The Scottish Parliament
Pàrlamaid na h-Alba

Passage of the

Regulatory Reform (Scotland) Bill 2013

SPPB 196

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Passage of the

Regulatory Reform (Scotland) Bill 2013

SP Bill 26 (Session 4), subsequently 2014 asp 3

SPPB 196

EDINBURGH: APS GROUP SCOTLAND

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland.

ISBN 978-1-78457-823-7

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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – "As Introduced", "As Amended at Stage 2" and "As Passed");
- the accompanying documents published with the "As Introduced" print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee's "Stage 1 report" (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament's Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the *Guidance on Public Bills* published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament's website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament's Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

At Stage 1, the Economy, Energy and Tourism Committee was designated as the lead committee for consideration of the Bill. The Bill was also considered by the Rural Affairs, Climate Change and Environment Committee as a secondary committee, and it reported to the lead committee.

Neither report included the oral and written evidence received by the committees. This material was originally published on the web only, and is now included in full in this volume. For the purpose of presenting it in an order that avoids duplication, this material is not set out in quite the same way as indicated in the original web publications. All the material from both reports is, however, included.

The Delegated Powers and Law Reform Committee (formerly the Subordinate Legislation Committee) reported to the lead committee at Stage 1 on the delegated powers provisions in the Bill. The Committee took oral evidence from Scottish

Government officials at its meeting on 28 May 2013 and the relevant extracts from the minutes and the Official Report of that meeting are included in this volume.

As part of its Stage 1 scrutiny, the Economy, Energy and Tourism Committee undertook fact-finding visits. The reports of those visits were not included in the Stage 1 Report. However, the Committee received and discussed those reports at its meeting on 22 May 2013. The reports and the Official Report of that meeting are, therefore, included in this volume.

The Scottish Government made a written response to the report of the Delegated Powers and Law Reform Committee at Stage 1, in addition to the Government's general response to the Stage 1 Report of the lead committee and its response to the secondary committee. At its meeting on 1 October 2013, the Delegated Powers and Law Reform Committee welcomed the response without debate. No extracts from the minutes or the Official Report of that meeting are, therefore, included in this volume. Relevant papers for that meeting, including the Scottish Government's response, are, however, included.

Prior to beginning formal Stage 2 consideration of amendments, the Economy, Energy and Tourism Committee issued a call for written evidence on three proposed Scottish Government amendments to the Bill that addressed issues not scrutinised at Stage 1. Written submissions received by the Committee on these issues, along with further correspondence from the Scottish Government, are included in this volume.

The Delegated Powers and Law Reform Committee considered the delegated powers in the Bill after Stage 2, and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.

Regulatory Reform (Scotland) Bill

[AS INTRODUCED]

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ACCOMPANYING DOCUMENTS
Explanatory Notes, together with other accompanying documents, are printed separately as SP Bill 26-EN. A Policy Memorandum is printed separately as SP Bill 26-PM.

Regulatory Reform (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to enable provision to be made for the purpose of promoting regulatory consistency; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

PART 1

REGULATORY FUNCTIONS

Regulations to encourage or improve regulatory consistency

1 Power as respects consistency in regulatory functions

(1) The Scottish Ministers may by regulations make any provision which they consider will encourage or improve consistency in the exercise by regulators of regulatory functions.

(2) Regulations under subsection (1)—

(a) must specify the regulators to which they apply,

(b) may specify regulatory functions in respect of which they are, or are not, to apply,

(c) may prescribe the forms, procedure or other arrangements in respect of which a regulator is to impose, set, secure compliance with or enforce a regulatory requirement (including the manner in which and extent to which fees may be charged or costs recovered),

(d) may require a regulator to co-operate, or co-ordinate activity, with other regulators or the Scottish Ministers (including providing information to the Scottish Ministers).

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

(a) the regulators to which the regulations would apply,

(b) such persons or bodies as appear to the Scottish Ministers to represent the interests of persons substantially affected by the proposed regulations,

(c) such other persons or bodies as the Scottish Ministers consider appropriate.

(4) For the purposes of subsection (1), "consistency" includes consistency—

(a) in the way in which particular regulators, their employees or their agents impose, set, secure compliance with or enforce a regulatory requirement,

(b) in the way in which different regulators, or the employees or agents of different regulators, impose, set, secure compliance with or enforce a regulatory requirement.

(5) In this Part—

"regulator" means a person, body or office-holder listed, or of a description listed, in schedule 1,

"regulatory functions" means—

(a) functions conferred by or under any enactment of—

(i) imposing requirements, restrictions or conditions in relation to an activity,

(ii) setting standards or outcomes in relation to an activity, or

(iii) giving guidance in relation to an activity, or

(b) functions which relate to the securing of compliance with, or enforcement of, requirements, restrictions, conditions, standards, outcomes or guidance which by or under any enactment relate to an activity,

"regulatory requirement" means a requirement, restriction, condition, standard or outcome (whether contained in guidance or otherwise)—

(a) which is to be complied with, met, attained or achieved by a person, body or office-holder whether by or under an enactment (including this Act) or otherwise, and

(b) in respect of which a regulator has regulatory functions.

(6) In the definition of "regulatory functions" in subsection (5), "activity" includes—

(a) providing goods and services, and

(b) employing or offering employment to any person.

2 Regulations under section 1: further provision

(1) Regulations under section 1 ("the regulations") may include provision requiring a regulator—

(a) to secure compliance with or enforce an existing regulatory requirement,

(b) to impose, set, secure compliance with or enforce any other regulatory requirement which the regulator proposes to, or may, impose or set.

(2) Subject to subsection (3), the regulations may also include provision—

(a) amending a regulatory requirement,

(b) for a regulatory requirement to cease to have effect (by means of repealing or revoking an enactment containing the requirement or otherwise),

(c) creating a regulatory requirement,

(d) requiring a regulator to create, amend or remove a regulatory requirement,

(e) where a regulator is required to act as mentioned in paragraph (d), imposing conditions in relation to that requirement.

(3) The regulations may not include provision that would—

(a) amend a regulatory requirement which, by or under an enactment (a "mandatory enactment")—

(i) must be complied with, met, attained or achieved, and

(ii) a regulator is required to impose or set,

(b) repeal or revoke a mandatory enactment.

(4) But the regulations may include provision such as is mentioned in subsection (3) if the regulations otherwise make provision having an equivalent effect to the mandatory enactment.

(5) A provision in the regulations requiring a regulator to impose or set a regulatory requirement is not a mandatory enactment for the purposes of subsection (3) (unless such provision is included by virtue of subsection (4)).

(6) Where the regulations include provision such as is mentioned in subsection (2), they may also include provision preventing a regulator from imposing or setting a regulatory requirement—

(a) that amends, replaces or revokes a regulatory requirement amended or created by the regulations,

(b) that has an equivalent effect to a regulatory requirement which ceases to have effect by virtue of the regulations.

(7) Where the regulations make provision that would (but for this subsection) apply to a regulator, the Scottish Ministers may, if they consider it necessary or expedient, direct that, for a period no longer than that mentioned in subsection (8)—

(a) the provision is not to apply to the regulator, or

(b) the provision is to apply to the regulator—

(i) with such modifications as may be specified in the direction,

(ii) subject to such conditions as may be so specified.

(8) The period is that beginning with the day on which the direction is given and ending 6 months later.

(9) Where the regulations include provision such as is mentioned in subsection (1)(b), such provision does not affect any requirement for the regulator to consult before imposing or setting the regulatory requirement mentioned in that subsection.

(10) This section is without prejudice to the generality of the power to make regulations under section 1.

Compliance and enforcement

3 Regulations under section 1: compliance and enforcement

(1) A regulator to which regulations under section 1 apply must comply with the regulations except to the extent that—

(a) the regulator lacks the powers necessary to comply, or

(b) the regulations impose on the regulator a requirement that conflicts with any other obligation imposed on the regulator by or under an enactment.

(2) Where a regulator fails to comply with the regulations, the Scottish Ministers may—

(a) declare the regulator to have so failed, and

(b) direct the regulator to take such steps to remedy the failure as are specified in the direction within such reasonable period as may be so specified.

(3) Where a regulator fails to take some or all of the steps specified in a direction under subsection (2)(b), the Scottish Ministers may—

(a) take the steps,

(b) arrange for any other person to take the steps, or

(c) apply to the Court of Session for an order requiring the regulator to take the steps.

(4) The Scottish Ministers may recover from a regulator the costs incurred by the Scottish Ministers in relation to—

(a) taking steps under paragraph (a) of subsection (3),

(b) arranging for another person to take steps under paragraph (b) of that subsection (including costs incurred by that other person which the Scottish Ministers have to bear),

(c) an application relating to the regulator under paragraph (c) of that subsection up to the time of making the application.

(5) The Scottish Ministers may recover the costs mentioned in subsection (4) as a civil debt.

Exercise of regulatory functions: economic duty and code of practice

4 Regulators' duty in respect of sustainable economic growth

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

(2) The Scottish Ministers may give guidance to regulators with respect to the carrying out of the duty imposed by subsection (1).

(3) Regulators must have regard to guidance given under subsection (2).

(4) Subsection (1) does not apply to a regulator to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect as that mentioned in that subsection.

5 Code of practice

(1) The Scottish Ministers may issue and from time to time revise a code of practice in relation to the exercise of regulatory functions by a regulator.

(2) A code of practice issued under subsection (1) applies only to—

(a) such regulators as may be specified in the code, and

(b) such regulatory functions as may be so specified.

(3) A copy of a code of practice issued under subsection (1) must be issued to the regulators to whom it applies.

(4) A regulator to whom a code of practice issued under subsection (1) applies must, from the date a copy is issued to the regulator, have regard to the code—

(a) in determining any general policy or principles by reference to which the regulator exercises any regulatory functions to which the code applies, and

(b) in exercising any such regulatory functions.

(5) References in this section to a code of practice issued under subsection (1) include references to such a code as revised from time to time under that subsection.

6 Code of practice: procedure

(1) Where the Scottish Ministers propose to issue or revise a code of practice under section 5, they must prepare a draft of the code (or revised code).

(2) In preparing the draft, the Scottish Ministers must seek to secure that it is consistent with the principles in subsection (3).

(3) The principles are—

(a) that regulatory functions should be—

(i) exercised in a way that is transparent, accountable, proportionate and consistent, and

(ii) targeted only at cases in which action is needed, and

(b) that regulatory functions should be exercised in a way that contributes to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of such functions to do so.

(4) The Scottish Ministers must consult the following about the draft—

(a) persons appearing to them to be representative of regulators in respect of which the code or revised code would apply,

(b) such other persons as they consider appropriate.

(5) If the Scottish Ministers decide to proceed with the draft (either in its original form or with modifications) they must lay the draft before the Scottish Parliament.

(6) Where the draft so laid is approved by resolution of the Parliament, the Scottish Ministers may issue the code (or revised code).

Power to modify list of regulators

7 Power to modify schedule 1

(1) The Scottish Ministers may by order modify schedule 1 so as to—

(a) add—

(i) a person, body or office-holder which has regulatory functions to the list of persons, bodies and office-holders for the time being listed there, or

(ii) a description of a person, body or office-holder having regulatory functions to that list,

(b) remove—

(i) a person, body or office-holder from that list, or

(ii) a description of a person, body or office-holder from that list,

(c) amend an entry on that list.

(2) An order under subsection (1) may, in relation to a person, body or office-holder or a description of a person, body or office-holder—

(a) specify that a function is or is not to be a regulatory function for the purposes of section 1, 4 or 5,

(b) specify the extent to which a function is or is not to be a regulatory function for such purposes.

PART 2

ENVIRONMENTAL REGULATION

CHAPTER 1

REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

8 General purpose: protecting and improving the environment

(1) The purpose of this Chapter is to enable provision to be made for or in connection with protecting and improving the environment, including (without prejudice to that generality)—

(a) regulating environmental activities,

(b) implementing EU obligations, and international obligations, relating to protecting and improving the environment.

(2) In subsection (1), "international obligations" means any international obligations of the United Kingdom other than obligations to observe and implement EU obligations.

9 Meaning of "environmental activities" and "protecting and improving the environment"

(1) Expressions used in section 8 have the following meanings for the purposes of this Chapter—

"environmental activities" means—

(a) activities that are capable of causing, or liable to cause, environmental harm, and

(b) activities connected with such activities,

"protecting and improving the environment" includes, in particular—

(a) preventing deterioration (or further deterioration) of, and protecting and enhancing, the status of ecosystems, and

(b) promoting the sustainable use of natural resources based on the long-term protection of available natural resources.

(2) In subsection (1)—

"activities" means activities of any nature whether industrial, commercial or otherwise and whether carried on in particular premises or otherwise; and includes (with or without other activities) the production, treatment, keeping, depositing or disposal of any substance,

"environmental harm" means—

(a) harm to the health of human beings or other living organisms,

(b) harm to the quality of the environment, including—

(i) harm to the quality of the environment taken as a whole,

(ii) harm to the quality of air, water or land, and

(iii) other impairment of, or interference with, ecosystems,

(c) offence to the senses of human beings,

(d) damage to property, or

(e) impairment of, or interference with, amenities or other legitimate uses of the environment.

(3) In schedule 2 (introduced by section 10), "regulated activities" means any environmental activities in respect of which regulations under that section make provision.

10 Regulations relating to protecting and improving the environment

(1) The Scottish Ministers may by regulations make provision for any of the purposes specified in Part 1 of schedule 2.

(2) Part 2 of that schedule has effect for supplementing Part 1 of the schedule.

(3) In accordance with section 8, the provision that may be made by regulations under this section is provision for or in connection with protecting and improving the environment, including any of the matters mentioned in paragraph (a) or (b) of that section.

11 Regulations relating to protecting and improving the environment: consultation

(1) Before making any regulations under section 10, the Scottish Ministers must consult—

(a) any regulator on whom the proposed regulations would confer functions, and

(b) such other persons as they think fit, including such persons appearing to them to be representative of the interests of local government, industry, agriculture, fisheries or small businesses as they consider appropriate.

(2) Consultation undertaken before the coming into force of this section is as effective compliance with subsection (1) as if undertaken after its coming into force.

(3) In subsection (1), "regulator" is to be construed in accordance with paragraph 3(1) of schedule 2.

CHAPTER 2

SEPA'S POWERS OF ENFORCEMENT

Fixed monetary penalties

12 Fixed monetary penalties

(1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a fixed monetary penalty on a person in relation to a relevant offence.

(2) Provision under subsection (1) must provide that a fixed monetary penalty—

(a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the relevant offence,

(b) is to be imposed by notice, and

(c) may not be imposed on a person on more than one occasion in relation to the same act or omission constituting the relevant offence.

(3) For the purposes of this Chapter, a "fixed monetary penalty" is a requirement to pay to SEPA a penalty of an amount specified in an order made under subsection (1).

(4) The maximum amount of such penalty that may be so specified in relation to a particular relevant offence is an amount equivalent to level 4 on the standard scale.

(5) In this section, "the standard scale" has the meaning given by section 225(1) of the Criminal Procedure (Scotland) Act 1995.

13 Fixed monetary penalties: procedure

(1) Provision under section 12—

(a) must secure the results in subsection (2) ("the mandatory results"),

(b) may secure the result in subsection (3) ("the optional result").

(2) The mandatory results are that—

(a) where SEPA proposes to impose a fixed monetary penalty on a person, it must serve on the person a notice of what is proposed (a "notice of intent") which complies with subsection (4),

(b) except where the person has discharged liability by virtue of provision made under subsection (3), the person may make written representations to SEPA in relation to the proposed imposition of the fixed monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the relevant offence),

(c) SEPA must, after the end of the period for making representations, decide whether to impose the fixed monetary penalty,

(d) SEPA must, in so deciding, have regard to any representations,

(e) where SEPA decides to impose the fixed monetary penalty, the notice imposing it ("the final notice") complies with subsection (5), and

(f) the person on whom a fixed monetary penalty is imposed may appeal against the decision to impose it.

(3) The optional result is that the notice of intent also offers the person the opportunity to discharge the person's liability for the fixed monetary penalty by payment of a sum specified in the notice of intent (which sum must be less than or equal to the amount of the penalty).

(4) To comply with this subsection the notice of intent must include information as to—

(a) the grounds for the proposal to impose the fixed monetary penalty,

(b) the right to make written representations,

(c) the period within which representations may be made,

(d) where provision is made under subsection (3)—

(i) how payment to discharge the liability for the fixed monetary payment may be made,

(ii) the period within which liability for the fixed monetary penalty may be discharged, and

(iii) the effect of payment of the sum referred to in subsection (3).

(5) To comply with this subsection the final notice must include information as to—

(a) the grounds for imposing the penalty,

(b) how payment may be made,

(c) the period within which payment must be made,

(d) any early payment discounts or late payment penalties,

(e) rights of appeal, and

(f) the consequences of non-payment.

(6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—

(a) include the grounds that—

(i) the decision was based on an error of fact,

(ii) the decision was wrong in law, and

(iii) the decision was unreasonable, but

(b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 23(1).

14 Fixed monetary penalties: criminal proceedings and conviction

(1) Provision under section 12 must secure that in a case where a notice of intent referred to in section 13(2)(a) is served on a person—

(a) no criminal proceedings for the relevant offence to which the notice relates may be commenced against the person in respect of the act or omission to which the notice relates—

(i) before the end of any period in which the person may discharge liability for the fixed monetary penalty pursuant to section 13(3), or

(ii) if the person so discharges liability, and

(b) the period as mentioned in subsection (2) is not to be counted in calculating any period within which such criminal proceedings must be commenced.

(2) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.

(3) Provision under section 12 must also secure that, in a case where a fixed monetary penalty is imposed on a person, no criminal proceedings for the relevant offence may be commenced against the person in respect of the act or omission giving rise to the penalty.

Variable monetary penalties

15 Variable monetary penalties

(1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a variable monetary penalty on a person in relation to a relevant offence.

(2) Provision under subsection (1) must provide that a variable monetary penalty—

(a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the relevant offence,

(b) is to be imposed by notice, and

(c) may not be imposed on a person on more than one occasion in relation to the same act or omission constituting the relevant offence.

(3) For the purposes of this Chapter, a "variable monetary penalty" is, subject to subsection (4), a requirement to pay SEPA a penalty of such amount as SEPA may in each case determine.

(4) SEPA may not in any case impose a variable monetary penalty that exceeds the maximum amount specified in an order made under subsection (1) in relation to that case.

(5) The maximum amount that may be so specified is—

(a) in the case mentioned in subsection (6), the maximum amount of the fine that may be imposed on summary conviction in such a case,

(b) in any other case, £40,000.

(6) The case is one where the relevant offence in respect of which the variable monetary penalty is imposed—

(a) is triable summarily (whether or not it is also triable on indictment), and

(b) is punishable on summary conviction by a fine (whether or not it is also punishable by a term of imprisonment).

(7) The Scottish Ministers may by order substitute another sum for the one for the time being mentioned in subsection (5)(b).

16 Variable monetary penalties: procedure

(1) Provision under section 15 must secure the results in subsection (2).

(2) The results are that—

(a) where SEPA proposes to impose a variable monetary penalty on a person, it must serve on the person a notice (a "notice of intent") which complies with subsection (3),

(b) the person may make written representations to SEPA in relation to the proposed imposition of the variable monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the relevant offence),

(c) SEPA must, after the end of the period for making such representations, decide whether to impose a variable monetary penalty and, if so, the amount of the penalty,

(d) SEPA must, in so deciding, have regard to any representations,

(e) where SEPA decides to impose a variable monetary penalty, the notice imposing it (the "final notice") complies with subsection (4), and

(f) the person on whom a variable monetary penalty is imposed may appeal against the decision as to the imposition or amount of the penalty.

(3) To comply with this subsection the notice of intent must include information as to—

(a) the grounds for the proposal to impose the variable monetary penalty,

(b) the right to make written representations, and

(c) the period within which representations may be made.

(4) To comply with this subsection the final notice must include information as to—

(a) the grounds for imposing the penalty,

(b) how payment may be made,

(c) the period within which the payment must be made,

(d) any early payment discounts or late payment penalties,

(e) rights of appeal, and

(f) the consequences of non-payment.

(5) Provision to secure the result in subsection (2)(c) must include provision for—

(a) the person on whom the notice of intent is served to be able to offer an undertaking as to action to be taken by that person, within such period as may be specified in the undertaking, for all or any of the following purposes—

(i) to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,

(ii) to benefit the environment to the extent that the commission of the offence has harmed the environment,

(iii) to secure that no financial benefit arising from the commission of the offence accrues to the person,

(b) SEPA to be able to accept or reject such an undertaking, and

(c) SEPA to take any undertaking so accepted into account in its decision.

(6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—

(a) include the grounds that—

(i) the decision was based on an error of fact,

(ii) the decision was wrong in law,

(iii) the amount of the penalty is unreasonable, and

(iv) the decision was unreasonable for any other reason, but

(b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 23(1).

17 Variable monetary penalties: criminal proceedings and conviction

(1) Provision under section 15 must secure the result in subsection (2) in a case where—

(a) a variable monetary penalty is imposed on a person, or

(b) an undertaking referred to in section 16(5) is accepted from a person.

(2) The result is that no criminal proceedings for the relevant offence in respect of the act or omission giving rise to the variable monetary penalty or the undertaking may be commenced against the person.

(3) Provision under section 15 must provide that the period mentioned in subsection (4) is not to be counted in calculating any period within which criminal proceedings in respect of an act or omission in relation to which a notice of intent under section 16(2)(a) is served must be commenced.

(4) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.

Non-compliance penalties

18 Undertakings under section 16: non-compliance penalties

(1) Provision under section 15 may include provision for a person to pay a monetary penalty (in this Part, a "non-compliance penalty") to SEPA if the person fails to comply with an undertaking referred to in section 16(5) which is accepted from the person.

(2) Where such provision is included, it may also—

(a) specify the amount of the non-compliance penalty,

(b) provide for the amount to be calculated by reference to criteria specified by order by the Scottish Ministers,

(c) provide for the amount to be determined by SEPA (subject to any maximum amount set out in the provision),

(d) provide for the amount to be determined in any other way.

(3) Where provision is included as mentioned in subsection (1), it must secure that—

(a) the non-compliance penalty is imposed by notice served by SEPA, and

(b) the person on whom it is imposed may appeal against the notice.

(4) Provision pursuant to subsection (3)(b) must secure that the grounds on which a person may appeal against a notice referred to in that subsection include that—

(a) the decision to serve the notice was based on an error of fact,

(b) the decision was wrong in law,

(c) the decision was unreasonable for any reason (including, in a case where the amount of the non-compliance penalty was determined by SEPA, that the amount is unreasonable).

Enforcement undertakings

19 Enforcement undertakings

(1) The Scottish Ministers may by order make provision—

(a) for or about enabling SEPA to accept an enforcement undertaking from a person in a case where SEPA has reasonable grounds to suspect that the person has committed a relevant offence, and

(b) for the acceptance of the undertaking to have the consequences in subsection (4).

(2) For the purposes of this Chapter, an "enforcement undertaking" is an undertaking to take action of a type mentioned in subsection (3) and specified in the undertaking within such period as may be so specified.

(3) The types of action are—

(a) action to secure that the offence does not continue or recur,

(b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,

(c) action of a description specified by order by the Scottish Ministers.

(4) The consequences are that, unless SEPA has certified under subsection (5)(g) that the person from whom the enforcement undertaking is accepted has not complied with the undertaking or any part of it—

(a) no criminal proceedings for the relevant offence may be commenced against the person in respect of the act or omission in relation to which the undertaking was offered,

(b) SEPA may not impose on the person a fixed monetary penalty which it would otherwise have power to impose by virtue of section 12 in respect of the act or omission, and

(c) SEPA may not impose on the person a variable monetary penalty which it would otherwise have power to impose by virtue of section 15 in respect of the act or omission.

(5) An order under this section may in particular include provision—

(a) as to the procedure for entering into an enforcement undertaking,

(b) as to the terms of an enforcement undertaking,

(c) as to publication of an enforcement undertaking by SEPA,

(d) as to variation of an enforcement undertaking,

(e) as to circumstances in which a person may be regarded as having complied with an enforcement undertaking,

(f) as to monitoring by SEPA of compliance with an enforcement undertaking,

(g) as to certification by SEPA that an enforcement undertaking or any part of it has not been complied with,

(h) for appeals against such certification,

(i) in a case where a person has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking, for that person to be regarded as not having complied with it,

(j) in a case where a person has complied partly but not fully with an enforcement undertaking, for that partial compliance to be taken into account in the imposition of any criminal or other sanction on the person,

(k) for the purpose of enabling criminal proceedings in respect of an act or omission in relation to which SEPA has accepted an enforcement undertaking to be commenced against a person who has not complied with the undertaking or any part of it, for the period mentioned in subsection (6) not to be counted in calculating any period within which such proceedings must be commenced.

(6) The period is that beginning with the day on which the enforcement undertaking is accepted and ending with—

(a) the day on which SEPA certifies, under provision made in pursuance of subsection (5)(g), that the undertaking or any part of it has not been complied with, or

(b) where an appeal against such a certification is taken, the day on which the appeal is finally determined.

(7) References in this section to taking action specified in an enforcement undertaking include references to refraining from taking such action.

Operation of penalties and cost recovery

20 Combination of sanctions

(1) Provision may not be made by order under section 12 and section 15 conferring powers on SEPA in relation to the same offence unless it secures that—

(a) SEPA may not serve a notice of intent referred to in section 13(2)(a) on a person in relation to an act or omission where a variable monetary penalty has been imposed on that person in relation to the act or omission, and

(b) SEPA may not serve a notice of intent referred to in section 16(2)(a) on a person in relation to any act or omission where—

(i) a fixed monetary penalty has been imposed on the person in relation to the act or omission, or

(ii) the person has discharged liability for a fixed monetary penalty in relation to that act or omission pursuant to section 13(3).

(2) Provision under section 12 must secure that in a case where a notice of intent referred to in section 13(2)(a) is served on a person—

(a) SEPA may not, before the end of any period in which the person may discharge liability to the fixed monetary penalty pursuant to section 13(3), impose a variable monetary penalty on the person in respect of the act or omission to which the notice relates, and

(b) SEPA may not, if the person so discharges liability, impose a variable monetary penalty on the person in respect of that act or omission.

(3) Provision under section 12 must also secure that in a case where a fixed monetary penalty is imposed on a person, SEPA may not impose a variable monetary penalty on the person in respect of the act or omission giving rise to the penalty.

(4) Provision under section 12 must also secure the result that a fixed monetary penalty may not be imposed on a person in respect of a relevant offence in relation to which—

(a) criminal proceedings have been commenced against the person,

(b) the person has been given a warning by the procurator fiscal,

(c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),

(d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal), or

(e) a work order has been made against the person under section 303ZA of that Act (work orders).

(5) Provision under section 15 must secure the result that a variable monetary penalty may not be imposed on a person in respect of a relevant offence in relation to which—

(a) criminal proceedings have been commenced against the person,

(b) the person has been given a warning by a procurator fiscal,

(c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),

(d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal), or

(e) a work order has been made against the person under section 303ZA of that Act (work orders).

21 Monetary penalties

(1) An order under this Chapter which confers power on SEPA to require a person to pay a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty may include provision for—

(a) early payment discounts,

(b) the payment of interest or other financial penalties for late payment of the penalty (such interest or other financial penalties not in total to exceed the amount of the penalty),

(c) enforcement of the penalty.

(2) Where such provision is included, it may also provide for—

(a) SEPA to recover the penalty, and any interest or other financial penalty for late payment, as a civil debt,

(b) the penalty, and any interest or other financial penalty for late payment, to be recoverable as if it were payable under an extract registered decree arbitral bearing a warrant for execution issued by a sheriff of any sheriffdom.

22 Costs recovery

(1) Provision under section 15 may include provision for SEPA to require a person on whom a variable monetary penalty is imposed to pay the costs incurred by SEPA in relation to the imposition of the penalty up to the time of its imposition.

(2) Where such provision is included, it must secure that—

(a) a requirement to pay the costs is imposed by notice,

(b) the notice specifies the amount required to be paid,

(c) SEPA may be required to provide a detailed breakdown of the amount,

(d) the person required to pay costs may appeal against—

(i) the decision of SEPA to impose the requirement,

(ii) the decision of SEPA as to the amount of the costs (including that some or all of the costs were unnecessarily incurred),

(e) SEPA is required to publish guidance about how it will exercise the power conferred by the provision.

(3) In subsection (1), the references to costs include in particular—

(a) investigation costs,

(b) administration costs,

(c) costs of obtaining expert advice (including legal advice).

(4) Subsections (1)(b) and (c) and (2) of section 21 apply to costs required to be paid by virtue of subsection (1) of this section as they apply to a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty.

Guidance

23 Guidance as to use of enforcement measures

(1) The Lord Advocate may issue, and from time to time revise, guidance to SEPA on the exercise of its functions relating to enforcement measures.

(2) SEPA must comply with such guidance or revised guidance in exercising those functions.

(3) In this section, an "enforcement measure" means a fixed monetary penalty, variable monetary penalty or enforcement undertaking (and any references in this Chapter to the imposition of an enforcement measure include acceptance of an enforcement undertaking).

(4) Where power is conferred on SEPA by virtue of this Chapter to impose an enforcement measure in relation to an offence, the provision conferring the power must secure the results in subsection (5).

(5) The results are that—

(a) SEPA must publish guidance about—

(i) how the offence is enforced,

(ii) the sanctions (including criminal sanctions) to which a person who commits the offence may be liable,

(iii) the action which SEPA may take to enforce the offence, whether by virtue of this Chapter or otherwise,

(iv) the circumstances in which SEPA is likely to take any such action,

(v) SEPA's use of the enforcement measure,

(b) in the case of guidance relating to a fixed monetary penalty or variable monetary penalty, the guidance must contain the relevant information, and

(c) SEPA must have regard to the guidance in exercising its functions.

(6) In the case of guidance relating to a fixed monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed,

(b) the circumstances in which it may not be imposed,

(c) the amount of the penalty,

(d) how liability for the penalty may be discharged and the effect of discharge, and

(e) rights to make representations and rights of appeal.

(7) In the case of guidance relating to a variable monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed,

(b) the circumstances in which it may not be imposed,

(c) the matters likely to be taken into account by SEPA in determining the amount of the penalty (including, where relevant, any discounts for voluntary reporting of non-compliance), and

(d) rights to make representations and rights of appeal.

(8) SEPA may from time to time revise guidance published by it by virtue of subsection (5).

(9) The references in subsections (5) to (7) to guidance include references to any revised guidance under subsection (8).

(10) Before publishing any guidance or revised guidance by virtue of this section, SEPA must consult—

(a) the Lord Advocate, and

(b) such other persons as it considers appropriate.

Publication of enforcement action

24 Publication of enforcement action

(1) Subsection (2) applies where the Scottish Ministers make provision by order under—

(a) section 12 as to the imposition by SEPA of a fixed monetary penalty,

(b) section 15 as to the imposition by SEPA of a variable monetary penalty, or

(c) section 19 as to the acceptance by SEPA of an enforcement undertaking.

(2) The order may require SEPA to publish such information as may be specified in the order as regards cases in which it has done what the order permits it to do.

Interpretation of Chapter 2

25 Interpretation of Chapter 2

In this Chapter—

"early payment discounts" means early payment discounts included in an order under this Chapter by virtue of section 21(1);

"enforcement undertaking" has the meaning given in section 19;

"fixed monetary penalty" has the meaning given in section 12;

"late payment penalties" means a requirement to pay interest or other financial penalties for late payment of a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty included in an order under this Chapter by virtue of section 21(1);

"non-compliance penalty" has the meaning given in section 18(1);

"variable monetary penalty" has the meaning given in section 15.

CHAPTER 3

COURT POWERS

Compensation orders

26 Compensation orders against persons convicted of relevant offences

(1) Where a person is convicted of a relevant offence, subsection (1) of section 249 of the Criminal Procedure (Scotland) Act 1995 (compensation order against convicted person) has effect in relation to the conviction subject to the modification in subsection (2).

(2) The modification is that the reference to payment of compensation in favour of the victim for any loss or damage caused directly or indirectly to the victim is to be read as if it included a reference to payment of compensation to a relevant person for costs incurred or to be incurred by the relevant person in preventing, reducing, remediating or mitigating the effects of—

(a) any harm to the environment resulting directly or indirectly from the offence,

(b) any other harm, loss, damage or adverse impacts so resulting from the offence.

(3) In subsection (2), the reference to costs does not include any costs which the relevant person has already recovered by virtue of—

(a) regulations under section 10 made in pursuance of paragraph 18(1) or 20 of schedule 2, or

(b) any other enactment.

(4) Where a compensation order (within the meaning of subsection (1) of section 249 of the 1995 Act) is made in respect of costs mentioned in subsection (2), that section has effect as if—

(a) the reference in subsection (8)(a) to the prescribed sum were, in relation to those costs, a reference to £50,000, and

(b) subsection (8A) were omitted.

(5) The Scottish Ministers may by order substitute a different sum of money for the one for the time being specified in subsection (4)(a).

(6) In this section—

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995,

"relevant person" means—

(a) SEPA,

(b) a local authority, or

(c) an owner or occupier of land—

(i) to which the harm, loss or damage mentioned in subsection (2) was caused, or

(ii) on which there was an adverse impact as mentioned in that subsection,

"owner", in relation to any land in Scotland, means a person (other than a creditor in a heritable security not in possession of the security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive the rents of the land, and includes a trustee, factor, guardian or curator; and in the case of public or municipal land includes the persons to whom the management of the land is entrusted.

Fines

27 Fines for relevant offences: court to consider financial benefits

(1) Subsection (2) applies where—

(a) a person is convicted by a court of a relevant offence, and

(b) the court proposes to impose a fine in respect of the offence.

(2) In determining the amount of the fine, the court must in particular have regard to any financial benefit which has accrued or is likely to accrue to the person in consequence of the offence.

Publicity orders

28 Power to order conviction etc. for offence to be publicised

(1) This section applies where a person is convicted by a court of a relevant offence.

(2) The court may, instead of or in addition to dealing with the person in any other way, make an order (a "publicity order") requiring the person to publicise in a specified manner—

(a) the fact that the person has been convicted of the relevant offence,

(b) specified particulars of the offence,

(c) specified particulars of any other sentence passed by the court in respect of the offence.

(3) A publicity order is to be taken to be a sentence for the purposes of any appeal.

(4) The court may make a publicity order—

(a) at its own instance, or

(b) on the motion of the prosecutor.

(5) A publicity order—

(a) must specify a period within which the requirement to publicise the matters mentioned in paragraphs (a) to (c) of subsection (2) are to be complied with, and

(b) may require the convicted person to supply SEPA, within a specified period, with evidence that that requirement has been complied with.

(6) In subsections (2) and (5), "specified", in relation to a publicity order, means specified in the order.

(7) A person who fails to comply with a publicity order commits an offence.

(8) A person who commits an offence under subsection (7) is liable—

(a) on summary conviction, to a fine not exceeding £40,000,

(b) on conviction on indictment, to a fine.

CHAPTER 4

MISCELLANEOUS

Vicarious liability

29 Vicarious liability for certain offences by employees and agents

(1) Subsection (2) applies where—

(a) a person ("A") commits a relevant offence while acting as the employee or agent of another person ("B"), and

(b) B is not a natural person.

(2) B also commits the relevant offence and is liable to be proceeded against and punished accordingly.

(3) Where B is charged with a relevant offence by virtue of subsection (2), it is a defence for B to show—

(a) that B did not know that the relevant offence was being committed by A,

(b) that no reasonable person could have suspected that the relevant offence was being committed by A, and

(c) that B took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against B in respect of the relevant offence whether or not proceedings are also taken against A in respect of that offence.

30 Liability where activity carried out by arrangement with another

(1) Subsection (2) applies where, in the course of carrying on a regulated activity—

(a) a person ("A") commits a relevant offence,

(b) at the time the offence is committed, A is carrying on the regulated activity for another person ("B"),

(c) B manages or controls the carrying on of the regulated activity, and

(d) B is not a natural person.

(2) B also commits the relevant offence and is liable to be proceeded against and punished accordingly.

(3) Where B is charged with a relevant offence by virtue of subsection (2), it is a defence for B to show—

(a) that B did not know that the relevant offence was being committed by A,

(b) that no reasonable person could have suspected that the relevant offence was being committed by A, and

(c) that B took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against B in respect of the relevant offence whether or not proceedings are also taken against A in respect of that offence.

(5) For the purposes of subsection (1)(b), A is carrying on a regulated activity for B whether A is carrying on the activity—

(a) by arrangement between A and B, or

(b) by arrangement with, or as employee or agent of, any other person ("C") with whom B has an arrangement under which C is to carry on the regulated activity.

(6) For the purposes of this section, "regulated activity"—

(a) has the meaning given in section 9(3), and

(b) includes activities specified in an order made by the Scottish Ministers for the purposes of this section.

Offence relating to significant environmental harm

31 Significant environmental harm: offence

(1) A person commits an offence if the person—

(a) causes, or permits to be caused, significant environmental harm,

(b) acts in a way that is likely to cause such harm,

(c) fails to act in a way such that the failure causes or is likely to cause such harm, or

(d) permits another person—

(i) to act in a way that is likely to cause such harm, or

(ii) not to act in a way such that the failure to act causes or is likely to cause such harm.

(2) But no offence is committed under subsection (1) by a person who—

(a) permits significant environmental harm to be caused, or

(b) permits another person to act, or not to act, as mentioned in paragraph (d) of that subsection,

if the permission was given by or under an enactment conferring power on the person to authorise the act, or failure to act, that caused or (as the case may be) was likely to cause such harm (however such authorisation may be expressed).

(3) For the purposes of subsection (1), a person's acts or failures constitute an offence under that subsection whether or not the person—

(a) intended to cause, or to be likely to be caused, significant environmental harm,

(b) knew that, or was reckless or careless as to whether, those acts or failures would cause, or be likely to cause, such harm,

(c) intended the acts or failures of another person to cause, or to be likely to cause, such harm, or

(d) knew that, or was reckless or careless as to whether, the acts or failures of another person would cause or be likely to cause such harm.

(4) For the purposes of subsection (1), a person acts in a way that is likely to cause significant environmental harm, or fails to act in a way such that the failure is likely to cause such harm if, at the time of so acting or failing to act, such harm may reasonably have been considered likely to occur even if it did not (for whatever reason) in fact occur.

(5) It is a defence for a person charged with an offence under subsection (1) to show that—

(a) the acts or failures alleged to constitute the offence were necessary in order to avoid, prevent or reduce an imminent risk of serious adverse effects on human health,

(b) the person took all such steps as were reasonably practicable in the circumstances to minimise any environmental harm, and

(c) particulars about the acts or failures were given to SEPA as soon as practicable after the acts or failures took place.

(6) It is a defence for a person charged with an offence under subsection (1) to show that the acts or failures alleged to constitute the offence were authorised by or otherwise carried out in accordance with—

(a) regulations made under section 10,

(b) an authorisation given under such regulations, or

(c) an enactment specified in an order made by the Scottish Ministers for the purposes of this section.

(7) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction to—

(i) a fine not exceeding £40,000,

(ii) imprisonment for a term not exceeding 12 months, or

(iii) both,

(b) on conviction on indictment to—

(i) a fine,

(ii) imprisonment for a term not exceeding 5 years, or

(iii) both.

(8) In this section, "environmental harm" has the same meaning as in section 9(2).

(9) For the purposes of this section, environmental harm is "significant" if—

(a) it has or may have serious adverse effects, whether locally, nationally or on a wider scale, or

(b) it is caused or may be caused to an area designated in an order by the Scottish Ministers for the purposes of this section.

(10) An order under subsection (9) may make different provision for—

(a) different areas, or

(b) different types of significant environmental harm in relation to different areas.

32 Power of court to order offence to be remedied

(1) This section applies where—

(a) a court convicts a person of an offence under section 31(1),

(b) it appears to the court that it is within the power of the person to remedy or mitigate the significant environmental harm to which the conviction relates.

(2) The court may, in addition to or instead of dealing with the person in any other way, order the person to take such steps as may be specified in the order to remedy or mitigate the harm.

(3) An order under subsection (2) (a "remediation order") is to be taken to be a sentence for the purposes of any appeal.

(4) A remediation order must specify a period ("the compliance period") within which the steps mentioned in that subsection are to be taken.

(5) On an application by the person convicted of the offence, the court may, on more than one occasion, extend the compliance period within which those steps are to be taken.

(6) An application under subsection (5) must be made before the end of the compliance period.

(7) A person who fails to comply with a remediation order commits an offence.

(8) A person who commits an offence under subsection (7) is liable—

(a) on summary conviction, to a fine not exceeding £40,000,

(b) on conviction on indictment, to a fine.

Publicity and remediation orders: appeals by prosecutor

33 Orders under sections 28 and 32: prosecutor's right of appeal

(1) The Criminal Procedure (Scotland) Act 1995 is amended in accordance with this section.

(2) In section 108 (Lord Advocate's rights of appeal against disposal)—

(a) in subsection (1), after paragraph (ca) insert—

"(cb) a decision under section 28(2) of the Regulatory Reform (Scotland) Act 2013 not to make a publicity order;

(cc) a decision under section 32(2) of that Act not to make a remediation order;",

(b) in subsection (2)(b)(ii), for the words "or (ca)" substitute ", (ca), (cb) or (cc)".

(3) In section 175 (right of appeal from summary proceedings)—

(a) in subsection (4), after paragraph (ca) insert—

"(cb) a decision under section 28(2) of the Regulatory Reform (Scotland) Act 2013 not to make a publicity order;

(cc) a decision under section 32(2) of that Act not to make a remediation order;",

(b) in subsection (4A)(b)(ii), for "or (ca)" substitute ", (ca), (cb) or (cc)".

Contaminated land and special sites

34 Land no longer considered to be contaminated or to be special site

(1) The Environmental Protection Act 1990 is amended as follows.

(2) After section 78Q insert—

"**78QA Land no longer considered to be contaminated**

(1) Subsection (2) applies where a local authority—

(a) has given notice under section 78B above that land in its area has been identified as contaminated land; and

(b) is satisfied that the land is no longer contaminated land.

(2) The local authority may give notice (a "non-contamination notice") that the land is no longer contaminated land to—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the local authority to be in occupation of the land;

(d) each person who appears to the authority to be an appropriate person.

(3) Where a non-contamination notice is given in respect of land—

(a) the notice mentioned in subsection (1) above ceases to have effect (and accordingly the land is no longer identified as contaminated land for the purposes of this Part);

(b) no remediation notice may be served in respect of the land;

(c) any remediation notice in force in respect of the land at the time the non-contamination notice is given ceases to have effect (except to the extent that the non-contamination notice provides otherwise); and

(d) no proceedings may be begun against a person for an offence under section 78M(1) above in respect of such a remediation notice except in relation to a provision of the notice which continues to have effect by virtue of paragraph (c) above.

(4) Where a local authority gives a non-contamination notice, it must keep (in such form as it thinks fit) a record of—

(a) details of the land to which the notice relates;

(b) its reasons for giving the notice; and

(c) the date of—

(i) the notice mentioned in subsection (1) above;

(ii) service of the non-contamination notice.

(5) Subsection (8) of section 78R below applies to records kept under subsection (4) above as it applies to registers maintained by enforcing authorities under that section; and for that purpose, the reference to entries is to be read as if it were a reference to information in such records.

(6) In performing its function under subsection (2) above, a local authority must have regard to any guidance issued by the Scottish Ministers in accordance with section 78YA below.

(7) In this section, references to land in respect of which a non-contamination notice is given include references to part of that land.".

(3) After section 78T insert—

"78TA Registers: removal of information about land designated as special site

(1) Subsection (2) applies where a local authority has entered in a register maintained under section 78R above particulars of or relating to notices mentioned in paragraph (e) or (f) of subsection (1) of that section.

(2) The local authority may remove the particulars from the register.

(3) Particulars may be removed under subsection (2) above only if—

(a) the local authority considers that the land to which the notices relate no longer requires to be designated as a special site, and

(b) the local authority has consulted the Scottish Environment Protection Agency on its proposals to remove the particulars.

(4) Where a local authority removes particulars from a register under subsection (2) above, it must keep (in such form as it thinks fit) a record of—

(a) the particulars that have been removed,

(b) its reasons for removing them, and

(c) the date on which the particulars—

(i) were originally entered in the register, and

(ii) were removed.

(5) Subsection (8) of section 78R above applies to records kept under subsection (4) above as it applies to registers maintained by enforcing authorities under that section; and for that purpose, the reference to entries is to be read as if it were a reference to information in such records.

(6) In performing its functions under subsections (2) and (4) above, a local authority must have regard to any guidance issued by the Scottish Ministers in accordance with section 78YA below.

(7) Where a local authority removes particulars from a register under subsection (2) above, it must give notice of such removal to—

(a) the Scottish Environment Protection Agency,

(b) any person who is the owner of land designated as a special site by a notice to which the particulars relate,

(c) any person who appears to the local authority to be in occupation of the whole or any part of that land, and

(d) each person who appears to the local authority to be an appropriate person in relation to that land.

78TB Effect of removal of information from register

(1) Where a local authority removes particulars from a register under section 78TA(2) above—

(a) the designation of the land as a special site by virtue of section 78C(7) or 78D(6) above is terminated,

(b) any remediation notice relating to the land ceases to have effect, and

(c) no proceedings may be begun against a person for an offence under section 78M(1) above in respect of any remediation notice relating to the land.

(2) In subsection (1), "the land" means land designated as a special site by a notice to which the particulars mentioned in that subsection relate.".

(4) In section 78YA (supplementary provisions with respect to guidance by the Scottish Ministers), in subsection (4A), after "draft" where it second occurs insert ", and a draft of any guidance referred to in section 78QA(6) or section 78TA(6) above,".

Authorisations relating to waste management: offences by partnerships

35 Carriers of controlled waste: offences by partnerships affecting registration

In section 3(5) of the Control of Pollution (Amendment) Act 1989 (restrictions on powers under section 2)—

(a) after paragraph (a), insert—

"(aa) a partnership has been convicted of a prescribed offence committed at a time when the applicant or registered carrier was a member of that partnership;",

(b) the word "or" immediately following paragraph (b) is repealed,

(c) after paragraph (b), insert—

"(ba) where the applicant or registered carrier is a partnership, a person who is a member of that partnership—

(i) has been convicted of a prescribed offence;

(ii) was a member of another partnership at a time when a prescribed offence of which that other partnership has been convicted was committed; or

(iii) was a director, manager, secretary, or other similar officer of a body corporate at a time when a prescribed offence of which that body corporate has been convicted was committed; or",

(d) in paragraph (c)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (i), insert—

"(ia) was a member of a partnership at a time when a prescribed offence of which that partnership has been convicted was committed; or",

(iii) in sub-paragraph (ii), for the word "for" substitute "of".

36 Waste management licences: offences by partnerships

In section 74(7) of the Environmental Protection Act 1990 (meaning of "fit and proper person")—

(a) after paragraph (a), insert—

"(aa) a partnership has been convicted of a relevant offence committed when the holder or, as the case may be, proposed holder of the licence was a member of that partnership;",

(b) the word "or" immediately following paragraph (b) is repealed,

(c) after paragraph (b), insert—

"(ba) where the holder or, as the case may be, proposed holder of the licence is a partnership, a person who is a member of that partnership—

(i) has been convicted of a relevant offence;

(ii) was a member of another partnership at a time when a relevant offence of which that other partnership has been convicted was committed; or

(iii) was a director, manager, secretary, or other similar officer of a body corporate at a time when a relevant offence of which that body corporate has been convicted was committed; or",

(d) in paragraph (c)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (i), insert—

"(ia) was a member of a partnership at a time when a relevant offence of which that partnership has been convicted was committed; or",

(iii) in sub-paragraph (ii), for the word "for" substitute "of".

Air quality assessments

37 Duty of local authorities in relation to air quality assessments etc.

In section 84 of the Environment Act 1995 (duties of local authorities in relation to designated areas)—

(a) subsection (1) is repealed,

(b) in subsection (2), for the words from the beginning to "to" where it fourth occurs, substitute "Where an order under section 83 above comes into operation, the local authority which made the order shall".

CHAPTER 5

GENERAL PURPOSE OF SEPA

38 General purpose of SEPA

After section 20 of the Environment Act 1995, insert—

"20A General purpose of SEPA

(1) SEPA is to carry out the functions conferred on it by or under this Act or any other enactment for the purpose of protecting and improving the environment (including managing natural resources in a sustainable way).

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

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

(b) achieving sustainable economic growth.

(3) In subsection (1), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

CHAPTER 6

INTERPRETATION OF PART 2

39 Meaning of "relevant offence" and "SEPA" in Part 2

In this Part—

"relevant offence" means an offence specified in an order made by the Scottish Ministers for the purposes of this Part,

"SEPA" means the Scottish Environment Protection Agency.

PART 3

MISCELLANEOUS

Marine licensing decisions

40 Marine licence applications, etc.: proceedings to question validity of decisions

(1) The Marine (Scotland) Act 2010 is amended as follows.

(2) In section 38 (appeals against licensing decisions), after subsection (3) add—

"(4) The duty in subsection (1) does not apply in relation to a decision under section 29 to which section 63A applies.".

(3) After section 63, insert—

"*Proceedings for questioning certain decisions under sections 28 and 29*

63A Proceedings for questioning certain decisions under sections 28 and 29

(1) If a person is aggrieved by a decision of the Scottish Ministers to which this section applies, and wishes to question the validity of the decision on either of the grounds mentioned in subsection (2), the person (the "aggrieved person") may make an application to the Inner House of the Court of Session under this section.

(2) The grounds are that—

(a) the decision is not within the powers of the Scottish Ministers under this Part,

(b) one or more of the relevant requirements have not been complied with in relation to the decision.

(3) This section applies to—

(a) a decision to cause, or not to cause, an inquiry to be held under section 28(1) in connection with the Scottish Ministers' determination of an application for a marine licence to carry on an activity in respect of which a generating station application must also be made, and

(b) a decision under section 29 in relation to an application for a marine licence to carry on such an activity.

(4) An application under this section must be made within the period of 6 weeks beginning with the date on which the decision to which the application relates is taken.

(5) On an application under this section, the Inner House of the Court of Session—

(a) may suspend the decision until the final determination of the proceedings,

(b) may quash the decision either in whole or in part if satisfied that—

(i) the decision in question is not within the powers of the Scottish Ministers under this Part, or

(ii) the interests of the aggrieved person have been substantially prejudiced by failure to comply with any of the relevant requirements in relation to the decision.

(6) In this section—

"generating station application" means an application for consent under section 36 of the Electricity Act 1989 (consent for the construction etc. of generating stations);

"the relevant requirements" in relation to a decision to which this section applies, means the requirements of this Act, or of any order or regulations made under this Part, which are applicable to that decision.".

Planning authorities' functions: charges and fees

41 Planning authorities' functions: charges and fees

In section 252 of the Town and Country Planning (Scotland) Act 1997 (fees for planning applications, etc.)—

(a) in subsection (1A), after paragraph (d) insert—

"(da) make provision for the charge or fee payable to different planning authorities to be of different amounts,",

(b) after subsection (1A) insert—

"(1AA)Provision such as mentioned in subsection (1A)(da) may be made in respect of a planning authority where the Scottish Ministers are satisfied that the functions of the authority are not being, or have not been, performed satisfactorily.

(1AB) The power to make provision such as is mentioned in subsection (1A)(da) is without prejudice to the generality of the power in section 275(2A).", and

(c) subsections (5) and (6) are repealed.

Street traders' licences

42 Application for street trader's licence: food businesses

In section 39 of the Civic Government (Scotland) Act 1982 (street traders' licences)—

(a) in subsection (4)—

(i) for "the food " substitute "a food",

(ii) after "1990)" insert "mentioned in subsection (4A)",

(b) after subsection (4) insert—

"(4A) A food authority referred to in subsection (4) is one which, in respect of the activity mentioned in that subsection, has registered the establishment that carries out or intends to carry out the activity for the purposes of Article 6.2 of Regulation EC No. 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs.".

PART 4

GENERAL

43 Consequential modifications and repeals

Schedule 3 makes minor modifications of enactments (including repealing enactments that are spent) and modifications consequential on the provisions of this Act.

44 Subordinate legislation

(1) Any power of the Scottish Ministers to make an order or regulations under this Act includes power to make—

(a) different provision for different purposes,

(b) incidental, supplemental, consequential, transitional, transitory or saving provision.

(2) The power to make regulations under section 1 includes power to modify any enactment (including this Act other than that section and sections 2, 3 and 7).

(3) The following orders are subject to the affirmative procedure—

(a) an order under section 12 or section 15,

(b) an order under section 7 that contains provision such as is mentioned in subsection (1)(a) of that section,

(c) an order under that section that specifies under subsection (2) of that section—

(i) that a function is to be a regulatory function for the purposes of section 1, 4 or 5,

(ii) the extent to which a function is to be a regulatory function for such purposes,

(d) an order under section 45(1) which contains provisions that add to, replace or omit any part of the text of an Act.

(4) The following regulations are subject to the affirmative procedure—

(a) regulations under section 1,

(b) regulations under section 10 which contain provisions that add to, replace or omit any part of the text of an Act.

(5) All other orders and regulations under this Act are subject to the negative procedure.

(6) This section does not apply to an order under—

(a) section 47(2),

(b) paragraph 29 of schedule 2.

45 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment (including this Act), instrument or document.

46 Crown application

(1) No contravention by the Crown of any provision made by or under this Act makes the Crown criminally liable.

(2) But the Court of Session may, on the application of the Scottish Ministers or any public body or office-holder having responsibility for enforcing the provision, declare unlawful any act or omission of the Crown which constitutes such a contravention.

(3) Despite subsection (1), any provision made by or under the provisions of this Act applies to persons in the public service of the Crown as it applies to other persons.

47 Commencement

(1) This Part (other than section 43) comes into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

48 Short title

The short title of this Act is the Regulatory Reform (Scotland) Act 2013.

SCHEDULE 1
(introduced by section 1(5))

REGULATORS FOR THE PURPOSES OF PART 1

Accountant in Bankruptcy

Food Standards Agency

Healthcare Improvement Scotland

Local authorities

Scottish Charity Regulator

Scottish Environment Protection Agency

Scottish Housing Regulator

Scottish Natural Heritage

Social Care and Social Work Improvement Scotland

VisitScotland

SCHEDULE 2
(introduced by section 10)

PARTICULAR PURPOSES FOR WHICH PROVISION MAY BE MADE UNDER SECTION 10

PART 1

LIST OF PURPOSES

Environmental activities

1 (1) Further defining environmental activities.

(2) Modifying the definition of any of those activities.

(3) Specifying other activities as environmental activities.

Emissions

2 (1) Establishing standards, objectives or requirements in relation to emissions.

(2) In relation to emissions, authorising the making of plans for—

(a) the setting of overall limits,

(b) the allocation of quotas, or

(c) the progressive improvement of standards or objectives.

(3) Authorising the making of schemes for the trading or other transfer of quotas so allocated.

Regulators

3 (1) Determining the authorities (whether SEPA or any other public or local authority or the Scottish Ministers) by whom functions conferred by the regulations for or in connection with regulating regulated activities are to be exercisable (such authorities being referred to in this schedule as "regulators").

(2) Specifying any other purposes for which any such functions are to be exercisable.

(3) Enabling the Scottish Ministers to give directions (whether general or specific) with which regulators are to comply, or guidance to which regulators are to have regard, in exercising functions under the regulations, including—

(a) directions providing for any functions exercisable by one regulator to be exercisable instead by another,

(b) directions given for the purpose of the implementation of any obligations of the United Kingdom under the EU Treaties or under any international obligations to which the United Kingdom is a party,

(c) directions relating to the exercise of any function in a particular case or description of case,

(d) directions providing for any matter to which the directions relate to be determined, in such manner (if any) as the directions may specify, by a person other than the Scottish Ministers.

Regulation of activities

4 (1) Prohibiting persons from carrying on, or from causing or permitting others to carry on, any regulated activity.

(2) Prohibiting persons from carrying on any regulated activity except so far as it is—

(a) authorised by or under the regulations, and

(b) carried on in accordance with the regulations.

(3) Enabling the carrying on of regulated activities to be authorised by providing that they are to be carried on—

(a) in accordance with a permit granted by a regulator under the regulations (a "permit"),

(b) subject to a requirement to register the carrying on of the activity with a regulator ("registration"),

(c) subject to a requirement to notify a regulator that the activity is being, or is proposed to be, carried on ("notification"),

(d) subject to compliance with rules specified in or made under the regulations ("general binding rules").

(4) Enabling the carrying on of regulated activities to be authorised by means of a permit, registration or notification whether or not the carrying on of those activities is also subject to general binding rules.

(5) Specifying a procedure under which the regulators may determine general binding rules.

(6) Treating as authorised the carrying on of regulated activities which are subject to general binding rules.

(7) Specifying the subsistence of an authorisation to carry on regulated activities which are subject to general binding rules.

Permits

5 (1) Prescribing the form and content of applications for permits.

(2) Regulating the procedure to be followed in connection with—

(a) applications for permits,

(b) the determination of such applications, and

(c) the grant of permits.

6 (1) Prescribing the form and content of permits.

(2) Authorising permits to be granted subject to conditions imposed by regulators.

(3) Securing that permits have effect subject to specified conditions.

(4) Requiring persons carrying on regulated activities authorised by way of a permit to submit to regulators, in respect of specified periods and at specified intervals, such information as may be specified relating to the carrying on of the activities and compliance with any conditions subject to which the permit was granted.

7 (1) Requiring permits, or the conditions to which permits are subject, to be reviewed by regulators (whether periodically or in specified circumstances).

(2) Authorising or requiring the variation of permits or such conditions by regulators (whether on applications made by holders of permits or otherwise).

(3) Regulating the making of changes in the carrying on of the activities to which permits relate.

8 (1) Regulating the transfer and surrender of permits.

(2) Authorising the suspension of permits by regulators.

(3) Authorising the revocation of permits by regulators.

(4) Authorising the imposition by regulators of requirements with respect to the taking of preventive or remedial action (by holders of permits or other persons) in connection with the surrender and revocation of permits.

9 (1) Authorising, or authorising the Scottish Ministers to make schemes for, the charging by the Scottish Ministers or public or local authorities of fees or other charges in respect of—

(a) the testing or analysis of substances in cases mentioned in sub-paragraph (2),

(b) the validating of, or of the results of, any testing or analysis of substances in such cases, or

(c) assessing how the environment might be affected by the release into it of any substances in such cases.

(2) The cases are those where the testing, analysis, validating or assessing is in any way in anticipation of, or otherwise in connection with, the making of applications for the grant of permits or is carried out in pursuance of conditions to which any permit is subject.

Registration

10 (1) Prescribing the form and content of—

(a) applications for registration,

(b) registration.

(2) Regulating the procedure for registration including—

(a) the procedure to be followed in connection with—

(i) applications for registration,

(ii) the determination of such applications, and

(iii) the grant of registration, and

(b) variation, transfer, surrender, suspension and revocation of registrations.

(3) Authorising registration to be granted subject to conditions imposed by regulators.

(4) Securing that registrations have effect subject to specified conditions.

(5) Specifying restrictions or other requirements in connection with registration, including—

(a) circumstances in which registration may be refused,

(b) the subsistence of registration.

Provisions common to permits and registration

11 (1) Enabling the granting of permits, or the registration of activities, authorising the carrying on of—

(a) one or more regulated activities,

(b) a regulated activity at one or more than one place.

(2) Securing that permits and registrations have effect subject to standard rules specified in or made under the regulations in respect of permits and registrations.

(3) Specifying a procedure under which regulators may determine such rules.

(4) Specifying restrictions or other requirements in connection with—

(a) applications for permits or registration,

(b) the grant of permits (including provisions for restricting the grant of permits to those who are fit and proper persons within the meaning of the regulations),

(c) the registration of regulated activities (including provision for restricting registration to the carrying on of such activities by those who are fit and proper persons within the meaning of the regulations).

(5) Specifying the circumstances in which persons or descriptions of persons may be deemed—

(a) to have control over activities the carrying on of which is authorised by grant of a permit or by registration (including complying with any conditions or requirements of the permit or registration),

(b) to be carrying on a regulated activity for the purposes of notices that may be served by regulators under paragraph 18,

(c) to be authorised to carry on a regulated activity without having applied for a permit or registration, or having given notification, in respect of that activity.

(6) Enabling the granting of a permit to, or registration of the carrying on of regulated activities by, more than one person.

(7) Enabling permits and registrations—

(a) to be varied, transferred, surrendered, suspended or revoked wholly or in part,

(b) to be consolidated.

Notification of regulated activities

12 (1) Prescribing the form and content of notifications and otherwise regulating the procedure for notifying the carrying on or proposed carrying on of regulated activities.

(2) Specifying restrictions or other requirements in connection with notifications, including—

(a) the subsistence of a notification,

(b) the subsistence of an authorisation to carry on a regulated activity in respect of which the notification is given.

Charging schemes

13 (1) Authorising, or authorising regulators to make, vary and revoke schemes for the charging by regulators of fees or other charges—

(a) in respect of, or in respect of applications for—

(i) the grant of a permit,

(ii) the variation of a permit or the conditions to which it is subject,

(iii) the transfer, surrender or revocation of a permit,

(iv) registration,

(v) the variation, transfer, surrender or revocation of registration,

(b) in respect of the subsistence of a permit or registration,

(c) in respect of consolidation of permits and registrations,

(d) in respect of notifications,

(e) in respect of other specified matters.

(2) Regulating the procedure for making, varying and revoking such schemes.

Information, publicity and consultation

14 Enabling persons of any specified description (whether or not they are holders of permits or carrying on activities that are subject to registration, a requirement of notification or general binding rules) to be required—

(a) to provide such information in such manner as is specified in the regulations,

(b) to compile information—

(i) on emissions,

(ii) on energy consumption and on the efficiency with which energy is used,

(iii) on waste and on the origins and destinations of waste.

15 Securing that—

(a) publicity is given to specified matters,

(b) regulators maintain registers of specified matters (but excepting information which under the regulations is, or is determined to be, commercially confidential and subject to any other exceptions specified in the regulations) which are open to public inspection,

(c) regulators publish, in a manner specified in the regulations, such registers,

(d) copies of entries in such registers, or of specified documents, may be obtained by members of the public.

16 Requiring or authorising regulators to carry out consultation in connection with the exercise of any of their functions (including consultation on any guidance they propose to issue in connection with the exercise of those functions), and providing for them to take into account representations made to them on consultation.

Enforcement and offences

17 (1) Conferring functions on regulators with respect to compliance with, and enforcement of, the regulations.

(2) Conferring power on regulators—

(a) to arrange for preventive or remedial action to be taken at the expense of persons carrying on regulated activities,

(b) to require such persons to provide such financial security as the regulators making the arrangements consider appropriate pending the taking of the preventative or remedial action.

(3) Authorising regulators to appoint suitable persons to exercise the functions mentioned in sub-paragraph (1) and the powers in sub-paragraph (2); and conferring powers (such as those specified in section 108(4) of the Environment Act 1995 (powers of entry, etc.)) on persons so appointed.

(4) Regulating the procedure under which regulators may make arrangements, or impose requirements, such as are mentioned in sub-paragraph (2).

18 (1) Authorising regulators to serve on any persons carrying on regulated activities (whether or not the carrying on of those activities is authorised by or under the regulations) notices, including notices requiring such persons—

(a) to notify the regulated activities being carried on by them,

(b) to take preventative or remedial action at their own expense, including such action in respect of contraventions (actual or potential) of authorisations, or conditions of authorisations, relating to the regulated activities,

(c) to provide such financial security as the regulators serving the notices consider appropriate pending the taking of preventative or remedial action required by virtue of paragraph (b),

(d) to take steps to remove imminent risks of serious adverse impacts on the environment (whether or not arising from any contraventions such as are mentioned in paragraph (b)),

(e) to stop the carrying on of regulated activities (whether or not the notice also requires the person to take such preventative or remedial action as may be specified in the notice).

(2) Authorising regulators, where such notices are not complied with by persons on whom they are served—

(a) to take, or arrange for the taking of, preventative or remedial action at the expense of those persons,

(b) to impose monetary penalties on those persons.

(3) Authorising regulators who serve such notices to require the persons on whom the notice is served to pay the cost incurred by the regulators in relation to the service of the notice up to the time of its service.

(4) Providing for the enforcement of such notices by civil proceedings.

(5) Specifying a procedure under which monetary penalties such as are mentioned in sub-paragraph (2)(b) may be imposed.

(6) Authorising regulators, where they are required by virtue of such a procedure to serve a notice, to require the person on whom the notice is served to pay the costs incurred by the regulators in relation to the service of the notice up to the time of its service.

(7) Providing for the enforcement of such notices by civil proceedings.

19 Creating offences and dealing with matters relating to such offences, including—

(a) the provision of defences, and

(b) evidentiary matters.

20 Enabling, where a person has been convicted of an offence under the regulations, a court dealing with that person for the offence to order the taking of remedial action (in addition to or instead of imposing any punishment).

Appeals

21 (1) Conferring rights of appeal in respect of decisions made, notices served or other things done (or omitted to be done) under the regulations.

(2) Making provision for (or for the determination of) matters relating to the making, considering and determination of such appeals (including provision for or in connection with the holding of inquiries or hearings).

General

22 (1) Making provision which, subject to any modifications that the Scottish Ministers consider appropriate, corresponds or is similar to—

(a) any provision made by or under, or capable of being made under, Part 2 of the Environmental Protection Act 1990, or

(b) any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with an EU obligation relating to protecting and improving the environment.

(2) Making provision about the application of the regulations to the Crown.

PART 2

SUPPLEMENTARY PROVISIONS

Particular types of regulated activity

23 The regulations may provide for specified provisions of the regulations to have effect in relation only to—

(a) specified regulated activities,

(b) the carrying on of regulated activities in specified circumstances, or

(c) the carrying on of regulated activities by specified persons or descriptions of persons.

Emissions trading scheme

24 (1) The regulations may authorise the inclusion in a trading scheme of—

(a) provision for penalties in respect of contraventions of provisions of the scheme,

(b) provision for the amount of any penalty under the scheme to be such as may be set out in, or calculated in accordance with—

(i) the scheme, or

(ii) the regulations (including regulations made after the scheme).

(2) In this paragraph, "trading scheme" means a scheme of the kind mentioned in paragraph 2(3).

General binding rules

25 (1) General binding rules may—

(a) impose conditions or requirements,

(b) prescribe standards or objectives to be complied with or achieved, and

(c) require standards or objectives specified in or under other enactments to be complied with or achieved.

(2) Before determining any general binding rules in accordance with a procedure specified under paragraph 4(5), a regulator must—

(a) publish a draft of the proposed rules,

(b) publicise the opportunity to make representations about the proposed rules under sub-paragraph (3) in such manner as the regulator thinks fit,

(c) make copies of the proposed rules available for public inspection for such period, which must be at least 28 days, as the regulator may determine.

(3) Any person who wishes to make representation about the proposed rules to the regulator may do so within the period determined under sub-paragraph (2)(c).

(4) The regulator must, in determining the rules, have regard to any representations on the proposed rules received by the regulator within that period.

Determination of matters by regulators

26 The regulations may make provision for anything which, by virtue of paragraphs 5 to 12, could be provided for by the regulations to be determined under the regulations by regulators.

Determination of rules and imposition of conditions

27 The regulations may provide—

(a) for regulators to have regard to any specified general principles, and to any directions or guidance given under the regulations—

(i) in determining any general binding rules,

(ii) in imposing any conditions as mentioned in paragraph 6(2) or 10(3),

(iii) in setting any standard rules they may make by virtue of paragraph 11(2),

(b) for such guidance to include the sanctioning of reliance by a regulator on any arrangements referred to in the guidance to operate to secure a particular result as an alternative to imposing any such conditions,

(c) for such conditions to be imposed by reference to agreements between or among persons authorised to carry on regulated activities as to the carrying on by them of the activities.

Charging schemes

28 The regulations may—

(a) require any such scheme as is mentioned in paragraph 9 or 13 to be so framed that the fees and charges payable under the scheme—

(i) are determined in the light of any specified general principles and any directions or guidance given under the regulations,

(ii) are sufficient, taking one year with another, to cover such expenditure (whether or not incurred by the regulator to whom they are so payable) as is specified,

(b) authorise any such scheme to make different provision for different cases (and specify particular kinds of such cases).

Power to specify EU instruments for the purposes of paragraph 22

29 The Scottish Ministers may, for the purposes of paragraph 22(1)(b), by order specify an EU instrument as one that is or contains an EU obligation mentioned in that paragraph.

Offences

30 (1) The regulations may provide for any such offence as is mentioned in paragraph 19 to be triable—

(a) only summarily,

(b) either summarily or on indictment.

(2) The regulations may provide for such an offence to be punishable—

(a) on summary conviction by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 12 months),

(ii) a fine not exceeding such amount as is specified (which must not exceed £40,000), or

(iii) both,

(b) on conviction on indictment by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 5 years),

(ii) a fine, or

(iii) both.

(3) The regulations may provide for continuing offences and for any such offences to be punishable by a daily or other periodic fine of such amount as is specified (in addition to any punishment provided for in pursuance of sub-paragraph (2)).

(4) The Scottish Ministers may by order substitute for the sum for the time being specified in sub-paragraph (2)(a)(ii) such other sum as appears to them to be justified by a change in the value of money appearing to them to have taken place since the last occasion on which the sum was fixed.

(5) An order under sub-paragraph (4) is not to affect the punishment for an offence committed before that order comes into force.

Service of notices

31 The regulations may make provision for or in connection with the service of any notice or other document required under the regulations to be served on or given to any person.

Powers exercisable in the regulations

32 The regulations may—

(a) modify any enactment, instrument or document,

(b) in making different provision for different purposes, make different provision for different cases, persons, circumstances or areas,

(c) contain provision for the delegation of functions,

(d) impose requirements in relation to any standards or other matters set out in such documents as may be specified in the regulations.

Interpretation

33 In this schedule—

"authorise", in relation to regulated activities, means authorise the carrying on of the activities in accordance with a permit, subject to registration, subject to notification or subject to compliance with general binding rules; and related expressions are to be construed accordingly,

"functions" includes powers and duties,

"general binding rules" means rules specified in or made under the regulations in pursuance of paragraph 4(3)(d),

"notification" means notification of the carrying on of, or of a proposal to carry on, a regulated activity in accordance with any provision made in the regulations in pursuance of paragraph 4(3)(c),

"permit" means a permit granted under any provision made in the regulations in pursuance of paragraph 4(3)(a),

"registration" means registration under any provision made in the regulations in pursuance of paragraph 4(3)(b),

"the regulations" means regulations under section 10,

"regulated activities" has the meaning given in section 9(3),

"regulators" has the meaning given in paragraph 3(1),

"specified" means specified in the regulations.

SCHEDULE 3
(introduced by section 43)

MINOR AND CONSEQUENTIAL MODIFICATIONS

PART 1

REGULATION OF ENVIRONMENTAL ACTIVITIES, ETC.

Prevention of Oil Pollution Act 1971

1 In section 11A of the Prevention of Oil Pollution Act 1971 (certain provisions not to apply where discharge or escape authorised under certain enactments), in subsection (1), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

Environmental Protection Act 1990

2 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 35 (waste management licences: general), in subsection (11A), after "1999" insert "or by an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

(3) In section 79 (statutory nuisances and inspections therefor), in subsection (10), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

Clean Air Act 1993

3 (1) The Clean Air Act 1993 is amended as follows.

(2) In section 31 (regulations about sulphur content of oil fuel for furnaces or engines), in subsection (4)—

(a) in paragraph (a)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (ii) insert "; or

(iii) part of an activity subject to regulation by the Scottish Environment Protection Agency under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013;",

(b) in paragraph (b), after "sub-paragraph (ii)" insert "or (iii)".

(3) In section 33 (cable burning), in subsection (1), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(4) In section 35 (obtaining information), in subsection (3), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(5) In section 36 (notices requiring information about air pollution), in subsection (2A) after "1999" insert "or to an activity subject to regulation by the Scottish Environment Protection Agency under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

(6) In section 41A (relation to Pollution Prevention and Control Act 1999)—

(a) in subsection (1), after "activities)" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013",

(b) in subsection (2)—

(i) in paragraph (a), after "permit" insert "or authorisation",

(ii) in paragraph (b), after "permit" insert "or authorisation",

(c) in subsection (3)—

(i) the words from "permit" to the end of the subsection become paragraph (a) of that subsection,

(ii) after that paragraph insert "; and

(b) "authorisation" means an authorisation under regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013, and the reference to an appeal is to an appeal under those regulations.".

(7) In the title to section 41A, after "1999" insert "and Regulatory Reform (Scotland) Act 2013".

Environment Act 1995

4 (1) The Environment Act 1995 is amended as follows.

(2) In section 56 (interpretation of Part 1), in the definition of "environmental licence" in relation to SEPA, after paragraph (aa) insert—

"(ab) an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013,".

(3) In section 108 (powers of enforcing authorities and persons authorised by them), in subsection (15), in paragraph (n) of the defintion of "pollution control functions" in relation to SEPA, after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(4) In section 114 (power of the Scottish Ministers to delegate functions of determining, or to refer matters involved in, appeals), in subsection (2)(a)(viii), after "Scotland" insert "or under section 10 of the Regulatory Reform (Scotland) Act 2013".

Merchant Shipping Act 1995

5 In section 136A of the Merchant Shipping Act 1995 (discharges etc. authorised under other enactments), after "1999" insert "or an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

Pollution Prevention and Control Act 1999

6 In the Pollution Prevention and Control Act 1999, in section 1 (general purpose of section 2 and definitions)—

(a) paragraph (a) is repealed,

(b) in paragraph (b), the words ", otherwise in pursuance of that Directive," are repealed.

Water Environment and Water Services (Scotland) Act 2003

7 (1) The Water Environment and Water Services (Scotland) Act 2003 is amended as follows.

(2) In section 2 (the general duties), in subsection (8), in the defintion of "the relevant enactments", after "Part" insert ", Part 2 of the Regulatory Reform (Scotland) Act 2013".

(3) Section 20 (regulation of controlled activities) is repealed.

(4) Section 21 (controlled activities regulations: procedure) is repealed.

(5) In section 22 (remedial and restoration measures)—

(a) in subsection (2)(a), the words "(as defined in section 20(6))" are repealed,

(b) after subsection (3) insert—

"(4) In subsection (2)(a), "pollution" in relation to the water environment means the direct or indirect introduction, as a result of human activity, of substances or heat into the water environment, or any part of it, which may give rise to any harm; and "harm" means—

(a) harm to the health of human beings or other living organisms,

(b) harm to the quality of the water environment, including—

(i) harm to the quality of the water environment taken as a whole,

(ii) other impairment of, or interference with the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems,

(c) offence to the senses of human beings,

(d) damage to property, or

(e) impairment of, or interference with, amenities or other legitimate uses of the water environment.".

(6) In section 23 (fixing of charges for water services)—

(a) in paragraph (a) of subsection (4), the words "(as defined in section 20(6))" are repealed,

(b) after that subsection insert—

"(5) In subsection (4)(a), "abstraction" means the doing of anything by which any water is removed or diverted by mechanical means, pipe or any engineering structure or works from any part of the water environment, whether temporarily or permanently, including anything by which the water is so removed or diverted for the purpose of being transferred to another part of the water environment, and includes—

(a) the construction or extension of any well, borehole, water intake or other work by which water may be abstracted,

(b) the installation or modification of any machinery or apparatus by which additional quantities of water may be abstracted by means of a well, borehole, water intake or other work.".

(7) In section 28 (interpretation of Part 1), the definition of "controlled activity" is repealed.

(8) In section 36 (orders and regulations)—

(a) in each of subsections (3), (5) and (6) the word "20," is repealed,

(b) in subsection (4), paragraph (b) and the "or" immediately preceding it are repealed.

(9) In schedule 1 (matters to be included in river basin management plans), in paragraph 10(b), for the words "schedule 2" substitute "paragraph 3(1) of schedule 2 to the Regulatory Reform (Scotland) Act 2013".

(10) Schedule 2 (controlled activities regulations: particular purposes) is repealed.

Income Tax (Trading and Other Income) Act 2005

8 In section 167 of the Income Tax (Trading and Other Income) Act 2005 (site preparation expenditure: supplementary), in subsection (1), after paragraph (c) insert—

"(ca) an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013,".

Water Services etc. (Scotland) Act 2005

9 In section 25 of the Water Services etc. (Scotland) Act 2005 (sewerage nuisance: code of practice), in subsection (9), after "(c.24)" insert "or by an authorisation under regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013".

Corporation Tax Act 2009

10 In section 144 of the Corporation Tax Act 2009 (site preparation expenditure: supplementary), in subsection (1) after paragraph (c) insert——

"(ca) an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013,".

PART 2

ENFORCEMENT OF REGULATIONS ON ENVIRONMENTAL ACTIVITIES, ETC.

Environmental Protection Act 1990

11 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 33A (fixed penalty notices for contraventions of section 33(1)(a) and (c): Scotland)—

(a) in subsection (1)(b), the words ", or an authorised officer of a waste regulation authority," are repealed,

(b) in subsection (4), paragraph (b) and the word "or" immediately preceding it are repealed.

(3) In section 59 (power to require removal of waste unlawfully deposited), after subsection (8B) insert—

"(8C) An authority may not recover costs under subsection (8) above if a compensation order has been made under section 249 of the Criminal Procedure (Scotland) Act 1995 in favour of the authority in respect of any part of those costs.

(8D) Subsection (8C) does not apply if the compensation order is set aside on appeal.".

Criminal Procedure (Scotland) Act 1995

12 In section 249 of the Criminal Procedure (Scotland) Act 1995 (compensation order against convicted person), after subsection (10) add—

"(11) This section is subject to section 26 of the Regulatory Reform (Scotland) Act 2013.".

Reservoirs (Scotland) Act 2011

13 (1) The Reservoirs (Scotland) Act 2011 is amended as follows.

(2) Sections 78 to 81 (enforcement undertakings, fixed monetary penalties, fixed monetary penalties: procedure and fixed monetary penalties: criminal proceedings and conviction, etc.) are repealed.

(3) In section 82 (further enforcement measures)—

(a) in subsection (4)—

(i) for the word "any" substitute "either",

(ii) paragraph (a) is repealed,

(b) in subsection (5), the definition of "variable monetary penalty" is repealed.

(4) In section 83 (further enforcement measure: procedure), subsections (6)(b) and (7)(c) are repealed.

(5) In section 84 (further enforcement measures: criminal proceedings and conviction), subsection (3)(b) is repealed.

(6) In section 86 (consultation in relation to certain orders), in subsection (1), paragraphs (b) and (c) are repealed.

(7) In the title of section 86, the words ", 78(1), 79(1)" are omitted.

(8) In section 87 (guidance as to use of stop notices, etc.), paragraphs (b) and (c) are repealed,

(9) In the title of section 87, the words ", fixed monetary penalties" are omitted.

(10) In section 89 (guidance: appeals), the words ", 78, 80," are repealed.

(11) In section 90 (publication of enforcement action)—

(a) in subsection (2), paragraph (b) is repealed,

(b) in subsection (3) the words ", fixed monetary penalty" are repealed.

(12) In section 114 (orders and regulations), in subsection (4)(f), the words ", 78(1), 79(1)" are repealed.

(13) In the schedule (index of defined expressions), the entries in the first column relating to "enforcement undertaking" and "fixed monetary penalty", and the corresponding interpretation provisions in the second column, are repealed.

PART 3

PURPOSES OF SEPA

Environment Act 1995

14 (1) The Environment Act 1995 is amended as follows.

(2) In section 31 (guidance on sustainable development and other aims and objectives), after subsection (2) insert—

"(2A) The Scottish Ministers may give guidance to SEPA with respect to the carrying out of its duties under section 20A.".

(3) In the title to section 31, after "on" insert "SEPA's general purpose and on".

(4) Section 32 (general environmental and recreational duties) is repealed.

(5) In section 33 (general duties with respect to pollution)—

(a) subsections (1), (4) and (5) are repealed,

(b) in subsection (2)—

(i) for "shall" substitute "may",

(ii) in paragraph (a), the words "pollution control" are repealed,

(iii) in paragraph (b), the words "pollution of" are repealed,

(iv) for "such pollution" substitute "the general state of the environment".

(6) The title to section 33 becomes "**General duties as respects the state of the environment and effects of pollution**".

(7) Section 34 (general duties with respect to water) is repealed.

(8) Section 36 (codes of practice with respect to environmental and recreational duties) is repealed.

(9) In section 39 (general duty of the new Agencies to have regard to the costs and benefits in exercising powers)—

(a) in subsection (1), for "Each new" substitute "The",

(b) in subsection (2), for "a new" substitute "the".

(10) In the title to section 39, for the words "new Agencies" substitute "Agency".

(11) In section 81 (functions of the new Agencies), in subsection (2)—

(a) the word "means" is repealed,

(b) at the beginning of paragraph (a) insert "means",

(c) in paragraph (b), for the words from "the functions" to the end of the paragraph, substitute "has the same meaning as in section 108(15) below in relation to SEPA".

Water Industry (Scotland) Act 2002

15 In schedule 7 to the Water Industry (Scotland) Act 2002 (modifications of other enactments), paragraph 24(2) is repealed.

PART 4

CONTROL OF POLLUTION ACT 1974

16 (1) The Control of Pollution Act 1974 is amended as follows.

(2) The following provisions are repealed—

(a) section 30B (classification of quality waters),

(b) section 30C (water quality objectives),

(c) section 30D (general duties to achieve and maintain objectives, etc.),

(d) section 30E (consultation and collaboration),

(e) section 31B (nitrate sensitive areas),

(f) section 31C (registering of agreement),

(g) section 41 (registers),

(h) section 42A (exclusion from registers of information affecting national security),

(i) section 42B (exclusion from registers of certain confidential information),

(j) section 43 (control of discharges into sewers),

(k) section 44 (provisions supplementary to section 43),

(l) section 45 (early variation of conditions of discharges),

(m) section 52 (charges in respect of certain discharges in England and Wales),

(n) section 57 (periodical inspections by local authorities),

(o) sections 63 to 67 (noise abatement zones),

(p) in section 87 (miscellaneous provisions relating to legal proceedings), subsection (3),

(q) section 88 (civil liability for contravention of section 3(3)),

(r) section 90 (establishment charges and interest in respect of certain expenses of authorities),

(s) section 101 (disposal of waste etc. by Atomic Energy Authority),

(t) Schedule 1 (noise abatement zones), and

(u) Schedule 1A (orders designating nitrate sensitive areas: Scotland).

(3) In section 51 (codes of good agricultural practice), in subsection (2), the words from "but" to the end of the subsection are repealed.

(4) In section 55A (regulations under Part 2), the words "and sections 43 to 45" are repealed.

(5) In section 56 (interpretation etc. of Part 2)—

(a) in subsection (1)—

(i) in the definition of "coastal waters", "controlled waters", "ground waters", "inland waters" and "relevant territorial waters", for the words from the beginning to "meanings" substitute ""controlled waters" has the meaning",

(ii) the definitions of "effluent", "micro-organism", "operations", "sewage effluent", "substance" and "trade effluent" are repealed,

(b) subsections (3), (5) and (6) are repealed.

(6) In section 73 (interpretation and other supplementary provisions)—

(a) in subsection (1), the definitions of the following expression are repealed—

(i) "noise abatement order" and "noise abatement zone",

(ii) "noise level register",

(iii) "noise reduction notice", and

(iv) "person responsible",

(b) in subsection (2), for the words "sections 62 to 67" in both places where they occur, substitute "section 62".

(7) In section 74 (penalties)—

(a) in subsection (1), in paragraph (a), the words "in the case of a first offence against this Part of this Act," are repealed,

(b) the words from "; and" immediately following that paragraph to the end of the section are repealed.

(8) In section 105 (interpretation etc. – general), in subsection (1), the definition of "trade effluent" is repealed.

PART 5

MISCELLANEOUS ENACTMENTS

Local Government (Scotland) Act 1973

17 In the Local Government (Scotland) Act 1973, in Schedule 27 (adaptation and amendment of enactments), paragraphs 146 to 148 are repealed.

Local Government, Planning and Land Act 1980

18 In the Local Government, Planning and Land Act 1980, in Schedule 2 (relaxation of controls over functions relating to clean air and pollution), paragraph 18 is repealed.

Litter Act 1983

19 In the Litter Act 1983—

(a) in section 4 (consultation and proposals for abatement of litter), subsections (4), (4ZA), (4A) and (5) are repealed,

(b) in section 9 (orders), subsection (3) is repealed,

(c) in section 13 (short title, commencement and extent), in subsection (4), the words "4(4)," are repealed.

Environmental Protection Act 1990

20 In the Environmental Protection Act 1990—

(a) section 84 (termination of Public Health Act controls over offensive trades, etc.) is repealed,

(b) section 145 (penalties for offences of polluting controlled waters, etc.) is repealed,

(c) in Schedule 15 (consequential and minor amendments of enactments)—

(i) in paragraph 15, sub-paragraphs (2) and (4) are repealed,

(ii) paragraph 17 is repealed.

Natural Heritage (Scotland) Act 1991

21 (1) Section 24 of the Natural Heritage (Scotland) Act 1991 (rights of entry and inspection under Parts 2 and 3) is amended as follows.

(2) In subsection (1)—

(a) in the opening words, the words "SEPA or" are repealed,

(b) in paragraph (a)—

(i) the words "SEPA or" are repealed,

(ii) the words "II or" are repealed,

(c) in paragraph (c)—

(i) for the words "either of these Parts" substitute "Part III",

(ii) for the words "one of these Parts" substitute "that Part".

(3) In subsection (9), the words "SEPA or", in both places where they occur, are repealed.

(4) In the title to section 24, for the words "Parts II and III" substitute "Part III".

Agricultural Holdings (Scotland) Act 1991

22 In section 26 of the Agricultural Holdings (Scotland) Act 1991 (certificates of bad husbandry), subsection (2) is repealed.

Radioactive Substances Act 1993

23 In the Radioactive Substances Act 1993, in Schedule 3 (enactments other than local enactments to which section 40 applies)—

(a) paragraph 11 is repealed,

(b) in paragraph 16—

(i) the words ", 30B, 30D, 41 to 42B" are repealed,

(ii) for "(3)" substitute "(2)".

Local Government etc. (Scotland) Act 1994

24 In the Local Government etc. (Scotland) Act 1994, in Schedule 13 (minor and consequential amendments), sub-paragraphs (3), (5) and (10) of paragraph 95 are repealed.

Environment Act 1995

25 (1) The Environment Act 1995 is amended as follows.

(2) Section 23 (functions of the staff commission established under section 12 of the Local Government etc. (Scotland) Act 1994) is repealed.

(3) In section 114 (power of the Scottish Ministers to delegate functions relating to appeals), subsections (2)(a)(i) and (3)(b) are repealed.

(4) In schedule 20 (delegation of appellate functions of the Scottish Ministers), paragraph 4(3)(a) is repealed.

(5) In Schedule 22 (minor and consequential amendments)—

(a) in paragraph 29—

(i) in sub-paragraph (2), for the words from "section 30C(1)" to the end of that sub-paragraph, substitute "section 51",

(ii) sub-paragraphs (4)(b) to (e), (5), (6), (8), (9)(a) and (b), (10) to (15), (17) to (22), (25), (26), (29) and (30) are repealed,

(b) in paragraph 96, sub-paragraphs (2) to (5), (7) and (8) are repealed.

(6) In section 108 (powers of enforcing authorities and persons authorised by them)—

(a) in subsection (1), after paragraph (a) insert—

"(aa) of determining whether an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 (offences relating to significant environmental harm) is being, or has been, committed;",

(b) in subsection (4), in paragraph (h), after sub-paragraph (iii) insert—

"(iv) to ensure that it is available for use as evidence in any proceedings for an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013;",

(c) in subsection (5), after "with" insert ", or whether an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 is being, or has been, committed,".

Town and Country Planning (Scotland) Act 1997

26 In the Town and Country Planning (Scotland) Act 1997, in section 275 (regulations and orders), the subsection numbered "(2A)" inserted by section 54(16)(a) of the Planning etc. (Scotland) Act 2006 is renumbered as "(2B)".

Crime and Punishment (Scotland) Act 1997

27 In the Crime and Punishment (Scotland) Act 1997, in section 30 (routine evidence)—

(a) in subsection (1), for the words "subsections (2) and (3)" substitute "subsection (3)",

(b) subsection (2) is repealed.

City of Edinburgh (Guided Busways) Order Confirmation Act 1998

28 In the City of Edinburgh (Guided Busways) Order Confirmation Act 1998, in section 29 (connection of drains, etc, with streams, etc.) of the Order contained in the Schedule confirmed by section 1 of that Act, subsection (4) is repealed.

Antisocial Behaviour etc. (Scotland) Act 2004

29 In the Antisocial Behaviour etc. (Scotland) Act 2004, in schedule 2 (penalties for certain environmental offences), paragraph 2 is repealed.

Forth Crossing Act 2011

30 In section 70 of the Forth Crossing Act 2011 (control of noise: Control of Pollution Act 1974), subsection (3) is repealed.

PART 6

MODIFICATIONS OF REFERENCES TO "ENACTMENT" ETC.

Control of Pollution Act 1974

31 (1) The Control of Pollution Act 1974 is amended as follows.

(2) In section 73 (interpretation and other supplementary provisions), after subsection (3) insert—

"(3A) In the definition of "statutory undertakers" in subsection (1), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 85 (appeals to Crown Court or Court of Session against decisions of magistrates' court or sheriff), after subsection (3) add—

"(4) In subsection (2), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 105 (interpretation etc. – general), in subsection (2)(b), after "private" add "or by or under any Act of the Scottish Parliament".

Environmental Protection Act 1990

32 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 33 (prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste), after subsection (10) add—

"(11) In subsection (4)(c) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 57 (powers of the Scottish Ministers to require waste to be accepted, treated, disposed of or delivered), after subsection (7) insert—

"(7A) In subsection (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 63 (waste other than controlled waste), after subsection (4) add—

"(5) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(5) In section 73 (appeals and other provisions relating to legal proceedings and civil liability), after subsection (9) add—

"(10) In subsection (2) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(6) In section 78X (supplementary provisions), after subsection (4) insert—

"(4A) In subsection (4)(f)(i) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(7) In section 79 (statutory nuisances and inspections therefor), after subsection (6A) insert—

"(6B) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(8) In section 98 (definitions for Part 6), after subsection (6), insert—

"(6A) In subsection (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(9) In section 140 (power to prohibit or restrict the importation, use, supply or storage of injurious substances or articles), in subsection (11), before the definition of "the environment" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(10) In Schedule 4 (abandoned shopping and luggage trolleys), after paragraph 1(2) add—

"(3) In sub-paragraph (2)(d) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Radioactive Substances Act 1993

33 (1) The Radioactive Substances Act 1993 is amended as follows.

(2) In section 40 (radioactivity to be disregarded for purposes of certain statutory provisions), in subsection (3)—

(a) in the definition of "statutory provision", in paragraph (a), after "Act" insert "or Act of the Scottish Parliament",

(b) in the definition of "local enactment"—

(i) after paragraph (a) insert—

"(aa) an Act of the Scottish Parliament the Bill for which was a private Bill for the purposes of the standing orders of the Scottish Parliament,",

(ii) in paragraph (b), after "by", where it second occurs, insert "the Scottish Parliament,".

(3) In section 46 (effect of Act on other rights and duties), in paragraph (b)—

(a) the words from "any", where it second occurs, to the end of that paragraph become sub-paragraph (i) of that paragraph,

(b) after that sub-paragraph insert—

"(ii) any Act of the Scottish Parliament, or".

Environment Act 1995

34 (1) The Environment Act 1995 is amended as follows.

(2) In section 27 (power of SEPA to obtain information about land), after subsection (3) add—

"(4) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 30 (records held by SEPA), after subsection (3) add—

"(4) In subsection (3) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 37 (incidental general functions), after subsection (8) insert—

"(8A) In subsection (8) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(5) In section 38 (delegation of functions by Ministers etc. to new Agencies), in subsection (10) after the definition of "eligible function" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(6) In section 40 (ministerial directions to the new Agencies), after subsection (8) add—

"(9) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(7) In section 43 (incidental power of the new Agencies to impose charges)—

(a) the existing text becomes subsection (1) of that section,

(b) after that subsection add—

"(2) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(8) In section 53 (inquiries and other hearings), after subsection (3) add—

"(4) In subsections (1) and (3) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(9) In section 87 (regulations for the purposes of Part 4), after subsection (9) add—

"(10) In subsection (5)(c) above, "enactment" includes an enactment comprised in an Act of the Scottish Parliament.".

(10) In section 108 (powers of enforcing authorities and persons authorised by them), in subsection (15)—

(a) in the definition of "pollution control enactments" at the end add "(including any enactments comprised in, or in instruments made under, an Act of the Scottish Parliament relating to those functions).",

(b) in the definition of "pollution control functions" in relation to the Scottish Ministers, after "instrument" insert "(including any enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament)".

(11) In section 113 (disclosure of information), in subsection (5), after the definition of "new Agency" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(12) In section 122 (directions), after subsection (5) insert—

"(6) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(13) In Schedule 6 (the Scottish Environment Protection Agency), in paragraph 15, after sub-paragraph (2) add—

"(3) In sub-paragraph (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(14) In Schedule 11 (air quality: supplemental provisions), in paragraph 5, after sub-paragraph (6) add—

"(7) In the definition of "fixed penalty offence" in sub-paragraph (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Flood Risk Management (Scotland) Act 2009

35 Section 78 of the Flood Risk Management (Scotland) Act 2009 (SEPA's power to obtain information about land) is repealed.

Regulatory Reform (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to enable provision to be made for the purpose of promoting regulatory consistency; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

Introduced by:	John Swinney
Supported by:	Paul Wheelhouse, Fergus Ewing
On:	27 March 2013
Bill type:	Government Bill

REGULATORY REFORM (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Regulatory Reform (Scotland) Bill introduced in the Scottish Parliament on 27 March 2013:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 26–PM.

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – OVERVIEW

3. The Bill is in 4 Parts:

- Part 1 – Regulatory functions
- Part 2 – Environmental regulation
- Part 3 – Miscellaneous, including marine licensing; planning authorities' functions: charges and fees; and street traders' licences
- Part 4 – General provisions

Part 1 – Regulatory functions

4. This Part makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.

Part 2 – Environmental regulation

5. This Part is divided into 6 Chapters.

6. Chapter 1 provides that the Scottish Ministers may make provision for or in connection with protecting and improving the environment, including provision regulating environmental activities and provision implementing EU obligations relating to protecting and improving the environment. It introduces schedule 2.

7. Chapter 2 provides that the Scottish Ministers may by order make provision:

- for or about the imposition by SEPA of fixed monetary penalties and variable monetary penalties,
- to enable SEPA to accept an enforcement undertaking from a person who SEPA reasonably suspects has committed a 'relevant offence' (as defined in section 39), and make provision for penalties where such undertakings are not complied with.

8. It also provides that the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to such penalties and undertakings.

9. Chapter 3 provides that the courts may make compensation orders in relation to persons convicted of a relevant offence; that they have to consider the financial benefit that has accrued to an offender when determining the amount of the fine to impose in respect of a relevant offence; and that they may require offenders convicted of a relevant offence to publicise information about the offence (a 'publicity order').

10. Chapter 4 makes miscellaneous provision. In particular, it provides:

- for the vicarious criminal liability of employers or principals for environmental offences committed by their employees or agents,
- for an offence of causing or permitting significant environmental harm,
- for the courts to have power to order persons convicted of an offence to remedy or mitigate the harm (a 'remediation order'),
- for the prosecutor to have a right of appeal against a decision of the court not to make a publicity order or a remediation order,
- for a local authority to be able—
    - to issue a notice that land identified as contaminated under the provisions of Part 2A of the Environmental Protection Act 1990 is no longer contaminated, and
    - to remove an entry for a special site from the contaminated land register maintained under that Part, and for the effect of the removal of such an entry,
- that waste carrier regulations may authorise a registration authority to refuse an application for registration as a waste carrier, or authorise revocation of a registration, where—
    - the applicant or carrier is a member of a partnership convicted of an offence, or
    - the applicant or carrier is a partnership, and a member of the partnership has been convicted of an offence; and
- that where the holder of a waste management licence must be a 'fit and proper' person to hold the licence, and for that purpose that neither the holder nor a relevant person must have been convicted of an offence, that a relevant person is—
    - a partnership of which the holder is a member, or
    - where the holder is a partnership, a member of the partnership.

11. Chapter 5 provides that SEPA must carry out the functions conferred on it by or under the Bill or any other enactment for the purpose of protecting and improving the environment, and in doing so must, so far as it is consistent with that purpose, contribute to-

- improving the health and well-being of the people in Scotland, and

- achieving sustainable economic growth.

12. Chapter 6 defines terms for the purposes of Part 2.

Part 3 – Miscellaneous

13. This Part makes provision for a statutory right of appeal in relation to marine licensing decisions; about charges and fees payable to planning authorities; and in relation to applications for street traders' licences for mobile food businesses.

Part 4 – General

14. This Part contains general provisions, including the delegation of a power to the Scottish Ministers to make by order such consequential provision as they consider necessary or expedient.

Schedule 1

15. This schedule lists regulators for the purposes of Part 1.

Schedule 2

16. This schedule sets out the purposes for which regulations under section 10 may be made.

Schedule 3

17. This schedule makes minor and consequential modifications of other enactments.

THE BILL – SECTION BY SECTION

PART 1 – REGULATORY FUNCTIONS

18. This Part makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.

Regulations to encourage or improve regulatory consistency

Section 1: Power as respects consistency in regulatory functions

19. This section enables the Scottish Ministers to make regulations containing provision that they consider will (when taken together and when read with other powers under this Part) encourage or improve consistency in the exercise of regulatory functions by one or more regulators in schedule 1 (a "listed regulator"). The regulations may, for example, set out the procedures to be followed by a listed regulator in carrying out a function. They may also require listed regulators to co-operate or co-ordinate activity with each other. In terms of section 44(4), any such regulations are subject to the affirmative procedure.

Section 2: Regulations under section 1: further provision

20. This section makes clear that the regulations may require a listed regulator to impose, set, secure compliance with or enforce a requirement, restriction, condition, standard or outcome (a "regulatory requirement"), including imposing or setting a new regulatory requirement(to the extent that a regulator has the power to impose or set it).

21. The regulations can also amend or remove a regulatory requirement that was imposed or set at the discretion of a listed regulator. However, if an enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be modified or removed if the regulations otherwise make provision having an equivalent effect.

22. The Scottish Ministers may direct that any provision of the regulations is, for a temporary period of up to 6 months, not to apply to a particular regulator or is to apply with modifications. This enables adjustments to be made quickly to take account of unforeseen circumstances. If any such adjustment needs to remain in place for a longer period, the regulations can be amended.

Compliance and enforcement

Section 3: Regulations under section 1: compliance and enforcement

23. This section provides that a listed regulator must comply with regulations under section 1 to the extent that it is able to do so. If a regulator fails to comply, it may be directed to take steps to remedy the breach, failing which the Scottish Ministers may do so or may arrange for another person to do so (and recover the costs as a civil debt).

Exercise of regulatory functions: economic duty and code of practice

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

24. This section places a duty on a listed regulator to exercise its regulatory functions in a way that contributes to sustainable economic growth. In carrying out the duty, listed regulators must have regard to relevant guidance given to them by the Scottish Ministers.

Section 5: Code of practice on regulatory functions

25. This section makes provision for the Scottish Ministers to issue a code of practice in relation to the exercise of regulatory functions by specified regulators in schedule 1. Each regulator must have regard to the code in exercising its regulatory functions and also in determining any general policy or principles adopted in relation to the exercise of those functions.

Section 6: Code of practice: procedure

26. This section sets out the procedure to be followed in relation to issuing the code (or a revised code). In preparing a draft, the Scottish Ministers must seek to ensure that it is consistent with the principles of better regulation and also the principle that regulatory functions should, where possible, be carried out in a way that contributes to achieving sustainable economic

growth. Ministers cannot issue the code unless a draft has been laid before and approved by the Parliament.

Power to modify list of regulators

Section 7: Power to modify schedule 1

27. This section enables the Scottish Ministers, by order, to amend the list of regulators in schedule 1 and to specify a function (or the extent to which a function) of any such regulator is (or is not) a regulatory function for the purposes of section 1, 4 or, as the case may be, 5. In terms of section 44, an order under this section is subject to the negative procedure, unless it adds a regulator to the list or adds (or extends) a regulatory function of a regulator on the list (for the purposes of sections 1, 4 or 5), in which case it is subject to the affirmative procedure.

PART 2 – ENVIRONMENTAL REGULATION

CHAPTER 1 - REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

28. This Chapter confers powers on the Scottish Ministers to make, by regulations, provision for the purpose of protecting and improving the environment (the "general purpose").

Section 8: General purpose: protecting and improving the environment

29. This section sets out the general purpose, and specifies that the purpose extends to provision regulating environmental activities, and provision implementing EU obligations (such as the Industrial Emissions Directive (Directive 2010/75/EU) or other international obligations (such as the Convention on Wetlands of International Importance).

Section 9: Meaning of "environmental activities" and "protecting and improving the environment"

30. This section defines terms used in Chapter 1.In particular, it defines—

- "environmental activities" (see section 8) to cover activities which are capable of causing or liable to cause environmental harm, and
- "environmental harm" to cover a wide range of matters, including harm to the quality of the environment such as might be caused by (for example) polluting activities.

31. In this context, "activities" is also defined, so that it covers a broad range of matters including the production, treatment, keeping, depositing or disposal of substances. The effect is that the Bill enables the regulation under section 10 of a wide range of matters relating to environmental activities, and the prevention of environmental harm. Regulations under section 10 may make further provision in respect of environmental activities, including specifying other activities as environmental activities (see paragraph 1 of Part 1 of schedule 2).

Section 10: Regulations relating to protecting and improving the environment

32. Section 10 of the Bill enables the Scottish Ministers to make provision by regulations for any of the purposes specified in Part 1 of schedule 2 (as described below). Subsection (3) sets out that the provision that may be made is provision for and in connection with the matters specified in section 9.

33. Regulations under section 10 are subject to negative procedure, unless they add to, replace or omit of the text of an Act (see section 44).

34. The power is in broadly similar terms to the powers in section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (which are not repealed), and the powers in respect of controlled activities in section 20 of and schedule 2 to the Water Environment and Water Services Act 2003 (which are repealed: see schedule 3). The 1999 Act has, and will continue to have, UK extent so that provision may be made under that Act in respect of both reserved and devolved matters where a single UK wide measure is considered appropriate.

35. The power in section 10 might, for example, be used to consolidate in one instrument environmental protection measures made under different enactments including those currently in the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (SSI 2011/209) and the Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/36).

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

36. Subsection (1) requires the Scottish Ministers, before making regulations relating to protecting and improving the environment, to consult certain regulators and such other persons as they think fit. Subsection (2) has the effect that such consultation can be undertaken prior to the coming into force of this section.

CHAPTER 2 - SEPA'S POWERS OF ENFORCEMENT

37. This Chapter enables provision to be made that will confer additional enforcement powers on SEPA.

38. The additional enforcement powers are similar to those in Part 3 of the Regulatory Enforcement and Sanctions Act 2008, sections 46 to 50 of the Marine (Scotland) Act 2010 and sections 78 to 90 of the Reservoirs (Scotland) Act 2011. The effect of any conferral of powers under this Chapter will be to help ensure that SEPA will be able to operate in a consistent manner when discharging a full range of regulatory functions.

39. The additional powers, if conferred, would complement the similar powers under the Marine (Scotland) Act 2010 exercisable in respect of the marine environment. The similar powers in the Reservoirs (Scotland) Act 2011 in respect of 'civil sanctions' are repealed (see Schedule 3 to the Bill). That repeal can be commenced in a co-ordinated manner should the powers in this Chapter be conferred on SEPA.

Fixed monetary penalties

Section 12: Fixed monetary penalties

40. This section enables the Scottish Ministers to make provision by order for SEPA to impose fixed monetary penalties on persons who SEPA is satisfied, on the balance of probabilities, have committed a relevant offence. In terms of Section 44(3), any such order is subject to the affirmative procedure. Relevant offences are those prescribed by order under section 39. For the purposes of imposing fixed penalty notices, these might include offences involving breach of a requirement for dry cleaners to report to SEPA quantities of solvent used and the total emission value per kilogram of fabric cleaned – information which SEPA requires to report to the European Commission. The amount of the fixed monetary penalty may be specified in the order, but may not in any event exceed level 4 on the standard scale of fines for offences triable summarily as provided by section 225 of the Criminal Procedure (Scotland) Act 1995 (currently £2,500 – see section 225(2)).

Section 13: Fixed monetary penalties: procedure

41. This section requires any order about fixed monetary penalties that may be made under section 12 to include certain mandatory provisions as to the procedure for the imposition of a fixed monetary penalty. An order must require SEPA to issue a notice of intent prior to issuing a fixed monetary penalty, and must provide an opportunity for a person served with such a notice to make written representations to SEPA. The order must also ensure that SEPA is required to take any such representations into account before imposing a final notice, and prescribes certain information that must be included in a notice of intent and final notice. The order must also provide a right of appeal against the imposition of the fixed monetary penalty, including on the grounds set out in subsection (6). In addition to these mandatory elements, an order under section 12 may provide persons served with a notice of intent an opportunity to discharge liability by payment of a specified amount (which can be less than the penalty) without proceeding to a final notice. This would allow early payment of the amount of a fine to be made by a person at their discretion (possibly at a discount) without the delay and expense of proceeding to a final penalty notice, and is a common feature applied to systems with fixed and variable penalties.

Section 14: Fixed monetary penalties: criminal proceedings and conviction

42. This section requires the Scottish Ministers, if they make an order under section 12 about fixed monetary penalties, to include provision about the interaction between fixed monetary penalties and criminal proceedings so as to avoid a person being sanctioned twice in relation to the same offence. It also requires the Scottish Ministers to include provision about extending the time available to commence criminal proceedings if a fixed monetary penalty is not served.

Variable monetary penalties

Section 15: Variable monetary penalties

43. This section enables the Scottish Ministers to make provision by order for the imposition by SEPA of variable monetary penalties on persons who SEPA is satisfied, on the balance of probabilities, have committed a relevant offence. In terms of Section 44(3), any such order is subject to the affirmative procedure. Relevant offences are those prescribed by order under

section 39. For the purposes of imposing variable penalty notices these might include offences involving failure to comply with a general binding rule (see schedule 2), carrying waste without a registration or carrying out minor engineering activities in water without appropriate authorisation. The Scottish Ministers may prescribe the maximum amount of the variable monetary penalty that can be imposed by SEPA which, in relation to most offences, could be up to £40,000, although SEPA would determine the amount of the penalty, up to the prescribed maximum, in each case.

Section 16: Variable monetary penalties: procedure

44. This section requires any order about variable monetary penalties that may be made under section 15 to include certain mandatory provisions as to the procedure for the imposition of a variable monetary penalty. The Scottish Ministers must make provision in any such order for certain minimum procedural requirements. These include the service of a notice of intent and a period within which a person served with such a notice may make representations to SEPA. The order must also permit an opportunity for the person to offer an undertaking as to action the person will take to restore the position, benefit the environment and/or secure no financial benefit accrues to the person. The order must also provide that SEPA can accept or reject such an undertaking, and take any undertaking that it decides to accept into account in its decision to issue a variable penalty notice. The order must also set out the minimum requirements for inclusion in a notice of intent and a final notice. The order must provide a right of appeal against the imposition of the variable monetary penalty, including on the grounds set out in subsection (6).

Section 17: Variable monetary penalties: criminal proceedings and conviction

45. This section requires the Scottish Ministers, if they make an order under section 15 about variable monetary penalties, to include provision about the interaction between variable monetary penalties and criminal proceedings so as to avoid a person being sanctioned twice in relation to the same offence, and to extend the time available to commence criminal proceedings if a variable monetary penalty is not served and an undertaking is not accepted.

Non-compliance penalties

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

46. This section enables the Scottish Ministers, if making an order under section 15 about variable monetary penalties, to include provision for a non-compliance penalty to be issued where an undertaking has been accepted by SEPA in response to a notice of intent to issue a variable monetary penalty (see section 16(5)),but the undertaking has not been complied with. Such provision may specify the amount of the non-compliance penalty, set criteria by which it should be calculated, empower SEPA to determine the amount (subject to any maximum amount set out in such provision) or provide for the amount to be determined in some other way. If provision for non-compliance penalties is included in an order under section 15, the order must provide a right of appeal against the imposition of such a penalty.

Enforcement undertakings

Section 19: Enforcement undertakings

47. This section enables the Scottish Ministers to make provision by order for enforcement undertakings. An enforcement undertaking is a voluntary undertaking offered to SEPA by a person to take certain action or refrain from taking certain action, where SEPA has reasonable grounds to suspect that the person has committed a relevant offence. Relevant offences are those prescribed by order under section 39. The action offered would be action to secure that the offence does not continue or recur, to secure that the position is, as far possible, restored to what it would have been if the offence had not been committed, or any other action that may be specified by the Scottish Ministers in the order.

48. The order establishing enforcement undertakings must provide that, once SEPA accepts an undertaking, the person giving it may not be prosecuted for the offence in respect of which the undertaking is given (or have a fixed or variable monetary penalty imposed on them in respect of the act or omission). If a person fails to comply (even in part) with an enforcement undertaking, then the person may be prosecuted for the original offence or SEPA may impose a fixed or variable monetary penalty, and time limits for commencing criminal offences may be extended in those circumstances.

49. The order may include provision for SEPA to certify that an undertaking has not been complied with, and may stipulate the circumstances in which a person is to be regarded as having complied with such an undertaking. It may also provide that where a person has given inaccurate, misleading or incomplete information in relation to an undertaking then that person may be regarded as not having complied with it. The order is not required to set out a right of appeal against the terms of the enforcement undertaking since it is offered voluntarily, but the order may provide that there is a right of appeal against certification from SEPA that the undertaking has not been complied with. In addition, the Scottish Ministers may also provide in the order for the procedure for entering into an enforcement undertaking, the terms of such undertaking, publication of or monitoring of compliance with such an undertaking by SEPA, and variation of such an undertaking.

Operation of penalties and cost recovery

Section 20: Combination of sanctions

50. This section requires the Scottish Ministers, if conferring upon SEPA through sections 12 and 15 the power to issue fixed and variable monetary penalties, to ensure that it is not possible to serve both a fixed and a variable monetary penalty in relation to the same act or omission. The Scottish Ministers may also provide that a fixed or variable monetary penalty may not be issued where there has already been a prosecution or where a person has been given a warning, been sent a conditional offer, or accepted a compensation offer by the procurator fiscal, or a work order has been made against them.

Section 21: Monetary penalties

51. This section provides that orders made by the Scottish Ministers in relation to fixed monetary penalties, variable monetary penalties and non-compliance penalties may include

provision for early payment discounts, interest or other penalties for late payments, enforcement of the penalty and recovery of the monetary penalty as if it were a civil debt. It also allows the order to facilitate recovery of such penalties by treating them as if they were payable under a civil court decree.

Section 22: Costs recovery

52. This section allows the Scottish Ministers to include in an order made under section 15 (variable monetary penalties) provision enabling SEPA to recover its investigation costs, administration costs and costs of obtaining expert advice (including legal advice) from a person who has been issued with a variable monetary penalty. Such provision, if made, must provide for SEPA to serve notice of the amount it is seeking to recover. It must also provide that the person required to pay SEPA's costs may appeal against the decision to impose the cost recovery notice, and against the amount of the costs sought. Provision must also require SEPA to publish guidance about how it will exercise its power to recover such costs. The provisions of section 21 relating to interest, late payment penalties and recovery as a civil debt are applied to costs recoverable under this section.

Guidance

Section 23: Guidance as to use of enforcement measures

53. This section provides that the Lord Advocate may issue and revise guidance to SEPA in relation to the exercise of its functions relating to enforcement measures (fixed monetary penalties, variable monetary penalties or enforcement undertakings), and that SEPA must comply with such guidance.

54. It also provides that, where this Chapter of the Bill or any provision made under it confers powers upon SEPA to use any enforcement measures (as defined in subsection (3)), any such provision must also require SEPA to publish guidance on specified matters relating to those measures. Any such provision must ensure that guidance published by SEPA includes specified information in relation to fixed and variable monetary penalties.

55. SEPA may revise guidance published by it from time to time and publish that revised guidance, and must consult the Lord Advocate and other appropriate persons before publishing any guidance or revised guidance.

Publication of enforcement action

Section 24: Publication of enforcement action

56. This section provides that an order made by the Scottish Ministers for the imposition of a fixed or variable monetary penalty by SEPA and the acceptance of an enforcement undertaking may also provide for SEPA to publish specified information on the cases where the procedures in those orders are applied.

Interpretation of Chapter 2

Section 25: Interpretation of Chapter 2

57. This section provides definitions for expressions used in Chapter 2.

CHAPTER 3 - COURT POWERS

Compensation orders

Section 26: Compensation orders against persons convicted of relevant offences

58. This section sets out provision for compensation orders. It provides that section 249 of the Criminal Procedure (Scotland) Act 1995, which makes general provision for compensation orders to be made by the courts, in addition allows the court to make a compensation order requiring compensation to be paid by a person convicted of a relevant offence. Compensation of up to £50,000 in respect of costs incurred in preventing, reducing or remediating, or mitigating the effects of, any harm to the environment or any other harm, loss, damage or adverse impact resulting from that offence may be paid to SEPA, a local authority or an owner or occupier of land to which harm or adverse impact occurred. The Scottish Ministers may by order change the maximum amount of compensation that may be the subject of such a compensation order.

Fines

Section 27: Fines for relevant offences: court to consider financial benefits

59. This section requires the criminal courts to have regard to any financial benefit which has accrued or is likely to accrue to a person convicted of a relevant offence in consequence of that offence in determining the amount of any fine.

Publicity orders

Section 28: Power to order conviction etc. for offence to be publicised

60. This section makes provision for publicity orders. This is an additional sentencing option for the criminal courts to use where appropriate. A publicity order may be made alongside or in place of other sentences that may be imposed for a relevant offence. The publicity order would require a person convicted of a relevant offence to publicise, in a specified manner, the fact that the person has been convicted of the offence, the details of the offence and any other sentence passed by the court, including a fine or compensation order. A publicity order must set out the period within which the publicity requirements must be complied with, and may require the convicted person to supply SEPA with evidence that those requirements have been met. This section also makes it an offence, punishable on summary conviction to a fine not exceeding £40,000 and on conviction on indictment to an unlimited fine, to fail to comply with a publicity order.

CHAPTER 4 - MISCELLANEOUS

Vicarious liability

Section 29: Vicarious liability for certain offences by employees or agents

61. This section provides that, where an employee or agent of a non-natural person commits a relevant offence while acting as the employee or agent of that non-natural person, the non-natural person is also guilty of the offence and may be punished accordingly. A relevant offence is one prescribed under section 39 of the Bill. Non-natural persons include bodies corporate, Scottish partnerships and limited liability partnerships. The section provides a defence for the non-natural person if it can show it did not know the relevant offence was being committed by the employee or agent; that no reasonable person could have suspected that the offence was being committed by the agent or employee; and that it took all reasonable precautions and exercised all due diligence to prevent the offence from being committed. However, where a relevant offence is committed by an employee or agent while acting as an employee or agent, and the employer or principal either knew about the offence or ought to have known about it, or did not take reasonable precautions and exercise due diligence to prevent it occurring, then that person shall be guilty of that offence. Proceedings may be taken against the employer or principal even if they are not taken against the employee or agent.

Section 30: Liability where activity carried out by arrangement with another

62. This section provides that, where a person is carrying on a regulated activity for a non-natural person, and they commit a relevant offence in the course of that activity, the non-natural person is also guilty of the offence and may be punished accordingly. A relevant offence is one prescribed under section 39 of the Bill. Non-natural persons include bodies corporate, Scottish partnerships and limited liability partnerships. The section clarifies that a person is carrying on a regulated activity for another person whether doing so by arrangement between those persons or by arrangement through a third party. The section provides a defence for the non-natural person if it can show it did not know the relevant offence was being committed by the other person, that no reasonable person could have suspected that the offence was being committed by them and that it took all reasonable precautions and exercised all due diligence to prevent the offence from being committed. Proceedings may be taken against the non-natural person even if they are not taken against the other person.

Offence relating to significant environmental harm

Section 31: Significant environmental harm: offence

63. This section creates a new criminal offence of causing or permitting significant environmental harm. In addition to causing or permitting significant environmental harm, acting in a way that is likely to cause such harm, failing to act in a way that such failure is likely to cause such harm, or permitting another person to act (or fail to act) in a way that is likely to cause such harm, also constitutes the offence. Environmental harm (as defined in section 9) is 'significant' if it has serious adverse effects whether locally, nationally or on a wider scale, or it is caused to an area designated by an order made by the Scottish Ministers. Different areas may be designated for different purposes and different types of harm.

64. No offence is committed where permission is or was given by or under an enactment conferring power to authorise the actor failure (for example where the action is covered by a permit issued by SEPA). A defence is available where the acts or failures constituting the offence were necessary to avoid, prevent or reduce an imminent risk of serious adverse effects on human health, provided that the person took such steps as were reasonably practicable to minimise harm to the environment and adverse effects on human health and particulars were given to SEPA as soon as practicable after the incident. A defence is also available where the acts or failures constituting the offence were authorised by, or carried out in accordance with, regulations under section 10, an authorisation given under those regulations, or an authorisation specified under an order made by the Scottish Ministers for this purpose. Provision is made on summary conviction for a fine not exceeding £40,000, imprisonment for up to 12 months or both or, on conviction on indictment, for an unlimited fine or imprisonment or both.

Section 32: Power of court to order offence to be remedied

65. This section creates a new power for the criminal courts to order a person convicted of the significant environmental harm offence in section 31 to remediate or mitigate the significant environmental harm to which the conviction relates, where that person has the power to do so, in addition to or instead of any other sentence. This is referred to as a 'remediation order'. Failure to comply with a remediation order will be an offence punishable on summary conviction with a fine not exceeding £40,000 and, on conviction on indictment, with an unlimited fine.

Publicity and remediation orders: appeals by prosecutor

Section 33: Orders under section 28 and 32: prosecutor's right of appeal

66. This section amends the Criminal Procedure (Scotland) Act 1995 to allow the Lord Advocate, or the prosecutor in summary proceedings, to appeal against any decision of a court not to make a publicity order or remediation order.

Contaminated land and special sites

Section 34: Land no longer considered to be contaminated or to be special site

67. This section amends Part 2A (contaminated land) of the Environmental Protection Act 1990, by inserting new sections 78QA, 78TA and 78TB of that Act.

Inserted section 78QA – Land no longer considered to be contaminated

68. Inserted section 78QA enables a local authority, if satisfied that land is no longer contaminated land, to issue a non-contamination notice to SEPA, the owner, and occupier and any "appropriate person" (as defined by section 78A(9) of the 1990 Act to mean any person who is determined to bear responsibility for anything which is to be done by way of remediation in any particular case).

69. A non-contamination notice has the effect that the land is no longer subject to the contaminated land regime in the 1990 Act and, in particular, that any remediation notice (for which see section 78E of the 1990 Act) ceases to have effect unless the non-contamination notice provides otherwise. A remediation notice requires action to be taken on the site. If the site is no

longer considered to be contaminated, there should normally be no need for remediation action. However, the authority could provide for some action, such as monitoring, to be continued.

Inserted section 78TA – Registers: removal of information about land designated as special site

70. Section 78R of the 1990 Act requires an enforcing authority (the local authority or, in the case of a special site, SEPA) for the purposes of Part 2A of that Act to maintain a register of matters relating to contaminated land, including notices under sections 78C and 78D of that Act relating to the designation of special sites.

71. Land is required to be designated under section 78C of the 1990 Act if it is land of a description prescribed for the purposes of that section, and for those purposes the Scottish Ministers may have regard to the matters specified in section 78C(10) of that Act. Those matters include whether it appears that the land is likely to be in such a condition, by reason of substances in, under or on the land that serious harm might be caused, or serious pollution of the water environment might be caused.

72. Inserted section 78TA provides for an enforcing authority to be able to remove a notice relating to a special site from that register if it considers that the land no longer requires to be designated as such a site. If it does, it must give notice to affected persons in the same manner as in inserted section 78QA.

Inserted section 78TB – Effect of removal of information from register

73. Inserted section 78TB provides for the effect of removal from that register, in particular that the designation of the land as a special site is terminated.

Authorisations relating to waste management: offences by partnerships

Section 35: Carriers of controlled waste: offences by partnerships affecting registration

74. It is an offence under the Control of Pollution (Amendment) Act 1989 to transport controlled waste without being registered for that purpose. An application may be refused or a registration revoked where the applicant, the holder or a "relevant person" has been convicted of an offence. Section 35 amends the 1989 Act so that the relevant person includes a partnership where the applicant or holder is a member of the partnership, and includes a member of a partnership where the applicant or holder is the partnership.

Section 36: Waste management licences: offences by partnerships

75. A waste regulation authority for the purpose of Part 2 (waste on land) of the Environmental Protection Act 1990 may, when granting, revoking, suspending or transferring a waste management licence, be required to determine whether an applicant or holder is a "fit and proper" person to hold a licence (section 35(1) of that Act sets out that a waste management licence is a licence authorising the treatment, keeping or disposal of waste on land, or the treatment or disposal of waste by means of mobile plant).

76. The authority may for that purpose require to have regard to whether the applicant, the holder or another "relevant person" has been convicted of an offence. Section 36 amends the 1990 Act so that "relevant person" includes a partnership where the applicant or holder is a member of the partnership, and includes a member of a partnership where the applicant or holder is the partnership.

Air quality assessments

Section 37: Duty of local authorities in relation to air quality assessments, etc.

77. Section 82 of the Environment Act 1995 requires a local authority to conduct an air quality review of the air within the area of the authority. The authority must designate as an air quality management area any part of the area of the authority where it appears, as a result of such a review, that an air quality standard or objective is not being achieved (or is not likely to be achieved). Section 84 of that Act requires an authority to undertake and report on a further assessment of air quality in an air quality management area.

78. This section repeals section 84 of the Environment Act 1995, with the effect that an authority no longer requires to undertake such a further air quality assessment.

CHAPTER 5 - GENERAL PURPOSE OF SEPA

Section 38: General purpose of SEPA

79. This section inserts a section 20A into the Environment Act 1995. Inserted section 20A provides, for the first time, a general purpose for SEPA.

80. SEPA must carry out any functions conferred on it by an enactment (as defined in inserted section 20A(3)) for the purpose of protecting and improving the environment, contributing, so far as is consistent with such functions, to improving the health and well-being of people in Scotland and achieving sustainable economic growth (see also section 4 which provides for a duty relating to sustainable economic growth for other regulators).

81. This section should be read together with the modifications in paragraph 14 of Part 3 of schedule 3 to the Bill. In particular, that paragraph inserts a new subsection (2A) into section 31 of the 1995 Act. Section 31 of that Act as amended will enable the Scottish Ministers to give guidance to SEPA with respect to the carrying out of its duties under inserted section 20A.

CHAPTER 6 – INTERPRETATION OF PART

Section 39: Meaning of "relevant offence" and "SEPA" in this Part

82. Section 39 defines terms for the purposes of Part 1 and, in particular, defines "relevant offence" so that it means an offence specified in an order made by the Scottish Ministers.

83. The term "relevant offence" applies, in particular, for the purposes of sections 12, 15, 19, 26 to 29 and 30 of the Bill.

84. The power in this section may be combined with the power in section 44 to enable different offences to be specified for the purposes of any of those sections (if desired).

PART 3 – MISCELLANEOUS

Marine licensing decisions

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

85. Section 40 concerns challenges to certain marine licensing decisions made by the Scottish Ministers under section 29 of the Marine (Scotland) Act 2010 ("the 2010 Act") and a decision to hold or not hold an inquiry in connection with their determination of applications for such licences under section 28. An applicant is currently able to challenge a decision regarding an application for a marine licence on the legality or on the merits in the sheriff court under the Marine Licensing Appeals (Scotland) Regulations 2011, which were made under section 38 of the 2010 Act. At present, all other persons or bodies who have standing may challenge the legality of a decision by the Scottish Ministers by means of an application for judicial review made to the Outer House of the Court of Session.

86. This section amends the 2010 Act by inserting new section 63A. This provides for a statutory appeal to be made to the Court of Session by any person or body who is aggrieved by the decision of the Scottish Ministers. The statutory appeal will only apply to Ministers' decisions taken under sections 28 and 29 of the 2010 Act regarding marine licence applications which relate to activities where ministerial consent under section 36 of the Electricity Act 1989 is also required, i.e., for offshore electricity generating systems with a capacity of no less than 1 megawatt. The section also consequentially amends section 38 of the 2010 Act to exclude from its scope appeals against decisions to which section 63A applies.

87. Any such application under section 63A of the 2010 Act must be made within six weeks of the date on which the decision to which the appeal relates is taken.

88. Section 63A(5) provides that the Court of Session may suspend a decision of the Scottish Ministers on an application for a marine licence until the final determination of the appeal proceedings. If satisfied that the Scottish Ministers have either acted outwith their powers under the 2010 Act, or have failed to comply with those legislative requirements as defined in section 63A(6), the Court may nullify the decision (or part of it).

Planning authorities' functions: charges and fees

Section 41: Planning authorities' functions: charges and fees

89. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers have determined that the functions of an authority are not being performed satisfactorily. The new subsection (1AB) ensures that the flexibility to set different fees for different authorities for reasons unconnected with performance is preserved.

90. Section 41 also removes subsections (5) and (6) so that all regulations made under section 252 are subject to negative parliamentary procedure.

Street traders' licenses

Section 42: Application for street trader's licence: food business

91. This section amends section 39(4) of the Civic Government (Scotland) Act 1982 to make it clear that the certificate to be produced for the purposes of a street trader's licence application for a mobile food business is to be from a food authority that has registered that establishment (rather than the food authority for the area in which the application for the licence is made). This means that if a mobile food business wishes to trade in more than one local authority area in Scotland it can, for each street trader's licence application, produce a certificate from the same registering food authority.

PART 4 - GENERAL

Sections 43 to 48

92. Section 43 introduces schedule 3, which provides for minor modifications of enactments, repeal of spent provisions, and consequential modifications.

93. Section 44 makes provision in respect of subordinate legislation that may be made under the Bill, including Parliamentary scrutiny of that legislation. It provides that any power to make an order or regulations under the Bill includes a power to make different provision for different purposes, and to make incidental, supplemental, consequential, transitional, transitory or savings provision. It also provides that a power to make regulations under section 1 includes a power to modify any enactment (including the Bill itself, except for sections 1 to 3 and 7).

94. Section 45 provides for the Scottish Ministers to make by order incidental, supplemental, consequential, transitional, transitory or savings provision. Such an order may modify any enactment, instrument or document. Section 44 provides that an order under this section is subject to negative procedure, unless it adds to, replaces or omits any part of the text of an Act in which case it is subject to affirmative procedure.

95. Sections 46 to 48 provide for Crown application, commencement, and the short title. A commencement order under section 47 is not subject to any parliamentary procedure.

SCHEDULE 1: REGULATORS FOR THE PURPOSES OF PART 1

96. This schedule lists regulators for the purposes of Part 1. The Scottish Ministers may by order modify this list (see section 7).

SCHEDULE 2: PARTICULAR PURPOSES FOR WHICH PROVISION MAY BE MADE UNDER SECTION 10

97. In this schedule, an environmental activity which is prohibited or authorised under regulations is described as a "regulated activity" (see section 9).

98. Schedule 2 is in two Parts. Part 1 provides for particular purposes for which provision may be made by regulations under section 10 (see paragraphs 1 to 22 of the schedule). Part 2 supplements Part 1 and provides, amongst other things, for charging schemes and for the maximum penalties that may be imposed in respect of offences created by the regulations.

99. Paragraph 1 enables the regulations to further define, expand on, or amend the definition of environmental activities, or to specify additional environmental activities.

100. Paragraph 2 enables the regulations to establish emission standards and requirements, to authorise making of plans for emission limits and quotas, and to authorise the making of emissions quota trading or transfer schemes (see also paragraph 24 of the schedule).

101. Paragraph 3 enables the regulations to specify the authorities on whom regulatory functions are conferred (defined as "regulators"), and enables the Scottish Ministers to give guidance and directions to regulators.

102. Paragraph 4 enables the regulations—

- to prohibit the carrying out of a regulated activity,
- to prohibit the carrying out of a regulated activity unless authorised by or under regulations, or
- to authorise the carrying out of a regulated activity in accordance with a permit, or subject to requirement to register or to notify the activity, or subject to compliance with "general binding rules" (see also paragraph 25 in that respect).

103. General binding rules may be made in regulations, or by a regulator under regulations (see also paragraph 25 of the schedule).

104. Paragraphs 5, 6, 7, 8, 10, 11 and 12 enable the regulations to specify the procedures relating to authorisation of regulated activities by permits, registration, and notifications. The effect of these paragraphs is to allow for detailed procedural provisions to be included in the regulations governing how an application for the permit or registration may be made and how to notify the carrying on of a regulated activity, how that application will be assessed and how a permit or registration may be granted. They also provide a framework for the extent to which the regulations may allow requirements to be imposed in permits and registrations, as well as allowing regulations to provide mechanisms for transfer, variation, and consolidation, and for suspension and revocation of permits (together with a requirement to take associated preventative or remedial action). These provisions also enable the regulations to specify when registration may be refused and when a registration or notification may lapse.

105. There are supplementary provisions at paragraphs 23, 26 and 27. Paragraph 23 allows for regulations to provide that specified provisions of the regulations have effect in relation only to specified regulated activities, circumstances or specified persons. Paragraph 26 allows regulations to make provision for anything in paragraphs 5 to 12 which could be provided for determination by the regulators to be provided for in regulations. Paragraph 27 allows

regulations to provide for regulators to have regard to specified principles and to any directions or guidance in determining rules and imposing conditions.

106. Paragraph 11 also allows provision to be made in connection with permits or registrations for multiple activities or for activities across multiple sites or for multiple persons to be granted a permit or registration. It allows 'standard rules' provision to be made, and provides the basis for the fit and proper person test to be applied before an authorisation is given to a person. It also provides a basis for certain persons or descriptions of person to be treated as carrying on regulated activities or as authorised to carry them on.

107. Paragraphs 9 and 13 enable the regulations to provide for charging (see also paragraph 28 of the schedule). Paragraph 9 enables the regulations to authorise, or authorise the Scottish Ministers to make, specific provision in respect of charging for testing and analysis of substances, and assessing the effect on the environment of release of such substances prior to grant of a permit. Paragraph 13 enables charges to be authorised under the regulations, and the making etc. of charging schemes by regulators.

108. Paragraphs 14 to 16 enable the regulations to secure that publicity is given to specified matters, and that public registers are maintained by regulators in respect of such matters. They enable persons to be required to provide information and/or compile information on emissions, energy consumption and energy efficiency, and waste. They also enable the regulations to require or authorise regulators to carry out consultation in connection with the exercise of any of their functions.

109. Paragraph 17 enables the regulations to confer functions on regulators with respect to compliance with, and enforcement of, the regulations. This includes conferring a power to arrange for preventative or remedial action to be taken at the expense of the persons carrying on a regulated activity. It also provides for the conferring of powers on regulators to appoint persons to exercise functions and powers of that type, and to confer further powers on persons so appointed (such as a power similar to the power of entry in section 108(4) of the Environment Act 1995).

110. Paragraph 18 enables the regulations to authorise regulators to serve notices on persons carrying on regulated activities, including notices requiring a person—

- to notify the carrying on by the person of a regulated activity requiring notification by a person of the carrying on of regulated activities,
- to take preventative or remedial action in respect of regulatory contraventions,
- to provide financial security pending the taking of preventative or remedial action,
- to take steps to remove imminent risks of serious adverse impacts on the environment, and
- to stop the carrying on of regulated activities.

111. It also enables the regulations to provide that regulators may require any person served with such notice to pay the costs incurred up to the date of service of the notice, and enables

regulators to impose monetary penalties for failure to comply with any such notice. It enables the regulations to provide for enforcement of notices by civil proceedings. Paragraph 31 enables the regulations to make provision for or in connection with the service of any notice or other document.

112. Paragraph 19 enables the regulations to create offences and provide for defences and evidentiary matters. Paragraph 30 provides more detail and allows offences to be triable summarily only or on indictment. It also provides the punishments for the offences that may be set out in the regulations.

113. Paragraph 20 enables regulations to provide for a court to be able to order remedial action where a person has been convicted of an offence.

114. Paragraph 21 enables the regulations to provide for rights of appeal for various matters, and for the determination of such appeals.

115. Paragraph 22 enables the regulations to make provision that corresponds, or is similar, to provision that is made (or is capable of being made) under Part 2 of the Environmental Protection Act 1990 or under the European Communities Act 1972. This will enable regulations made under section 10 to include provision that might otherwise require to be made under the 1990 or 1972 Acts, such as the designation of a Scottish public body such as SEPA as the competent authority for the purpose of functions in or under an EU instrument. Paragraph 29 allows the Scottish Ministers by order to specify an EU instrument as one that is or contains an EU obligation relating to protecting and improving the environment.

SCHEDULE 3: MINOR AND CONSEQUENTIAL MODIFICATIONS

116. Schedule 3 has six Parts.

117. Part 1 makes minor and consequential modifications related to the measures authorised by or under regulations made under section 10 - in particular, where other enactments require to be modified to refer to environmental activities. For example, reference is made to section 108 of the Environment Act 1995 which requires to refer to the regulator's functions under regulations made under section 10 in order that authorised persons may exercise statutory powers in relation to compliance and enforcement functions for regulated activities.

118. Part 2 contains amendments consequential on the new enforcement measures in Chapter 2 of Part 2 of the Bill. In particular, existing provision in the Reservoirs (Scotland) Act 2011 allowing for civil enforcement measures is modified.

119. Part 3 contains minor and consequential amendments consequential on the measures in Part 2 of the Bill. In particular, it repeals sections 32 (general environmental and recreational duties) and 34 (general duties with respect to water) of the Environment Act 1995.

120. Part 4 repeals a number of provisions that are either spent or not needed. These include provisions in the Control of Pollution Act 1974 (since superseded by the Water Environment and

Water Services (Scotland) Act 2003 and the Environmental Protection Act 1990), and provisions on the establishment of noise abatement zones and nitrate sensitive areas that have never been used in Scotland.

121. Part 5 contains a number of miscellaneous minor amendments. These include repeals of spent provisions, generally connected with amendments in the preceding Parts of the schedule. It also includes repeals of provisions in the Litter Act 1983 that have never been brought into force.

122. Part 6 modifies certain pre-devolution environmental enactments to provide for references to an "enactment" to include as appropriate a reference to an enactment comprised in, or made under, an Act of the Scottish Parliament. The effect is that references in the modified enactments no longer apply only to enactments comprised in, or made under, an Act of Parliament.

FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Regulatory Reform (Scotland) Bill introduced in the Scottish Parliament on 27 March 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. This Memorandum considers the financial cost implications of the Bill, first in general terms and then in terms of key parts of the Bill.

3. The Bill is an important tool in delivering the Scottish Better Regulation agenda. The measures enacted in the Bill will allow this agenda to move to the next level. It is not about introducing new regulatory requirements and objectives. Rather it is about how we deliver regulation and help ensure that regulators and the regulated work together to achieve the required outcomes including sustainable economic growth.

4. From the Scottish Government's perspective, there is a limited number of additional costs to be associated with the Bill which will be met from existing resources. Those costs that will be incurred principally relate to the development of secondary legislation. This reflects that many of the provisions in the Bill are enabling powers.

PART 1 – REGULATORY FUNCTIONS

5. This section considers the costs associated with the provisions contained in Part 1 of the Bill to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.

Costs on the Scottish Administration

6. Using the powers to improve regulatory consistency will require resource associated with the development of any proposed national standards and associated legislation. It is anticipated for the policy area implementing national standards that this could involve 1 x B2 and 0.2 x C1 staff at a cost of £50,000. Alongside publication and analysis costs for associated consultation, the estimated total cost to Scottish Government is £65,000 which will be met from existing resources. An option of funding a post to help coordinate the development and delivery of national systems with, in particular, COSLA and local authorities, is anticipated to cost around £70,000 per annum plus associated travel and subsistence costs. It is anticipated the development of a code of practice on the exercise of regulatory functions could involve 0.25 x C2 and 0.25 x B2 staff at a cost of £30,000. Alongside publication and analysis costs associated

with consultation of around £15,000, the estimated total cost to the Scottish Government is around £45,000, which will be met from existing resources.

Costs on local authorities

7. The provisions in Part 1 are anticipated to deliver efficiency savings as well as support the better delivery of regulation. There are likely to be nominal set-up costs in contributing to the development of the code of practice (shared with other regulators) and the development of national standards and systems although, in relation to the latter, funding a post to help coordinate the development and delivery of national systems (as referred to above) would support this. It is, therefore, anticipated that this will be absorbed into existing work streams and is likely to be cost-neutral as it will provide savings and efficiencies in the longer term as individual local authorities would not need to separately develop their own standards and procedures. No net impact on costs is, therefore, anticipated.

Cost on other bodies, individuals and business

8. The provisions to encourage or improve regulatory consistency will not directly impact on regulated businesses, but will benefit them through the Bill's provisions shaping the regulatory environment in which they operate. Over time, these provisions will help deliver efficiency and compliance benefits for business through increased consistency in how they are regulated. This is particularly important, for example, for the retail sector which operates across the whole of Scotland and has to meet the requirements of a number of local authorities. More information on the efficiencies that might be achieved, using the example of mobile food business, can be found in paragraph 50 (street traders' licences). National standards aim to provide clarity and simplicity for businesses in Scotland. They would be developed in an inclusive, multilateral way with the involvement and support of front line regulators and the regulated. While this would require some resource, this is expected to be negligible and provide savings and efficiencies in the longer term; for example, a reduction in costs incurred by business (staff time, legal/consultancy costs) to ensure compliance. Small businesses in particular can be disproportionately affected by regulation and may tend to over-comply due to lack of awareness or understanding of what is required. A more consistent approach should avoid this and deliver an associated reduction in compliance costs.

9. The Bill places a duty on listed Scottish regulators to support sustainable economic growth in exercise of their regulatory functions. In addition, a code of practice in relation to the exercise of regulatory functions will be developed collaboratively with business representatives, regulators, public bodies and COSLA. The code will strengthen arrangements in place to ensure that regulators consider their activities to find the optimum balance between regulatory functions and the Government's purpose of increasing sustainable economic growth; and also ensure consistency with the principles of better regulation. Additional resource costs arising from this would be limited. There would be no cost implications for business or the public, but the code will provide clarity and transparency as to how regulatory objectives are being delivered in this wider context. There will, therefore, be business benefits arising from more consistent regulation.

PART 2 –ENVIRONMENTAL REGULATION

Costs on the Scottish Administration

10. As respects the environmental regulation provisions, the main costs will be associated with the development of legislation. This will principally involve a small team for up to three years dedicated to co-ordinating the Better Environmental Regulation programme (0.5 x C1 and 0.75 x B3 staff) as well as input from individual policy teams for their specific areas, for example, water environment and waste. This will be at a cost of approximately £70,000[1] per annum for staff costs associated with the development of the regulations. In addition there will be relatively small costs (approximately £500) for individual consultations (currently expected to be a maximum of 5 consultations).

11. Income which arises from any monetary penalties imposed by SEPA will not be retained by SEPA. Although there is no previous history on the use and level of fixed and variable monetary penalties, with proposed fines ranging from £500-£40,000, it is estimated that there will be approximately twenty cases per year. Among those cases, approximately ten are expected to be drawn from cases currently reported and prosecuted (see paragraph 14) or where no action is taken, with average penalties expected to be around £3,000 per case, giving a total estimate in penalties from those cases of £30,000 a year (10 x £3,000). Up to an additional eight cases (which presently result in enforcement action rather than referral to the procurator fiscal) are expected to result in monetary penalties at the lower end of the range of variable monetary penalties issued, giving a total estimated in penalties from those cases of £12,000 per year (8 x £1,500). There are also estimated to be a small number of fixed monetary penalties issued each year, ranging from £500 for an individual to £1,000 for a company, giving a total in penalties from these cases estimated at £1,500 a year (2 x £750 – the average of £500 and £1,000). Therefore in total, up to £43,500 a year is estimated to require to be paid to SEPA in penalties. SEPA will pay any penalty received to the Scottish Ministers as soon as is reasonably practicable.

12. In line with the 'polluter pays' principle, provision is also made for SEPA to be able to recover certain costs related to enforcement measures. This would enable SEPA to recover costs for its investigation, administration and obtaining of expert (including legal) advice from a person or business that has been issued with a variable monetary penalty. As these costs have been incurred by SEPA, they will be retained by SEPA. The costs will vary depending on the seriousness of the case, but on average they are expected to be in the region of £10,000 to £20,000 per case. The level of costs sought to be recovered will be a matter for SEPA.

Costs on the Crown Office and Procurator Fiscal Service and the Scottish Court Service

13. The introduction of additional enforcement measures (including fixed and variable penalties and enforcement undertakings) will extend the range of potential interventions that SEPA can make. Where enforcement is required, SEPA's current flexibility to respond is limited and relies heavily on the criminal court system. The introduction of additional enforcement measures will allow SEPA to respond in a more proportionate way than the current

[1] Based on SG Average Staff Costs 2012-13

focus solely on the criminal courts allows, and, therefore, fewer cases are likely to be heard in the criminal courts in future.

14. The additional enforcement measures are not intended to be used against those with serious criminal intent or where the impact is significant – these would continue to be referred to the criminal courts as they are now. It has been estimated by SEPA for the year 2010-11 that, if the new enforcement measures had been available, they would have been used in approximately one-fifth of the cases that were referred to the procurator fiscal, and this would have had the knock-on effect of seven fewer cases being prosecuted in the criminal courts. The majority of SEPA cases, including those where an enforcement measure might be used instead of prosecutorial action, are tried summarily in the sheriff courts where the costs of court proceedings amount to on average £2,400 per case. This breaks down to £1,200 for Scottish Court Service costs associated with the case, £600 in Crown Office and Procurator Fiscal Service prosecution costs and £600 per case for SEPA or other Crown witnesses attending court. Under the new regime, and using 2010-11 figures as an estimate, all of the seven cases could be dealt with by enforcement measures instead of by prosecution. This would indicate a potential saving to the Scottish Administration up to the value of £16,800 per year (7 x £2,400).

15. Appeals from the fixed and variable monetary penalties are expected to be heard in an independent tribunal to be established at a future date. It is estimated that SEPA may serve around twenty financial penalties per year of which, based on current practice in relation to regulatory appeals, it is estimated two or three may be appealed. The proposed Tribunals (Scotland) Bill will inform the relevant tribunal to hear such appeals, and it is expected that this will be attached to an existing jurisdiction within the tribunal system where the costs will be absorbed within existing baselines, offset by savings from the criminal courts. Again, it is expected that the procedural requirements of the tribunal will involve lower costs to both the Scottish Administration and the appellant than the costs of a criminal trial.

16. The Bill confers powers to create a number of regulatory offences. Those offences are expected to be similar to existing regulatory offences made under other enactments, and will in some cases replace them on a like for like basis.

17. The Bill creates new vicarious liability offences and a new offence of causing or permitting significant harm to the environment. In terms of the new offences, it is considered that this will not lead to any increase in prosecutions in relation to SEPA, and therefore costs. For example, the Bill will enable offences to be prosecuted by reference to the significance of environmental harm that has been caused, rather than for a narrow regulatory breach such as a breach of permit conditions.

Costs on local authorities

18. The proposals in the Bill cover local authorities' activities both as regulators and as persons carrying on regulated activities. As regulators, there are no impacts from the environmental proposals. Where they operate regulated enterprises, for example, landfill sites, they will be covered by the provisions of the Bill, and will benefit in the same way as other businesses.

Costs on the Scottish Environment Protection Agency (SEPA)

19. In terms of the environmental regulation provisions, the principal public sector impacts are on SEPA. The Bill's provisions will support and facilitate SEPA's organisational transformation programme. Considerable investment has already been made through SEPA to become a more efficient and effective organisation. The Bill will support SEPA to move to the next level in this work and underpins the next phase of SEPA's transformation.

20. As an organisation, SEPA is funded by a combination of grant-in-aid and charges on regulated entities. No changes are proposed to SEPA's grant-in-aid as a consequence of the Bill. Whilst not strictly part of the Bill proposals (as no legal change is proposed to its charging powers), a separate consultation has been undertaken on SEPA's regulatory funding model. This is a key element in supporting SEPA's move from its current focus on charges set by activity to a approach based on environmental risk.

21. In line with the requirements of the Environment Act 1995, SEPA's charges are based on recovering full economic cost. Given the Scottish Government's intention to maintain its grant-in-aid commitment, and the contribution of the Bill's provisions in securing efficiency savings, it is anticipated that over time this will lead to a reduction in the sum to be raised from regulated persons in general.

22. SEPA has been delivering significant change to its operations for several years and will continue to commit internal resource to delivering, for example, the new permissioning framework, effective use of the new enforcement tools and the operational change towards becoming a more flexible and outcome-based regulator. The core SEPA change management resource to deliver this is anticipated to be around £0.75m in each of the next 3 financial years. The majority of this will be staff resource but this will also fund the publication of guidance and other material.

Costs on business

23. The environmental regulation provisions of the Bill set out the scope of the intended permissioning framework, which SEPA will administer using the new enforcement tools in the Bill. It does not introduce new regulatory requirements; many of which are EU obligations; but rather supports the efficient and effective delivery of these.

24. Through the introduction of a simpler and more coherent permissioning regime (focussed on environmental risk) there will be efficiencies in SEPA's operating costs. Given that SEPA's charges are based on full economic cost recovery this will, over time, benefit a number of businesses. Under the new regime, business will benefit from simpler permissions and guidance, more online processing of permit applications, more targeted advice and support and more proportionate enforcement and risk-based inspections. The single permissioning regime will also benefit those businesses which operate under more than one permissioning regime through efficiencies from consistent processes. Evidence from similar work by the Environment Agency (for England and Wales) has estimated that savings to administration costs for regulated businesses could be to the order of 20% per annum.

25. Scotland's environment will benefit from SEPA's focus on activities that present the greatest potential risk of environmental harm. This proactive approach, supported by the Bill's provisions in terms of permissioning and enforcement, contributes to the preventative spend agenda for business and the public sector in terms of reducing the likelihood of actions that require to be cleared up or restored at a later stage.

26. The Better Environmental Regulation programme will mean that poor performers are likely to pay more to reflect the true cost of their actions. For example, the most serious offenders will continue to be referred to the criminal courts where they will potentially face larger penalties and any costs associated with their defence. Less serious offenders may avoid the criminal courts and instead be subject to a more appropriate and proportionate enforcement measure. This is consistent with the 'polluter pays' principle, and reflects the additional burden poor performers present to SEPA (and thus other charge payers). SEPA regularly assesses the compliance of businesses with their environmental responsibilities via a formal annual compliance classification scheme. The vast majority of Scottish companies comply with statutory requirements but there are some that currently fail to do so.[2]

27. Incentivising positive behaviour is a further tool to improve overall compliance. In addition to supporting appropriate and proportionate sanctions, the use of enforcement measures SEPA can use directly will also speed up the time in which breaches and follow-up action are resolved. This will be to the benefit of those who are subject to enforcement action; for example, through earlier decisions and thus reduced uncertainty whilst they await the outcome of the enforcement process. To provide an example, a land manager who has allowed silage effluent to overflow from land due to poor effluent management would currently face prosecution via the courts. This would be a relatively lengthy process potentially involving considerable time and legal advice. Under this proposed legislation, if the case has not resulted in significant harm, then a direct measure such as a variable monetary penalty or voluntary enforcement undertaking could be applied instead, saving time and money for both SEPA and the non-compliant person. The additional enforcement measures will be focused on remediation, and in particular an enforcement undertaking may provide remediation of the harm caused and/or some further benefit to the environment or the local community which would not otherwise have taken place or have to be financed by alternative means. In this example, the cost to the farmer related to the voluntary enforcement undertaking would depend on the nature of the incident and the level of remediation required. It is stressed that the decision to enter into an enforcement undertaking is voluntary. If the case has not resulted in significant harm then a direct measure could be applied, for example, a low financial penalty.

PART 3 –MISCELLANEOUS

MARINE LICENSING DECISIONS

Costs on the Scottish Administration

28. The process for authorising the development of offshore marine energy involves two consents. The first is a marine licence under section 29 of the Marine (Scotland) Act 2010. The

[2] As highlighted in the attached *Progress on delivering better environmental regulation* report http://www.sepa.org.uk/about_us/publications/better_regulation.aspx

second is consent by the Scottish Ministers under section 36 of the Electricity Act 1989, which is reserved legislation. To maintain and apply that approach, consequential provision would require to be passed following the passage of the Bill by the UK Parliament in relation to energy consents under the Electricity Act 1989 and marine licensing decisions beyond 12 nautical miles, which fall within reserved matters (though in practice are decisions made by the Scottish Ministers under the devolution settlement). This would require an order to be made under section 104 of the Scotland Act 1998 providing for consequential modifications to be made to the 1989 Act and to the Marine and Coastal Access Act 2009 in consequence of legislation passed by the Scottish Parliament. The section 104 order would be laid before the UK Parliament and would be debated in both houses.

29. Decisions under section 29 of the Marine (Scotland) Act 2010 are made by the Scottish Ministers. Section 38 of the Marine (Scotland) Act 2010 and regulations made under that provision - the Marine Licensing Appeals (Scotland) Regulations 2011 - provide that an applicant is able to challenge a decision in the sheriff court. All other persons or bodies who have standing may challenge the legality of a decision by the Scottish Ministers by means of an application for judicial review made to the Outer House of the Court of Session.

30. The Scottish Government considers that the mechanism for bringing legal challenges to offshore marine energy decisions would benefit from being more consistent with the Planning and Roads Acts. The reasons for this are twofold. Firstly, to make transparent, focussed and consistent the legal basis and process by which a challenge may be brought, as the current arrangements (across a range of land and marine use management decisions) blend a mix of statutory appeals and judicial review. Secondly, to ensure that this vital democratic safeguard is exercised in a way which avoids unnecessary delay in the courts by applying a six-week time limit. Any such delay is obviously undesirable to both the challenger and to the projects themselves, particularly where any initial offer of private equity and debt funding available to these projects is time limited.

31. In addition, section 28 of the Marine (Scotland) Act 2010 provides that the Scottish Ministers may hold an inquiry in connection with their determination of an application for a marine licence. For consistency, these decisions made by the Scottish Ministers under section 28(1) concerning holding a public inquiry should be subject to the same challenge mechanisms as a licensing decision.

32. The Bill will, therefore, extend statutory review mechanisms to decisions by the Scottish Ministers under sections 28 and 29 of the Marine (Scotland) Act 2010 relating to those offshore marine energy projects with a permitted capacity of no less than one megawatt. The statutory appeal will be to the Inner House of the Court of Session.

33. Legal challenges to the Scottish Ministers' decisions can be an expensive and time-consuming process. They come at a substantial cost to public finances, not just in terms of the effort of defending the legal proceedings, but also the additional costs incurred as a result of the delays to the services affected. The financial impact of the proposals is difficult to quantify in precise terms because the potential impacts will vary depending on the size of the projects to which the decision relates. In addition, the Scottish Court Service does not at present hold information on the relative costs of judicial review and statutory appeal. However, it is

considered that the provisions should reduce the impact on the commencement of the projects caused by litigation.

34. The amendments will allow the possibility for legal challenges under such circumstances to be heard in the Inner House of the Court of Session, rather than the Outer House, so reducing the number of potential layers of appeal and bringing earlier finality to legal proceedings. Moreover, strict time limits for bringing the challenge would apply. Thus, it is anticipated that the reduced number of tiers of appeal will help reduce the overall impact of delay to projects caused by litigation.

35. It is considered that the introduction of a statutory appeal mechanism will result in a reduction in the costs to the Scottish Government of each challenge to a decision of the Scottish Ministers by reducing a tier of appeal present in judicial review cases (cases would be heard in the Inner House only rather than being heard, or remittable to the Outer House). The effect of a challenge that starts in a higher court is a reduction in the number of possible appeal stages. The cost of an action in the Inner House is greater than that in the Outer House, not least because it is heard in the presence of three judges. The cost of a court hearing (in normal hours) before a single judge, payable by each party for every 30 minutes or part thereof, is £85. The cost of a court hearing (in normal hours) before three or more judges, payable by each party for every 30 minutes or part thereof, is £212.[3] There are no centrally held records of the average length and duration of appeals as these depend on the circumstances of individual cases. Despite this, it is considered that the reduction in the number of appeal stages will lead to an overall saving in both its legal costs and time. It would also reduce the costs that the Scottish Government, under the protected costs order system or under Article 9(4) of the Aarhus Convention which may apply to many or most judicial reviews, cannot recover. Therefore, fewer layers or tiers of appeal will result in lower unrecoverable legal costs per challenge for the state.

36. There are approximately 11 to 12 offshore energy projects per year. As at March 2013, there has only been one licence granted under the Marine (Scotland) Act 2010 and there have been no applications for judicial review (though as there are no time limits, judicial review is still possible). There is a possibility that the introduction of a statutory appeal mechanism may result in an increase in challenges; however it is considered that the six-week time limit should mitigate the impact of this.

37. The costs of implementation are considered to be minimal. The court rules and their guidance are already in place and will only need the addition of a reference to the Regulatory Reform (Scotland) Act.[4]

Costs on local authorities

38. The offshore marine energy proposal to introduce a statutory appeal will only impinge on local authorities if they have made an application under section 29 of the 2010 Act. If that is the case, the effect will be the same as on other businesses or individuals who have made applications (see below).

[3] See the Court of Session etc. Fees Amendment Order 2012 (www.legislation.gov.uk/ssi/2012/290/contents/made).
[4] See Rules of the Court of Session, Chapter 41: Appeals under statute (www.scotcourts.gov.uk/docs/default-source/cos---rules/chap41.pdf?sfvrsn=2).

Cost on other bodies, individuals and business

39. As regards other businesses or individuals, legal challenges can have a significant impact on projects both in terms of timing and cost. The main impact for applicants (aside from the costs of the litigation itself) is in delay to a programme or project concerned and the associated economic or environmental benefits it might be expected to have. In certain types of case, in particular those involving large planning developments or constructions where significant sums may be at stake, any delays can have an impact on the costs of the project, potentially putting its financial viability at risk. The measures proposed, alongside other work being taken forward by the Scottish Government seek, therefore, to ensure such cases can proceed as expeditiously as possible through the courts. The direct appeal to the Inner House and the imposition of a strict time-limit are designed to make the appeal process as efficient as possible whilst maintaining the public accountability of the Scottish Ministers.

40. It is anticipated that these provisions will reduce the costs for many who wish to challenge the decisions of the Scottish Ministers in that, if they wish to take the challenge to the highest level, there are fewer levels of appeal. There is a financial downside, however, for those cases which are not subject to further appeal in that the costs in the Inner House are higher than the costs in the Outer House of the Court of Session. Full information on the respective costs in each House is not available. However, there is a reference to the fees in each in paragraph 36 above.

41. In a majority of cases, challenges are unsuccessful. Independent research[5] reported on 18 February 2013 into judgments in Scotland over the past 10 years in cases brought to challenge grants of planning permission, reveals a "relatively stable" picture with little change in the average number of cases and their success rate. A total of 64 cases between 2003 and 2012 resulted in 17, or just over 25%, being successful. According to the research paper, this compares with a success rate in England and Wales of between 45% and 55% annually. In one recent high profile judicial review action relating to another type of large infrastructure project which delayed the project by over two years, the Scottish Ministers accrued considerable costs in addition to those of instructing Counsel. During the legal challenge period there was a requirement for continuing project management costs, costs associated with responding to on-going correspondence and costs associated with preparing briefings for Counsel in relation to legal challenges. The Scottish Ministers are concerned that similar challenges to their decisions regarding marine licences would result in similar delays and costs to them.

PLANNING AUTHORITIES' FUNCTIONS: CHARGES AND FEES

Costs on the Scottish Administration

42. Establishing the legislative powers to consider performance when setting planning application fees will only have limited additional direct costs to the Scottish Administration if the provisions are used to reduce fees in specific authorities. As already indicated, the main additional cost will principally relate to bringing forward amending legislation to reduce planning application fees for planning authorities that the Scottish Ministers have determined are

[5]This independent research, entitled "Judicial review of planning decisions in Scotland", was carried out by Neil Collar, partner at Brodies LLP. The report can be viewed at http://www.brodies.com/images/pages/planning%20e-update%20report%20february%202013.pdf. Brodies published it on its website in March 2013.

not performing. It is anticipated that this cost will be borne by existing budgets; this will be in the region of £15,000 which equates to about 30% of a policy officer's time.

43. Additional implementation costs relate to amending the online fee calculator linked to the e-planning website. Amending the system to allow the site to calculate the fee based on location of the applicant is estimated at around £35,000 to £40,000. It is however possible that this cost is reduced or incorporated into other amendments of the system. It is also anticipated that any solution developed will allow annual updates to be carried out at least cost possible.

44. If the provisions are implemented (because planning authorities have not taken steps to address performance), the total implementation costs (incorporating the costs detailed above) of the planning elements are estimated to be in the region £50,000-£55,000, which will be met from existing resources. The provisions of the Bill will, however, have benefits in improving performance of planning authorities, leading to an overall reduction in costs through more efficient processing of applications and reducing uncertainty and waiting times. Although it is difficult to quantify these costs and benefits with any precision, it is anticipated that the benefits from improved performance are likely to significantly exceed the costs of implementation, and thus the overall effect will be to reduce regulatory costs to the Scottish economy as a whole.

Costs on local authorities

45. The planning provisions of the Bill relate to local authorities' functions as planning authorities. If an authority fails to address performance issues, their planning application fee will potentially be reduced. In 2010-11, planning application fee income across all planning authorities was £22.3m; income for each authority varies considerably due to the number, size, location and development types coming forward. Planning fee income for smaller and more rural authorities is between £0.1m and £0.5m, while the income for larger urban authorities ranges from £1m to £2m. Overall resourcing of the planning service is the responsibility of the local authority. Irrespective of the level of income, any authority whose planning application fees are reduced will see a related drop in income which may impact their other budgets.

46. It is not clear if reducing fees will have a consequential impact on the number of applications submitted to poor performing authorities. Some businesses have indicated that they may not bring forward developments in poor performing authorities due to costs of delay which may outweigh any reduction in fee, whilst other developers, particularly smaller businesses, have indicated that they have little option about where they develop.

Cost on other bodies, individuals and business

47. One of the desired outcomes of linking fees to performance is to deliver an efficient and effective planning system that eliminates undue delay. The impact of delay can be significant in terms of lost opportunity as well as additional costs. This cost varies from development to development and, therefore, it is not possible to quantify at this point. A reduced planning application fee in poor performing authorities does mean that applicants will pay less to planning authorities. This will not necessarily cover any costs of delay, but it will encourage poor performing planning authorities to improve their response time.

APPLICATION FOR STREET TRADER'S LICENCES: FOOD BUSINESS

Costs on the Scottish Administration

48. The requirement, introduced by the Bill, that the food hygiene certificate produced for a street trader's licence application must be from a food authority that the mobile food business has registered with, rather than the authority in which the application is made, has no cost implications on the Scottish Administration. The administration and issue of these certificates and licenses rests with local authorities.

Costs on local authorities

49. The requirement that the certificate must be from a food authority that the mobile food establishment is registered with will not increase local authorities' costs, and may provide efficiencies for all local authorities issuing street trader's licences. At present, a separate certificate is generally provided by each food authority in which an application for a street traders licence is made. In future, since the certificate must be from a food authority that has registered the establishment, certificates for multiple applications can be provided by the same food authority thereby offering some efficiencies in terms of administration costs.

Costs on other bodies, individuals and businesses

50. The requirement that the certificate must be from a food authority that the mobile food establishment is registered with could potentially benefit up to 1,300 mobile food businesses (to the extent that they might wish to operate in two or more local authority licensing areas). By reducing the need for mobile food businesses to obtain a certificate of compliance from each authority in which it is applying for a street traders licence, business may be expected to make savings, both in relation to any charges for the certificates and business time lost in seeking to obtain them. While not all authorities charge for these certificates, the costs can range from £25-£125. Businesses might also avoid loss of staff time and sales revenue if the number of inspections required to obtain multiple certificates is reduced accordingly. This would vary depending on the type of business – a half day lost sales could be around £150.

SUMMARY OF COSTS

51. The table below summarises the costs that arise as a direct result of the Bill:

	Scottish Government	Local authorities	Other bodies, individuals and businesses
Costs arising as a direct result of the Bill	Staffing and administration costs of £305,000 per annum (during implementation) which will be met from	Overall there will be no on-going direct costs to local authorities; however, should the planning fees provision be used there would a	Part 1 – Regulatory Functions - There will be no direct costs on businesses that will benefit through the way in which they are regulated. Part 2 – Environmental regulation - Direct costs to SEPA of £0.75m. Overall

	existing resources. This comprises costs: Part 1 Regulatory Functions £180k Part 2 Environmental Regulation £70k Part 3 Marine Energy Licensing £0 Planning fees £50-55k	financial loss to specified local authorities.	there will be no direct additional costs to businesses but those people who breach rules will be subject to a greater range of enforcement measures (including fines ranging from £500 to £40,000 depending on the severity of the offence and its impact) and potential recovery of SEPA's enforcement costs. Part 3 – Miscellaneous Marine licensing decisions - Costs will only affect those seeking or defending an appeal and and overall streamlining of appeals process should reduce costs. Planning authorities' functions: charges and fees -There will be no costs on businesses from this provision.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 27 March 2013, the Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney MSP) made the following statement:

> "In my view, the provisions of the Regulatory Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament."

PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE

On 27 March 2013, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

> "In my view, the provisions of the Regulatory Reform (Scotland) Bill would be within the legislative competence of the Scottish Parliament."

REGULATORY REFORM (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Regulatory Reform (Scotland) Bill introduced in the Scottish Parliament on 27 March 2013. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 26–EN.

BACKGROUND

2. The Regulatory Reform (Scotland) Bill ("the Bill") was announced by the First Minister in the Programme for Government in September 2012 and takes forward the 2011 commitment to improve further the way regulations are applied in practice across Scotland. The primary purpose of the Bill is to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment. It will protect our people and environment, help businesses to flourish and create jobs.

STRATEGIC OBJECTIVES

3. This Bill takes forward the Government's distinctive Better Regulation agenda which is based on the five principles of better regulation, requiring it to be transparent, accountable, proportionate, consistent and targeted where needed. It will contribute to the Scottish Government's Purpose of focussing Government and public services on creating a more successful country, with opportunities for all Scotland to flourish, through increasing sustainable economic growth. The Bill will contribute directly to the achievement of the Economic Growth, Productivity and Sustainability purpose targets by providing a more supportive business environment, improving the efficiency and affordability of the public sector and protecting and enhancing Scotland's natural assets to support our long-term competitiveness. The Bill will also contribute to a number of National Outcomes, including that:

- we live in a Scotland that is the most attractive place for doing business in Europe;
- our public services are high quality, continually improving, efficient and responsive to local people's needs;
- we value and enjoy our built and natural environment and protect and enhance it for future generations.

POLICY OBJECTIVES OF THE BILL

4. The Scottish Government's Better Regulation and Better Environmental Regulation programmes are distinct agendas with a number of synergies. This Bill combines them where legislation is required, and is made up of four primary elements, explained further below:

- Part 1 - Regulatory functions;
- Part 2 - Environmental regulation;
- Part 3 – Miscellaneous, including marine licensing; planning authorities' functions: charges and fees; and street traders' licences;
- Part 4 – General.

PART 1 - REGULATORY FUNCTIONS

5. There are three main enterprise elements contained in Part 1 of the Bill. These take account of the *Consultation on Proposals for a Better Regulation Bill* [1](August to October 2012).

6. In response to business evidence about the adverse impact of inconsistent application of regulation, it provides a regulation-making power to encourage or improve consistency in the exercise of regulatory functions. In particular, where a regulator has discretion as to how to apply a regulatory requirement, the power may be used to encourage or improve consistency. For example, regulations may provide for, or require the adoption of, consistent requirements and procedures. However, if a regulator makes a compelling case that local circumstances merit a variation, the regulations can take account of this.

7. It places a duty on listed regulators (i.e., those specified, or of a description specified, in schedule 1) to exercise functions in a way that contributes to achieving sustainable economic growth (in so far as this is not inconsistent with the exercise of those functions). These regulators must also have regard to any guidance issued by the Scottish Ministers in relation to the duty.

8. It also provides for a code of practice in relation to the exercise of regulatory functions. The purpose is to encourage the adoption of practices that reflect the better regulation principles and the principle that regulatory functions should be carried out in a way that contributes to achieving sustainable economic growth. The code will be developed collaboratively with business representatives, public bodies, regulators and COSLA.

9. The specific functions of local authority and other public regulators are usually framed by legislation and objectives which protect individuals, assets or the environment, whether natural or built, from an identified risk or hazard. Although much remains to be achieved, over the last few years progress has been made in ensuring that public services are high quality, continually improving, efficient and responsive to local people's needs.

[1] http://www.scotland.gov.uk/Publications/2012/08/8403

10. In the specific context of Better Regulation, some progress has been achieved in requiring regulators to have appropriate regard to economic and business considerations in the delivery of their duties. The Public Services Reform (Scotland) Act 2010 imposed duties on certain public bodies, which now have to publish a range of information annually, including an annual statement of the steps taken to promote and increase sustainable economic growth and to improve efficiency and effectiveness during the relevant financial year.

11. Part 1 of the Bill enables further steps to be taken to encourage and improve the way specific regulatory functions are exercised, with a view to creating more consistent and favourable business conditions in Scotland.

PART 2 - ENVIRONMENTAL REGULATION

12. Similarly, there are three main environmental regulation elements contained in Part 2 of the Bill.

13. Current legislation sets out a number of objectives and general duties for SEPA, particularly in the Environment Act 1995 and the Water Environment and Water Services (Scotland) Act 2003. The Bill will simplify and update these into a new statutory purpose to reflect the sort of environmental regulator Scotland needs for the future. It provides that all of SEPA's functions are exercisable for the general purpose of protecting and improving the environment, including the sustainable management of natural resources, and that, in carrying out its functions in pursuit of that primary purpose, SEPA should contribute to improving the health and wellbeing of people in Scotland and achieving sustainable economic growth.

14. Giving SEPA a new general purpose helps to make it clear that SEPA's functions are not simply in relation to pollution control, and recognises the broader role that SEPA should have. It provides for the focus of the regulatory framework to be protecting and improving the environment. The new general purpose also properly reflects the fact that having a good environment is integral to having a good economy, and how the way that SEPA works with business and other stakeholders can make a direct contribution to having a favourable business environment in Scotland.

15. The Bill will provide and enable a simpler legislative framework, and by doing so will enable SEPA to be more transparent, accountable, proportionate, consistent and targeted in carrying out its regulatory functions. The Bill will enable the regulation of environmental activities, which are defined in terms of activities capable of causing, or liable to cause, environmental harm. This shifts the focus of the regulatory framework from pollution control to environmental harm. In particular, the Bill will enable the integration of the permissioning arrangements of SEPA's four main regimes (water, waste, radioactive waste and pollution prevention and control) and simplify the regulatory procedures. This will not only make the legislative framework and regulatory procedures easier for SEPA to apply consistently and for businesses to understand, reducing the administrative burden on both, it will also enable SEPA to better identify, and focus most effort on, the most important environmental risks and harms. This will ensure more effective and efficient protection of the environment, reduce the regulatory burden on business and allow SEPA to take opportunities to improve the environment. The Bill will also remove redundant provisions of existing environmental protection legislation.

16. SEPA has a strong track record in terms of taking appropriate enforcement activity to ensure that Scotland's environment is protected. SEPA needs, however, to have the right powers to do its job efficiently and effectively. The Bill will therefore enable the Scottish Ministers to provide SEPA with a more strategic range of enforcement tools, including additional enforcement measures such as fixed and variable monetary penalties and enforcement undertakings. The Lord Advocate will provide guidance to SEPA in respect of such penalties and undertakings, so helping to ensure that new penalties are applied consistently and proportionately as part of the whole range of sanctions that are available (including prosecution for offences).

17. Consistent with the "polluter pays" principle, the Bill will enable SEPA to recover the costs for imposing a variable monetary penalty (up to the date of imposition). It will also enable subordinate legislation to provide regulators such as SEPA with the ability to recover the costs of enforcement notices (up to the date of imposition), and to impose monetary penalties following non-compliance with such a notice.

18. The new range of enforcement tools will ensure that SEPA can make the right range of interventions to tackle poor performance, and better protect the environment for the benefit of all.

19. The Bill provides for employers or principals to have vicarious criminal liability for environmental offences, as specified by the Scottish Ministers, if committed by their employees or agents. This will help ensure that those who benefit from offending behaviour are held accountable for regulatory breaches.

20. The Bill provides for a new offence of causing or permitting significant environmental harm, where serious harm has actually been, or is likely to be, caused to the environment. The new offence will enable harm of that kind to be dealt with in a more effective and proportionate manner than under the current law.

21. The Bill will provide criminal courts with a wider range of sentencing options including the power to impose publicity orders and compensation orders, and to order that significant environmental harm be remediated in addition to, or instead of, imposing any other sanction. It will be an offence to fail to comply with a publicity order or a remediation order. The aim is to deter actions which damage the environment and undermine legitimate businesses, and to ensure that the environment is, where possible, remediated.

22. The Bill also makes a number of miscellaneous provisions relating to contaminated land, waste management licensing and air quality to further improve regulatory consistency.

PART 3 – MISCELLANEOUS

Marine licensing decisions

23. The Scottish Government is firmly committed to the development of a successful marine renewable energy industry in Scotland. The seas around Scotland have the potential to provide us with a sustainable, renewable energy source with up to 25% of Europe's tidal power, 10% of

its wave power and around 25% of the European offshore wind resource potential. In all, Scotland is estimated as being able to produce 12 gigawatts of energy from marine renewable and offshore wind sources by 2020.

24. The Scottish Government has, therefore, committed to achieving the EU 2020 target - 20% of EU's energy consumption from renewable sources by 2020 - through a stated target of meeting 100% of Scotland's electricity demand from renewable sources by 2020.

25. In progressing towards these important goals, the Scottish Government fundamentally believes that policy development and decision-making affecting offshore energy development should be conducted in an open and transparent way.

26. The process for authorising the construction and operation of new offshore wind, wave and tidal turbines and generators (between 1 and 12 nautical miles offshore) involves two consents. The first is a marine licence under section 29 of the Marine (Scotland) Act 2010. The second consent is an energy consent by Ministers under section 36 of the Electricity Act 1989, which is required for all generating stations in the territorial sea adjacent to Scotland with a permitted capacity of over 1 megawatt. Before a decision can be taken under section 29 of the Marine (Scotland) Act 2010, notice of the application must be published.

27. While it endeavours to get marine licensing decisions right first time, the Scottish Government recognises it is a principle of a just and fair society that there should be mechanisms in place for those who are affected by such decisions to challenge them.

28. In this regard, the Scottish Government considers that the mechanism for bringing legal challenges to offshore energy decisions would benefit from two principal changes.

29. First, to make transparent, focussed and more consistent with planning and roads reviews the legal basis and process by which a challenge may be brought. The current arrangements (across a range of land and marine use management decisions) blend a mix of statutory appeals and judicial review. Second, to ensure that this vital democratic safeguard is exercised in a way which avoids unnecessary delay in the courts (a delay which is obviously undesirable to both the challenger and to the projects themselves, particularly where the initial offer of private equity and debt funding available to these projects may be time limited) by applying strict time limits.

30. Part 3 of the Bill will, therefore, extend statutory appeal mechanisms to decisions by the Scottish Ministers under sections 28 and 29 of the Marine (Scotland) Act 2010 relating to those offshore marine energy projects within the Scottish territorial sea with a permitted capacity of 1 megawatt and above. The appeal will be to the Inner House of the Court of Session.

31. To maintain and apply that approach, consequential provision would require to be passed following the passage of the Bill by the UK Parliament in relation to energy consents under the Electricity Act 1989 and marine licensing decisions beyond 12 nautical miles, which fall within reserved matters (though in practice are decisions made by the Scottish Ministers under the devolution settlement). This would require an order to be made under section 104 of the Scotland Act 1998 providing for consequential modifications to be made to the 1989 Act and to

the Marine and Coastal Access Act 2009 in consequence of legislation passed by the Scottish Parliament. The section 104 order would be laid before the UK Parliament and would be debated in both houses.

Planning authorities' functions: charges and fees

32. In recognition of the resource pressures faced by planning authorities, subject to parliamentary approval, the Scottish Ministers will increase planning fees by 20% in April 2013. Part 3 of the Bill also contains provisions to amend the Town and Country Planning (Scotland) Act 1997, as amended. The amendment aims to allow the Scottish Ministers to vary planning application fees based on the performance of a planning authority. This is to ensure the Government's aspiration of an effective and efficient planning system is delivered. The Scottish Government will continue to work in partnership with COSLA, planning authorities and other stakeholders to drive a continuous performance improvement agenda to ensure that higher fees result in better performance.

Street traders' licences

33. Part 3 of the Bill also amends section 39 (street traders' licences) of the Civic Government (Scotland) Act 1982 to enable the certificate of compliance, which is required to accompany a street trader's licence application for mobile food businesses, to be produced by the food authority with which the business is registered. Separate to this provision, it is envisaged that new national standards will be put in place to provide consistency and transparency with a view to reducing, where possible, the costs to mobile food businesses and relevant food authorities associated with production of certificates of food hygiene compliance for street traders' licence applications.

ALTERNATIVE APPROACHES

34. Some of the provisions in the Bill are intended to replace the existing legislation. In other areas, the Scottish Government has decided to make changes which it believes will better serve the interests of the people of Scotland. In all instances where a policy decision was required, either to replicate or to change an element of the existing system, careful consideration has been given to the policy alternatives and a decision was made on the basis of the available evidence. The following paragraphs make reference to these alternative approaches and explain why the Scottish Government has formed its position.

Regulatory functions

35. The consultation and partial Business and Regulatory Impact Assessment[2] outlined a number of different approaches. These were: defining and implementing national standards and systems; a duty on regulators to promote economic and business growth through regulatory activity; reviews and sun-setting; common commencement dates for future business related legislation; prompt payment; and a transferable/single certificate of compliance for mobile food businesses. The consultation responses showed clear support for an enabling power in relation to national standards and for a transferable certificate of compliance. There was also business

[2] http://www.scotland.gov.uk/Publications/2012/08/8403

support for a duty for regulators to contribute to achieving sustainable economic growth, while other respondents highlighted the importance of an approach which ensured that economic factors would be considered routinely and in a balanced way rather than being prioritised. A Code of Regulatory Practice was suggested as a tool for regulators. It was clear that there was no appetite for a legislative approach to the other proposals in the consultation paper, and as such, reviews and sun-setting and common commencement dates will be followed up through non-legislative means.

Environmental regulation

36. One alternative approach to the changes proposed for environmental regulation is *status quo*. Although current permissioning arrangements for environmental regulation have been in place for a number of years and could be continued, they are unnecessarily complex and inconsistent for both SEPA and those it regulates. In addition, current enforcement options are limited and inconsistent across the four main regulatory regimes with, for example, lower level offences being pursued via the criminal courts. Maintaining activity-based regulation would also not allow the focussing of resource on the higher risk activities, which is likely to be detrimental to protecting and improving Scotland's environment and lead to an unnecessary burden on the regulated. In contrast, the introduction of a risk-based and integrated framework will lead to a simpler, more consistent and risk-based approach to permissioning and would be implemented together with a more proportionate means of enforcement. This would be supported by major operational change within SEPA to deliver a more flexible, targeted and joined-up approach to regulation. Regulated business will benefit from greater proportionality, more joined-up permissions, simpler procedures, and a more holistic approach from SEPA to tackling new environmental problems and promoting the use of new technologies. Overall, the proposals will be beneficial to the environment through targeting regulatory activity where it adds most value.

Marine licensing decisions

37. The Proposals for a Better Regulation Bill consultation[3] sought views on whether there was any merit in extending the express right of appeal to the Court of Session for people or bodies with a sufficient interest in the project to those classes of decision made by Scottish Ministers under legislation governing infrastructure projects. The *status quo* means that all challenges are by application for judicial review to the Outer House of the Court of Session. These are appealable to the Inner House and subsequently to the Supreme Court. Judicial review has no time limits for application. The alternative proposed is a statutory right of appeal to the Inner House of the Court of Session with a six-week time limit. This would be appealable to the Supreme Court. It is considered that this alternative option would lead to quicker final decisions. This will benefit Scottish businesses applying for licences, groups and individuals challenging such an application, and the Scottish Government as it will involve less time and expense in court. It is also considered that it will benefit the Scottish economy as a whole.

Planning authorities' functions: charges and fees

38. Central to the Government's aspirations for the planning system are improved performance and resourcing of the system. Whilst overall resourcing of the planning service is

[3] http://www.scotland.gov.uk/Publications/2012/08/8403

the responsibility of local authorities, the Scottish Ministers want to be sure that increased funding through increases in planning application fees leads to improved planning performance by authorities. The Better Regulation Bill consultation sought views on the proposal to give powers to the Scottish Ministers to set the level of the planning fee payable in each authority based on an assessment of performance as well as evidence and views on the most effective mechanism for introducing the proposed link between fees and performance.

CONSULTATION

39. The content of the Bill is predicated on two separate consultation processes described in paragraphs 40-44 below.

Regulatory functions, marine licensing decisions and planning authorities' functions: charges and fees

40. A consultation cycle about the prospective enterprise content[4] of the Bill was open from 2 August to 26 October 2012. It sought views on: defining and implementing national standards and systems; a duty on regulators to promote economic and business growth through regulatory activity; reviews and sun-setting; common commencement dates for future business related legislation; prompt payment; and a transferable/single certificate of compliance for mobile food businesses. It also sought views on allowing the Scottish Ministers to vary planning application fees based on the performance of a planning authority and extending statutory review mechanisms. Eighty responses were received[5] and an independent analysis of responses to the consultation will shortly be available on the Scottish Government Better Regulation website[6] . In broad terms there was limited support for regulatory steps in relation to sun-setting, common commencement dates for future business-related legislation and prompt payment. There was clear business support for an economic duty on regulators, while other respondents highlighted the importance of a considered and risk-based approach which ensured that economic factors would be considered in a balanced way rather than being systematically prioritised. Some respondents suggested that a Code of Regulatory Practice would be a valuable tool for regulators and regulated businesses. Following further and ongoing dialogue with a range of stakeholders, the Bill features:

- A power to deliver consistent regulation including by means of setting and implementing national standards and systems (for example, in relation to mobile food businesses). A related requirement that a food hygiene certificate produced for a street trader's licence application for a mobile food business must be from a food authority that has registered the business;
- A duty on regulators to exercise regulatory functions in a way that contributes to sustainable economic growth (in so far as it is not inconsistent with the exercise of those functions);
- Provision for a code setting out how regulators are to apply regulatory principles and good practice in order to find the optimum balance between regulatory and economic

[4] http://www.scotland.gov.uk/Publications/2012/08/8403
[5] http://www.scotland.gov.uk/Publications/2012/12/4140
[6] http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation

factors. The code will be developed collaboratively with business representatives, public bodies, regulators and COSLA.

41. In addition to the formal consultation process, Scottish Government officials continue to engage directly with businesses, business organisations, local authorities and the Regulatory Review Group.

42. On proposals to allow the Scottish Ministers to vary planning application fees based on the performance of a planning authority, the balance of respondents broadly favoured the notion of linking fees and performance but most qualified this by counselling caution as to how it was to be done. There was a very clear majority in favour of the proposal to extend the scope of statutory reviews and substantial support, from the relatively small numbers answering the question, for the proposal to extend access to the statutory review mechanism to people or bodies with sufficient interest in the legality of Ministers' decisions in relation to the granting of a marine licence and extending statutory review mechanisms.

Environmental regulation

43. A joint Scottish Government-SEPA consultation on the environmental permissioning and enforcement content of the Bill was run from 4 May 2012 to 4 August 2012[7]. It outlined the policy agenda for environmental regulation, specific proposals for legislative change and described in broad terms how SEPA would seek to change its operational delivery. Eighty nine written responses were received. The consultation asked whether or not the overall proposals would provide more effective protection of the environment and human health. It also asked for views on specific proposals for legislative change. This included changes to the structure of environmental legislation in order to create a new, integrated framework for the permissions (licences, permits, rules etc.) which SEPA uses to control activities which could harm the environment and changes to the enforcement tools (sanctions such as fines or enforcement undertakings) which SEPA uses to deter non-compliance. An analysis of the responses was published on 20 December 2012[8]. The overall response to the consultation indicated strong support in principle for the proposals in the Bill to introduce an integrated permissioning framework, more direct and proportionate enforcement tools and a more targeted, risk-based approach to regulation. Although there was strong broad support for the proposals, stakeholder views helped to shape the final detail - for example, the decision to restrict the use of publicity orders to the criminal courts.

44. In addition to the formal consultation process, Scottish Government and SEPA officials continue to engage directly with key stakeholder groups to identify and address issues and concerns and to build consensus on the way forward. Open and constructive dialogue continues to be undertaken with a range of key stakeholders, including membership organisations such as the NFU Scotland, business associations such as the Federation of Small Businesses, the Scotch Whisky Association and some of SEPA's largest customers such as Scottish Water and SSE Ltd.

[7] http://www.scotland.gov.uk/Publications/2012/05/6822
[8] http://www.scotland.gov.uk/Publications/2012/12/6197

EFFECTS ON EQUAL OPPORTUNITIES

45. The proposals in the Bill will help balance the strict level of environmental standards and monitoring with a clear focus on supporting economic growth. They do not discriminate on the basis of age, gender, race, religion, disability or sexual orientation.

46. As part of the consultation process, the Scottish Government held stakeholder engagement events and the opportunity was provided for equality organisations and others to make their representations known on the impact of the programme and the Bill's proposals. No equality issues or concerns were raised by stakeholders in either written responses or at the stakeholder engagement events.

47. An Equality Impact Assessment (EQIA) has been undertaken and no significant issues have been raised.

EFFECTS ON HUMAN RIGHTS

48. The measures in the Bill are compatible with rights under the European Convention on Human Rights (ECHR).

Part 1 – Regulatory functions

49. Part 1 of the Bill makes provision for regulatory functions, and does not have any effects on human rights.

Part 2 – Environmental regulation

50. Chapter 1 of Part 2 of the Bill provides for a power to make regulations for and in connection with protecting and improving the environment, and has no direct effect on human rights.

51. Chapter 2 of Part 2 of the Bill provides generally for powers to make orders providing for the imposition of fixed monetary penalties or variable monetary penalties, and a power to make an order providing for the making and acceptance of enforcement undertakings. Again, those measures have no direct effect on human rights.

52. The enabling powers in Chapters 1 and 2 are capable of being exercised in a manner that is compatible with Convention rights, and Ministers are required to ensure that measures made in exercise of the powers are so compatible.

53. For example, section 13(2)(f) of the Bill requires Ministers, when making an order providing for fixed monetary penalties, to ensure that a person on whom a penalty is imposed can appeal against the imposition of an order. The court or other body to which appeal may be taken is for Ministers to determine in the order, and Ministers will have to ensure that any system of fixed monetary penalties complies with Article 6 ECHR (right to a fair and public hearing).

54. Chapter 3 of Part 2 of the Bill provides for the disposals that may be made by the courts on conviction of a person for an environmental offence, and no ECHR issues arise in that respect. In particular, Article 6 ECHR is not engaged as measures only apply following conviction, and Article 1 Protocol 1 ECHR (deprivation of property) is not infringed as compensation orders are a penalty imposed in the public interest subject to conditions imposed by law. In addition, the courts must, as a public body, exercise the powers conferred under Chapter 3 in a manner that is compatible with Convention rights.

55. Chapter 4 provides, in particular, for new offences related to vicarious liability for other environmental offences, and for a new offence relating to the causing of significant environmental harm. These are strict liability offences to the extent that a person does not need to have criminal intent in order to be convicted. That is, however, compatible with Article 6 of ECHR as that Article does not prevent the penalisation of a simple or objective fact irrespective of whether it results from criminal intent or from negligence.

56. The other provisions in Chapter 4, and the provisions in Chapters 5 and 6, do not raise any further Convention issues.

Part 3 - Miscellaneous

57. Section 40 of the Bill enables, but does not require, persons aggrieved by certain marine licensing decisions, to apply to the Inner House of the Court of Session for a review of a decision. It does not affect any right of such person to seek a judicial review of a decision that is not subject to the new statutory review. It is therefore considered to be compatible with Article 6 ECHR.

58. The other provisions in Part 3 do not raise Convention issues.

EFFECTS ON ISLANDS AND RURAL COMMUNITIES

59. The Bill has no differential impact upon island or rural communities. The provisions of the Bill apply equally to all communities in Scotland.

EFFECTS ON LOCAL GOVERNMENT

60. The provisions of implementing national regulation standards and systems for local government and other regulators will involve an initial impact on time and resources but there will be efficiency savings in the long term from using a national approach.

61. Implementing an economic duty on all Scottish regulators will result in some additional costs in gathering and reporting on information for local authorities.

62. The requirement, introduced by section 42, that the food hygiene certificate produced for a street trader's licence application must be from a food authority that the mobile food business has registered with is expected to reduce overall costs for local authorities because fewer compliance checks are likely to be required where certificates are issued by the same registering food authority.

63. The proposals in the Bill cover local authorities' activities as regulators as well as regulated enterprises (for example, landfill providers). As a regulator there are no impacts from the provisions in the Bill. Where local authorities operate regulated enterprises (for example landfill sites) they will be affected by the provisions of the Bill.

64. As the only involvement with local authorities is normally as consultees in respect of applications for marine licences, the provision to extend statutory review mechanisms will not impact on them.

65. These provisions aim to incentivise improvements in the performance of planning authorities, which will reduce uncertainty and waiting times, ultimately reducing costs for applicants. The Scottish Government will identify and work with COSLA, planning authorities and other stakeholders to address performance issues to ensure that all opportunities are explored before reducing planning application fees that are submitted by the applicant. It is, therefore, anticipated that only authorities that continuously fail to improve performance will be subject to a reduction in fee. The potential of reduced planning fees will help to focus all authorities to deliver a high quality, efficient and responsive planning service focused on continuous improvement.

SUSTAINABLE DEVELOPMENT

66. The Bill will have no negative impact on sustainable development. The Scottish Government's focus on sustainability is explicit within the National Outcomes and associated National Indicators, incorporating all of the aspects of sustainable development, from reducing greenhouse gas emissions and improving resource efficiency to preserving Scotland's natural environment. As our Government Economic Strategy highlights, as well as being a desired characteristic of growth, sustainability is also an important long-term driver of sustainable economic growth and will be key if we are to maximise Scotland's economic potential.

67. It is in this context that the provisions in this Bill are expected to lead to largely positive environmental, economic and societal effects and complement existing plans, strategies and measures.

68. The provisions of the Environment Act 1995, which require the Scottish Ministers to provide guidance to SEPA on the contribution it should make towards attaining the objective of achieving sustainable development by performance of its functions, remain and sit alongside the new statutory purpose for SEPA.

69. Strategic Environmental Assessment pre-screening has been carried out on the proposals. The position, supported by the Consultation Authorities, was that that proposed legislation does not in itself lead to any significant environment effects. The rationale for this is that the main purpose of the Bill is to provide the tools to improve the way regulation is developed and applied in Scotland. The Bill does not specify how these will be deployed and does not contain any specific new environmental objectives or targets.

REGULATORY REFORM (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Regulatory Reform (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Regulatory Reform (Scotland) Bill was announced by the First Minister in the Programme for Government in September 2012 and takes forward the 2011 commitment to improve further the way regulations are applied in practice across Scotland. The primary purpose of the Bill is to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment. It will protect our people and environment, help businesses to flourish and create jobs.

4. The Scottish Government's Better Regulation and Better Environmental Regulation programmes are distinct agendas with a number of synergies. This Bill combines them where legislation is required and is made up of four primary elements:

- Enterprise
- Environmental regulation
- Marine energy
- Planning

Enterprise

5. The Bill enables regulations to be made to encourage or improve consistency in the exercise of regulatory functions by a regulator in schedule 1 (a "listed regulator").

6. It imposes a duty on listed regulators to exercise regulatory functions in a way that contributes to sustainable economic growth.

7. It provides for a code of practice in relation to the exercise of regulatory functions.

8. Section 39(4) of the Civic Government (Scotland) Act 1982 is amended so that the certificate to be produced in relation to a street trader's licence application for a mobile food business must be from a food authority that has registered it.

Environmental regulation

9. The Bill will simplify and update the wide range of objectives given to SEPA by different legislative regimes into a new statutory purpose to reflect the sort of environmental regulator Scotland needs for the future.

10. The Bill will enable the integration of the permissioning arrangements of SEPA's four main regimes (water, waste, radioactive waste and pollution prevention and control) and simplify the regulatory procedures.

11. The Bill will also enable the Scottish Ministers to provide SEPA with a more strategic range of enforcement tools, including additional enforcement measures such as fixed and variable monetary penalties and enforcement undertakings. The Bill will also provide criminal courts with a wider range of sentencing options including the power to impose publicity orders and compensation orders and to order that significant environmental harm be remediated in addition to, or instead of, imposing any other sanction.

Marine energy

12. The Bill will extend statutory review mechanisms to decisions by Ministers under sections 28 and 29 of the Marine (Scotland) Act 2010 similar to those set out in the Planning Acts, relating to those offshore marine energy projects with a permitted capacity of over 1 megawatt. The review will be by the Inner House of the Court of Session.

Planning

13. The Bill will contain provisions to amend the Town and Country Planning (Scotland) Act 1997, as amended. The amendment aims to allow Scottish Ministers to vary planning application fees based on the performance of a planning authority.

RATIONALE FOR SUBORDINATE LEGISLATION

14. The Bill contains a number of provisions which delegate powers to Scottish Ministers. The Scottish Government has considered whether each provision is best managed on the face of the Bill or through subordinate legislation. In consideration of this, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the need to achieve the appropriate balance between the importance of the issue and the need to ensure sufficient flexibility to respond to changing circumstances without having to resort to primary legislation;
- the need to make proper use of Parliamentary time;
- the likely frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament.

15. The delegated powers relating to the Bill are listed below. These detail what the power does, why the power was taken and the reason for the Parliamentary procedure used.

DELEGATED POWERS

Section 1 – Power as respects consistency in regulatory functions

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative procedure**

Provision

16. Section 1 (read with section 2) confers a power on the Scottish Ministers to make regulations containing any provision which they consider will encourage or improve consistency in the exercise of regulatory functions by a regulator in schedule 1 ("a listed regulator"). It includes power to make different provision for different purposes (section 44(1)) and power to modify any enactment apart from sections 1 to 3 and 7 (section 44(2)).

17. The regulations may require a listed regulator to impose, set, secure compliance with or enforce any requirement, restriction, condition, standard or outcome (a "regulatory requirement"), including a newly created one, to the extent that the regulator has the power to do so. In addition to imposing a new regulatory requirement, the regulations may also amend or remove a requirement that was imposed or set at the discretion of a regulator.

18. However, if an enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be amended or removed if the regulations include provision that has an equivalent effect to that enactment (section 2(4)). The regulations cannot therefore amend or remove a mandatory regulatory requirement which the regulator must, by law, impose or set unless alternative provision is made having equivalent effect.

Reason for taking power

19. The reason for seeking this power is to provide sufficient flexibility to enable measures to encourage or improve regulatory consistency to be taken quickly and efficiently in response to changing circumstances without having to resort to primary legislation.

20. For example, if regulatory inconsistency is found to be having an unnecessary adverse impact on regulated business activities, measures can be taken quickly to require a regulator to impose, set or enforce a consistent regulatory requirement or to standardise procedures for dealing with applications for permits in relation to the regulated activity.

21. These provisions seek to achieve an appropriate balance between the importance of the issue and the need to make proper use of Parliamentary time, having regard to the likely frequency of amendment and the need to anticipate the unexpected. In particular, although targeted measures can be taken quickly if regulatory inconsistency is having an adverse impact, any existing regulatory requirement which must by law be imposed or set can only be changed or removed if the new measures have an equivalent effect to that law.

Reason for choice of procedure

22. There is a business and public interest in the way regulatory functions are carried out. Draft regulations containing provision to encourage or improve regulatory consistency are therefore thought to merit the approval of Parliament before they can be made. Section 44(4) therefore provides that regulations under section 1 are subject to the affirmative procedure.

Section 7 - Power to modify schedule 1

Power conferred on:	**The Scottish Ministers**
Power exercisable by:	**Order made by Scottish statutory instrument**
Parliamentary procedure:	**Negative procedure, unless the order adds a regulator to schedule 1 or adds (or extends) a regulatory function of a regulator in that schedule, in which case affirmative procedure**

Provision

23. Section 7 confers a power on the Scottish Ministers to modify schedule 1 (regulators for the purposes of Part 1) so as to add a person having regulatory functions to the list, to remove or amend an entry and to specify that a function is or is not to be a regulatory function for the purpose of section 1 (power as respects regulatory consistency), section 4 (Regulators' duty in respect of sustainable economic growth) or section 5 (code of practice on exercise of regulatory functions).

Reason for taking power

24. The reason for seeking this power is to provide sufficient flexibility to enable the entries in schedule 1 to be kept up-to-date, and to enable any other person that exercises regulatory functions to be added so that those functions can be brought within the scope of the power in section 1 and so that any such person can be required to comply with the duty in section 4 and the code under section 5, without having to resort to primary legislation.

Reason for choice of procedure

25. Sections 1, 4 and 5 apply only in relation to a person, body or office-holder in schedule 1. Any modification of schedule 1 that adds an entry or adds (or extends) a regulatory function for the purposes of those sections may therefore extend the scope of the power in section 1, or extend the application of the duty in section 4 or the code under section 5.

26. Where an order under section 7 contains any such modification, it is considered to merit the approval of Parliament before it can be made. Section 44(3)(b) and (c) therefore provides that, where this is the case, the order is subject to the affirmative procedure.

27. Where an order under this section only removes (or updates the name of) an entry or otherwise removes (or narrows) a regulatory function, it will not extend the scope or application of the provisions in Part 1. It is therefore considered appropriate that any such order is subject only to the negative procedure. Section 44(5) provides for this.

Environmental regulation

Section 10 – Regulations relating to protecting and improving the environment

Power conferred on:	**Scottish Ministers**
Power exercisable by:	**Regulations made by Scottish statutory instrument**
Parliamentary procedure:	**Negative procedure, unless the order modifies or repeals primary legislation, in which case affirmative procedure**

Provision

28. Section 10(1) allows the Scottish Ministers, by regulations, to make provision for any of the purposes specified in Part 1 of schedule 2.

29. Regulations may for example provide for the scope and extent of environmental activities and regulated activities, for a prohibition on carrying on any activity (described in the schedule as a "regulated activity"), for a prohibition on carrying on an activity without authorisation, for different levels of authorisation (permit, registration, notification or compliance with general binding rules), for procedural requirements, for administrative charges by regulators for public registers, for enforcement powers (including statutory notices), for offences for failure to comply with regulatory requirements. regulated activities, and for measures equivalent to those that might be made under the European Communities Act 1972 or on waste under the Environmental Protection Act 1990.

30. Section 10(3) sets out that, in accordance with section 8, the provision that may be made is provision for or in connection with protecting and improving the environment, including provision regulating environmental activities, and provision implementing any EU or international obligation relating to protecting and improving the environment (for example, the Water Framework Directive (Directive 2000/60/EC), the Waste Framework Directive (Directive 2008/98/EC), the Basic Safety Standards Directive (Directive 96/29/Euratom), and the Industrial Emissions Directive (Directive 2010/75/EU)).

31. Ministers must before making any regulations consult any body on whom functions will be conferred, and such other persons as they think fit.

32. The powers in this section are supplemented by the order making powers in schedule 2, as considered below.

Reason for taking power

33. The power will enable the regulation of activities that might impact on the environment, or if subject to regulation might improve the environment.

34. It is intended in particular that regulations made under the power will simplify and rationalise a wide range of existing measures relating to protection of the water environment, integrated pollution control, waste management, and radioactive substances. The aim is to move towards a single regulatory structure that will be significantly easier to use for both SEPA and businesses carrying on regulated activities.

35. The new structure will be a significant improvement on the present measures, which can be complex and hard for businesses to use. Some existing measures are included in older primary legislation such as the Radioactive Substances Act 1993 and the Environmental Protection Act 1990, both of which have been amended on numerous occasions. Other existing measures are included in statutory instruments made under a range of Acts, or indeed more than one Act.

36. Measures regulating, for example, environment activities will contain a lot of detailed technical provision that would be inappropriate in a Bill. Such measures would also need to be regularly updated to take account for example of technical developments, and new EU and international obligations. The flexibility that is needed in this area would not be available if the relevant measures were specified directly in primary legislation.

Choice of procedure

37. Regulations made under this power will provide for the detailed regulation of environmental activities, often for the purposes of transposing or implementing EU obligations.

38. It is not thought that technical measures of that kind need in general to be approved in advance by Parliament. However, some regulated activities will be economically significant, or may present a serious risk to the environment. It is therefore appropriate for Parliament to be able to scrutinise such measures, and they are therefore subject to negative procedure.

39. In some cases however the regulations will modify or repeal primary legislation, and it is thought that it is appropriate for Parliament to approve such measures in advance. Regulations that include such measures will therefore be subject to affirmative procedure.

Section 12 – Fixed Monetary Penalties

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative procedure**

Provision

40. Section 12(1) enables the Scottish Ministers to make provision by order for the imposition by SEPA of a fixed monetary penalty in relation to a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. The order under section 12(1) must provide that SEPA may not serve any such notice unless it is satisfied on the balance of probabilities that an offence has been committed. The maximum amount of the penalty that may be specified in the order is an amount equivalent to level 4 on the standard scale (£2,500). This section must be read with section 23(1) where the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to enforcement measures (including fixed monetary penalties). Under section 23(2) SEPA must comply with that guidance.

41. Certain procedural requirements that an order under section 12(1) must include are set out in section 13. Section 14 requires Ministers, if making an order under section 12(1), to provide that, where a fixed monetary penalty has been imposed upon a person in relation to an act or omission, no criminal proceedings may be commenced against that person for the same act or omission. Such an order must also provide that if the person is prosecuted at a later date for the original offence then the period between service of notice of intent and the deadline for receiving representations is not counted for any period within which criminal proceedings should be commenced (section 14(1)(b)).

42. By virtue of section 23(4), any order made under section 12(1) must require SEPA to issue guidance about the use of the powers conferred by the order. Section 24(2) enables Ministers to make provision requiring SEPA to publicise cases where it has imposed fixed monetary penalties in accordance with an order made under section 12(1).

43. Section 20 also requires that any provision under section 12(1) includes safeguards against the imposition of a fixed monetary penalty in combination with other sanctions.

Reason for taking power

44. Fixed monetary penalties, as may be provided for in an order under section 12(1), are intended to be one of several enforcement options available to SEPA in the event of regulatory non-compliance. The Bill sets out the broad principles of the fixed monetary penalty regime that may be created under section 12(1), and imposes certain fundamental safeguards (such as the opportunity to make representations, the opportunity to appeal, and a prohibition on criminal proceedings being commenced against someone for the same act or omission in relation to which a fixed monetary penalty has been imposed). The Bill having set out this framework, the detailed processes and procedures regarding the imposition by SEPA of fixed monetary penalties

is a relatively technical matter that, it is submitted, is more appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for imposing a fixed penalty and to amend the level of fixed monetary penalties over time as monetary values change (within the limits prescribed in the Bill) without having to amend primary legislation.

Choice of procedure

45. Although the Bill sets out certain procedural safeguards that an order under section 12(1) must include, the imposition by SEPA of fixed monetary penalties in relation to certain offences is a serious matter with adverse financial consequences for persons not complying with regulatory requirements. It is accordingly considered appropriate that any order made under these provisions should be subject to the greater level of parliamentary scrutiny that the affirmative procedure provides.

Section 15 – Variable Monetary Penalties

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative procedure**

Provision

46. Section 15(1) enables the Scottish Ministers to make provision by order for the imposition by SEPA of a variable monetary penalty in relation to a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. The order under section 15(1) must provide that SEPA may not serve any such notice unless it is satisfied on the balance of probabilities that an offence has been committed. The maximum amount of the penalty that may be imposed by SEPA in the majority of cases is the maximum fine that can be imposed on summary conviction. In a limited number of cases, where an offence is not triable summarily or is not punishable on summary conviction by a fine, the maximum amount is specified as £40,000. Section 15(7) enables the Scottish Ministers by order to substitute another sum for that amount. This section must be read with section 23(1) where the Lord Advocate may issue guidance to SEPA on the exercise of its enforcement functions relating to enforcement measures (including variable monetary penalties). Under section 23(2) SEPA must comply with that guidance.

47. Certain procedural requirements that an order under section 15(1) must include are set out in section 16. These include provision that an undertaking may be offered by a person in response to a notice of intent. Section 17 requires Ministers, if making an order under section 15(1), to provide that, where a variable monetary penalty has been imposed upon a person or an undertaking under section 16 accepted from them in relation to a particular act or omission, then criminal proceedings may not be commenced against that person for the same act or omission. Such order must provide that if the person is prosecuted at a later date for the original offence then the period between service of notice of intent and the deadline for receiving representations is not counted for any period within which criminal proceedings should be commenced (section

17(3)), and may also provide for a non-compliance penalty notice to be issued if any such undertaking is not complied with (section 18).

48. Provision made under section 15 may also include provision for SEPA to require a person served with a variable monetary penalty notice to pay costs incurred by SEPA in relation to the notice, including investigation costs, administration costs and costs of expert advice (section 22). Certain procedural safeguards must be included in any such provision by virtue of section 22(2).

49. By virtue of section 23(4), any order made under section 15(1) must require SEPA to issue guidance about the use of the powers conferred by the order. Section 24(2) enables Ministers to make provision requiring SEPA to publicise cases where it has imposed variable monetary penalties in accordance with an order made under section 15(1).

50. Section 20 also requires that any provision under section 15(1) includes safeguards against the imposition of a variable monetary penalty in combination with other sanctions.

Reason for taking power

51. Variable monetary penalties, as may be provided for in an order under section 15(1), are intended to be one of several enforcement options available to SEPA in the event of regulatory non-compliance. The Bill sets out the broad principles of the variable monetary penalty regime that may be created under section 15(1), and imposes certain fundamental safeguards (such as the opportunity to make representations, the opportunity to appeal, and a prohibition on criminal proceedings being commenced against someone for the same act or omission in relation to which a variable monetary penalty has been imposed). The Bill having set out this framework, the detailed processes and procedures regarding the imposition by SEPA of variable monetary penalties is a relatively technical matter that, it is submitted, is more appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for imposing a variable monetary penalty without having to amend primary legislation.

Choice of procedure

52. Notwithstanding that the Bill sets out certain procedural safeguards that an order under section 15(1) must include, the imposition by SEPA of variable monetary penalties in relation to certain offences is a serious matter with adverse financial consequences for persons not complying with regulatory requirements. It is accordingly considered appropriate that any order made under these provisions should be subject to the greater level of Parliamentary scrutiny that the affirmative procedure provides.

Section 18(2)(b) – Undertakings under section 16: non-compliance penalties

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

53. Section 15 enables the Scottish Ministers to make provision for the imposition by SEPA of a variable monetary penalty in relation to a relevant offence, including provision for an undertaking to be accepted in response to a notice of intent regarding a variable monetary penalty. Such provision may also provide for a non-compliance penalty notice to be issued if any such undertaking is not complied with (section 18).

54. Provision made under section 15 may also provide, *inter alia*, for the amount of the non-compliance penalty to be calculated by reference to criteria specified by order by the Scottish Ministers.

Reason for taking power

55. It is thought that in order to make appropriate use of Parliamentary time having regard to the level of detail involved in setting down specific criteria, it is appropriate for such criteria to be delegated to secondary legislation. In addition, there needs to be flexibility to amend the specific criteria for calculating a non-compliance penalty in order to respond to changing circumstances without having to resort to primary legislation.

Choice of procedure

56. The negative procedure is considered appropriate for these powers as the main parameters for SEPA accepting an undertaking and then, if provided for, imposing a non-compliance penalty are set out in primary legislation and the detail of the criteria for determination of a non-compliance penalty may therefore be dealt with by negative procedure.

Section 19(1) – Enforcement Undertakings

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

57. This section enables the Scottish Ministers to make provision by order for SEPA to accept an enforcement undertaking from a person where it has reasonable grounds to suspect that the person has committed a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. The order under section 19(1) may provide that the

acceptance of an enforcement undertaking is to have certain consequences for subsequent enforcement measures and proceedings that may be taken against that person. The consequences include that (unless the person fails to comply with the undertaking) no criminal proceedings may be commenced against that person in respect of the act or omission for which the undertaking was offered, and that SEPA may not impose a fixed or variable monetary penalty in respect of that act or omission.

58. This section must be read in conjunction with section 23(1) where the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to enforcement measures, which include the acceptance of an enforcement undertaking. Under section 23(2) SEPA must comply with that guidance. In addition section 23(4) requires that an order made by the Scottish Ministers for the 'imposition' of an enforcement undertaking by SEPA must also require SEPA to publish guidance on those measures and have regard to that guidance in exercising its functions. Section 24(2) provides that an order made by the Scottish Ministers for the acceptance of an enforcement undertaking by SEPA may also provide for SEPA to publish information on the cases where it has accepted an enforcement undertaking.

Reason for taking power

59. Enforcement undertakings, as may be provided for in an order under section 19(1), are intended to be one of several enforcement options available to SEPA in the event of regulatory non-compliance. The Bill sets out the broad principles of how enforcement undertakings are intended to operate. The Bill having set out this framework, the detailed processes and procedures regarding the acceptance by SEPA of an enforcement undertaking, and the monitoring of compliance with such an undertaking, are relatively technical matters that, it is submitted, are more appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for the acceptance and monitoring of enforcement undertakings without having to amend primary legislation.

Choice of procedure

60. The negative procedure is considered appropriate for an order made under this section as enforcement undertakings cannot be imposed upon a person SEPA believes has committed a relevant offence. Rather, they must be voluntarily offered by the person concerned. As such, they are not thought to merit the same level of Parliamentary scrutiny as orders under sections 12 (fixed monetary penalties) and 15 (variable monetary penalties), where penalties may be imposed upon persons against their will, and for which it is proposed that the affirmative procedure is appropriate. Mindful of the need to make proper use of Parliamentary time, it is submitted that the negative procedure is appropriate for an order under section 19(1).

Section 19(3) – Enforcement Undertakings

Power conferred on: Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

61. Section 19 enables the Scottish Ministers to make provision for SEPA to accept an enforcement undertaking. Paragraph (c) of subsection (3) enables the Scottish Ministers to make provision by order describing specific types of action that an enforcement undertaking may specify.

Reason for taking power

62. While there are types of action that an enforcement undertaking may specify identified, in broad terms, in section 19(3), an order under section 19(3)(c) would allow further, more specific requirements to be added. The ability to add further or alternative actions gives flexibility to tailor the operation of enforcement undertakings to meet policy objectives.

Choice of procedure

63. The negative procedure is considered appropriate for these powers as by this provision the subordinate legislation will be setting additional parameters for an enforcement tool that is voluntarily offered by the person who is believed by SEPA to be responsible for committing a relevant offence, and has enforcement consequences only if accepted by SEPA. As such, they are not thought to merit the same level of Parliamentary scrutiny as orders under sections 12 (fixed monetary penalties) and 15 (variable monetary penalties), where penalties may be imposed upon persons against their will, and for which it is proposed that the affirmative procedure is appropriate. Mindful of the need to make proper use of Parliamentary time, it is submitted that the negative procedure is appropriate for an order under section 19(3).

Section 26(5) – Compensation orders against persons convicted of relevant offences

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Scottish statutory instrument
Parliamentary procedure: Negative procedure

Provision

64. Section 26 makes provision for section 249 of the Criminal Procedure (Scotland) Act 1995 to extend to any conviction for a relevant offence. What constitutes a relevant offence is for Ministers to determine in an order under section 39. This will allow the courts to make compensation orders requiring offenders to make payment of compensation to SEPA, local authorities or an owner or occupier of land in respect of costs incurred in preventing, reducing or remediating, or mitigating the effects of harm to the environment resulting from a relevant offence. In section 26(4)(a), the prescribed sum that is specified as a maximum amount for the purposes of a compensation order made in relation to a conviction for a relevant offence is £50,000. Section 26(5) allows the Scottish Ministers by order to substitute a different maximum amount.

Reason for taking power

65. In order to ensure that the provision for compensation orders remains effective, it may be necessary to vary the maximum amount from time to time. It is desirable that Ministers have the flexibility to do so without having to amend primary legislation.

Choice of procedure

66. It will be for the courts to make compensation orders in relation to relevant offences where they consider it appropriate to do so. Section 26(5) simply allows Ministers to vary the maximum amount for which a compensation order may be made by the courts. Given the role the courts will play in determining the actual amount of any compensation order, and mindful of the need to make proper use of Parliament's limited time, the lesser degree of Parliamentary scrutiny offered by negative procedure is considered appropriate for an order under section 26(5).

Section 30(6) – Liability where activity carried out by arrangement with another

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

67. This subsection relates to the provision in section 30 for vicarious liability where a person (A) commits an offence and A is at that time carrying on a regulated activity for another person, B. Section 30 provides that, in those circumstances, B is also guilty of the offence. Section 30(6) enables Ministers to extend the scope of this section to apply to activities other than those that are "regulated activities" (as defined in section 9(3)).

Reason for taking power

68. Regulated activities are environmental activities in respect of which regulations under section 10 of the Bill make provision. However, it is important to ensure that it is possible to apply the section 30 vicarious liability provisions to activities regulated under existing legislation pending the introduction of the new permissioning framework under section 10. As a transitional measure Scottish Ministers require flexibility to extend this to cover activities currently regulated under regulations made under, for example, the Pollution Prevention and Control Act 1999 and Water Environment and Water Services (Scotland) Act 2003. Such provision is considered to be most appropriately made in subordinate legislation.

Choice of procedure

69. The negative procedure is considered appropriate for these powers as it is simply a mechanism for specifying which activities may be covered by the new provision on vicarious liability. If the Scottish Parliament approves the principle of vicarious liability where an activity is carried out by arrangement with another, the activities to which it applies can, it is submitted, appropriately be considered under the negative procedure.

Section 31(6) – Significant environmental harm: offence

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

70. This subsection relates to the new criminal offence of causing or permitting significant environmental harm. Section 31(6) provides that it is a defence for a person charged with the significant environmental harm offence to show that the acts or failures alleged to constitute the offence were authorised by regulations made under section 10, or by an authorisation given under such regulations. To allow for the possibility of the provisions under section 31 coming into force before regulations under section 10 are in force, section 31(6) provides that it is also a defence if such act or failure was authorised under an enactment designated by the Scottish Ministers for this purpose by order. That will allow Ministers to designate existing enactments, so that an authorisation under such an enactment can be a defence under section 31(6).

Reason for taking power

71. The reason for taking this power is in order to ensure that a wide range of existing statutory authorisations can be included, without setting these out in detail in the primary legislation. It is submitted that the listing of such enactments is best dealt with in subordinate legislation.

Choice of procedure

72. Negative procedure is considered appropriate for this power as it is a mechanism for specifying which existing forms of authorisation may provide a basis for a statutory defence. It merely clarifies the scope of the defences available under section 31(6) rather than creates a new defence.

Section 31(9) – Significant environmental harm: offence

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

73. This subsection relates to the new criminal offence of causing or permitting significant environmental harm. Section 31(9) provides that environmental harm can be treated as "significant" not only if it has serious adverse effects, but also if (regardless of the seriousness of the adverse effects) it is caused to an area that is designated by order. Section 31(9) allows the Scottish Ministers to specify any such area and section 31(10) allows the Ministers to specify different areas, and to specify different types of significant environmental harm in relation to different areas.

Reason for taking power

74. In order to ensure that areas in relation to which the significant environmental harm offence will apply may be designated to reflect changing environmental priorities and local or national sensitivities, a degree of flexibility is required to allow areas to be designated, modified or de-designated. It is not considered appropriate to specify these areas in primary legislation, which would then require amendment whenever they required to be updated or changed. Rather, a delegated power is considered appropriate.

Choice of procedure

75. The negative procedure is considered appropriate for this power as the particular areas in relation to which the significant environmental harm offence will apply may require frequent amendment.

Section 39 – Meaning of "relevant offence" and "SEPA" in Part 2

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

76. In Part 2 of the Bill, there are a wide range of provisions which only or may only apply in respect of a "relevant offence". These include the offences in relation to which provision for fixed monetary penalties, variable monetary penalties and enforcement undertakings may be made, and the offences in relation to which compensation orders, the vicarious liability offence, or the significant environmental harm offence may apply, as well as the offences in respect of which the courts must have regard, when imposing a fine, to the financial benefits that accrued to the accused. This subsection allows the Scottish Ministers to specify which offences constitute a "relevant offence" for the various purposes of Part 2. When read in conjunction with section 44(1), the Scottish Ministers may specify different offences for different purposes so that, for example, a limited range of offences may be specified as a relevant offence for the purposes of the fixed monetary penalty provisions, with a wider range of offences specified in relation to which compensation orders may be made.

Reason for taking power

77. Relevant offences will be drawn initially from the wide range of environmental offences present under various pieces of existing environmental legislation. Once the different provisions within this Part and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions to be added. It is therefore likely that what constitutes a relevant offence will be subject to frequent change. Given this, a delegated power is considered appropriate, as such a power will ensure that there is a suitable

level of flexibility to add (or remove) offences when this is required. Without such a power, frequent amendments to primary legislation would be required.

Choice of procedure

78. The negative procedure is considered appropriate for these powers. The subordinate legislation will not be creating new offences but will instead be designating to which offences it is appropriate to apply the various provisions of Part 2. Negative procedure will provide a sufficient degree of Parliamentary scrutiny as regards the matter of which offences they apply to.

Section 41 – Planning authorities' functions: charges and fees

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

79. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers are satisfied that the functions of an authority are not being performed satisfactorily. Section 41 (c) removes subsections (5) and (6) so that all regulations made under section 252 are subject to negative parliamentary procedure.

Reason for taking power

80. This is amending the Scottish Ministers existing powers to set planning fees. This amendment is to allow Scottish Ministers to set planning fees based on the performance of the planning authority.

Reason for choice of procedure

81. The intention is that the provision should be exercisable at the discretion of Scottish Ministers if they are satisfied that a planning authority is under performing. The decision to reduce fees would be taken following an assessment process. It is not intended to tie the power to make regulations directly to the outcome of a particular assessment process. It is not the intention that the provision should specify how a planning authority's performance is to be assessed or that this should be specified in regulations.

82. Under section 252(5) regulations made under section 252(1) or (2) are subject to affirmative procedure, unless they are amendments consequential upon changes in the cost of living, the retail prices index or an inflation index or they specify the person by whom the calculation is to be made, in which case they are subject to the negative procedure. The

proposed policy is that all regulations made under section 252 should be subject to the negative procedure which would bring these regulations in line with most other SSIs that set fees.

Section 45(1) – Ancillary provision

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Negative procedure, unless the order modifies or repeals primary legislation, in which case affirmative procedure**

Provision

83. Section 45(1) enables the Scottish Ministers, by order, to make any incidental, supplemental, consequential, transitional, transitory or saving provision they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, the Bill.

Reason for taking power

84. This is to provide sufficient flexibility to enable incidental, supplemental, consequential, transitional, transitory or saving provision to be made for the purposes of, in consequence of, or for giving full effect to, the Bill without having to resort to primary legislation.

Choice of procedure

85. Where a draft order under section 45(1) contains provision that add to, replaces or omits any part of the text of an Act it is thought to merit the approval of Parliament before it can be made. Accordingly, section 44(3) provides that an order under this section which contains any such provision is subject to the affirmative procedure. If an order under this section contains no such textual amendments, section 44(5) provides it is instead subject to the negative procedure.

Section 47(2) – Commencement

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by Scottish statutory instrument**
Parliamentary procedure: **Laid in Parliament**

Provision

86. This provides that the provisions of the Bill (other than sections 44 to 48) comes into force on such day or days as the Scottish Ministers may by order appoint. Any such order may include transitional, transitory or saving provision.

Reason for taking power

87. This is to provide flexibility to enable the provisions of the Bill to be brought into force in a coordinated and managed way, along with any transitional, transitory or saving provision as may be required, so as to give proper effect to the Bill without having to resort to primary legislation.

Choice of procedure

88. It is thought to be sufficient that any order under this section is laid before Parliament as soon as practicable after it is made (and before it comes into force). This is provided for by virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Schedule 2 – Specification of an EU instrument as one that is or contains an obligation relating to protecting and improving the environment

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Laid in Parliament**

Provision

89. Paragraph 29 of schedule 2 enables the Scottish Ministers, by order, to specify an EU instrument as one that is or contains an EU obligation relating to protecting and improving the environment.

Reason for taking power

90. An EU obligation may relate partly to the environment and partly to other matters, or there may be doubt as to the extent to which it relates to the environment. The power may be exercised to clarify that regulations under section 10 may, by virtue of paragraph 22 of schedule 2, make provision in connection with a particular EU obligation.

Choice of procedure

91. The power will only be used to clarify the scope of the main power in section 10. It is not therefore thought to be appropriate to take up Parliamentary time scrutinising the exercise of the power, particularly as regulations made under section 10 in connection with a specified instrument will be subject to separate scrutiny.

Schedule 2 – Substitution of new maximum fine for a summary offence

Power conferred on: **Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative procedure**

Provision

92. Paragraph 30(4) of schedule 2 enables the Scottish Ministers, by order, to substitute a sum other than £40,000 as the maximum amount of the fine that may be imposed where regulations provide for an offence to be punishable on summary conviction by a fine.

Reason for taking power

93. Over time inflation may reduce the real value of the maximum fine that may be imposed, so reducing the deterrent effect of a criminal conviction for a summary offence. The power will be exercised to ensure that the maximum fine is adjusted to reflect changes in the value of money.

Choice of procedure

94. The power relates to criminal penalties so Parliament should be able to scrutinise that power. It is thought that negative procedure is appropriate given that the power can only be exercised in limited circumstances.

The Scottish Parliament
Pàrlamaid na h-Alba

Economy, Energy and Tourism Committee

11th Report, 2013 (Session 4)

Stage 1 Report on the Regulatory Reform (Scotland) Bill

Published by the Scottish Parliament on 8 October 2013

The Scottish Parliament
Pàrlamaid na h-Alba

Economy, Energy and Tourism Committee

11th Report, 2013 (Session 4)

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The Scottish Parliament
Pàrlamaid na h-Alba

Economy, Energy and Tourism Committee

Remit and membership

Remit:

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

Membership:

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

Committee Clerking Team:

Clerk to the Committee
Stephen Imrie

Senior Assistant Clerk
Fergus Cochrane

Assistant Clerk
Diane Barr

Committee Assistant
Jonas Rae

The Scottish Parliament
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RECOMMENDATIONS AND CONCLUSIONS

Consultation responses prior to Parliamentary scrutiny

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

Wider Parliamentary scrutiny

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

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

National standards – a centralised approach

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

Exemption criteria and implementation

CONCLUSION 1: We endorse the view of the Delegated Powers and Law Reform Committee that the inclusion of a six month modification period is very unusual and is not subject to parliamentary scrutiny and that any modification of how the regulations apply to a regulator must be published

on being made. We therefore welcome the Cabinet Secretary for Finance, Employment and Sustainable Growth's commitment to lodging a stage 2 amendment to provide for publication.

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

Regulators' duty in respect of sustainable economic growth

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

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

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

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

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

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

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

Enforcement of the duty

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

Code of practice – Parliamentary scrutiny

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

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

Code of practice – procedure

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

Power to modify list of regulators - selection of regulators included

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

Marine licencing decisions - statutory appeal mechanism

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

Six week appeal time limit

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

Planning authorities' functions: charges and fees - measuring performance

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

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

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

Linking fees to performance - resource implications

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

Impact on services

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

RECOMMENDATION 12: Some of the witnesses we heard from raised concerns that reducing fees could adversely affect the performance of a planning authority and the range of services that it could provide. However, we also heard reassurance from the Minister for Local Government and Planning that linking planning fees to performance, as well as undertaking other measures in the first instance, should provide the necessary incentive and support to improve planning authority performance and that

the measure to reduce fees will not be necessary. On this basis, we are content that the Bill remains as drafted but we also recommend that the Scottish Government monitor performance and reports back to the Committee a year after policy implementation.

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

Alternative approaches to improving performance

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

Street traders' licences

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

Stage 2 amendments – primary authority partnerships

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

Policy and Financial Memoranda

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

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

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

Subordinate legislation

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

Ancillary provision

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

General principles of the Bill

RECOMMENDATION 20: The Committee recommends to the Parliament that the general principles of the Bill be agreed.[5]

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

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

The Scottish Parliament
Pàrlamaid na h-Alba

Economy, Energy and Tourism Committee

11th Report, 2013 (Session 4)

Stage 1 Report on the Regulatory Reform (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Regulatory Reform (Scotland) Bill was introduced in the Scottish Parliament by the Cabinet Secretary for Finance, Employment and Sustainable Growth on 27 March 2013. The Bill was accompanied by a Policy Memorandum[6], Explanatory Notes [7]and a Delegated Powers Memorandum.[8]

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

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

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

Purposes of the Bill

5. The Scottish Government's intention is that the Bill should "improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment".[9]

[6] Policy Memorandum
[7] Explanatory Notes
[8] Delegated Powers Memorandum
[9] Policy Memorandum, page 1, paragraph 2.

6. In addition, the Bill makes specific provision about regulatory functions relating to marine licensing, planning authorities charges and fees, and street traders' licences for food businesses.

Parliamentary scrutiny

7. The EET Committee issued a call for written evidence on the Bill, to which it received 35 written submissions and 14 supplementary responses. The Committee undertook three informal fact-finding meetings on 21 May 2013 and took formal evidence on the general principles of the Bill at five meetings between 29 May and 11 September 2013.[3] The Committee would like to extend its thanks to all those who took the time to provide oral and written evidence on the general principles of the Bill. Details of that evidence can be found in Annexes C and D.

Reports by other committees

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

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

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

Consultation responses prior to Parliamentary scrutiny

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

- From May to August 2012 the Scottish Government and SEPA consulted on Proposals for an integrated framework of environmental regulation.
- From August to October 2012 the Scottish Government consulted on Proposals for a Better Regulation Bill: Consultation, which covered regulatory functions, marine licensing decisions and planning authorities' functions: charges and fees.
- From October 2012 to January 2013 the Scottish Government and SEPA consulted on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency.

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

- On 28 June 2013 the Scottish Government launched the Consultation on Primary Authority Arrangements relating to the

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

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

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

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

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

PART ONE – REGULATORY FUNCTIONS

Section 1: Power as respects consistency in regulatory function

Wider Parliamentary scrutiny

15. The Scottish Government adopted the five key principles for regulatory functions proposed by the Regulatory Review Group (RRG), which are that regulations should be "(i) exercised in a way that is transparent, accountable, proportionate and consistent, and (ii) targeted only at cases in which action is needed."[10]

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

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

18. The Law Society of Scotland expressed regret " …that more information is not yet available about Government's intentions as to the content of the regulations" and it " …urges the Scottish Parliament to clarify the approach that Scottish Government intends to take."[11]

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

> "There is limited detail surrounding which regulations and regulatory bodies Ministers intend to apply these proposed new powers. Therefore it is difficult to comment on the extent to which we believe it will streamline regulation."[12]

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

> " …much of the detail of the Bill remains to be developed over time – through codes of practice, guidance and subordinate legislation" and "that scrutiny of the Bill at Stage 1 could have been improved if the Policy Memorandum had contained more detailed explanations of the policy intent behind the provisions in the Bill."[13]

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

[10] Regulatory Reform (Scotland) Bill: Section 6,3,(a) of the Regulatory Reform (Scotland) Bill.
[11] The Law Society of Scotland, *written submission*, page 1, June 2013.
[12] SCDI, *written submission*, page 1, June 2013.
[13] RACCE Committee Report, page 3, paragraph 13.

regulations and urged " …the Scottish Parliament to clarify the approach that Scottish Government intends to take even only in general terms."[14]

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

> "Along with the unicameral structure of the Scottish Parliament we would be concerned about the possible lack of scrutiny, for example, in deciding if regulations would have "equivalent effect" to a previous mandatory enactment."[15]

23. Andrew Fraser of North Ayrshire Council, told the Committee that "…giving ministers the power to make broad, sweeping regulations without parliamentary scrutiny is more likely to produce further bad legislation than good legislation."[16]

24. Whilst Councillor Cook of COSLA, added that, " …legislation that has generalised powers at its heart is, to be frank, not the right way to proceed."[17]

25. Scottish and Southern Energy (SSE) in its written submission recommended that the following approach should be adopted, saying that "Any changes to regulation should only be introduced following an open consultation period, in which any interested party can comment on the proposed changes."[18]

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

> "The Bill for example includes powers to amend or remove existing regulatory requirements, or to create new ones in respect of which a regulator will have regulatory functions, and to require regulators to enforce compliance with new requirements. The policy justification as it has been explained to the Committee is more limited to an intention to introduce national standards of regulation for consistency, which are appropriate for specific areas of business which have yet to be fully identified."[19]

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

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[14] The Law Society of Scotland, *written submission*, page 1, June 2013.
[15] Centre for Water Law, Policy and Science – University of Dundee, *written submission*, page 1, May 2013.
[16] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2969.
[17] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2946.
[18] Scottish and Southern Energy, *written submission*, page 2, June 2013.
[19] Delegated Powers and Law Reform Committee Report: page 3: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/sur-13-40w.pdf

28. The DPLR Committee also raised a concern about the use of the affirmative procedure to substantially amend, remove or create new regulatory requirements, as this would not enable the Parliament to amend these provisions. It recommended in this instance the use of a "super-affirmative" procedure to enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval.

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

30. RSPB Scotland also raised a concern about how decisions would be made to amend or revoke existing regulatory requirements and recommended that "Robust and sufficient safeguards would be needed to ensure that the provisions do not reduce levels of environmental protection."[20]

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

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

National standards

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

34. Professor Russel Griggs, Chair of the Regulatory Reform Group (RRG), told the Committee that the Bill was necessary as "Inconsistency is a disbenefit not just to business, but to practitioners in councils, who must deliver."[21] Adding that "We do not get consistency if we do not have something in legislation."[22]

[20] RSPB Scotland, *written submission*, page 2, June 2013.
[21] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2893.
[22] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2903.

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

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

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

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

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

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

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

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[23] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2893 - Garry Clark of the Scottish Chambers of Commerce, *Official Report*, 19 June 2013, Col 3067 - David Martin of the Scottish Retail Consortium; and the Federation of Small Businesses, *written submission*, page 2, June 2013 respectively.

[24] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3045 - Susan Love of the Federation of Small Businesses and *Official Report*, 19 June 2013, Col 3067 - Paul Waterson of the Scottish Licensed Trade Association.

[25] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2894.

[26] UNISON Scotland, *written submission*, page 3, June 2013.

[27] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3049.

> "Section 1(9) of the [Charities and Trustee Investment (Scotland)] 2005 Act provides that OSCR must in performing its functions, have regard to the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed. This is identical with the principles set out at section 6(3)(a) of the Bill."[28]

A centralised approach

42. Some witnesses viewed the proposal for Scottish Ministers to apply national standards as centralising power and questioned this approach. Stephen Boyd of the STUC stated that the RRG should continue to deal with regulatory issues, saying that " …nobody has been able to make the case to me in any coherent fashion why we need the bill to supplement RRG activity".[29] Susan Love of the Federation of Small Business (FSB) advocated a "collaborative approach",[30] whilst Riddell Graham of VisitScotland promoted working in partnership, telling the Committee that "The principle of working in partnership rather than imposing things works extremely well from a tourism perspective in those two areas [quality assurance and planning framework]."[31]

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

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

- A commitment to local democracy and the value often associated with local flexibility and decision-making;
- A shared ambition to increase sustainable economic growth, nationally and at a local level, underpinned by optimising support for business within the local community;
- The established principles of Better Regulation.[32]

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

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

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[28] The Office of the Scottish Charity Regulator, *written submission*, page 1, June 2013.
[29] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 2980.
[30] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3047.
[31] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2919.
[32] Memorandum of Understanding, page 1.

legislation to require a non-statutory memorandum of understanding to make it acceptable and workable."[33]

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

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

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

Section 2: Regulations under section 1: further provision

Exemption criteria and implementation

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

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

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

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

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

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[33] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2946.
[34] SCDI, *written submission*, page 1, June 2013.
[35] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3068.
[36] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3059.

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

55. In its report, the DPLR Committee drew to the EET Committee's attention that the inclusion of a six month modification period was unusual and not subject to parliamentary scrutiny and recommend that any modification of how the regulations apply to a regulator "must be published on being made". [39]

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

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

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

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

Section 3: Regulations under section 1: compliance and enforcement

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

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

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[37] COSLA, *written submission*, page 1, June 2013.
[38] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3060.
[39] Delegated Powers and Law Reform Committee Report: page 8: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/sur-13-40w.pdf
[40] Explanatory Notes, page 5.
[41] Regulatory Reform (Scotland) Bill, section (3) (1).

> "Given the many broadly-phrased statutory duties imposed on public authorities including for example the duty to foster climate change, or well being, or to survey for contaminated land, and not least those proposed in section 4 of this bill, it is inevitable that these will on some interpretations fall into apparent conflict with the duty imposed by section 3(1)."[42]

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

Possible conflict with a regulator's existing primary purpose

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

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

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

64. Professor Russel Griggs told the Committee that whilst the proposed sustainable economic growth duty had not been a specific RRG recommendation, it was his view that the duty would not take priority over other duties and that its purpose was to demonstrate "…visibly that the economic impact has been considered."[43]

65. In its written evidence, Oxfam expressed opposition to the duty, stating that " …we do not believe it is appropriate for the Government to require regulators to contribute to achieving sustainable economic growth. The aim of regulators should be to pursue their primary purpose".[44]

66. Trisha McAuley of Consumer Futures agreed, warning that the new duty may " …override regulators' core functions" as it " …skews regulation towards one aspect of the work of regulators, possibly at the expense of protecting some of their core functions."[45]

67. The Association of Salmon Fishery Boards were concerned about complying with the new duty as well as existing sustainable development duties, saying that " …it is not clear how such a duty would interact with the current duty that SEPA, and other bodies, have to achieve sustainable development."[46]

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[42] The Law Society of Scotland, *written submission*, page 4, June 2013
[43] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2905.
[44] Oxfam, *written submission*, page 1, June 2013.
[45] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3003, 2984.
[46] Association of Salmon Fishery Boards, *written submission,* page 1, May 2013.

68. Whilst Scottish Environment LINK thought that compliance with the duty might override environmental protection or well-being, saying that—

> "There exists a grave risk here that it will prove impossible to reconcile duties for sustainable development, which balance economic, social and environmental development concerns, with a growth duty which clearly gives added weight to economic concerns alone."[47]

69. Frances McChlery of the Law Society of Scotland told the Committee that the duty would " …make it less easy for the regulator to take a clear-cut decision."[48]

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

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

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

73. More generally, the RACCE Committee recommended that this be adopted to assist all regulators, asking the Scottish Government to " …give further consideration to the use of the hierarchical model set out in section 38 as a means to aid clarity for regulators other than SEPA."[53]

74. In its report, the RACCE Committee indicated that it "remains concerned that the manner in which this section of the Bill has been drafted results in a lack of clarity on how the duty to achieve sustainable economic growth will sit alongside the primary purpose of regulators."[54]

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[47] Scottish Environment LINK, *written submission*, page 2, June 2013.
[48] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3099.
[49] UNISON Scotland, *written submission*, page 3, June 2013.
[50] Scottish Environment LINK, *written submission*, page 4, June 2013.
[51] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3072.
[52] RACCE Committee Report, page 10, paragraph 53.
[53] RACCE Committee Report, page 10, paragraph 55.
[54] RACCE Committee Report, page 10, paragraph 54.

75. In March 2013, the Scottish Government held meetings with COSLA and a number of other stakeholders and agreed that there was merit in linking the proposed economic duty to statutory guidance which would provide clarification on the practicalities of determining an appropriate balance between economic and other regulator-specific objectives.

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

> "The duty, as I have already made clear, does not prioritise sustainable economic growth over other regulatory objectives ... it must be something to which regulators must have regard."[55]

77. In evidence to the Committee, the Minister for Energy, Enterprise and Tourism confirmed that the code of practice will assist regulators in making decisions on prioritising their duties as it will " …provide a lot of practical assistance to regulators and stakeholders, and I hope that it will address some of the concerns that members have expressed in this committee and previously."[56]

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

79. **RECOMMENDATION 6: We note the view of the RACCE Committee and its proposal to replicate the SEPA hierarchy for SNH and other regulators. The Committee further notes that the Minister for Environment and Climate Change has stated that this is unnecessary and we agree with the Scottish Government's approach.[57]**

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

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

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

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

[55] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3178..
[56] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3180.
[57] Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).

> on the issue. Secondly, it is unclear what yet another duty on public bodies will achieve and how it is to fit with their other statutory duties. This raises questions of legal enforceability and where that is in doubt, what it adds that clearly authorised policy guidance cannot."[58]

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

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

> "What do the people who use services–our customers–understand by "sustainable economic growth"? When we design the delivery of services within a regulatory framework, it is important that people can understand why services are designed and delivered in the way that they are."[61]

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

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

86. Dave Watson of UNISON Scotland cautioned of the unintended consequence " …that regulators will be concerned about how companies–particularly big companies with deep legal pockets–will make use of this provision to the detriment of the public."[67]

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[58] The Law Society of Scotland, *written submission*, page 5, June 2013.
[59] UNISON Scotland, Professor Andrea Ross of the University of Dundee, Federation of Small Businesses, Scottish Environment LINK and Andrew Fraser of North Ayrshire Council.
[60] Professor Andrea Ross, University of Dundee, *written submission*, page 2, May 2013.
[61] Economy, Energy and Tourism Committee*, Official Report*, 12 June 2013, Col 2986.
[62] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3059.
[63] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 2984.
[64] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3052.
[65] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2955.
[66] Economy, Energy and Tourism Committee, Official Report, 5 June 2013, Col 2957,.
[67] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 2985.

87. In its report, the RACCE Committee indicated that with regards to the duty "…any lack of clarity with regard to the definition will make it difficult to implement, measure and enforce" and recommended that if the term is to remain in the Bill that the "…Scottish Government bring forward amendments to the Bill at Stage 2 to include such a definition."[68]

88. Another significant concern for witnesses was how the duty would be interpreted and understood. Richard Escott of SSE told the Committee that businesses require clarity to " …know what they and their satisfaction criteria are."[69] Whilst the Royal Environmental Health Institute of Scotland pointed out that "…it is difficult to know what is expected of regulators and what the desired outcomes are."[70]

89. The Association of Salmon Fishery Boards cautioned that the duty could be interpreted as "…economically sustainable growth (i.e. not environmentally sustainable)."[71] A view which was echoed by Professor Colin Reid of the University of Dundee who posed the question " …is it economically sustainable growth, or economic growth within the limits of (ecological and social) sustainability?"[72]

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

> "… our current view is that there is no compelling case for including a definition in the bill. I should point out that the duty will be underpinned by the code of practice. To address stakeholder concerns about the matter, a definition will be included in the code. The definition will be the one that we have provided."[73]

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

> "I can see the scope for dispute as to what the duty requires a particular regulator to do in a particular circumstance, but I do not think that that is the same as saying that there is a dispute as to what "sustainable economic growth" means."[74]

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

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[68] RACCE Committee Report, page 12, paragraph 61.
[69] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3105.
[70] Royal Environmental Health Institute of Scotland (REHIS), *written submission*, page 1, June. 2013.
[71] Association of Salmon Fishery Boards, *written submission,* page 1, May 2013.
[72] Professor Colin Reid, *written submission*, page 1, May 2013.
[73] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3176.
[74] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3177.

be a reasonable point to make" [75] and to write to the Committee prior to Stage 2 with his view of whether a definition should be included in the Bill.

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

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

95. The majority of evidence in favour of the inclusion of a duty to contribute to achieving sustainable economic growth came from the business sector, who told the Committee that the duty was necessary as it would " …give a signal throughout regulators that supporting sustainable economic growth is a priority for the Government",[76] "…raise the profile of the issue",[77] " …might lead to an improved level of evidence,"[78] and provide " …a clear vision that Scotland needs sustainable economic growth."[79]

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

97. In its written submission, SCDI said that it " …can only offer cautious welcome, as the extent to which this duty will drive operational change remains unclear,"[80] and David Watt of the Institute of Directors (IoD) told the Committee that a lack of a definition of sustainable economic growth might mean "that we could end up in court".[81]

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

99. Frances McChlery of the Law Society of Scotland told the Committee that it was " …a step too far and it skews the balance",[82] whilst Aedán Smith of the RSPB Scotland argued that it "…would introduce a bias towards economic

[75] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3177.
[76] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3050, Gareth Williams of SCDI.
[77] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3030, Alison Polson of Planning Aid for Scotland
[78] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3031, Colin Smith of RICS.
[79] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3049, David Watt of the Institute of Directors.
[80] SCDI, *written submission*, page 2, June 2013.
[81] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3058.
[82] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3101 and 3103.

aspects over the other two pillars of sustainable development: environmental and social",[83] and Councillor Michael Cook of COSLA added that the duty meant that " …equally important balancing considerations, whether they are social or environmental, are potentially subverted."[84]

100. Those in favour of a sustainable development duty included the Scottish Property Federation who indicated that its members would " …support a statutory presumption in favour of sustainable development as one of the most objective ways to stimulate sustainable economic growth."[85]

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

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

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

> " …the Scottish Government and regulators in Scotland value economic growth and protection of the environment. Those need not be mutually exclusive; we can, and should, aspire to deliver mutually supportive outcomes wherever possible."[89]

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

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

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[83] RSPB Scotland, *written submission*, page 2, June 2013.
[84] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2945.
[85] Scottish Property Federation, *written submission*, page 3, June 2013.
[86] Scottish Land and Estates, *written submission*, page 2, June 2013.
[87] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3100.
[88] RACCE Committee Report, page 14, paragraphs 70-72.
[89] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3181.

recommend that the Scottish Government ensures that its definition of this term is explicitly stated and explained in subsequent guidance and that, furthermore, it gives a commitment that drafts of this guidance are submitted to the Parliament for scrutiny prior to being issued by Scottish Ministers.[90]

Reporting on the duty

106. The Committee heard from some regulators that they already follow statutory duties to report on either sustainable economic growth or sustainable development and therefore the new duty was either unnecessary or would cause confusion. OSCR in its written evidence said that it " …already reports on sustainable economic growth as required by Section 31 (1) (a) of the Public Services (Scotland) Act 2010."[91]

107. Whilst Roger Burton of SNH said that "There is a lack of clarity over the potential overlap between the new duty and our existing duty to report on sustainable development, and I am not entirely clear how we would tease those apart."[92]

Enforcement of the duty

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

109. The Scottish Retail Consortium said that guidance would be inappropriate as it has no statutory basis, warning that "There is also little guarantee that a regulator, when discharging its duties, will even observe the guidance."[93]

110. Section 4 (4) states that the duty does not apply to a regulator which is already subject to a duty to the same effect as that mentioned in that subsection. SCDI cautioned that "As sustainable economic growth is not defined within the legislation, duties of 'the same effect' are open to interpretation."[94]

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

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

[90] Agreed to by division: For 6 (Chic Brodie, Mike Mackenzie, Marco Biagi, Mark McDonald, Dennis Robertson and Murdo Fraser), Against 3 (Alison Johnstone, Margaret McDougall and Hanzala Malik).
[91] Office of the Scottish Charity Regulator (OSCR), *written submission*, page 3, May 2013.
[92] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2933.
[93] Scottish Retail Consortium, *written submission*, page 2, June 2013.
[94] SCDI, *written submission*, page 2, June 2013.

comprehensive and will clearly define what is expected of regulators in relation to their duties under section 4."[95]

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

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

Parliamentary scrutiny

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

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

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

116. Roger Burton of SNH said that the code of practice had a significant role to play in " …defining how to deal with local decisions that need to properly reflect local circumstances in national standards."[96] Whilst Susan Love of the FSB said that there was an issue with " …the parameters of the duty and the extent to which the code of practice will sort those out and reach a suitable conclusion."[97]

117. In its report, the RACCE Committee indicated that it was " …disappointed in the lack of available information in relation to both section 4 and the proposed code of practice provided for by section 5" [98] and its intention to consider taking " …evidence from stakeholders and the Minister with a view to submitting a formal response to the Scottish Government prior to the draft code being finalised and laid before Parliament."[99]

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

[95] RACCE Committee Report: Page 15, paragraph 78.
[96] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2920.
[97] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3058.
[98] RACCE Committee Report: page 16, paragraphs 83 and 85.
[99] RACCE Committee Report: page 18, paragraph 96.

respect of carrying out the sustainable economic growth duty will not, stating that it had—

> " …some concerns as to this assimilation of the contents of matters which regulators will need to have regard to, between 2 documents to which quite different levels of Parliamentary scrutiny will apply (with none at all proposed in the case of the section 4 guidance)."[100]

119. It recommended that " …both the section 4 guidance and the section 5 code of practice must be published, on issue and when any revisions are made".[101]

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

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

Code of practice: procedure

122. The Policy Memorandum states that "The code is to be developed collaboratively with business representatives, public bodies, regulators and COSLA".[102]

123. Trisha McAuley of Consumer Futures raised a concern that it " …does not mention collaborating with people who represent consumer interests and citizen interests" adding that there is a need to " …ensure that communities are properly consulted".[103]

124. Whilst in its written evidence, the Centre for Water Law, Policy and Science at the University of Dundee said that "We would like to see (as in all cases where consultation is required by statute) a general requirement to consult the public."[104]

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

[100] DPLR Committee Report: page 9, paragraph 48.
[101] DPLR Committee Report: page 9, paragraph 49.
[102] Policy Memorandum: page 2, paragraph 8.
[103] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3001.
[104] Centre for Water Law, Policy and Science – University of Dundee, written submission, page 2, May 2013.

" …consult her [Ms McAuley] and her colleagues prior to the finalisation of the code and get her views on that extremely important matter."[105]

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

Section 7: Power to modify list of regulators

Selection of regulators included

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

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

129. Some witnesses questioned why the Scottish Government and its agencies were not included in the list of regulators. In its written submission, Scottish Land and Estates noted that Historic Scotland had been removed from the list of regulators as it does not have a legal identity which is separate from Scottish Ministers and requested clarity on " …what proposals there are to ensure that the same objectives can be achieved by other means for such regulatory bodies within the Scottish administration which are not separate legal identities?"[106]

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

131. The Minister for Energy, Enterprise and Tourism confirmed that neither would be subject to the new duty, explaining that in relation to planning authorities stating that " …we think that the application of the bill to planning authorities is not the appropriate way to deal with matters, because sustainable economic growth is already a consideration that is enshrined in planning law."[107]

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

[105] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3196.
[106] Scottish Land and Estates, *written submission*, page 2, June 2013.
[107] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3179.

partnership discussion instead of something on which an individual minister would simply come to a view."[108]

133. In evidence to the Committee, the Minister for Energy, Enterprise and Tourism clarified that "We would certainly consult COSLA and all other relevant bodies were we minded to consider using that power."[109]

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

[108] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2959.
[109] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3197.

PART THREE - MISCELLANEOUS

Section 40: Marine licencing decisions

Statutory appeal mechanism

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

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

137. In written evidence, the Right Honourable Lord Gill, Lord President of the Court of Session, stated that "In my view, it is desirable that there should be one, uniform type of remedy available from the Court of Session against decisions on infrastructure projects. The remedy should not depend on the type of project."[110]

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

139. Professor Colin Reid of the University of Dundee highlighted that "There has been a missed opportunity for joined-up thinking across government in relation to reform of the civil justice system, both courts and tribunals, and our compliance with the Aarhus Convention."[111] RSPB Scotland agreed, adding that there was " …a real need for a joined-up approach to judicial reform."[112]

140. Others suggested that existing legislation be used instead, with the Law Society of Scotland suggesting awaiting the outcome of the current consultation on the Courts Reform (Scotland) Bill and proposed reform of the tribunals system in terms of the Tribunals (Scotland) Bill and suggested that the " …Scottish Parliament considers giving guidance to the Scottish Government as to the inclusion of environmental permitting and appeals into the reforms to administrative law currently under consideration."[113]

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

[110] The Right Honourable Lord Gill, Lord President of the Court of Session, *written submission*, page 3, May 2013
[111] Professor Colin Reid, *written submission*, page 4, May 2013.
[112] RSPB Scotland, *written submission*, page 3, June 2013.
[113] The Law Society of Scotland, *written submission*, page 3, June 2013.

have still to be brought in and we need to find out whether or not they actually work."[114]

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

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

Six week appeal time limit

144. Any statutory appeal to a decision made by Scottish Ministers under the proposed inclusion of section 63A into the Marine (Scotland) 2010 Act, must be made within six weeks. In the Policy Memorandum it states that this will " …involve less time and expense in court " and that subsequently it " …would lead to quicker final decisions".[115]

145. The Committee heard conflicting views on the merits of a six week appeal time limit being introduced, with SCDI in favour saying that it "…provides a means of improving consistency between onshore and offshore development",[116] but adding that further detail on how this would work was required, asking " …who will pay for appeals, and if unsuccessful is there any recompense for unnecessary delays?"[117]

146. Frances McChlery told the Committee that whilst the Law Society of Scotland was content with the proposed timescale, she cautioned that " …any challenger only knows whether they have a case when they get the decision in their hand".[118]

147. Aedán Smith of RSPB Scotland raised a concern that the six week appeal time limit would impact on the ability of small businesses and individuals to appeal a decision as they " …are not necessarily so well equipped to get engaged with the issues."[119]

148. In contrast, Richard Escott of SSE told the Committee that the new appeal process would prolong decision making, as "…appeals could still be brought forward via Judicial Review".[120] Adding that a parallel appeals process would

[114] Economy, Energy and Tourism Committee, *Official Report,* 19 June 2013, Col 3066.
[115] Policy Memorandum: page 7, paragraph 37.
[116] SCDI, *written submission*, page 2, June 2013.
[117] SCDI, *written submission*, page 3, June 2013.
[118] Economy, Energy and Tourism Committee, *Official Report,* 26 June 2013, Col 3096.
[119] Economy, Energy and Tourism Committee, *Official Report,* 26 June 2013, Col 3096.
[120] SSE, *written submission*, page 1, June 2013.

create uncertainty for SSE and recommending instead a " …single appeals process that covered the entire consenting process."[121]

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

Section 41: Planning authorities' functions: charges and fees

Measuring performance

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

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

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

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

154. In the Financial Memorandum, it states that "One of the desired outcomes of linking fees to performance is to deliver an efficient and effective planning system that eliminates undue delay."[122] This gave stakeholders the impression that time taken to process applications would continue to be the main method for measuring planning authority performance.

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

[121] Economy, Energy and Tourism Committee, *Official Report,* 26 June 2013, Col 3094.
[122] Financial Memorandum: page 32, paragraph 47.

stated that "…time is only one indicator of performance and a more comprehensive performance measurement framework is needed."[123]

156. Nancy Jamieson of Heads of Planning Scotland told the Committee that the system of performance recording is "crude" and that "There are many reasons for delays in the planning system. Sometimes it is difficult to get the big picture if we look just at bald statistics."[124] Whilst UNISON Scotland indicated that "Delays are due to underfunding and heavy workloads. Members also point out that there is a range of community planning partners involved in the process. There are no proposals to introduce carrots or sticks for these organisations."[125]

157. Malcolm Fraser of Malcolm Fraser Architects highlighted the importance of accurate performance data, saying that "Challenging the figures and ascertaining how to get figures that accurately reflect how many applications planning departments, as opposed to applicants, are not dealing with in time would be a good, simple, straightforward output for the committee."[126]

158. Garry Clark of the Scottish Chambers of Commerce agreed, adding that currently " …it is difficult to compare performance between different planning bodies. That will have to be squared before the new rules can really bite."[127]

159. A number of witnesses raised potential unintended consequences of focussing on outputs rather than outcomes. In its written submission, SCDI warned that measuring time taken could " …create false incentives to prioritise speed over optimal results."[128] Malcolm Fraser of Malcolm Fraser Architects agreed, providing the Committee with the following example of how a planning authority could meet a time target by turning down an application and inviting a second one, saying that "A planning authority then has the great benefit of deciding on two applications on time."[129]

160. SEPA was concerned that a consequence could be that they are " …asked to respond to poorer quality consultations with inadequate supporting information which in turn could lead to delay and additional cost".[130]

161. An issue for a number of witnesses was that prioritising speed could impact on the quality of the decisions made. Both Councillor Cook of COSLA and David Cooper of Aberdeenshire Council stressed that the quality of planning decisions was critical, saying that " …in our view, the important thing is quality decision making"[131] and that whilst there are a multitude of reasons for time taken

[123] Audit Scotland, Modernising the Planning System Report, page 22.
[124] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3010.
[125] UNISON Scotland, *written submission*, page 4, June 2013.
[126] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3013.
[127] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2916.
[128] SCDI, *written submission*, page 3, June 2013.
[129] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 3009.
[130] SEPA, *written submission*, page 2, June 2013.
[131] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2960 - Councillor Cook of COSLA.

" …it is far better to get an application properly assessed, taking on board objectors' views, rather than rush it through."[132]

162. Whilst Dave Watson of UNISON Scotland highlighted that planners have a responsibility to balance both community and commercial interests, which were not reflected in the Bill, telling the Committee that "If you read the planning sections of the bill, you would think that the only customers of a planning department are developers, when, in fact, the customers are us–the community."[133]

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

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

> "It might be more appropriate to include a definition in guidance or in another vehicle–perhaps a statutory instrument–but one would not necessarily legislate for performance. I propose the same in this context."[136]

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

> "There are markers of good performance that are based on the planning performance framework. Those pose a number of questions on timescales, offering of processing agreements, pre-application consultation for major applications and whether a plan is less than five years old, which is a statutory requirement. There is a range of indicators."[137]

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

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

[132] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2963 - David Cooper of Aberdeenshire Council.
[133] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 2979.
[134] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3023.
[135] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3108.
[136] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3186.
[137] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3185.

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

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

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

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

Linking fees to performance

170. The Policy Memorandum states that the recent planning fee increase of 20 percent was in " …recognition of the resource pressures faced by planning authorities" and that this increase should be linked to performance as "Scottish Ministers want to be sure that increased funding through increases in planning application fees leads to improved planning performance by authorities."[138]

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

172. Those in favour of linking fees to performance were mainly from the business sector. David Watt of the Institute of Directors told the Committee that in his view "…the number 1 problem with planning is delay."[139]

173. Other witnesses from the business sector, such as the Scottish Property Federation, Scottish Land and Estates and the Royal Institute of Architects Scotland respectively, told the Committee that they wished to see an improved service for the increased fees that they were paying, saying that " …increases in planning fees should be related to a tangible improvement in the performance of the planning system",[140] " …it is important that there is a clear connection between quality of service/performance of the Planning Authority and the level of fee paid by the applicant",[141] and of the need to establish " …a legislative link

[138] Policy Memorandum: page 8, paragraph 38.
[139] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3061.
[140] Scottish Property Federation, *written submission*, page 1, June 2013.
[141] Scottish Land and Estates, *written submission*, page 3, June 2013.

between planning fees and performance"[142] to ensure that necessary changes were made.

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

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

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

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

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

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

> "A 20 per cent fee increase was a big ask. It will get more resources into the system, but we have to be serious about performance and I believe that that mechanism will be a driver to improvement."[148]

180. In its written evidence, UNISON Scotland stated that the performance management of planning authorities is " …the role of democratically elected councillors"[149] and in a letter to the Committee, COSLA described the measure

[142] Royal Incorporation of Architects in Scotland, *written submission*, page 1, June 2013.
[143] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3108.
[144] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3064.
[145] Scottish Land and Estates, *written submission*, page 3, June 2013.
[146] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3074.
[147] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3015.
[148] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3185.
[149] UNISON Scotland, *written submission*, page 4, June 2013.

as " …fundamentally too much Ministerial interference in the operations of a specific council service."

181. In response, the Minister for Local Government and Planning disputed this view stating that planning was an " …area in which the Scottish Government has clear responsibility, and given that every planning application in the country could be determined by the minister."[150]

Resource implications

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

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

184. Alison Polson of Planning Aid for Scotland told the Committee that " …there is a broader resourcing issue".[151] Whilst, Nancy Jamieson of Heads of Planning Scotland said that "…we seriously need to look at the resourcing of planning authorities" and highlighted the current gap between the level of fees and the cost of processing applications, indicating that—

> " …in some major applications there is a huge gap. We need to address that by restructuring fees so that we can fund both the pre-application advice–which at the moment we in Scotland do not charge for–and the actual processing of the application."[152]

185. Colin Smith of the RICS agreed, adding that "If we are to have a system that focuses resources on major applications, which of course have the biggest economic, social and design impact, I think that there is a reasonable case for having differential fees to reflect the resources that planning authorities require to put into that work."[153]

186. In response to questions on the costs to planning authorities of processing applications, the Minister for Local Government and Planning told the Committee that whilst this data was not currently available "We are working in partnership with Heads of Planning Scotland to establish the cost of planning applications and to take that work forward as best we can."[154]

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

[150] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3188-89.
[151] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3019.
[152] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3008 and 3019
[153] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3021.
[154] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3184.

and outcomes, and there will be no loss of income because planning authorities will step up to the plate."[155]

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

Impact on performance

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

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

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

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

Impact on services

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

> "A good system of permitted development, pre-application consultation and elected member engagement, as well as confidence in the system at the outset and a bit of certainty, are all key ingredients of a high-quality well-performing planning system."[161]

[155] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3187.
[156] The Law Society of Scotland, North Lanarkshire Council, East Renfrewshire Council.
[157] East Renfrewshire Council, *written submission*, page 1, June 2013.
[158] North Lanarkshire Council, *written submission*, page 1, May 2013.
[159] The Law Society of Scotland, *written submission*, page 8, June 2013.
[160] Federation of Small Businesses, *written submission*, page 5, June 2013.
[161] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3192.

194. However, a key concern raised during the evidence sessions was that a reduction in income would lead to a planning authority reducing the range of services provided. Alistair MacDonald of RTPI Scotland warned that "The resources that go into the pre-application process might just disappear."[162]

195. Nancy Jamieson of Heads of Planning Scotland explained that "Over the years, more has been added to the planning system, and it is difficult to do all those extra things and speed up the process at the same time."[163]

196. The Committee heard that the pre-application process in particular was invaluable, with Colin Smith of RICS stating that it can improve the quality of a planning application as it " …can raise and deal with issues and engage with the community, societies and everyone else to ensure that what is ultimately submitted is as well thought through as possible."[164]

197. Whilst Alison Polson of Planning Aid for Scotland told the Committee that it was vital to continue to engage with communities to ensure that they understood applications, saying that "If people do not get that chance, the risk is that there will be more challenges that have to go through the system."[165]

198. There were environmental concerns raised by Aedán Smith of RSPB Scotland who cautioned that reduced resources could impact on the planning authority's " …capacity to carry out environmental protection roles"[166] and Scottish Environment LINK who thought that it could " …increase the pressure on authorities to grant permission before an application has been fully assessed, potentially resulting in significant detrimental environmental impacts and possible breaches of legislation such as the Habitats Regulations."[167]

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

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

[162] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3022.
[163] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3023.
[164] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3021.
[165] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3024.
[166] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3107.
[167] Scottish Environment LINK, *written submission*, page 4, June 2013.

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

Alternative approaches to improving performance

202. The Business and Regulatory Impact Assessment (BRIA), states that should planning fees be linked to performance "The Scottish Government would work in partnership with planning authorities to ensure that every opportunity to support improved performance had been taken before a change to the level of planning fee was introduced."[168]

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

204. Colin Smith told the Committee that whilst RICS supported reduced fees for " …persistent poor performance and lack of effort to improve", he thought that it was far better to " …reward good performance, best practice and delivery, and there are a lot of good examples of that in our experience and from elsewhere."[169]

205. Whilst the Scottish Property Federation and UNISON Scotland respectively suggested the use of a peer group " …drawn from high performing local authorities or a central government resource that could assist a poorly performing authority to improve its processes,"[170] and which could " …encourage better liaison, more sharing of best practice." [171]

206. Frances McChlery of the Law Society of Scotland suggested that "…the Government should send somebody or a number of people in to sort it out. That is more constructive than removing resources from it." [172] Whilst Gareth Williams of SCDI recommended the use of " …a link between certain milestones being achieved through the process and overall customer satisfaction"[173] and Andy Myles of Scottish Environment LINK thought that single outcome agreements " … might be a much better mechanism for improving performance."[174]

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

[168] Business and Regulatory Impact Assessment (BRIA), page 18.
[169] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3025.
[170] Scottish Property Federation, *written submission*, page 3, June 2013.
[171] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 2994.
[172] Economy, Energy and Tourism Committee, *Official Report*, 26 June 2013, Col 3107.
[173] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3062.
[174] Economy, Energy and Tourism Committee, *Official Report*, 19 June 2013, Col 3062.

period of probing to understand the range of factors–some of which might be outwith the planning authorities' control–and to allow an opportunity for improvement." [175]

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

Section 42: Application for street traders' licences: food businesses

Street traders' licences

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

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

211. The STUC in its written submission warned that the proposal could " …lead to regulatory arbitrage i.e. businesses seeking out the local authority area with perceived weakest regulation" and advised that "In order to avoid this occurring it will be necessary for each LA to retain the right to inspect any business operating in their area."[176]

212. In its written evidence, The Royal Environmental Health Institute (REHIS) agreed, adding that "This must not, however, prevent another food authority, within which the vehicle, kiosk or moveable stall is trading, from inspecting the vehicle kiosk or moveable stall and taking appropriate action if necessary."[177]

213. David Cooper of Aberdeenshire Council, also agreed and asked that this be explicitly outlined in the Bill, saying that "If something can be built into the legislation that still allows the authority in whose area a business is operating to carry out inspections, we will be happy with that."[178]

214. Whilst welcoming the proposal, UNISON Scotland were concerned that "Currently the government is planning to set up a new food standards body and UNISON is concerned that this Bill is not properly co-ordinated with that proposal."[179]

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

[175] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col 3190.
[176] STUC, *written submission*, page 3, June 2013.
[177] REHIS, *written submission*, page 2, June 2013.
[178] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2968.
[179] UNISON SCOTLAND, *written submission*, page 3, June 2013.

confirm whether local authorities will retain the right to inspect mobile food businesses operating within their area and that the policy is co-ordinated with its proposal for a new food safety and standards body.

MISCELLANEOUS ISSUES

Stage 2 amendments – indications to date from the Scottish Government

Primary Authority Partnerships

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

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

218. The Committee heard evidence both for and against adopting primary authority partnerships in Scotland. David Martin of the Scottish Retail Consortium told the Committee that Primary Authority Partnership should be underpinned by statute, as it is "… a business-led solution which does provide greater assurance of compliance and would better facilitate more of a risk-based approach to enforcement."[180]

219. Whilst Stephen Boyd of the STUC said that the RRG had seen little hard evidence about how Primary Authority Partnerships " …benefited companies in practice"[181] and warned of the unintended consequence that "Over time, companies might gravitate towards local authority areas where regulation is regarded as being less stringent."[182]

220. In evidence to the Committee, the Minister for Energy, Enterprise and Tourism indicated the Scottish Government's intention to lodge a Stage 2 amendment and gave a commitment to provide " … more detail after our analysis of the responses that we have received has been completed. I will do my best to provide more detail, if I can, prior to stage 2."[183]

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

Policy and Financial Memoranda

222. The lead committee is required under Rule 9.6.3 of Standing Orders to report on the Policy Memorandum which accompanies the Bill.

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[180] Scottish Retail Consortium, *written submission*, page 4, June 2013.
[181] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3005.
[182] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3005.
[183] Economy, Energy and Tourism Committee, *Official Report*, 11 September 2013, Col. 3197.

223. **RECOMMENDATION 16: We consider that the Policy Memorandum provides adequate detail on the policy intention behind the provisions in the Bill.**[184]

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

225. **RECOMMENDATION 17: We are content with the consultations carried out by the Scottish Government prior to introducing the Bill.**[185]

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

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

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

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

230. Whilst Councillor Cook of COSLA said that "The expectation that has been created around the memorandum of understanding is that there will be discussion with the Scottish Government about anticipated cost impacts as a result of something that the Government wants to bring forward."[190]

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

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

[186] Financial Memorandum: page 24, paragraphs 7 and 9.

[187] The written submissions received by the Finance Committee are available on the Parliament's website at:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/66030.aspx

[188] Economy, Energy and Tourism Committee, *Official Report*, 29 May 2013, Col 2925-26.

[189] Economy, Energy and Tourism Committee, *Official Report*, 12 June 2013, Col 3005-06.

[190] Economy, Energy and Tourism Committee, *Official Report*, 5 June 2013, Col 2951.

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

PART FOUR – GENERAL

Delegated powers in the Bill

Subordinate legislation

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

233. In relation to the provisions for planning authorities' functions: charges and fees the Explanatory Notes state that "Section 41 also removes subsections (5) and (6) so that all regulations made under section 252 [Town and Country Planning (Scotland) Act 1997] are subject to negative parliamentary procedure."[191]

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

> " …that the Scottish Government has not provided sufficient justification to it for the provision in section 41(c) that all regulations made under section 252 of the Town and Country Planning (Scotland) Act 1997 in connection with planning fees and charges should be subject to the negative procedure, or why the level of scrutiny enacted in the Planning etc. (Scotland) Act 2006 should be departed from."[192]

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

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

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

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

[191] Explanatory Notes: page 18, paragraph 90.
[192] DPLR Committee Report: page 9, paragraphs 109 – 110.

provision for different purposes and (b) incidental, supplemental, consequential, transitional, transitory or saving provisions.

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

> " …potentially wide and uncertain scope of the power in section 44(1) to make supplemental provision, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill. Section 1(1) enables Ministers to make any provision they consider will encourage or improve consistency in the exercise by regulators of regulatory functions. Section 10 enables regulations which make provision for any of the many purposes set out in Schedule 2. Those powers would be wide and to some extent uncertain in their possible scope, without adding a further power to make supplemental provisions."[193]

Ancillary provision

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

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

> " …potentially wide and uncertain scope of the power in section 45 to make supplemental provisions in an order under the section, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill."[194]

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

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

[193] DPLR Committee Report: page 9, paragraphs 112 and 114.
[194] DPLR Committee Report: page 9, paragraphs 115 and 116.

GENERAL PRINCIPLES OF THE BILL

General principles of the Bill

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

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

EXTRACTS FROM MINUTES OF THE ECONOMY, ENERGY AND TOURISM COMMITTEE

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

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

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

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

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

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

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

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

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

Riddell Graham, Director of Partnerships, VisitScotland;

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

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

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

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

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

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

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

Jim Galloway, Service Manager, Economic Development, City of Edinburgh Council.

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

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

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

Stephen Boyd, Assistant Secretary, STUC;

Fraser Kelly, Chief Executive, Social Enterprise Scotland;

Trisha McAuley, Director for Scotland, Consumer Futures;

Dave Watson, Scottish Organiser, UNISON Scotland;

Malcolm Fraser, Director, Malcolm Fraser Architects;

Nancy Jamieson, Vice-Convener, Heads of Planning Scotland,

Development Management Sub Committee;

Alistair MacDonald, Convenor, Royal Town Planning Institute Scotland;

Alison Polson, Brodies LLP, representative for Planning Aid for Scotland;

Colin Smith, Director, Turley Associates, representative for the Royal Institution of Chartered Surveyors.

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

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

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

Susan Love, Policy Manager for Scotland, Federation of Small Businesses;

Andy Myles, Parliamentary Officer, Scottish Environment LINK;

David Watt, Executive Director, Institute of Directors Scotland;

Gareth Williams, Head of Policy, The Scottish Council for Development and Industry.

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

David Martin, Head of Policy, Scottish Retail Consortium;

Belinda Oldfield, Regulation General Manager, Scottish Water;

Paul Waterson, Chief Executive, The Scottish Licensed Trade Association.

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

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

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

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

Frances McChlery, Solicitor, Law Society of Scotland;

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

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

Food Standards Agency in Scotland;

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

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

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

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

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

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

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

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

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

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

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

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

Note of divisions in private:

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

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

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

but retains concerns that the duty to contribute to sustainable economic growth will dilute regulators' ability to deliver their primary functions and risk greater litigation of regulatory decisions.

ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE TO THE ECONOMY, ENERGY AND TOURISM COMMITTEE

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

Written Evidence
- Office of the Scottish Charity Regulator (OSCR)
- Regulatory Review Group
- Scottish Natural Heritage
- VisitScotland

Oral Evidence

Supplementary Evidence
- Scottish Natural Heritage
- Professor Russel Griggs – Chair of the Regulatory Review Group

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

Written Evidence
- Convention of Scottish Local Authorities (COSLA)

Oral Evidence

Supplementary Evidence
- Aberdeenshire Council
- COSLA
- COSLA – July 2013

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

Written Evidence
- Planning Aid for Scotland
- Royal Institution of Chartered Surveyors (RICS)
- Royal Town Planning Institute Scotland
- Scottish Trades Union Congress
- UNISON

Oral Evidence

Supplementary Evidence
- UNISON
- UNISON – July 2013

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

Written Evidence

Federation of Small Businesses
Scottish Environment LINK
Scottish Council for Development and Industry
Scottish Water
Scottish Retail Consortium

Oral Evidence

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

Written Evidence
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Law Society of Scotland
Food Standards Agency in Scotland
Royal Environmental Health Institute of Scotland
Royal Society for the Protection of Birds Scotland

Oral Evidence

Supplementary Evidence
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Written Evidence
Scottish Government

Oral Evidence

SUBMISSION FROM THE OFFICE OF THE SCOTTISH CHARITY REGULATOR

1. Introduction

The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') as a Non-Ministerial Department (NMD) forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,500 charities registered in Scotland.

OSCR has been asked to give evidence to the Scottish Parliament Economy, Energy and Tourism Committee on 29 May 2013 on the Regulatory Reform (Scotland) Bill (the Bill). The Committee is particularly interested in how the provisions in Part 1 of the Bill will impact on OSCR.

This evidence outlines the view we intend to discuss at the Committee on 29 May 2013. In forming our view we have considered our overall vision, which is for *charities you can trust and that provide public benefit*, underpinned by the effective delivery of our regulatory role.

2. Part 1 – Regulatory Functions

The primary purpose of the Scottish Government's Bill is to improve the way regulation is developed and applied, creating more favourable business conditions and delivering benefits for the environment. Part 1 of the Bill deals with Regulatory Functions and is split into four parts:

1. Regulations to encourage or improve regulatory consistency
2. Compliance and enforcement
3. Exercise of regulatory functions: economic duty and code of practice
4. Power to modify list of regulators.

The Bill, in particular Part 1, does not specifically address our regulatory focus of charity regulation. However, we would clearly agree with the principle underlying Part 1, that of encouraging or improving regulatory consistency.

In fact the 2005 Act already embodies many of the principles set out in Part 1. Section 1(9) of the 2005 Act provides that OSCR must in performing its functions, have regard to the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed. This is identical with the principles set out at section 6(3) (a) of the Bill.

In considering the impact of the Bill, OSCR has views in two areas:

1. the proposed powers to allow Ministers to make regulations in respect of how OSCR undertakes its functions
2. the economic duty

2.1 Ministerial regulation-making powers

Part 1 of the Bill states a number of powers in respect of Ministers making regulations that they consider will encourage or improve consistency in the exercise by regulators of regulatory functions.

OSCR is a single national regulator and the legislation in force already requires us to carry out our functions having regard to the principle of consistency. As we understand it, the Bill aims to improve consistency in regulation as between different authorities carrying out a similar regulatory function in different geographical areas. There are no local variations in how we perform our functions of the kind that may occur for other regulators listed such as local authorities. It is not clear therefore how directly the intention underlying this provision applies to OSCR.

It is worth emphasising that the 2005 Act already provides Ministers with regulation or order-making powers with regard to over twenty aspects of OSCR's activities[1]. The existing legislation therefore gives Ministers very direct and well-defined mechanisms to specify how OSCR should carry out its key functions, and these powers are specific to charity regulation.

Ministers have already used these powers in ways which have been welcomed (by OSCR and the charity sector) as deregulatory, most recently in the Charities Reorganisation (Scotland) Amendment Regulations 2012. It is not clear to OSCR what a more open-ended regulation-making power would achieve beyond the powers Ministers already have.

In the context of the 2005 Act there are sections dealing with fundraising and the regulation of public benevolent collections (sections 85 and 86) whereby local authorities, not OSCR, have powers to determine the application process and consent and refuse. These regulations are not in force, however local variation in the operation of this process is a possibility, and OSCR would seek to encourage consistency in process. Therefore, we can see the advantage for regulations of this nature in cases such as this.

Finally, turning to the Compliance and enforcement regime set out in section 3 of the Bill, OSCR is a Non-Ministerial Department (NMD). This status was agreed following consultation with stakeholders who stressed that OSCR should be seen and be seen to be independent from Ministers. Being a NMD with a non-executive Board and accountable to Parliament ensures that Ministers cannot direct our operational or strategic decisions. There may be a concern that an open-ended power of direction as set out in Part 1 may give rise to a perception that Ministers can direct OSCR in a way that is not consistent with the intentions underlying its establishment.

2.2 Economic Duty

Section 4 of Part 1 places a duty on listed regulators to *'contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so'*. Clearly, through effective regulation we can create an environment whereby there is a well regulated and managed charity sector, and this will have an impact on the achievement of the economic duty.

[1] Full list is supplied at Appendix 1

However, this duty will not always be particularly relevant as the charity sector is very diverse: some types of charity such as those furthering rural or urban regeneration may have a very direct and measurable impact on sustainable economic growth; other areas of charitable activity (advancement of religion or of human rights), while providing public benefit in equally valid ways, have a far less direct, let alone measurable, impact on sustainable economic growth.

OSCR already reports on sustainable economic growth as required by Section 31 (1) (a) of the Public Services (Scotland) Act 2010. This information is published annually on our website.

3. Overall

Mechanisms to achieve many of the aims underlying the Bill as far as they are relevant to OSCR are already present in existing legislation. It may be worth considering therefore how relevant and what the benefits are of including OSCR in Schedule 1 of this Bill.

However, should it be decided that we remain on Schedule 1 we would seek to engage with the Bill's aims and specifically in reference to Part 1 (section 6) be involved in the development of any Code of practice that informs how we work to achieve these.

Office of the Scottish Charity Regulator
May 2013

Appendix 1 – Summary of Ministers Regulation or Order Making powers within 2005 Act

Section 3 (3) (f)
Scottish Charity Register - any other information in relation to the charity which the Scottish Ministers by regulations require to be set out in the Register

Section 6 (1)
Applications: further procedure
This section has no associated Explanatory Notes
(1)The Scottish Ministers may by regulations make such further provision in relation to the procedure for applying and determining applications for entry in the Register (including applications under section 54(1), 56(1) and 59(1)) as they think fit.

Section 7 (4) (b) & (5)
The charity test
(4) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if—

(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities

(5) The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (4) in relation to any body or type of body specified in the order. (Ministerial Control)

Section 15 (1)
References in documents
(1) The Scottish Ministers may by regulations require each body entered in the Register to state, in legible characters—

(a)that it is a charity,

(b)such other information as may be specified in the regulations, on such documents issued or signed on behalf of the charity as may be so specified.

Section 19 (4) and (8)
Removal from Register: protection of assets
(4) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any property or income which a body removed from the Register is required to apply in accordance with subsection (1).
(8) An order under subsection (8) may make provision in relation to particular items or types of property or in relation to property owned by particular persons

Section 23 (2) and (3)
Entitlement to information about charities
(2) A charity may charge such fee as it thinks fit for complying with such a request; but such a fee must not exceed the cost of supplying the document requested or, if less, any maximum fee which the Scottish Ministers may by order prescribe.
(3) The Scottish Ministers may by order exempt from the duty set out in subsection (1) any charities which meet such criteria as may be specified in the order.

Section 25 (2)
Removal of restrictions on disclosure of certain information
(2)The Scottish Ministers may, by order, designate—

(a)for the purposes of paragraph (a) of subsection (1), any public body or office-holder in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom,

(b)for the purposes of paragraph (b) of that subsection, any Scottish public authority with mixed functions or no reserved functions, and references in that subsection to a "designated body" are to be construed accordingly.

Section 35 (1)
Transfer schemes
(1) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any assets of—

(a) another charity,

(b) a body which is controlled by a charity (or by two or more charities, when taken together),

(c) a body which is not a charity but which is or has been representing itself as a charity.

Section 38 (1)
Delegation of functions
(1) It is for the Scottish Ministers to exercise OSCR's functions under sections 28 to 35 (other than section 30), and any of its general functions relating to those provisions, in so far as they are exercisable in relation to—

(a) charities which are registered social landlords,

(b) bodies controlled by any such charity (or by two or more such charities, when taken together), and

(c) persons acting for or on behalf of any such charity or body.

Section 38 (7)
Delegation of Functions
(7) Subsection (1) does not prevent OSCR from authorising, under subsection (2), the Scottish Ministers to exercise functions in relation to a person other than a registered social landlord.

Section 39 (2)
Reorganisation of charities: applications by charity
(2) The Scottish Ministers may by regulations make such provision as they think fit in relation to the procedure for applying for and determining applications under this section.

Section 44 (4)
Accounts
(4) The Scottish Ministers may by regulations make provision about the matters referred to
in subsection (1) including—

(a) the meaning of "financial year",

(b) the information to be contained in the accounting records and statement of account,

(c) the manner in which that information is to be presented,
(d) the keeping and preservation of the accounting records,
(e) the methods and principles according to which, and the time by which, the statement of account is to be prepared,
(f) the time by which the copy statement of account is to be sent to OSCR,
(g) examination or audit of the statement of account,
(h) such other matters in relation to the accounts of a charity as the Scottish Ministers think necessary or expedient.

Section 48 (1)
Dormant accounts of charities: procedure and interpretation
(1) The Scottish Ministers may, by regulations, make provision as to—
(a) the procedure to be followed by OSCR under section 47,
(b) the extent to which OSCR, in transferring an amount under subsection (3) of that section, may retain a sum in respect of its expenses in exercising its functions under that section.

Section 50 (3)
Constitution and Powers
(3) A SCIO's constitution must also provide for such other matters, and comply with such requirements, as are specified in regulations made by the Scottish Ministers.

Section 52 (1)
Name and Status
(1) The name of a SCIO must appear in legible characters on—
(a) such documents issued by or on behalf of the SCIO,
(b) such documents signed by or on behalf of the SCIO,as may be specified in regulations made by the Scottish Ministers.

Section 64
Regulations relating to SCIOs
The Scottish Ministers may by regulations make further provision in relation to SCIOs including, in particular, provision about—
(a) applications for constitution as, or conversion into, a SCIO, the determination of applications, entry in the Register and the effect of such entry,
(b) the administration of a SCIO,
(c) amalgamation of SCIOs and transfer of a SCIO's property, rights and liabilities to another SCIO,
(d) the winding up, insolvency or dissolution of a SCIO,
(e) the maintenance of registers of information about SCIOs (for example, registers of members, of charity trustees or of charges over the SCIO's assets),
(f) such other matters in connection with the provision made by this Chapter as they think fit.

Section 75 (1)
Scottish Charity Appeals Panel
(1) The Scottish Ministers must, from time to time, constitute a panel to be known as the Scottish Charity Appeals Panel (in this Act referred to as "the Panel") to exercise functions conferred on it by section 76.

Section 83 (1)
Regulations about fundraising
(1) The Scottish Ministers may, after consulting such persons as they think fit, make regulations—

(a) about the solicitation by professional fundraisers of money or promises of money for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes,

(b) about representations made by commercial participators in relation to benevolent contributions,

(c) generally for or in connection with regulating benevolent fundraising by benevolent fundraisers.

Section 86 (10)
Local authority consents
The Scottish Ministers may, by regulations, disapply the duty to consult under subsection (2) in relation to applications of such type as they may describe in the regulations.

Section 90 (1)
Regulations relating to public benevolent collections
(1) The Scottish Ministers may, by regulations, make further provision for the purpose of regulating public benevolent collections.

Section 91 (1)
Collection of goods
(1) The Scottish Ministers may, by regulations, make provision about the collection from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

Section 97 (1)
Financial assistance for benevolent bodies
(1) The Scottish Ministers may make such payments as they think fit to—

(a) any benevolent body, in connection with its activities,

(b) any person, in connection with anything done by that person with a view to enabling one or more benevolent bodies, benevolent bodies of a particular type or benevolent bodies generally to implement their purposes to better effect.

Section 99 (3)
Population of Register etc.
(3) The Scottish Ministers may by order—

(a) disapply section 3(3) in so far as it would otherwise apply to any body entered in the Register under subsection (1) for such period ending no later than 18 months after the commencement of this section as may be specified in the order,

(b) provide—

(i) that any unregistered charitable body (or any such body of a particular type) may, despite any contrary provision in this Act, refer to itself as a "charity" for such period ending no later than 12 months after the commencement of this section as may be so specified, and

(ii) that any provision of this Act or of any other enactment is to apply (with such modifications, if any, as may be so specified) to any such body as if it were entered in the Register for so long as it refers to itself as a “charity”.

Section 102
Ancillary provision
The Scottish Ministers may by order—

(a) modify any enactment for the purposes of preventing a body established by enactment from failing the charity test by reason of either or both of paragraphs (a) and (b) of section 7(4),

(b) make such other incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes or in consequence of this Act.

Section 103 (1) & (2)
Orders, regulations and rules
(1) Any power of the Scottish Ministers under this Act to make orders, regulations or rules is exercisable by statutory instrument.
(2) Any such power includes power to make—

(a) such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

(b) different provision for different purposes.

SCHEDULE 1
Various
Refers to “The Regulator” set up etc

SUBMISSION FROM THE REGULATORY REVIEW GROUP

The Regulatory Review Group (RRG) would like to offer the following observations in response to Economy, Energy and Tourism Committee's call for evidence on the Regulatory Reform (Scotland) Bill. RRG is an independent business-led committee[1] which works to promote and develop a culture and environment where both business and Government work together to create better regulation for all.

The RRG works with the Scottish Government to actively promote an improved regulatory landscape. From an early stage, we have been involved in informal discussions and stakeholder events with policy officials and the Minister for Energy, Enterprise and Tourism to influence thinking and development on the Bill, to ensure that it delivers the principles of better regulation, and consistency in particular.

As noted in our response to the Scottish Government's consultation on Proposals for a Better Regulation Bill, consistency in delivery and implementation are key factors in supporting business competitiveness. Issues around inconsistent interpretation, implementation and enforcement of regulation frequently come to the attention of RRG. The need for improved consistency has been highlighted often:

- Our review of the Licensing (Scotland) Act 2005 found inconsistency across Scotland in respect of the cost and licensing application process which placed unnecessary burdens on both business as well as local authorities. Similar inconsistencies in respect of public entertainment and street traders licensing have also been raised with RRG.

- Most recently, our review of the Knife Dealer's Licensing Scheme found inconsistency in approach across local authorities in both process and cost, placing unnecessary additional burdens on business. The absence of official guidance in respect of the definition of domestic / non domestic knives, for example, resulted in both uncertainty and inconsistency.

The example of street trader licence applications for mobile food business, contained within the Consultation on Proposals for a Better Regulation Bill, provides another real example of the burdens and costs which an inconsistent approach to regulation can bring to business, and small business in particular. We therefore welcome the proposed changes to the requirements for certificates of compliance required for street traders licences, which alongside new national standards should deliver a Scotland-wide and consistent approach, delivering benefits for both business and licensing authorities.

While recognising that good examples of consistency exist, and that decisions need to be taken at the right level, a Scotland-wide consistent approach can provide greater efficiency and effectiveness. Decisions need to be made in the right place and level, and in many cases that may be very local, but consistency in process and procedures is clearly required to support and deliver better regulation.

Respecting the principles of better regulation requires an approach that ensures regulation is transparent, proportionate, consistent, accountable and targeted only

[1] This response reflects the collective view of RRG but the position of individual member organisations may vary on some aspects.

where needed. Regulation is necessary to provide protection but it also has an important role in driving competitiveness and economic growth – the Government's main purpose. Ensuring regulators consider the contribution of their regulatory activity on sustainable economic growth, while finding the appropriate balance between economic and other regulatory objectives, is key to this.

RRG would be happy to engage further with you on this as your considerations progress.

Professor Russel Griggs OBE
Chair, Regulatory Review Group

SUBMISSION FROM SCOTTISH NATURAL HERITAGE

Context

We understand that the Economy, Energy and Tourism Committee is examining parts 1, 3 and 4 of the Bill relating to regulatory functions, miscellaneous and general provisions.

We understand we have been invited to provide oral evidence to a session of the Committee that will be focusing on Part 1, although written submissions have been invited to address all or any of the following:

- The proposals for regulatory reform, such as: the provision of a regulation making-power for Scottish Ministers to encourage or improve consistency in the exercise by regulators of regulatory functions; to exercise those functions in a way that contributes to achieving sustainable economic growth; and the proposed code of practice in relation to the exercise of regulatory functions.
- The proposals for the process and appeal mechanisms for marine licensing decisions;
- The proposals for Scottish Ministers to make provision for the charge or fee payable to different planning authorities to be of different amounts dependent on performance;
- The proposal to amend the Civic Government (Scotland) Act 1982 to enable the certificate of compliance for street traders' food licences; to be produced by the food authority with which the business is registered.
- Any other aspects within parts 1, 3 and 4 of the Bill.

Background and general comments

Scottish Natural Heritage (SNH) is the public agency established under the Natural Heritage (Scotland) Act 1991 with responsibility for securing the conservation and enhancement; understanding and enjoyment; and sustainable use and management of the natural heritage; and as the Government's statutory adviser on these matters.

Our Corporate Strategy identifies four high-level outcomes:

- High quality nature and landscapes that are resilient to change and deliver greater public value.
- Nature and landscapes that make Scotland a better place in which to live, work and visit.
- More people experiencing, enjoying and valuing our nature and landscapes; and
- Nature and landscapes as assets contributing more to the Scottish economy.

We are pleased to have the opportunity to present evidence to the EET Committee. We welcome the overarching purpose of the Bill – to achieve a range of social, economic and environmental benefits by improving and aligning regulatory functions. In doing this, it will provide a framework for linking with other initiatives, such as Planning Reform, which have a bearing on the regulatory landscape.

From the consultation and policy memorandum we understand that the Bill is primarily about regulations that do not involve us. Given our purpose and role, our interpretation of the Bill is that we have regulatory functions under:

- Section 1 (5) (a) and (b). For example, we impose requirements, set standards and give guidance; and in terms of
- Section 1 (6) (a) and (b). For example, we provide an advisory service and employ staff in delivering that service.

Our primary regulatory functions are therefore:

- Licensing of management, research and development-related activities affecting wildlife.
- Determining Operations Requiring Consent on Sites of Special Scientific Interest (SSSI).
- Providing advice to Planning Authorities and Competent Authorities on the impact of proposals on the natural heritage.

In fulfilling these functions, we have, for some time, been shifting the focus of our effort towards engagement prior to receiving an application for a licence/consent or request for advice. We want to flag up opportunities and issues as early as possible and thereby influence proposals, and if possible resolve issues 'upstream', before a formal application is submitted, ensuring that our regulatory decision or advice does not come as a surprise to other parties.

SNH comment on the Bill's key regulatory reform proposals

Part 1

Section 1

We understand the importance of consistency for providing both certainty and confidence for businesses and other customers. This requirement was illustrated in the Audit Scotland Report 'Modernising the Planning System' and our Customer Survey of developers and planning officers undertaken in 2011.

We have taken a number of steps to improve the consistency of our regulatory functions, in terms of:

- consistency within SNH. This is something we have always worked towards as part of delivering a national service locally. We have regularly reviewed and updated both our regulatory and enabling processes, established dedicated teams to deal with particular functions; and provided staff guidance and training.
- consistency with other regulators. This is most relevant to our role within the Planning System but also applies where other competent authorities may consent or incentivise management activities on SSSIs and Natura sites. We have been working towards this through joint working including the Planning Reform Key Agencies Group; the Interagency Group for Onshore Renewables

and bilateral working arrangements such as that we have with SEPA. This work is integral to our efforts for a Team Scotland approach to business.

Whilst a new power could help to improve consistency amongst regulatory functions, we also know that marrying consistent regulation with the flexibility to respond to local circumstances remains a challenge. We therefore welcome the proposals in Section 5 of the Bill for a Code of Practice which present an opportunity to further develop practical ways of securing consistency of approach to common issues in differing local circumstances. This could involve the use of national standards. We comment further on this section below.

Section 4 (1)

We see this in the context of the overarching Government purpose - "to make Scotland a more successful country, with opportunities for all to flourish, through increasing sustainable economic growth". We currently exercise all our functions in a way that seeks to maximise our contribution to this through:

- Our Corporate Plan. This is directly aligned to the national outcomes and performance indicators, and outlines the importance of Scotland's 'natural capital' for securing sustainable economic growth.
- Our licensing procedure takes account of requirements for '…preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature…'.
- We have statutory balancing duties. These require that, in exercising our functions, SNH takes appropriate account of a range of interests including; the needs of agriculture, fisheries and forestry; the need for social and economic development; and the interests of owners and occupiers of land.

Key to exercising these functions is our understanding of other interests and how our advice or decision is likely to impact on them. Building such 'mutual understanding' is integral to the 'solutions' orientated approach to influencing that we aspire to – to get win-win decisions.

In our evidence to the RACCE Committee we made comment on our balancing duty in terms of …*extent that it would be inconsistent with the exercise of those functions to do so*. This relates to our role in assisting Scottish Ministers meet their European and international obligations through areas of our work that are excluded from application of our balancing duty, namely: proposing new Natura sites and their subsequent protection under the Habitats etc. Regulations; implementing the same Regulations in respect of European Protected Species; and notification of SSSI under the Nature Conservation (Scotland) Act 2004

However, where these functions could override our balancing duty, we exercise them as proportionately as possible. For example, we ensure as far as we are able that mitigation is adequately explored in the early stages of developing a proposal in order to suggest solutions before formal regulation processes are initiated.

Sections 5 and 6

We support and would be pleased to contribute to the development of a Code of Practice. It presents an opportunity to set out what regulatory reform will look like in reality. It has the scope to reflect different roles in the regulatory landscape and emphasise that it is cultural change, as much as procedural change, which will achieve the aspired reforms.

We are confident that our recent and current service delivery improvements accord with the 'better regulation' principles described in Section 6. For example, our updated approaches to licensing, Operations Requiring Consent and engagement in the Planning System are based on published standards/guidance and risk. This has allowed us to withdraw from some types of casework to focus on the most significant in terms of impact, and to streamline the need for and process of granting approvals.

Part 3

Section 4

We support the introduction of a transparent and scrutinised appeals mechanism for marine licensing decisions.

Section 41

We hope that the proposals for planning authorities' functions: charging and fees will allow them to develop their own capacity without increasing their expectations on ourselves, for example, in terms of response times.

Section 42

We have no comment on the proposals in relation to certificates of compliance for street traders' food licences.

Any other aspects within parts 1, 3 and 4 of the Bill.

As indicated in above, we welcome the overarching purpose of the Bill. Its development reflects that regulation can be necessary to secure environmental and other societal objectives, and Section 1 has the scope to provide greater leadership on issues of national importance. However Section 1 also recognises that there is a collective role – government, regulators and business – to make improvements so that regulation supports sustainable development.

Scottish Natural Heritage
22 May 2013

SUBMISSION FROM VISITSCOTLAND

1. Introduction

VisitScotland welcomes the opportunity to be involved in the evidence session on the Scottish Government's Regulatory Reform Bill at the Economy, Energy and Tourism Committee meeting on 29 May.

Ahead of the session VisitScotland would like to bring the role of VisitScotland in Quality Assurance and the creation of The Tourism Development Plan - which will assist local planning authorities meet the requirements of Scotland's thriving Visitor Economy - to the attention of Committee Members.

2. Quality Assurance

VisitScotland operates 20 schemes to promote quality and maintain standards among tourism establishments. This includes four core schemes plus the Welcome Schemes. We also offer support and advice on a range of quality-related issues for businesses.

Over 9,000 businesses a year participate in one of the VisitScotland Quality Assurance schemes.

The Quality and Standards team assess accommodation, visitor attractions and places to eat in Scotland. For example, in the accommodation sector measures such as the quality and range of hospitality, service, cleanliness, accommodation, comfort and food are looked at.

High-quality service and facilities are crucial to making Scotland a must-visit, must-return destination. VisitScotland offers support to businesses to ensure that you meet and exceed the high standards expected by your guests. We play a vital role in assessing quality and service standards with our internationally recognised Quality Assurance Scheme.

VisitScotland's Quality Assurance scheme is a benchmark for quality across the tourism industry and operates across accommodation, visitor attractions and food sectors. In Scotland, 75% of tourism businesses are already taking part in a quality scheme - almost twice the number of those taking part in other schemes in England.

There are also specialised schemes such as the various Welcome Schemes (for walkers, cyclists, golfers and other specific groups) and also the Green Tourism Business Scheme to promote sustainability.

Although not a regulatory body, VisitScotland plays a key role in assisting the tourism businesses we work with achieve and maintain the high standards expected by visitors and, required in order to continue to expand the economic importance of the sector.

VisitScotland will continue to work with regulatory bodies across others sectors in order to share best practice and ensure the delivery of services to the highest standards.

3. The Tourism Development Plan for Scotland

The Tourism Development Plan for Scotland: *Delivering the Visitor Economy* sets out the framework to assist and promote growth in Scotland's visitor economy to 2020. It will support the national tourism strategy launched in March this year by the Scottish Tourism Alliance.

The Cabinet Secretary for Finance, Employment and Sustainable Growth has confirmed that VisitScotland is now the lead economic development agency driving growth in the visitor economy, alongside Scottish Development International (SDI), Highlands and Islands Enterprise (HIE) and Scottish Enterprise (SE).

The Tourism Development Plan for Scotland (the Plan) is one of the measures to help co-ordinate and deliver future growth in the visitor economy. It helps define a more proactive and co-ordinated approach to assist all stakeholders in the sector to engage with the development plan system and help secure future opportunities.

Key requirements cited with the Plan include the need for quality at the heart of all developments and the overall customer experience.

4. Purpose of the Tourism Development Plan for Scotland

A significant amount of work is currently carried out in the visitor economy by many different agencies, working in partnership and involving both public and private sectors. The aim of the Plan is to build upon this work and help secure a more co-ordinated approach to planning for growth in the visitor economy.

This Plan is formed by the collective view of VisitScotland, Highlands and Islands Enterprise, Scottish Development International, Scottish Enterprise, Historic Scotland, Scottish Natural Heritage, Marine Scotland, Forestry Commission Scotland and other agencies with input from industry itself.

Following on from the consultation process, the Plan will be finalised to produce the development strategy to deliver sustainable tourism development opportunities and upgrades to infrastructure in areas across Scotland to support the aspirations of the national tourism strategy - *Tourism Scotland 2020*.

The Plan will help focus emerging development plans across Scotland on growth potential at the national, regional and local levels. It will encourage these emerging development plans, as well as national policy (National Planning Framework 3 and the review of Scottish Planning Policy), to set the visitor economy in its context as part of Scotland's sustainable economic development, and help define the outcomes necessary to secure growth in visitor economy.

VisitScotland
21 May 2013

Regulatory Reform (Scotland) Bill: Stage 1

09:31

The Convener: Item 2 is commencement of our scrutiny of the Regulatory Reform (Scotland) Bill. I welcome Professor Russel Griggs and Garry Clark, who are both members of the regulatory review group that the Scottish Government set up in 2004.

We have received a written submission from Professor Griggs. He does not want to add anything to it at this stage, so we move straight to questions. I remind members to keep their questions short and to the point. If we could also have responses that are as short and to the point as possible, that will help us to get through the broad range of issues that we want to cover in the time that is available.

I will begin by asking about the inconsistent application of regulation across Scotland, which is at the heart of what the bill is trying to do. Can you give examples of difficulties that have been experienced as a result of inconsistent application?

Professor Russel Griggs (Regulatory Review Group): Yes. I will start by referring to our most recent report, which we have just published on our website: our review of the knife dealers licensing scheme. Where the Government has put in place legislation that gives councils a power, as opposed to a duty, to take action, it is left to the councils to figure out how to do that, which means—in the case of the knife dealers licensing legislation—that some councils license entities that others would not license. That is particularly the case for councils that cover rural areas, where retailers sell knives to people who go out on the hills to do all sorts of things. Different views are taken of the issue.

We also experienced such a situation three or four years ago with alcohol licensing. For companies such as Tesco, the form that has to be filled in to apply for a licence in Aberdeen can be completely different from the one that has to be filled in in Dumfries and Galloway.

The position that we have reached is to ask not about the democratic process and the thing that councils should do, which is make decisions, but about why different processes are needed in different parts of Scotland when it comes to filling in all the forms that have to be filled in.

I apologise, because I am already giving a long answer; let me try to be brief. The Convention of Scottish Local Authorities has a thing called the regulatory forum, on which we sit. About three

years ago, it formed a number of little theme groups, one of which was on consistency. I chaired that group. The unanimous view from the practitioners out in the councils—the people who do licensing, planning, trading standards and environmental health—is that a move towards more consistent processes would benefit them because it would enable them to exchange information much more easily, to look at best practice and to talk to clients about what they have done.

Inconsistency is a disbenefit not just to business, but to practitioners in councils, who must deliver. There have been myriad examples in planning and licensing in relation to the fees that are charged across Scotland. We have had representation over the years from street traders and from the Scottish Showmen's Guild about variations in licences. We understand why the variations exist, but there is a general inconsistency around how legislation is implemented.

When we all agree that it is sensible—that is how we must preface this—we should have a national standard for how a process is done.

Garry Clark (Regulatory Review Group): Russel Griggs has summed the situation up. People have come before us at the RRG and have explained how they operate in different areas and how different processes and fees apply. An example that was brought to my attention outside the RRG is that it is cheaper to license a zoo through South Ayrshire Council than it is to license a kennel.

The Convener: And there are lots of zoos in South Ayrshire, obviously.

Garry Clark: Clearly.

Chic Brodie (South Scotland) (SNP): Don't go there, convener.

Garry Clark: It is 25 times more expensive to license a kennel in South Ayrshire than it is to do it in Glasgow. There are some pretty stark differences across the country, as far as application of regulation is concerned. The reasoning is that it is supposed to represent the cost of the process in the different areas. However, if we look at some of the stark differences between parts of the country, we begin to question how the process is being applied.

The Convener: We want to explore those matters in more detail. Members have other questions on the conflict between national standards and local decision making. In your view, setting of national standards would not impede local decision making in any way, would it?

Professor Griggs: Indeed, it would not. You could speak to practitioners—licensing clerks, for example—about the opportunity to have one set of forms throughout Scotland. We have managed to get it down to 13 forms. People have to apply for alcohol licences throughout Scotland. A licensing committee's being able to look at a form from elsewhere that is the same as theirs would help that committee to make a better democratic decision. It could consider what was done elsewhere, and it could see what happened at the other committee. It is a matter of process; it is not about trying to influence a committee's decision. It is just a matter of suggesting that we could all fill in the same forms to create consistency in what we do.

The Convener: That is interesting. Some committee members met informally with various stakeholders last week. Another issue that came up was taxi licensing. There are very different standards in different local authorities for licensing taxis and private hire cars, which has caused a major problem for companies that operate across a range of local authorities. That might be caught by the bill.

Professor Griggs: It will be. We always recall the very first example that we came across, which was the window cleaner's licence. Someone who wants to be a window cleaner can get a licence in one local authority, but would have to get 31 other licences to do the same job in the rest of Scotland. That strikes me as odd. If we accept that a window cleaner can clean windows in South Lanarkshire, why can they not clean windows everywhere else? Some sort of regularisation of the process would help us all, and could cut out an awful lot of resource that is wasted through inconsistency.

The Convener: That is very interesting—I did not even know that a window cleaner had to have a licence. I will need to check with my window cleaner, next time he comes round, whether he has a licence. I am rather concerned that he might not have one.

Professor Griggs: He does not need a licence to do your windows; he does need a licence to clean the windows of a public building.

The Convener: Ah. Thank you.

Dennis Robertson (Aberdeenshire West) (SNP): I will stay with consistency, which is one of your five principles. I find it slightly strange that, although we are looking to achieve consistency through a national standard, you are at the same time advocating local autonomy. Could you explain that a wee bit more for me?

Professor Griggs: There are differences. In doing anything in business—never mind in the public sector—two things must be taken into account: the process of getting things to the point at which you can make a decision, and the local conditions that can come into play. I cite as an

example an alcohol licensing situation on Paisley Road in Glasgow. The Tesco at one end of the road applied for a licence and got it, but the Tesco at the other end applied and did not. The influence of the democratic process was quite correct, because the licensing committee's judgment was that although the process was the same, the second Tesco's alcohol licence would have added no value to the retail economy in that part of Paisley Road. If the same issue were to be considered in another part of Scotland, the view would be totally different; you have to give local authorities the benefit of factoring local conditions into their decisions. I am certainly quite clear about the difference between process and local decision making.

In most cases—in planning, for example—people can appeal decisions if they so wish, but the fact is that local circumstances vary. To go back to the Scottish Showmen's Guild example that Garry Clark and I mentioned, I should say that the reasons for some of the various licensing charges across Scotland are quite interesting. In order to get a specific event going, some councils deem it necessary for the person to turn up with the rides and so on and so charge a very minimal fee. Their view is that it is very much part of tourism and other economic development that they want in their areas. However, in parts of Scotland where such things are not as important or as critical, councils might make different decisions on what they charge. I do not have a problem with that because people will always make the decision that is pertinent to their local area. Of course, that does not mean that the process should be different.

Dennis Robertson: I spoke last week to environmental health officers, who expressed concern about the potential for national standards to be diluted, and suggested that cities such as Glasgow, Edinburgh and Aberdeen have very high standards in, for example, licensing street traders such as fast-food mobiles and so on. Do you share that concern?

Professor Griggs: No. The point is that practitioners such as our environmental health officers should be used properly to help us to put national standards together. A good example of that is the national building standards, which were put together by practitioners. Everyone agrees that the measure is very good and that there has been no dilution in expertise or standards. As with everything, if you do these things properly, there should be no dilution of standards.

Garry Clark: A more international example is the current debate in Europe about health and safety standards in the oil and gas industry. There was a very real prospect that Europe would come up with its own standards and apply them to the North Sea, which is its leading oil and gas production area. Instead, Europe has—sensibly, in my view—looked at developments in health and safety in the UK and the North Sea oil and gas area that the industry, unions and so on have been piecing together over recent years, and is now considering whether to apply those standards in the rest of Europe instead of coming up with new standards of its own. Work with the industry to arrive at a set of standards that have a more general application would be a welcome move and is certainly something that we would advocate.

Professor Griggs: I suppose that my retort to the environmental standards people—with whom, I should point out, we work closely and have a good relationship—is that national standards would set boundaries on the resources that each local authority would have to put them in place. For some time now, we have been concerned about whether Scotland has enough environmental health and trading standards officers; we strongly believe that those officers should enable business rather than enforce things, and that there is a real difference between the two. A good set of national standards would mean that each local authority—and people at national level—would have to think about the type and level of resource that would be needed.

09:45

Dennis Robertson: Are you therefore content that the bill meets your principle of consistency?

Professor Griggs: Yes—if we all go through the process and decide that standards should be set nationally before the bill is passed. After all, it should be done at the beginning rather than at the end.

Dennis Robertson: Should there be a sixth principle of better regulation, which would be that it must be effective?

Professor Griggs: That is an interesting question: let me ponder it.

I suppose that it all depends on what is meant by effective regulation, which brings us back to our point about enabling and enforcing. Either you can be a policeman and simply tell a company when it has got something wrong, or you can help it not to get it wrong in the first place. In that case, regulation becomes effective only if there is an effective regulator who is an enforcer when he needs to be but who is first and foremost an enabler who works with businesses to change their mindset and to ensure that they understand the rationale behind all this. On Garry Clark's health and safety example, one of the challenges over the past two decades has been that the system has been based on ensuring that businesses comply instead of on ensuring that

they understand the benefits that compliance can bring.

Dennis Robertson: Thank you very much.

The Convener: I bring in Chic Brodie—who probably wants to ask about opening a zoo in South Ayrshire.

Chic Brodie: At least you did not say that South Ayrshire is a zoo, convener.

The regulatory review group has existed since 2004; it is now 2013 and we are looking at this bill. Can you cite a major example of good regulation that you have effected as a result of which the Government has enjoyed substantial economic benefit?

Professor Griggs: There are a number of examples; you need only compare where the Scottish Environment Protection Agency is now with where it was in 2004, when the RRG was established.

The RRG advises the Government on how it might change the things that it does and take a different approach. Initially, our main role was to ensure that, as I have mentioned, regulators were enablers and not enforcers, so we have changed things in that respect. In fact, SEPA, which is covered in the bill, is giving evidence elsewhere in Parliament about how it has changed. I think that it stands as a good example of where we have had an influence.

We have also influenced the way in which Government works and how parties work together. Ages ago, we recommended this wonderful thing called multilateral consultation, which means getting everyone in a room to discuss a subject. That has become mandatory in certain areas of planning including offshore, wind and wave and other large-scale projects.

The business regulatory impact assessment, which has to be carried out for every bill that affects business and requires civil servants to talk to the businesses that will be affected, has also had a real economic impact, as have the changes that were made after the review of the alcohol licensing legislation. Similarly, with regard to our friends in SEPA, if you operate as an enabler rather than as a policeman, you are much more likely to find a good solution for the company in question. After all, if you are acting as a policeman, it usually means that the company has done something wrong.

We have, therefore, influenced how people work. We have had other specific influences. For example, we proposed what became a section—I think that it is section 17—of the Public Services Reform (Scotland) Act 2010. A challenge for Government was that if a piece of legislation was seen to be silly and needed to be changed, it could take an awful long time to find a hook to hang it back on. Section 17 allows that if a section of an act or a rule offends one of the five principles of better regulation, a minister can change it through a Scottish statutory instrument.

All those little bits added together mean that Scotland now is seen internationally as being ahead of the game on better regulation. Because of that, about four weeks ago, Joe Brown, who is the lead civil servant on RRG, and I were asked to present to the Regulatory Policy Committee in London on how we deal with such issues in Scotland, and we will go to Europe in July to present on the same thing. That is because we have concentrated on better regulation, rather than on more or less regulation. We have concentrated on the process of ensuring that what we deliver in Scotland works for Government and for business.

Chic Brodie: We are perhaps looking at the bill in isolation, and we do not know what may or may not happen in September 2014.

How much attention is paid to competition law, whether European law or law that is gold plated by the UK Government? You talked about regulation by SEPA, and so on. When you are reviewing regulation, how much attention to do you pay to competition law?

Garry Clark: Competition law is certainly something that the RRG has discussed fairly regularly. We fed into the various committees or commissions that looked into the gold-plating of European legislation at both Scottish and UK levels over the past few years.

We foresee a stronger role if Scotland were to achieve some sort of constitutional change over the next few years that would allow it greater power and, therefore, greater responsibility.

Chic Brodie: That is interesting. Two weeks ago, I attended a David Hume Institute lecture about competition in a new Scotland. There are tangential points at which regulation and regulatory reform will impact on that, which is significant.

I am not sure which of the five principles cover economic growth, which—in my view—has to be a substantive element of whatever we do. I am very concerned that we are talking about national standards that do not reflect the view of consultation respondents, 70 per cent of whom were in favour of setting more local standards in exceptional circumstances—although I do not know what they are. I fail to understand how you measure, intend to measure or have measured regulatory reform's impact on creating substantial economic growth.

Professor Griggs: I will try to answer. In our last annual report, which is now on our website, we have a big section on how we believe regulation is now a key part of international competitiveness. I will give you some examples. For the past 18 months, we have been chairing in Grangemouth a forum that works with all the chemical companies there, the local council, SEPA, Transport Scotland and everybody else to look at how we can ensure that the cluster of chemical companies in Grangemouth remains competitive in the international environment.

In many ways that is down to regulation. We have been discussing things such as flooding and how the flooding regulations will impact on Grangemouth. At the beginning of the exercise, the companies were very worried that they would have to be involved heavily. The gentlemen who run Ineos in Grangemouth want to put a proposal to its owners in China for a £1 billion investment. The first thing the investors will want to know is that all of it will be spent on investing in the company and not on building flood defences.

We have also looked at how the industrial emissions directive, which brings together a number of European directives into one, will impact on Grangemouth. At the end of the exercise, we now have a much more competitive way of dealing with regulation areas for that cluster of chemical companies, which allows them to have much more certainty about how they compete and how they can bid for money, because most of them are internationally owned.

In many ways, that is how businesses see competition. We have been working on a regulatory framework for carbon capture and storage since the Longannet proposal, so Scotland is now the only place in the world that has in place a regulatory framework that means that if a company wants to set up a carbon capture and storage plant in Scotland, we can tell it exactly how long it will take and who will do the regulation. You have to go through 63 different regulations to set up a carbon capture and storage plant, but we know how to do it and we will work in parallel with all the regulators, so we are internationally competitive. Indeed, an institute for carbon capture and storage held its conference in Scotland last week, because we are seen as being competitive.

We must understand that regulation is an integral part of international competition; it is almost as important as money. We have recognised that in regulation of a range of industries in Scotland, but that does not mean that we are making it easier.

For example, in the meat processing industry it is more expensive to run a business in Scotland than it is anywhere else in the UK, but that is okay because it is driven by the farming community's desire to retain the premium on Scottish meat. That desire came out of the foot-and-mouth crisis back in 2001, when the farming community said that it never wanted something like that to happen again. We therefore have higher standards for our abattoirs and rendering plants in Scotland in order to protect our farmers and the meat that comes out of such plants. We probably need to have higher standards in Scotland to maintain our international competitiveness in that marketplace.

Chic Brodie: That certainly did not help us with Hall's of Broxburn.

Professor Griggs: It probably did not.

The Convener: Before I bring in Rhoda Grant, I will follow up on Chic Brodie's first question. You have made a lot of recommendations to the Government since 2004. How many of your recommendations have been rejected?

Professor Griggs: Not many of our recommendations have been rejected. I can think of one or two that are still in process, if I can put it that way, but the Government has generally done what we have recommended.

In the forthcoming planning legislation, which I am sure will come before Parliament at some point over the next year, our drive towards getting bilateral communication out and multilateral communication in is at the core of where Derek Mackay and his team want to go. They want to make it understood that the best way to reach a proper decision is to get everybody who would be involved in the decision round the table at once, rather than to have discussions with each, one at a time. That approach will save a huge amount of resource.

A regulatory change that we made about five years ago took three years off the planning time and meant that the resources that were used by companies, councils and everybody else were reduced significantly. Such reductions have an economic impact.

Rhoda Grant (Highlands and Islands) (Lab): I come back to the issue of local versus national. You gave the example of the Scottish Showmen's Guild. Some local authorities might charge very little for a licence because they are trying to encourage showmen in as part of an event. In other, more lucrative areas, where showmen might want to set up because they would make a lot of money, the charge might be higher.

It could be that the same principle applies to the situation with kennels and the like. South Ayrshire Council might think that the area is overprovided with kennels, so it is more expensive to get a kennel licence than it is to get a licence for a zoo. Who decides what is local and what is prescribed as charging through the bill?

Professor Griggs: In some areas I would like to leave it to councils to decide on the charge. For example, in the north-east the fees for licences for members of the Scottish Showmen's Guild are fairly low, but that is because a lot of the fairs and events that showmen go to are an intrinsic part of the community and the council wants to keep them.

I would like to see more transparency about how the fees are put together. It is very difficult across Scotland to figure out how the fees are worked out. For example, I think that showmen are charged £25 to have a licence for the Kirkcaldy fair, which as you know goes on for a week, whereas they would be charged £2,000 for a licence for a fair in Edinburgh. It is up to the local council to decide on the amount of money, but it is not clear how it reaches that decision—and that is what we get most complaints about.

Although the difference in charging is a factor, people's primary concern is that they do not know how the council works out the charge in the first place. There should be more transparency nationally so that we all can agree on a way of showing people how we reach such decisions. Garry Clark was correct to say that the process is supposed to be a neutral cost, but one of the challenges is that local authorities all work out their cost bases differently.

10:00

I have no issue with local councils deciding, for economic reasons, that they want to charge people one amount while another council charges something else—that is a decision for the councils to make—but the way in which they do that underpins a lot of the complaints that we get. There is a lack of understanding about how local councils make those decisions.

Garry Clark: That is right. Some of the bodies that have appeared before us have gone to local authorities to ask why something is 10, 20 or 100 times more expensive in one local authority area than in another, when it is supposed to be clear what it costs a local authority to process a licence application.

In the circumstances described, where a local authority may actively be seeking to incentivise a certain type of business to come to its area, it is understandable that the amount would differ. If the Scottish Showmen's Guild were aware that certain local authorities are keen to get the shows into their areas and that there is a preferential rate, the difference would be understandable. As has been said, the difficulty arises when people are given the same message by every local authority in Scotland while the fee structure remains so varied.

Rhoda Grant: The bill as it stands allows the Scottish ministers to prescribe the fees level. Who decides what can be done with a local decision to encourage a fair? Who decides whether there needs to be an alcohol licence or a dog licence, for instance? Who decides which decisions remain local and are made for local reasons, and who decides what is part of the better regulation agenda and therefore subject to national symmetry?

Professor Griggs: My understanding is that the minister and Councillor Stephen Hagan have already put in place a memorandum of understanding between COSLA and the Scottish Government to work through those processes before a bill ever gets to Parliament. When we all start thinking about something and discussing whether more prescription is required—

Rhoda Grant: There will not be a bill before Parliament, but a statutory instrument, which is not open to the same scrutiny.

Professor Griggs: It could be anything. I have not seen all the words, but I understand that there is now a memorandum of understanding between COSLA and the Scottish Government about how the procedure will operate and not reach the stage that you are talking about. They will have decided and agreed all that stuff before the matter is ever dealt with, whether through a statutory instrument, guidance or whatever.

There will be much more discussion. COSLA now sits on the RRG and is an active part of our membership. We discuss all those issues with COSLA, and both of us are comfortable with our own positions. Neither of us will go out and do anything that we feel has not been part of good discussion and consultation. As I said, I have not seen it, but I gather that the minister and Councillor Hagan now have a memorandum of understanding between them and a protocol for how the process will work.

Rhoda Grant: I turn to forms, which are currently designed locally. The bill gives powers to prescribe what forms are completed. Could a one-page form turn into a 16-page form because different local authorities need different information to reflect local circumstances, or do you ignore local circumstances and prescribe the information on which they can base their decisions?

Professor Griggs: Our experience covers all sorts of forms, although we have done most work on the alcohol licensing form. About 95 per cent of forms contain information that everybody needs, and the differences tend to be at the margins. We have now agreed a set of 13 individual forms for alcohol licences, which cover the whole raft of different things someone has to do when they are in charge of licensing.

To answer your question, I do not think that a one-page form will become a 16-page form. If we can get the practitioners who design the forms into a room together, they will come up with something. I cannot think of a form for which less than 90 per cent of it was not a common standard. There are things at the margins, but they tend to be at the margins.

Rhoda Grant: Yes, but if each local council had 10 per cent of the form that was unique to them, that could make for quite a big form—it could double its size.

Professor Griggs: It could do, but I have not seen anything that suggests that that would happen.

Rhoda Grant: Okay. Given what you have said about your work on changing regulations and making them more streamlined, do we need legislation on the issue? Should work not be done on it along the lines of how you worked previously: speaking to people, negotiating and coming up with best practice? Do we need a bill to enforce that?

Professor Griggs: I think that the answer to your question is yes. A local council official was asked the same question recently and he said that we can all agree that something is a good thing to do but that knowing that we have to do it makes it certain that we will do it.

One of the issues that the official talked about, which is covered in the bill, is the desire to make sustainable economic development a duty for people to consider. His comment was interesting, because he said that we report on things that we have a duty to report on but we do not necessarily discuss all the other things that might be of interest to us or report on them. He said that having it in writing that we have to report on certain things would make it much easier for him as an official to do so.

We do not get consistency if we do not have something in legislation. I am not sure that the bill is a harsh or, indeed, difficult piece of legislation. All it says is that, from time to time, when all of us think that we need to introduce national processes and standards on a certain issue, we will do so. The legislation does not give any Government the blanket power to do that all the time, because there has to be consultation. As I said a minute ago, the minister and COSLA now have in place a way of proceeding.

The legislation allows us to say, "Here is a way of doing things." That legislative power will allow local authority practitioners to get involved in the preparation of bills a lot earlier than they do. One criticism that we have heard for a long time is that, for some bills, the officials who will implement them become involved only at the end rather than at the beginning. If we put in a national standard, it will come to the Parliament to be approved, and those who are to deliver it—the practitioners—will have to be involved at an early stage.

Therefore, yes, I think that we sometimes need legislation to get us to a point where something becomes part of the way in which we do things, which is usually governed by rules.

Rhoda Grant: What about the public who must live by that regulation? For example, we have listened to suggestions that having a pan-local authority taxi licensing regime would create difficulties for people who operate in rural areas who would have to gold plate everything to the urban standard. Is it not the case that everything will be gold plated to the highest standard and will not reflect local concerns and circumstances?

Professor Griggs: Again, I have not seen that. We have talked to practitioners who work in a host of areas over Scotland, and when they sit round a table and try to do something nationally they do not reach the point of saying "Well, we'll do everything for the central belt. We'll not do things for rural areas." They tend to come up with what I would call a very sensible way of doing things that covers everybody. I have not seen any reflections in actuality that would substantiate what you describe.

Margaret McDougall (West Scotland) (Lab): Good morning, gentlemen. If the minister both sets the national standards and deals with any exceptions or appeals, do you have a view on the potential for conflict?

Professor Griggs: I suppose that that comes back to the difference between process and decision making.

The national standard will be only about the process. For example, in the case of a planning application, the standard will apply only to the process of taking the application to the local planning committee. If the local planning committee makes a decision that people want to appeal, they will appeal the decision rather than the process. There will be no conflict that I can think of, although Garry Clark might want to comment on the issue.

Different bodies of people can make a different judgment on the information that comes to them, depending on the circumstances in which they do that. All that we are saying is that the standard should detail the process that brings the information to them. The standard is not about trying to force people to make a particular decision.

Garry Clark: Thinking back to my previous life as a solicitor, I recall that one of my tasks was to deal with licensing applications for a supermarket

in various parts of Scotland. From our point of view, matters would have been a lot easier if there had been one set of forms. Notwithstanding that, one can anticipate that issues will be raised about a planning application, which will be either accepted or rejected at the local licensing committee. Dealing with those issues should be a matter of fact, and the bill will just make the process of reaching that point a lot easier. Any challenges that are made will probably be on the basis of the decision that is made rather than on the application of the process.

The Convener: Another issue of interest in the bill is the economic duty and how that will interrelate with the other duties on the various regulators. I think that Alison Johnstone wants to ask about that.

Alison Johnstone (Lothian) (Green): I notice that the RRG's various submissions on the bill do not touch on the economic duty. Were you surprised to see that in the bill? Was that something that the RRG discussed previously?

Professor Griggs: We discussed that issue many times, but we discussed many duties and not just the economic one.

I guess that my view is the one that I expressed following what I heard from the local authority official. The economic duty is about ensuring that people take economic development seriously. I must say that I was surprised when I heard this, but the local authority official said that, because there is a duty to consider health issues for an alcohol licence, local authorities will report on that when they make a decision. However, because there is no duty to consider the economic impact, that might be discussed only sometimes.

For me, the great thing is to have the right balance. The economic duty is not about saying—I say this quite firmly—that the economic impact should take preference over everything else in some kind of hierarchy; rather, the duty is about demonstrating visibly that the economic impact has been considered. I think that that is why the Government wants to include such a duty.

We have looked at the issue in discussions with regulators over the years about the balance between the economic impact and the effect on the environment, health and safety and so on. Given that the current Government has sustainable economic development at the heart of its policy, I guess that the economic duty shows that it wishes to see the effect on economic growth considered formally in any decision that is made on licensing, planning and all sorts of others things. I have no issues with the proposal, and I have even fewer issues now that I have heard from people in local authorities about how the duty will make them have to consider it.

I go back to my comparison—this was a true case—of the decisions on two licensing applications for Tesco stores on Paisley Road. The gentleman from Tesco said that it would have been a lot simpler to understand the decision if the written judgment included details on why the decision had been made on economic grounds. Because the decision mentioned only the health grounds, which were the only duty that was required to be considered, Tesco could not understand why different decisions had been made. If the economic argument had been included, the difference would have been understandable. I think that the duty will make the issue more visible.

Alison Johnstone: In last year's annual report, the RRG made it very clear that it thought that regulators were making great progress in working towards an enabling culture. Given your answer to Rhoda Grant about legislation making it certain that such issues will be covered, I assume that you feel that the same will happen in this case.

On a fact-finding meeting last week, Dennis Robertson and I heard from someone who was involved in environmental and trading standards. He did not see the point in having the economic duty in the bill and felt that it would be better deleted, given that there are already concordats in place that cover economic impact. He pointed out that no environmental health officer would want to see a restaurant, for example, closed down for more than a day; the officials understand that people's livelihoods and businesses are involved. However, you seem to want to see that issue covered in legislation.

10:15

Professor Griggs: Yes—but it would be extremely unfair of me to say that that view is held by everyone at the RRG as it is not. We have people who feel exactly the same as that environmental health officer.

As chair, I was moved—although not all the members were—to say that including a duty will bring greater visibility. However, I agree that the issue of economic benefit already exists and has been part of the argument on many changes in regulation over the last 20 or 30 years. Given that it is felt that we want to have the balance visible, if I can put it that way, it needs to be put through in legislation.

The same principle applies as to matters in the bill that relate to SEPA, such as the way that it wants to alter its fee structure. Unless SEPA has the legislative power to do that, it will not be able to carry out some of the enabling that it wants to achieve. If we are going to allow good people to pay less and require bad people to pay more, we

need to have visibility and the structures in place to do that. In the world of government and legislation, the only way that we can ensure that things are seen to be done is to legislate.

Alison Johnstone: Obviously, there are those who believe that a conflict exists. That includes organisations such as Scottish Natural Heritage, and we have received a submission from Professor Colin Reid. There are also debates about what sustainable economic growth means. In your earlier response you spoke about economic development. Do you think that there are any risks, given that there are different views about what sustainable economic growth actually means?

Professor Griggs: I will start and then pass the subject to Garry Clark.

The answer to that question is no—not as long as we are all sensible human beings.

The Convener: If only that were possible.

Professor Griggs: One thing we raised in the long discussion about the balance between the economy and the environment is how we apply common sense. A simple answer is that, as long as we continue to apply common sense, a conflict should not exist.

Garry Clark: There is a need to achieve some degree of cultural change in order to make better regulation a reality throughout Scotland.

As a group we have often held up SEPA as an example of positive change in that respect. That change has been a result of sensible practices, strong leadership and a change in focus away from being the policeman, as Russel Griggs has suggested, and towards working with businesses to achieve compliance and better results. That is one reason why we need a legislative approach. SEPA is a big organisation; it requires a lot to get that particular ship to change tack.

Let us take the example of the planning system. Before the Planning etc (Scotland) Act 2006 came into force, there was a lot of talk about changing the culture in planning. It required legislation to get that change in motion. We are still working on the system and, obviously, aspects of this bill continue that path towards changing planning culture. Some sort of legislative imperative for a cultural change, as well as a legislative focus on the economy, is central to what we are doing.

Alison Johnstone: Do you feel that in cases in which a contentious decision has to be made—for example, the decision on the Menie estate, as a result of which a site of special scientific interest has become a golf course—politicians are, by relying on bodies such as SNH to weigh up the pros and cons of environmental sustainability against economic benefits and to take a view instead of doing that work themselves, almost saying, "I'd rather someone else made the decision"?

Professor Griggs: I am not sure what is wrong with asking your experts to make a decision.

Alison Johnstone: So you do not feel that there is any conflict between making such decisions and, say, protecting the environment.

Professor Griggs: No. Over the years, we have discussed some very sensitive issues with Government bodies such as SNH, SEPA, and the Royal Society for the Protection of Birds, as well as with non-governmental organisations. We have had very sensible discussions about that balance and sometimes it comes down on the environmental side and sometimes it comes down on the economic side. Let me put it this way: I have not seen that conflict—or rather I have not seen it not be resolved in a sensible way that satisfied people on both sides of the fence.

The Convener: Dennis Robertson has a supplementary question.

Dennis Robertson: It is just a point of clarification, convener.

If I understand you correctly, Professor Griggs, you are advocating legislation. That is absolutely fine, but you are also suggesting that it be open to interpretation.

Professor Griggs: No, I do not think that I said that. Did I?

Dennis Robertson: I have to say that I am bit confused. At times, you have said that there are occasionally ifs, buts and maybes; that there is a local process as well as national standards; and that some of the regulatory reforms could be open to interpretation because of the move from national to local. Am I wrong?

Professor Griggs: You would have to give me an example of where I said that.

Dennis Robertson: I got a bit confused when in response to Alison Johnstone's question you said that people might have to apply common sense at times. That suggests to me that individual aspects might be open to interpretation.

Professor Griggs: Let me rephrase what I meant. The question was about whether legislation pushes people in one direction rather than another. In response to that, I think that I would now say: no, as long as you apply common sense in the interpretation of legislation. If the legislation is good, you will not get into those conflicts and there should be fewer differences; after all, if we think about it sensibly, good legislation should drive us all in the same direction. As a result, I do not see that kind of conflict or misinterpretation arising.

Dennis Robertson: Thank you for that.

The Convener: Chic Brodie, too, has a brief supplementary question.

Chic Brodie: I have to say that I am struggling with the same issue. We have dwelt on the idea of consistency, but what of the conflict that might arise if a minister involved in determining national standards listens to applications for exceptions to them and advice that, as Professor Griggs suggested, might go down the economic or environmental route? How do we achieve consistency, particularly given the need that you have suggested for national standards?

Professor Griggs: It all comes back to where we started: we are discussing national standards and the particular process that they represent.

I remind members of Garry Clark's example of a lawyer putting forward evidence to a judge or court. Each of us in this room could look at the same piece of information and come up with a different interpretation. That is the decision part of standards, and the bill says nothing about how people make decisions. National standards are about process and saying that the way we do things in certain areas should be the same across Scotland.

Chic Brodie: But surely they are the backdrop to a decision being made.

Professor Griggs: I do not think that that is the case at all. Process is about bringing forward the information that you require to make a decision. All we are saying is that, in certain issues, it would be useful if that information were brought forward in the same way across Scotland.

Chic Brodie: Thank you.

Marco Biagi (Edinburgh Central) (SNP): I want to go back to the duty on sustainable economic growth. The bill will provide that regulators must contribute to sustainable economic growth, except to the extent that it would be inconsistent with the exercise of other functions. Does that make it almost a secondary duty? If so, is that a good or bad thing?

Professor Griggs: If anything, it will make it an equal duty. It will raise it to a duty, rather than a power—although we could go on forever about the difference between duties and powers. It will not make it higher or lower.

Garry Clark: Anything that will encourage regulators to take a more holistic view has to be positive. Russel Griggs mentioned the business and regulatory impact assessment, which has been successful in ensuring that Government takes a more holistic view of business in the application of a regulation. Anything that will give an incentive to take a more holistic view has to be welcomed.

Professor Griggs: It was interesting to look at how the first and second round of business and regulatory impact assessments have worked and the feedback on them that we had from businesses and Government officials, which was positive. When the RRG started BRIAs, they were a means to an end. The end was about getting officials and businesses to talk more about what they want to do before they do it. BRIAs now make that mandatory and are a good example of how a rule takes you to the consequence.

All of us in the RRG have said that we want to get to a position in which a BRIA is not needed because, when officials look at a new piece of policy, they routinely find 12 companies on which it will impact, and then have a conversation with them. We have had to make it a rule, because sometimes the only way to get a horse to go to water and understand that it is good to drink is first to put in place a rule that allows you to go down that road. That is what BRIAs are all about.

The businesses that have replied said that the process was very time consuming but really interesting. They did not think that it was a waste of time at all, because they now understand where the policy maker comes from, as much as where the business comes from. We want to encourage a much greater exchange of information between Government and businesses on regulation and rules and how we do everything. Sometimes, we have to first put in place a rule to get people to understand what we are trying to get to.

Marco Biagi: Some advisory bodies that feed into the planning process already have duties to consider economic impact, although I do not know whether those are formalised in statute. For example, controversial developments in heritage properties can be justified on economic grounds. Is that model similar to the one that we will see in regulators and advisory bodies more widely?

Professor Griggs: Yes, I think so. SEPA already has that for things such as small hydro schemes. Interestingly, as such schemes have gone through that licensing process, the balance has been about 50:50 between those that have been turned down for environmental reasons and those that have been told yes for economic reasons. The answer to your question is probably yes.

Marco Biagi: To illustrate the benefits of the new duty, you referred to Tesco a few times, which shows the clear benefit on explanatory grounds. Can you suggest an example of where a decision would be different as a result of the duty?

Garry Clark: An example that springs to mind is the fire safety regulations from two or three years back.

Professor Griggs: You should talk about that, Garry, because you remember more about it than I do.

Marco Biagi: Is that when there was an issue with bed and breakfasts?

Professor Griggs: Yes.

Garry Clark: At an early stage, it was detected that the application of the regulations was particularly onerous on smaller business such as B and Bs and small hotels and that the regulation far outweighed the risk in some of those instances. The RRG went back and looked at the area and the Government made some changes to the regulations. If that impact had been considered earlier, we might have ended up with better regulation in the first place that allowed businesses to comply with a relevant set of standards, and we might not have had to re-examine things later.

10:30

Professor Griggs: Garry Clark is right. Indeed, one of the consequences of that work, which was led by little Jimmy Campbell of the fire service, was an understanding that, as Mr Campbell himself pointed out, both the legislation and the guidance were not awfully clear on the matter. He said, "You're trying to get fire officers to do something that they are not trained to do," which was to make a risk assessment of a B and B and ask sensible questions. As a result, what was required was not just a change in regulation, but a change in the training of those who were going to have to implement the regulation. After knocking on someone's door and asking, "Are you a B and B?", a fire officer should then ask, "And how often are you a B and B?" because if the response is, "Only when the Open golf championship comes to my area," that establishment should be treated differently from a B and B that takes in three people every week.

As I said, Garry Clark is correct. The combination of the change in the legislation and the change in the training process has moved things forward a long way. That is a very good example and I thank Garry for it.

The Convener: Before I bring in Mike MacKenzie, I want to discuss the interface between national standards and local discretion. You said that national standards are very much a process, but I note that section 1(1) of the bill says:

"The Scottish Ministers may by regulations make any provision which they consider will encourage or improve consistency in the exercise by regulators of regulatory functions."

However, the term "regulatory functions" is defined inter alia in section 1(5)(a)(ii) as

"setting standards or outcomes in relation to an activity".

If the regulatory functions include setting outcomes, does that not go beyond process?

Professor Griggs: No. Going back to the issues of alcohol licensing, knife crime and the RRG's focus on where the economic impact might be felt, I note that, when the Government formulates a policy, it starts by asking "What?" or in other words, "What are we trying to achieve from a bill?" With the alcohol licensing legislation, the aim was to impact on the amount of alcohol that was being taken and the number of knife crimes.

The legislation that is introduced is the how, and one thing that the RRG tries to do all the time is to find out whether the how gives us the what. In many instances, that is not the case. People will probably start throwing things at me in a minute for saying this, but I am not sure that, with the legislation that aimed to address alcohol licensing and knife crimes, the how satisfied the what, if I can put it that way. It is important in a bill to understand at the beginning the outcome that you are trying to achieve. If the bill gives the Scottish Government the ability to put in place hard outcomes that will drive the other processes, the result, one would hope, will be that processes that give a different outcome from the one that the Government is trying to achieve will not be put in place. If we start off with no outcomes, we will wander merrily all over the place. I understand what you are saying, convener, but I am not sure that the definition that you highlighted is totally inconsistent with the rest of the bill.

Mike MacKenzie (Highlands and Islands) (SNP): If we were able to effect a better regulatory regime, would it be possible to achieve enhanced sustainable economic growth while safeguarding the environment, communities and individuals' quality of life?

Professor Griggs: Yes. An example is our work with the chemical companies in Grangemouth, which I mentioned. At the start of our meetings, companies were sceptical about how some of the balances could be achieved, but at our meeting a couple of weeks ago one of the gentlemen who run Ineos said, "The great thing about meeting in multilateral forums to discuss the issues is that now I understand better how everyone else round the table operates, so that when we have wider conversations about why I am concerned about paying for flood defences, I can understand what the council and SEPA's views are."

An interesting discussion emerged in that regard, which SEPA is taking forward. One issue that can be fairly contentious is how regulators and Governments portray information on their websites. Ineos said that when one of its analysts in China starts to evaluate its business plan, they will scan Government websites. Indeed, the representative from Scottish Development International said that it is fairly common for people to scan Government and regulator websites across the world. Therefore, how things are depicted is important. Currently, the only flood map on the SEPA website shows Grangemouth under 10 feet of water, because SEPA is legally bound to show only a map of a one-in-200-years event. By the end of the year, that will not be the case; SEPA will have three maps on its site, to show what is likely to happen, what is a really extreme event and what is less likely to happen. There will be maps showing medium, high and low likelihood.

It is about explaining to people that changing some of the minor things that they do can have an impact on competition and economic development. The example that I have given is one of the best recent examples of a simple and easy way in which the RRG and others have been able to have an impact in that regard. SEPA said, quite justifiably, "That is not what we are there to do." Industry replied, "We agree, but that is not how others see you. If everyone is to work together to ensure that we present the best possible case, we must think about how we strike a balance."

Mike MacKenzie: I am looking for a one-word answer to this question. If the bill is implemented, do you expect it to increase sustainable economic growth?

Professor Griggs: Yes.

Mike MacKenzie: Thank you.

We have talked about geographical consistency and so on, but we have not talked about proportionality, which is a big area of concern for me, not least because some commentators suggest that recovery, when it comes, will come from the small business sector.

We took informal evidence directly from small businesses, which was interesting. We often hear from lobby groups and representative organisations, but we do not often get the chance to hear directly from small businesses. An interesting request from the small businesses, which I think that we are bound to go along with, was that we preserve their anonymity. That struck a chord with me, because I hear all the time from small businesses that are struggling, not just with the complexity of regulation but with the culture in which it is implemented.

How far will the bill advance proportionality? It is not clear to me what mechanisms there are in the bill to achieve that end, although it is one of the bill's stated aims.

Garry Clark: Engagement between business and Government and the regulator has brought the best results over the past few years in relation to various aspects of better regulation. The bill has the potential to increase such engagement. That brings me back to what the business and regulatory impact assessment process has achieved. We are on a path towards better regulation. It is easy for business organisations to say, "Regulation bad," but I do not think that too many of us say that any more. The issue is not about the number of regulations out there, and it is not a numbers game; it is about ensuring that we have the best possible regulation and engagement so that we have a process—

Mike MacKenzie: Can I stop you there? I am not sure that the word "engagement" appears anywhere in the bill. On the issue of proportionality, are there specific teeth there? I absolutely agree with you about the concept of engagement, which is a virtuous concept, but where in the bill are the mechanisms that will lead us to more proportionate implementation of regulation?

Garry Clark: Even the very fact that we are looking at national standards on processes must be a benefit for a number of businesses, particularly those that trade across local government areas. In Ayrshire there are potentially three different authorities to deal with and, depending on what a business is looking for, three different sets of forms to fill out. Even the simple process of having one standard form that can be—

Mike MacKenzie: Can I perhaps tell you a wee story that will illustrate what I am getting at?

The Convener: Can you make it quite a short story, please?

Mike MacKenzie: I often hear the complaint from constituents that regulators seem to almost look the other way or have reasonable and understandable relationships with public sector organisations that they have to regulate—I am thinking about SEPA and Scottish Water—or big business. Those guys have at least a reasonable and equal chance of being able to deal with regulators and getting through the minefield of regulation, whereas the small business labours under a huge degree of complexity and sometimes a culture that is less enlightened than any of us would wish to see.

Professor Griggs: I do not think that any bill will ever solve that. I have been involved in small business and was chair of the small and medium-sized enterprises council of the Confederation of

British Industry for five years, so I know that that is a perennial problem. I do not think that you will ever make every small business happy with legislation.

Since the RRG started in 2004, it has continually asked businesses to come forward with regulations that they are unhappy with. However, without taking my socks off to count, I could probably tell you the number of specific cases that people have raised over the past 10 years or so.

One challenge that we have with small firms is ensuring that the process that we have works for them. You are correct in what you say. Last year, we looked at a case to do with new EU regulations on biocides, which were being put together by organisations such as BASF—huge chemical companies. There would have been a huge impact on a load of SMEs across Scotland but, working with the Health and Safety Executive, we have mitigated a lot of that.

I do not think that any bill will ever deal with the question that you raise. The challenge with teeth is that you have to figure out who you want to bite.

Mike MacKenzie: Sometimes it is just about having them.

Professor Griggs: We had a discussion about that with SEPA years ago. Imagine that SEPA came to you and said, "You know what this new regulation means and you know how to enact it. We will trust you to go away and implement it and we will come back and audit you from time to time to make sure you do it." If you have teeth as a policeman, you ask, "Will you please show me how you have obeyed the law?" That is different, and probably the wrong way to go with a company. We have tried hard to move to the former, rather than the latter, if I can put it that way.

Mike MacKenzie: My final question is an easy one. Part of the bill is about enhanced planning fees. There is a suggestion that planning authorities that do not provide a quality service will perhaps lose the ability to charge the enhanced fees, so there will be a financial penalty.

I am a Highlands and Islands regional member, so I interface with a number of planning authorities that have obviously different performance or quality standards. However, they all seem capable of generating report cards for themselves that give 97 per cent ratings. Bearing in mind that planning is a highly contentious area, how on earth will we manage to assess the quality of standard between one planning authority and the next?

10:45

Garry Clark: That is a difficult question for us to answer.

The Convener: You were assured that it would be an easy one.

Garry Clark: In general, our members are reasonably comfortable with the prospect that an increase in planning fees would be accompanied by an increase in performance. If our members are assured that they will get something for their money, they will be relatively comfortable with that. There is an issue with business rates, in that we are being asked to pay 22 per cent more over the current spending period without anything material in return. That is a different story. However, on planning, if we can be assured that there will be material changes for the better in return for increased planning fees, most of the members to whom I have spoken would be relatively comfortable with that.

You are right that it is difficult to compare performance between different planning bodies. That will have to be squared before the new rules can really bite.

Professor Griggs: The last thing that the RRG would want is to set up a regulator to do that. We must be careful that we do not create little industries to go away and do some of those things. Both of us understand your concern on that, Mr MacKenzie.

Chic Brodie: Professor Griggs said that it depends on who you want to bite. On achieving a level playing field between large and small business, I want to make sure that we bite. At a conference that I was at, the managing director of Oxera suggested that we could either be lumpers or splitters, with lumpers being those who prefer a single organisation to take charge of not only regulation, but competition law.

I ask that, when you consider how we apply regulation, you consider not only the impact on international competitiveness, but the fairness of competitiveness between big business and small. We will certainly do that.

Professor Griggs: Yes, we will. We are already doing that. On biocides, which I used as an example earlier, we are already trying to influence in Europe. Basically, the European authorities go to trade associations. However, we have made it clear in our BRIA process that we do not think that trade associations are the right bodies to ask; we must ask individual businesses. The trade associations tend to be staffed by large organisations, because they tend to have the people and resources to do that. Therefore, we are pressing hard to ensure that the voice of small businesses is heard in that process. That issue is challenging and not without its difficulties, but we are 100 per cent on your side on that.

Chic Brodie: Thank you.

The Convener: I draw this evidence-taking session to a close. I thank Professor Griggs and Garry Clark for coming. They have given us a lot to consider over the coming weeks. I am grateful to them for their time.

We will have a short suspension to allow the changeover of witnesses.

10:48

Meeting suspended.

10:53

On resuming—

The Convener: We come to our second panel on the Regulatory Reform (Scotland) Bill. I welcome Roger Burton, who is the programme manager for wildlife and social and economic development programmes at Scottish Natural Heritage; Riddell Graham, who is director of partnerships at VisitScotland; and Martin Tyson, who is head of registration at the Office of the Scottish Charity Regulator.

Before we get into questions, I invite the witnesses to provide a short introduction to their evidence. We will start with Roger Burton.

Roger Burton (Scottish Natural Heritage): We are pleased to have the opportunity to present our evidence to the committee. We welcome the bill's overarching purpose of achieving a range of social, economic and environmental benefits by improving regulatory functions. Our written submission sets out the basis of our evidence, and I will not repeat it. I will be pleased to answer any questions that members might have that would help them to understand the role that we play in the wider regulatory framework and how we approach it.

Riddell Graham (VisitScotland): I am delighted to be here and to provide evidence. I will give some context to VisitScotland's work and my role in particular. My team is responsible for all the external partnership working that VisitScotland needs to do to deliver its overarching objective, and it engages with a very wide range of external partners. More specifically, my team delivers our world-leading quality assurance scheme, which covers accommodation and visitor attractions. It is linked to a very strong advisory and signposting service. We also engage with businesses commercially to sell commercial marketing opportunities.

In the past 12 months, I have led a piece of work to create a new national tourism development framework, which is aimed at influencing the planning system nationally, regionally and locally in relation to tourism, given the planning system's importance to the tourism economy.

As an organisation, we are not a statutory regulatory body.

Martin Tyson (Office of the Scottish Charity Regulator): We are glad to be here and to have the opportunity to give evidence. The Office of the Scottish Charity Regulator regulates more than 23,000 charities in Scotland. It is a highly diverse sector. We welcome the regulatory principles that are set out in the bill. They are largely the same principles as those that underpin the Charities and Trustee Investment (Scotland) Act 2005, which provides the legal framework for our activities.

I will not repeat what is in our written evidence. As far as our main observations are concerned, we have some questions. We are slightly unclear about how directly the bill has a bearing on our activity and to what extent it replicates powers that are already contained in the legislation that controls us.

The Convener: Thank you.

Some of you will have heard the tail end of the previous evidence session. There are a number of areas that are of particular interest to committee members. One is the issue of national standards, the opt-out and how that will work in practice. We are also interested in the resource implications for regulators and public bodies, and whether there is a conflict between the economic duty and the other duties on regulators—for example, in relation to environmental issues. We will tease some of that out as we go through the questions.

As we have three distinct viewpoints on the panel, it would be helpful if, rather than throwing out general questions, members could direct their questions to a specific member of the panel. If any of the panellists would like to respond to a question that has been asked of someone else, they should catch my eye and I will bring them in. Because we have three different interests represented on the panel and a wide range of subjects to cover, I ask members to ask short and focused questions. If we could also have short and focused answers, that will help us to get through the issues in the time that is available.

We will start with the issue of national standards.

Margaret McDougall: Good morning, gentlemen. This is a general question for all of you. Does the power need to be directed at bodies such as VisitScotland, SNH and OSCR?

Riddell Graham: In my opening remarks, I referred to quality assurance and the planning work that planning authorities carry out in relation to tourism. The quality assurance function that we have carried out for more than 30 years has

worked extremely well on a voluntary basis. Our quality scheme has the highest penetration level of any part of the United Kingdom. Funnily enough, our colleagues in Northern Ireland, where quality assurance had involved a compulsory element, have adopted our scheme in the past 12 months, and we are delivering it on their behalf. They found that a compulsory element does not really work in raising standards.

As far as the planning framework is concerned, what has been encouraging from my point of view is that we have engaged with all the local authorities in Scotland in developing it. We were clear that we wanted to work with them rather than impose anything on them as part of the plan and the framework. That has been welcomed immensely by COSLA and by 30 of the 32 local authorities that responded. The principle of working in partnership rather than imposing things works extremely well from a tourism perspective in those two areas.

Martin Tyson: OSCR is a national regulator of charities across Scotland so we find it harder to see how the driver of getting consistency across several bodies doing the same kind of regulation in different geographical areas applies to us. I understand the driver for that across local authorities, but it is not clear to us how it applies to us as a national regulator. Turning that around, we have an interest in things such as the licensing of public benevolent collections—shaking tins on the street—which is largely done by local authorities, and we are glad to see anything that will enable the regulation of that to be more consistent.

11:00

Roger Burton: I would make the same point, as SNH is a national body that plays a role at local and national levels. There are aspects of the bill that we hope will have little bearing on SNH. There will always be issues within larger organisations of consistency at the individual level, but we have put in place processes to address that. We also play a role in providing guidance in the planning system, and there are areas in which we can see the bill having potential benefit by providing added weight to that guidance in the process.

Margaret McDougall: SNH's submission says:

"We hope that the proposals for planning authorities' functions: charging and fees will allow them to develop their own capacity without increasing their expectations on ourselves, for example, in terms of response times."

Why should SNH be exempted in that way?

Roger Burton: I do not think that SNH should be exempted from that, but our resources are constrained. If there is a vast increase in throughput, we will have to look carefully at how we can play our part in the system. If that throughput is being resourced by increased capacity in local authorities that are getting additional resources and fees, which allows them to process planning applications faster, we will have to look closely at the level of input that we can provide to those planning applications so that we can manage within our fixed resource.

Margaret McDougall: Staying on the point about national standards and opt-outs, do you think that there is sufficient scope for local opt-outs from the national standards in the bill?

Roger Burton: I am not certain how far the bill goes in that way. That is where we see a code of practice having a significant role to play in defining how to deal with local decisions that need to properly reflect local circumstances in national standards.

Margaret McDougall: Yes. The bill is not clear on the exact criteria for opt-outs, so do you think that they should be better defined?

Roger Burton: I am not sure that I can answer the question about whether the bill should go there. There is always a question as to how far we go with the legislation and how far issues can be dealt with through codes of practice and other mechanisms.

Margaret McDougall: Do any of the other panel members have a view?

Riddell Graham: I do not really have a view. Our day-to-day work is not close enough to those issues. The new national tourism development framework is at a very early stage. We have just been through the consultation process and are just pulling together the final version of the framework.

How this would work effectively in relation to tourism and planning is by working closely at a local level with the right people around the table. Having them make decisions that are right for the local economy would make it work. As we all know, every part of Scotland is different and that should be reflected in the way in which the bill operates for planning at the local level.

Martin Tyson: Our involvement with planning is marginal; it tends not to be much at all.

Mike MacKenzie: My questions are for Mr Tyson. OSCR is a regulatory body, but it is unusual in the fact that it is non-ministerial. I suppose that OSCR has drawn attention to itself because of the strong sense in its submission that it should not be in schedule 1. Why do you think that is the case?

Martin Tyson: I do not think that we have a particularly strong sense of that. As I said at the beginning, it is more that we are querying how directly some of the bill bears on us. As we are a

national regulator, it is not clear how the geographical consistency issue bears on us.

The other issue is the way in which we were established. We were established as a non-ministerial department, which is probably still a fairly rare beast. Looking back to how that was done and the consultation that surrounded it, I think that there was a driver for having a regulator that stood slightly to the side of Government and whose regulatory decisions and operational processes could be seen as independent. Specific mechanisms are set out in the 2005 act that the Parliament considered when it was thinking specifically about charity regulation. Ministers have the levers to consider how regulation should be done and to tweak how it should be done, if that seems sensible. We are concerned about how it might be perceived if there was a more open-ended power to influence how we go about our regulatory business.

Mike MacKenzie: Yes, but that begs a question that is often asked about regulators and which is particularly apt in your case. Who regulates the regulator? Who regulates OSCR?

Martin Tyson: In our case, it is Parliament. We account to Parliament for how we go about our normal business. Obviously, on the financial side, as a public body, we account to ministers for the money that we get, but we report to Parliament on our regulatory activities.

Mike MacKenzie: Okay.

One of the stated principles in the bill is proportionality. I take it that you would sign up to that principle.

Martin Tyson: Very much so. Proportionality was also one of the regulatory principles that was built into the 2005 act.

Mike MacKenzie: From your written submission, I get the impression that you really do not want to be part of the process, as you are already doing pretty much everything that the bill suggests.

Martin Tyson: We would not in any way suggest that we are perfect or that we are there. We have a strong consciousness of the need to be proportionate and consistent. Obviously, there is sometimes a tension between the two, as there is between the other principles, such as fairness, and the targeting of activity, which goes along with proportionality.

Although they are not necessarily directly to do with accountability, there are mechanisms for challenging our decisions. There is the procedure for internal review and there is the Scottish charity appeals panel. Our decisions can eventually be appealed at the Court of Session.

On proportionality, I am thinking about the cases that we have had at the Scottish charity appeals panel, which very much holds us to account and tests us on proportionality. The same applies to consistency. Consistency is one of the key things that any of our regulatory decisions will be tested on. We will be asked, "Is the decision the same as the one that you made last year in similar circumstances? Is it consistent with legal precedent?"

Mike MacKenzie: I question the effectiveness of that, given the number of complaints that I have received about OSCR from very small charities that have charitable status only because funding agencies often make that a prerequisite for receiving funding. In fact, the situation seems so bad that a number of those very small charities have asked me not to raise the issues formally with you because they are so frightened of OSCR.

The evidence that I have suggests that, far from being removed from schedule 1, OSCR should be there at least twice. It gives me great concern that your approach is, "No, no. That shouldn't apply to us; we don't want to be part of it." Do you have any advice for very small charities that feel that they have been disproportionately dealt with by OSCR on minor housekeeping issues, or made to feel like criminals absconding with large amounts of charitable proceeds? What mechanism is there for them to seek redress?

Martin Tyson: Where we have made decisions that are reviewable, people can ask us to review them; we then move to more formal mechanisms. We look increasingly to go out and engage with small charities. I was in Orkney last week, talking to a lot of small charities in the islands: local development trusts, village halls and the like.

Life is very difficult for the trustees of small charities, for all sorts of reasons. We do not intend regulation to be something that makes life more difficult for them. There are certain basics in charity law and charity regulation with which charity trustees must comply. However, we are concerned to have a proportionate approach. In the past, we have recommended to Scottish ministers that they make regulations that will enable the approach to be more proportionate. We gave an example of that in our written evidence about charity reorganisation, which can be a burden for small trusts. For instance, outdated trust deeds can make life very difficult for trustees; sometimes they cannot recruit new trustees or use their money in the way that they might want to.

Similarly, we have tried to simplify the submission of charity accounts and annual returns. A couple of years ago, we reduced the annual return to, essentially, one page of A4. We are alive to the concerns of trustees of small charities. I am concerned that those issues have

been raised with you. The first thing that we would say to trustees who are feeling like that is that they should speak to us.

Mike MacKenzie: As I have explained, a lot of them are so intimidated that they do not want even me to raise matters with you formally. That concerns me because, as I am sure you will agree, the social enterprise sector is a growing sector in our economy. Many, if not all, social enterprises tend to be charities. There can be an economic effect of regulation not being proportionate, and it can inhibit people from getting involved in charities.

Martin Tyson: The social enterprise aspect is interesting. Some social enterprises fall squarely within the charitable sector. There are social enterprises at the other end of the spectrum that do not; rather, they are businesses that have a social conscience, if you like, but which do not want to be charities. We sometimes have an issue with the boundary of what is charitable and what is social enterprise and how those interact.

The best that we can do is to be out there, speaking to social enterprises and to the people who represent these sectors, so that we can try to tailor the kind of regulation that we do to their needs.

Mike MacKenzie: I have one final question. Prior to OSCR being set up, charities were regulated by Her Majesty's Revenue and Customs. Are you aware of any areas of conflict between HMRC and your office?

Martin Tyson: We tend to work quite closely with HMRC and our working relationships are good. There is a fundamental issue there, which is that, in recognising charities and deciding whether charities get tax reliefs, HMRC uses English tax law. That is very similar to Scottish law and to what is in the 2005 act, but it is not quite the same. There can be areas around the edges, such as social enterprise, development trusts and the like, where English law is not quite the same as Scots law and a tension arises.

11:15

Rhoda Grant: I have a supplementary question on this subject, which goes back to why OSCR is included in the bill. Is it not the case that OSCR demands that organisations report annually in certain ways, and that that can coincide with the need for organisations that are registered as companies to report in that respect, too? Is there not scope for OSCR to work with the other organisations to streamline regulations, so that people just need one form of accounting? I am aware that some people have to prepare different returns for different organisations, which creates more work. They have to conform to different sets of regulations.

Martin Tyson: The requirement to report annually to OSCR is a legislative one. It is not something that we have made up.

Rhoda Grant: But you could streamline it with other reporting agencies to ensure that people can put together one set of reports, rather than several.

Martin Tyson: We work with the likes of Companies House and other regulators such as the Scottish Housing Regulator to streamline things where we can.

The other development in the past few years is the Scottish charitable incorporated organisation. That is a regulatory form—a form of incorporation—that is specifically aimed at charities, so that they do not have to be registered with Companies House. The only return that they produce is to us. Many of the very small, unincorporated charities and trusts report only to us. We have tried as hard as we can to streamline the content and form of the report and to allow them to report online, thus reducing the burden for them where we can.

Rhoda Grant: Is the scope of the bill not to streamline the reporting to different organisations? That is what we have been hearing very clearly—the real aim of the bill is to simplify the procedures that currently involve people completing different forms for different organisations. Would it not be helpful to have OSCR involved in that?

Martin Tyson: Yes, but we do that already. We have a memorandum of understanding with Companies House and with the Scottish Housing Regulator—we have a big overlap with its work. There is scope in the bill for us to delegate some of our functions, for instance with the churches, as some denominations are designated religious charities, and there is scope for us to withdraw from some of our functions in respect to those charities. We do that to the extent that we can.

There is a limit to that, as different regulators do different jobs. There is a minimum requirement on us to do what we are required to do in our regulatory role, which is not quite the same as that of Companies House—it is a registrar of companies, and is interested in the role of directors and in people fulfilling their fiduciary role as directors, whereas we have a slightly different slant on regulation, as we are interested in trustee duties and in people complying with the charity test.

The Convener: Let us move the discussion on a bit and consider some other issues around resource implications and infrastructure questions.

Dennis Robertson: I will start with VisitScotland, but I also seek the views of SNH and OSCR. Does the bill have a resource implication for VisitScotland? If so, how do you intend to address it?

Riddell Graham: As far as I can see, the answer to that is no. In relation to quality assurance, the scheme is voluntary, so we adjust the resource depending on the engagement with businesses. People pay to be assessed and the resources are allocated accordingly. We have more than 30 years' experience of running the scheme, so we are pretty well in the line in that regard.

Your question is an interesting one as far as the national tourism plan is concerned. A number of people have said, "Fine—you might have produced the plan, but how are you going to implement it?" My team includes a series of regional directors who, although they engage predominantly with local authorities, also engage with local stakeholders and there are a number of mechanisms—area tourism partnerships, of which there are a number of good ones in Scotland; existing community planning arrangements; and local forums—that we can use to bring the plan to life. We would play more of a facilitation role and ensure that the right people are round the table to turn the plan's fine words into action on the ground.

In response to your question, however, as I see things right now, there are no immediate resource implications in the two areas for which I am responsible.

Dennis Robertson: Even being a facilitator will require resources. Are you content that the bill will impose no additional resource burdens?

Riddell Graham: Yes. As far as the plan is concerned, I think that it gives my team a much more focused reason for engaging with local authorities. At the moment, our relationship centres on the airways that we have in relation to funding for marketing activity. The national tourism development framework's relationship with planning will have a much greater impact on local economic activity as well as a much greater general economic impact than the current straightforward relationship. It will give my existing staff a much better local role than they have at the moment, but I do not see any additional burden on our current resources.

Dennis Robertson: And there will be no additional economic impact on you.

Riddell Graham: None at all.

Dennis Robertson: Excellent. What does SNH have to say?

Roger Burton: Details have still to emerge and we do not know how the code will work but, as far as we can tell at present, we do not think that the bill will have any material implications for our resources. We might do a bit more in certain areas, but as we are already doing much of that work in some shape or form, it will simply complement or displace what we are doing through our team Scotland approach and our work in planning reform, forums and so on.

Another slight uncertainty relates to reporting requirements under the new economic duty. Under the Public Services Reform (Scotland) Act 2010, we already have a duty to report on sustainable development. A separate reporting requirement could add some complexity, but the issue is at the edges rather than being substantive.

Dennis Robertson: So you are fairly content that the bill will have no adverse impact on your current operations. Will it help you to focus?

Roger Burton: It might. A number of areas in the bill might help with the way in which we are travelling. For example, ensuring that our guidance is consistent and understood might help us to manage things within our resources, which might then help to offset the sorts of pressures that Margaret McDougall mentioned, which we wanted to put a little marker against.

Martin Tyson: Likewise, I see no great resource impact or implications for OSCR. You are not too far out of line with where we are at present.

Dennis Robertson: I am sure that we are all content that the bill will have no adverse effects on your organisation's resources. Thank you for that.

The Convener: Chic Brodie will start off our next line of questioning, which is on the impact of the new economic duty.

Chic Brodie: Good morning. What do you think we mean when we talk about sustainable economic growth?

Riddell Graham: Our pretty clear view of sustainable economic growth can be explained through the three-legged stool analogy. In other words, economic sustainability on its own just does not work. It needs the social and environmental elements.

Chic Brodie: Where do you place the emphasis, among the three elements?

Riddell Graham: They must all be in balance; one affects the other. If we encourage far too many tourists to an area, there is great economic benefit but the environment is destroyed, which is no good. If the community does not accept the additional impact from visitors, that is no good either. There are few areas in Scotland where I think that—

Chic Brodie: What do you do when there is conflict between any two of the three? Where does your priority lie?

Riddell Graham: The economic benefit is important to Scotland, but if that takes precedence over the other elements, there is a chance that the benefit will not be sustainable in the long term, and sustainability is about the longer term—

Chic Brodie: That was not my question. My question was this: as far as you are concerned, if the elements are in conflict, what side is your organisation on? I understand the desire for balance, but life is not perfect. Where is the priority?

Riddell Graham: At the end of the day, VisitScotland is an economic development agency that is responsible for generating revenue to the Scottish economy, but that is not at all costs. It is important to recognise the social and environmental impact. The reason why people come to Scotland on holiday is because they love the landscape and the countryside. They also like to engage with local people. The social and environmental elements are really important and we ignore them at our peril in our thinking about long-term growth in Scottish tourism.

Roger Burton: I agree with a lot of what Riddell Graham said. We see sustainable economic growth in the context of the Government's purpose to make Scotland a more successful country, with

"opportunities for all to flourish."

That sets the context, and the national performance framework provides the balancing mechanism for all the different interests that need to be recognised if growth is to be sustainable.

Chic Brodie: We have discussed process and we are talking about planning frameworks. Some of us would like to see outcomes. How do you report meaningfully on performance in relation to the economic duty that your organisations have?

Roger Burton: The reporting that we do on the sustainable development duty highlights areas in which our work contributes particularly to economic development. There will be wider areas where it contributes less directly. We highlight our work in the planning system—

Chic Brodie: How do you report?

Roger Burton: How do we report? There is a separate annex in our annual report, which is laid before the Parliament.

Riddell Graham: VisitScotland reports in our annual report in relation to the return on investment that our marketing activity generates in the United Kingdom and internationally. We also report on the added value that comes from our other activities. For example, you might wonder what impact our quality assurance work has, but in fact it has a significant impact on businesses investing in and improving the quality of their product. That is a direct result of our involvement and engagement with partners. However, the main reporting is on return on investment from marketing activity.

Chic Brodie: And you know how much investment you make, or the whole industry makes.

Riddell Graham: No—let me be clear about what we measure. We measure the impact of VisitScotland's investment in relation to the benefit to the Scottish economy. The wider involvement of individual businesses is something that we measure overall on an annual basis, but our direct involvement is measured through the ROI work that we do—

Chic Brodie: I will come back to that, if I may, in terms of what teeth you have in relation to regulation.

Martin Tyson: We also report annually. Under the Public Services Reform (Scotland) Act 2010, we have a duty to report on sustainable economic growth. That is what we have done, in relation to our activities as a public body and as a regulator. As Roger Burton said in the context of his organisation, some of our activity has a bearing on sustainable economic growth. However, much of what charities do does not have such a direct relationship, so it is—

11:30

Chic Brodie: I am the convener of the cross-party group on social enterprise. Your name has never come up with regard to help and guidelines. Do you have a database of all social enterprises, community interest companies or charity organisations?

Martin Tyson: CICs cannot be charities. We have a register of charities—that is one of our main functions. The problem is that social enterprise is a sort of label rather than a form of organisation. A lot of different kinds of charities that call themselves development trusts or community bodies will have a social enterprise element to them. There is a difficulty in pinning down what is a social enterprise and what is not.

Chic Brodie: You are the charity regulator and many of those are charities.

Martin Tyson: Yes, indeed.

Chic Brodie: My view is that we do not know how many there are out there, so how can you be regulating them?

Martin Tyson: We know how many charities there are. We are a charity regulator, not a social

enterprise regulator. A lot of charities have a social enterprise element. Part of what they do will be a social enterprise that fundraises for the directly charitable activity. They would not necessarily describe themselves as social enterprises. It is not a definite or hard-edged label or concept.

Chic Brodie: Should it be, under new regulations?

Martin Tyson: Should social enterprises be regulated as social enterprises?

Chic Brodie: Yes.

Martin Tyson: That would be quite difficult, for the very reason that it is hard to pin down what they are. Some bodies would definitely describe themselves as social enterprises, whereas some would say that they are a charity that does a bit of social enterprise—

Chic Brodie: —and is treated as a charity.

Martin Tyson: They are treated as charities because they are on the register and are therefore subject to charity regulations.

Chic Brodie: However, there are some that are not on the register.

Martin Tyson: That is exactly right. One thing that is being done by the Scottish Council for Voluntary Organisations is a database of the larger voluntary sector, which includes non-charities and some social enterprises.

Chic Brodie: Do you accept that there are organisations that are treated as charities and that, although you are the charity regulator, you do not know all of them?

Martin Tyson: We know all the charities that are on our register.

Chic Brodie: I would disagree with you. I cannot even get—

The Convener: That is not really relevant—

Chic Brodie: I think that it is relevant to regulation.

VisitScotland talked about regulations and how well tourism and planning work together. There was a comment about South Ayrshire that was not particularly relevant. I will give you a comment that is relevant. I know that VisitScotland has responsibility for signposting. Why is there not regulation that allows planning authorities or VisitScotland to get brown tourist signs, which is a fundamental aspect of achieving your objectives?

Riddell Graham: Just to be really clear on that—

Chic Brodie: It is left to the construction company or road company.

The Convener: I am not sure that that is entirely relevant to the Regulatory Reform (Scotland) Bill.

Chic Brodie: I will come to the final point in a minute.

The Convener: Mr Graham, perhaps you can try to answer the question.

Riddell Graham: I will be absolutely clear on brown signposting. VisitScotland's role is simple. It is to communicate how people can apply for brown signs and to acknowledge whether they are in a quality assurance scheme. The responsibility for erecting, manufacturing and approving signs sits with either the local authority or the trunk roads authority.

As I speak, a seminar is taking place on brown and white signposting, involving all local authorities and a significant number of industry people. I am looking to improve the situation. Our role is only to acknowledge whether people are quality assured. The responsibility for turning down applications for signs—for whatever reason—lies with the local authority or the trunk roads authority.

Chic Brodie: My last question is for SNH. It is interesting that, yesterday, the Public Petitions Committee discussed wild land and conflict. As is mentioned in the schedules, SNH will have significant input to the Regulatory Reform (Scotland) Bill. What happens when you make recommendations? What is your view on the potential conflict for ministers in making determinations, based on your recommendations, on applications for exemptions from the national standards? Do you feel that you have teeth and that you are a doer, or are you just there to think?

Roger Burton: I hope that I am interpreting those roles correctly. I cannot possibly cover the whole range of situations in which we might provide advice, but when we do that, the advice will have a different status depending on whether it relates to international designations or some nationally recognised important feature. In relation to wild land, we are in national, not international, territory, so our advice is just that. In planning terms, we are not the decision taker. Others are required to balance the range of interests in their decision. When they reach that decision, we do not then take a view on how we feel about it. It is their decision.

Chic Brodie: Do you measure how many of your recommendations to ministers for regulation or changes are successful?

Roger Burton: We could probably provide an answer to that question in relation to ministers, but I am not certain whether we could quickly extract that information from our systems in relation to

local authorities. We have been updating them over the years to meet changing needs, but I am not certain whether I could give you that answer.

Chic Brodie: Mr Graham, would you like to comment?

Riddell Graham: In relation to wild land?

Chic Brodie: No, in relation to the recommendations that you make to ministers. What happens if a potential conflict arises for ministers in determining from either your advice or your recommendations what national standards should be? In what circumstances can applications be made to circumvent or be exempted from them? How many of your recommendations are accepted and how many are rejected?

Riddell Graham: It will vary depending on the advice that we have been asked for. We provide advice on a range of issues affecting tourism. In most cases, our recommendations are taken into account, but ultimately we must recognise that there is a democratic system in place that may overrule them. We can certainly find that information for you if you require it.

Chic Brodie: How much do all three witnesses think they will influence the Regulatory Reform (Scotland) Bill? My emphasis is on the word "influence".

Riddell Graham: I would look at it the other way round. I would look at how the bill has influenced VisitScotland as an organisation. We have never really been directly involved in the planning system, and the tourism development plan and framework have been developed on the back of the work that Russel Griggs led in developing the bill. As you know, Professor Griggs is a board member of VisitScotland, and when he sought advice from colleagues round the table and the VisitScotland board, planning was one of the key issues that they identified as requiring a more consistent approach. As an organisation, we have not been involved in that historically, and now we are directly involved in pulling the plan together and encouraging a more consistent approach and a greater focus on local economic development for tourism through the planning system. That would not have happened had the bill not been going through Parliament.

Roger Burton: I was going to say a similar thing. SNH is thinking much more about how the bill impacts on us, rather than how far we can influence the bill or have influenced it. We responded to the consultations with relatively minor points of detail, and we see that input working its way through. We think that we can contribute to some of the codes of practice that will follow from the bill, but not to the bill itself. The bill's impact on us is to reinforce the direction in which we are travelling.

Martin Tyson: Likewise, OSCR sees the question in terms of the bill's influence on us. As we say in our written submission, we are keen to be involved in the preparation of the codes of practice and the nitty-gritty of how the bill will work.

The Convener: Alison Johnstone also has some questions on the new economic duty.

Alison Johnstone: My questions are for Roger Burton. Has SNH's statutory balancing duty helped with its core purpose of protecting Scotland's natural heritage?

Roger Burton: I firmly believe so. Indeed, in recent years, we might have given greater weight to that duty and we see considerable benefits from embracing it. Natural heritage and the quality of our landscapes and nature are not only at the core of sustainable development but a huge asset to the country, and the need to look after them is recognised. They certainly contribute to sustainable economic growth.

Alison Johnstone: Do you see SNH's role as being to balance environmental and economic priorities?

Roger Burton: In some situations. Of course, we are not always the decision taker, but balancing is an important activity with regard to our policies and we certainly need to do it in the situations where we are the decision taker. I come back to the fact that balancing allows us to more effectively secure the conservation and enhancement of our natural heritage, the need for which has been recognised, as I have said.

Alison Johnstone: Do you see the new economic duty as duplication or double counting of what you are already doing?

Roger Burton: It could be seen as such. However, if that is the case, the provision in—I think—section 2(4) would mean that the new duty might not apply. If it does, we think that it will simply add to and reinforce our existing duties.

Alison Johnstone: But you do not think that the duty will impact on your ability to give independent advice on any conflict.

Roger Burton: No, because the bill is clear that in certain situations the duty should not override a public body's primary purpose or duties.

Alison Johnstone: Finally, are you clear that there is an understanding of what "sustainable economic growth" means, and not just what it means to SNH?

Roger Burton: I am quite sure that, in the wider world, there is a range of views on what is meant by that phrase. I think that I have already given the

committee our views on it with regard to the Government's purpose. I acknowledge that a much more esoteric—or, for all that I know, more practical—debate is going on, but I do not want to get into that here.

Alison Johnstone: Would you prefer the term "sustainable development" to be used instead?

Roger Burton: We do not have a strong view on the matter. There is a lack of clarity over the potential overlap between the new duty and our existing duty to report on sustainable development, and I am not entirely clear how we would tease those apart.

The Convener: I will slightly rephrase what Alison Johnstone was trying to get at in a question for all three of you. What difference, if any, will the new economic duty make to the current operation and delivery of your services?

Roger Burton: I do not think that it will make any difference, given that we are already working towards the national performance framework within which it sits. It is high up on the pyramid that the framework is building.

Riddell Graham: My response almost mirrors Mr Burton's. However, I am encouraged by the fact that, in the consultation exercise for the new national planning framework, a reference to sustainable economic development appeared for the first time ever. That is a really positive step and we need to take some credit for influencing it.

Interestingly, when we speak to local authorities they will, in almost every instance, tell us that tourism is a really important part of the local economy. However, when we delve below plans to see whether tourism and economic development are being brought together, we quite often find that both are missing. The thinking behind the national tourism development framework is to ensure that tourism is seen as a key sector in the local economy and that it is key to sustainable economic growth. That has not necessarily been the case in the past and I am delighted that all local authorities have now signed up to the approach that is set out in the plan that we have developed. As I said, I think that we influenced that recognition.

Martin Tyson: The duty will not make much difference to certain areas of our work and certain types of charity. Instead, it might focus more on the regeneration, development and social enterprise type charities that Mr Brodie mentioned and will feed into and facilitate the work that we are already carrying out with some of the umbrella bodies in those areas.

The Convener: Unless there are other members who have not caught my eye and who wish to ask a question, I think that we have reached the end of our evidence session. I thank the witnesses for their very helpful evidence.

We now move into private session.

11:45

Meeting continued in private until 12:00.

SUPPLEMENTARY EVIDENCE FROM SCOTTISH NATURAL HERITAGE

Introduction

The Economy, Energy and Tourism Committee has asked if SNH is able to provide practical examples of how the duty to promote sustainable economic growth might impact (positively and/or negatively) on a regulator or regulated activity compared with applying a duty to promote sustainable development when exercising regulatory functions. The Committee has also asked that we comment on what we consider any differential impacts of these two possible duties might be.

Context

As outlined in our submission to the Committee dated 22 May 2013, our primary regulatory functions are:

- Licensing of management, research and development-related activities affecting wildlife.
- Determining Operations Requiring Consent on Sites of Special Scientific Interest (SSSI).
- Providing advice to Planning Authorities and Competent Authorities on the impact of proposals on the natural heritage.

In relation to Section 4(1) of the proposed Bill, we indicated that all our functions are exercised in a way that seeks to maximise our contribution to the overarching Government purpose - 'to make Scotland a more successful country, with opportunities for all to flourish, through increasing sustainable economic growth'. We do this through implementation of our statutory balancing duties (set out in Annex 1 for reference) by taking appropriate account of a range of interests.

Commentary

Our consideration has focused on how fulfilment of our balancing duties might be materially changed by a duty to promote sustainable economic growth (were this not to be dis-applied by Section 4(4) of the Bill), and whether this might be different under a duty to promote sustainable development.

In doing so we have used

- the definitions of sustainable development used by the Brundtland Commission and paragraph 24 of the draft Scottish Planning Policy; and

- the definitions of sustainable economic growth recommended by the OECD High Level Advisory Group and paragraphs 14-17 of the draft Scottish Planning Policy.

At a general level, the Natural Heritage (Scotland) Act 1991 requires SNH to 'have regard to the desirability of…securing that anything done, in relation to the natural heritage…is undertaken in a manner which is sustainable'. This brings consideration of environmental and socio-economic factors closer together.

We have implemented this requirement by ensuring that our balancing duties are embodied within our general approach and based on an understanding of a wide range of interests. These interests contribute to the human, environmental and economic capital of 'sustainable economic growth', but also cover the wider societal/human/cultural and environmental change dimensions that are associated with the '…without compromising the ability of future generations…' aspect of sustainable development.

At a practical level, the difference in application between the definitions is hard to determine. There are two reasons for this. Firstly, because our primary functions are implicit in both the terms 'sustainable economic growth' and 'sustainable development'. Secondly, implementation of our balancing duties is inherently based on an understanding of the needs of those being regulated and how our advice or decision is likely to impact on them. More formalised balancing assessment is most likely to come into play where we consider the natural heritage implications may justify advising or deciding against a proposal (according to our regulatory role in the circumstances) and we have to weigh-up the social or economic considerations with the environmental ones.

To illustrate this, we have set out some examples for each of our regulatory functions.

1. <u>Licensing of management, research and development-related activities affecting wildlife.</u>

   SNH issues licences under a range of legislation enacted largely for conservation or animal welfare purposes. .

   The legislation protects these interests by creating offences such as killing protected species, damaging the places they use or disturbing their breeding sites. However, licences may be issued to permit actions which might otherwise be against the law. The purposes of these actions vary according to the legislation, but almost invariably involve reasons associated with economic growth or the social dimension of sustainable development. For example: preventing serious damage to crops, livestock, property or growing timber; public health and safety needs (including air safety); for research and study; and imperative reasons of public interest. In assessing a licence application, these purposes help provide the balance required with the conservation or welfare implications of a proposal.

   When considering how a duty to promote sustainable economic growth might affect those subject to regulatory activity as compared with a duty concerned with sustainable development, we recognise different customer's needs and what they might consider more important. For example, an agricultural tenant who applies to prevent geese causing serious damage to grassland will most likely be thinking about the economic impacts of the damage on their business and, therefore, perhaps relate more to a duty about sustainable economic growth. On the other hand, a developer who wants to build a block of flats and a car park in an area which is home to a substantial colony of great-crested newts may relate to the

idea of sustainable economic growth, but may feel they are really involved in the business of sustainable development.

However, in both cases, our current balancing duties are sufficiently broad to cover the interests of both customers and we do not consider that a duty to promote either sustainable economic growth or sustainable development would materially affect our approach.

2. Determining Operations Requiring Consent on Sites of Special Scientific Interest (SSSI).

Our regulatory function is governed by the provisions of the Nature Conservation (Scotland) Act 2004. Implementation is through a risk-based approach in order to reduce the burden on land-based businesses. The emphasis is on working with owners and occupiers to secure positive management which would meet conservation needs.

For this approach to be effective, we need to understand and 'balance' the management needs of the SSSI's natural features with those of the occupying business for changes to land management practices (such as grazing, drainage or tree/scrub cutting). For example, for one off activities like the Ben Nevis Hill race or car parking for the Commonwealth Games shooting on Barry-Buddon, we need to understand the wider public benefit and where there would be only localised, temporary or recoverable damage to an SSSI, provide the necessary consent. This accords with our general approach to our balancing duties and allows us to consider wider interests when balanced with the protection of a nationally-important SSSI. This helps us agree suitable amendments that will benefit both the applicant and the interests of the site and where required by legislation, an entitlement to compensation.

A new duty to promote sustainable economic growth is unlikely to impact on our consideration of these activities because of the range of issues we are already taking into account through our balancing duties. It could be argued that a new form of expression of sustainable development could improve the perception of those who question being regulated in this way. However, as noted with respect to licensing, we do not see our regulatory function being influenced in any material way by a new duty to promote either sustainable economic growth or sustainable development when compared with the current position.

3. Provision of advice to Planning Authorities and Competent Authorities on the impact of proposals on the natural heritage.

Our founding legislation (the Natural Heritage (Scotland) Act 1991) includes a general advisory function in respect of Planning. This function is implemented under a range of planning legislation in situations where we provide advice to the decision maker.

Our balancing duties and the range of interests it covers are integral to this work. For example, when advising on the Forth Replacement Crossing there were

potentially significant natural heritage impacts on protected sites, habitats and species from this proposal. We worked with developers and decision-makers to influence the proposal and help find solutions to allow the project to proceed. This involved measures such as undertaking works at the time of year when natural heritage sensitivities were lower, or employing working method statements which had been considered by all parties to ensure their interests were safeguarded. We think this approach would be the same for both sustainable development and sustainable economic growth duties.

Similarly, when advising on the Dunbeath Wind Farm in Caithness, we considered the social and economic benefits of the scheme. However, the weight of natural heritage impacts was such that our response to the Planning Authority was one of objection. This consideration took into account the project's contribution to high-level plans, economic development, employment, deprivation and regeneration, historic and cultural issues as well as possible environmental benefits – all captured by the social and economic factors of both sustainable development and sustainable economic growth.

Conclusion

We hope our commentary illustrates that our balancing duties cover the range of interests of both sustainable development and sustainable economic growth. It is therefore unlikely that a new duty incorporating either definition would affect (positively and/or negatively) the balance of our efforts or the effectiveness of environmental regulation.

In saying this, there are some potential resource implications of using the definition 'sustainable economic growth'. This is because existing guidance/advice would need to be updated and there is always uncertainty associated with any new terminology. The latter is sometimes manifested as initial legal challenge.

On the other hand, a new duty to promote sustainable economic growth or sustainable development may be helpful in reminding those being regulated that there are broader interests that need to be considered as part of the regulatory functions.

We would also look to guidance from Ministers through the proposed Code of Practice to ensure that any consequent change in reporting requirements was cost-neutral.

We would be pleased to provide further examples/commentary if this would be of assistance to the Committee.

Scottish Natural Heritage
31 July 2013

Annex 1: SNH's balancing duties

Section 3 of the Natural Heritage (Scotland) 1991 Act states:

> '…it shall be the duty of SNH in exercising its natural heritage functions to take such account, as may be appropriate in the circumstances, of:
>
> a) actual or possible ecological and other environmental changes to the natural heritage of Scotland;
>
> b) the needs of agriculture, fisheries and forestry;
>
> c) the need for social and economic development in Scotland or any part of Scotland;
>
> d) the need to conserve sites and landscapes of archaeological or historic interest;
>
> e) the interest of owners and occupiers of land; and
>
> f) the interests of local communities.'

In relation to deer, Section 1(2) of the Deer (Scotland) Act 1996 (as amended) states:

> '…it shall be the duty of SNH, in exercising its deer functions, to take such account as may be appropriate in the circumstances of:
>
> a) the size and density of the deer population and its impact on the natural heritage;
>
> b) the needs of agriculture and forestry; and
>
> c) the interests of owners and occupiers of land; and
>
> d) the interests of public safety; and
>
> e) the need to manage the deer population in urban and peri-urban areas.

SUPPLEMENTARY EVIDENCE FROM PROFESSOR RUSSEL GRIGGS, CHAIR OF THE REGULATORY REVIEW GROUP

Thank you for your email of 26 June in which you requested further written evidence from RRG regarding the Regulatory Reform (Scotland) Bill in light of evidence already received. You have raised three specific points which I have dealt with below.

Whether sustainable economic growth requires to be defined in the Bill and how it will interact with other duties that public bodies need to undertake.

The proposed economic duty was not a specific suggestion from RRG and while the majority of members are supportive of it, there is not a consensus within the group on this provision. RRG does however believe that there is no need for any further definition within the Bill as this may prove restricting.

Regulation has an important role in driving competitiveness and regulators should always consider the contribution of their regulatory activity on sustainable economic growth. Regulators are already working with a range of duties in specific areas of Government policy and adding an economic duty makes regulators more accountable and transparent in ensuring sustainable economic growth is clearly considered.

How local issues will be taken into account and whether the exemption criteria should be defined in the Bill.

RRG recognises the important of local democracy. National standards and systems would determine process, doing things the same way across Scotland, and this should not affect the ability of the regulator to make a decision at a local level.

It should be agreed upfront that a national approach will be developed in any proposed legislation which should also involve regulators and practitioners at an early stage to help identify national standards which will help deliver better outcomes.

The exemption provisions allow exceptional local circumstances to be considered and we understand the Memorandum of Understanding between the Scottish Government and COSLA agrees to collaborative working on this. Since the provision could be used to cover a wide range of areas of legislation where different types of exemption criteria may exist, it probably isn't sensible to define these within the Bill, as of their nature many will be unknown until they occur.

A view on the planning fees and charges proposal within the Bill.

RRG have discussed this provision and there are varying views held by member organisations so RRG takes no particular view, although we do believe it is important that regulators are provided with support which enables them to deliver effectively. We consider this aspect of the Bill could be a suitable area for RRG to review at a

later date once it has been in operation for some time to determine if it is achieving its objectives.

RRG fully believes that in overall terms the Bill will support an on-going change in culture and enable regulators to continue to move towards an enabling approach and would be happy to engage further with you on this as your considerations progress.

PROF RUSSEL GRIGGS OBE
Chair, Regulatory Review Group
August 2013

SUBMISSION FROM THE CONVENTION OF SCOTTISH LOCAL AUTHORITIES

COSLA would like to offer the following observations in response to Economy, Energy and Tourism Committee's call for evidence on the Regulatory Reform (Scotland) Bill.

COSLA Vision

The single focus of COSLA and local authorities is to improve outcomes for communities. Local government is at the heart of the government's focus on prevention, service integration and "place", effective reform and strong local services are more important now than ever. National governance should enhance the ability of local government to achieve this as effectively as possible and deliver those benefits to communities thorough:

- Empowering local democracy
- Integration not centralisation led by community planning
- Focus on outcomes not inputs
- Local democracy needs to be at the heart of improvement and accountability

National Standards

COSLA believes that the approach to and introduction of national standards, where appropriate and recognising the need for local variation, can be used to deliver COSLA's objectives and the better regulation principles of proportionality, consistency, accountability, transparency and targeted with are the objectives of the Bill.

As noted in our response to the consultation on the draft Bill our central concern with regards to national standards was that any prescriptive national approach could diminish the capacity for elected members, on behalf of communities, to shape and influence their local environment. Whilst we are not against national standards per se, we are against the presumption that such national standards can be specified by national government without clear mechanisms for consultation of local communities prior to enactment of future legislation and a clear requirement for Scottish Ministers to transparently demonstrate why these standards are needed in delivering specific regulations. Local communities should remain empowered and have the right to differing standards to reflect different locally required outcomes.

The implementation of national standards could also have a clear impact on local resourcing decisions, potentially diverting them from the frontline or other local priorities. The consultation was clear that costs will not be accepted as a justification for opting out of the national standard, given the potential implications on other locally decided priorities we do not agree with this. Local authorities should be able to opt out for social, health, environmental, financial, economic or local democratic reasons. COSLA will work in partnership with Scottish Government to help identify when and where local variation is required for the benefit of communities and to improve outcomes.

The deployment of national standards and duties to promote economic growth must be balanced with and complementary to existing duties and legal responsibilities held by councils, e.g. best value, community empowerment or power of well-being.

The development of a Memorandum of Understanding with the Scottish Government and the commitment to collaborative working in the development of any national

standards is a welcome step to address our concerns. We will seek to empower local democracy, focus on outcomes and not inputs and defend local choice and accountability in the development of any national standards. We support consistency when appropriate but disagree that a transparent and accessible design of services can be described as a postcode lottery. Postcode lotteries are only relevant in the context of a single national service that fails to deliver consistently for all its users. Variation across Scotland is a legitimate local democratic choice about different priorities and different circumstances.

COSLA welcomes the good working relationship which has been developed with Scottish Government on this issue and the continuing positive dialogue between the Minister and COSLA Spokesperson. COSLA further welcomes the funding of a post within COSLA to enable this work to be taken forward collaboratively, this will facilitate the achievement of both local and national government objectives.

Economic Duty
Sustainable economic growth is a key priority for local authorities, especially given the current the economic circumstances, although it cannot be pursued at the expense of appropriate consideration of environmental and community factors. COSLA supports the recognition in the Bill that contributing to economic growth should not override the other aims of regulation with regards to protecting consumers and keeping a level playing field, as well as the other duties and responsibilities which are held by councils.

Again COSLA welcomes the collaborative approach to developing the Code of Practice which will support the economic duty and will seek to empower local communities to enable them to achieve their goals.

Planning Penalty Clause
As was made clear in our responses to the Planning Reform and Regulatory Reform consultations we do not support the introduction of planning fee penalty clause for 'poorly' performing planning authorities. The principle is counter-intuitive as 'poorly' performing councils will face reduced resources making it more difficult to improve performance. Our concerns with the planning penalty clause can be summarised as follows:

- There is no definition of 'good' or 'bad' performance
- A penalty clause focus on inputs and outputs, not outcomes
- It does not enable a move towards full cost recovery
- Planning authorities don't control the whole planning system and delays are often from things outwith their control, such as section 75 agreements
- There is no indication of the scale of a penalty nor the length of time it would apply

We are concerned with the lack of definition around what good or bad performance is and what planning authorities will be judged on. The indication from the Financial Memorandum is that the focus will only be on 'improving response time'. Time taken is not an indicator of quality, nor does it indicate where any problems may exist within the planning system – decisions made quickly are not guarantees of quality. The focus should be on outcomes and not inputs. The new Planning Performance Framework (PPF) is used to provide data focusing on outcomes, it supplements the Scottish Government statistics which now focus on average time taken. Applications,

no matter the size, must be considered appropriately and take account of the public's views and the impacts on communities – one size will not necessarily fit all. Setting an arbitrary time limit does not recognise the importance of achieving good outcomes for communities given the long term impacts of planning decisions on place-making.

The proposed penalty clause focuses on inputs, in one element of the planning system in the Development Management side. It does not focus on outcomes, a key feature of which is that 93% of all planning applications are approved. Audit Scotland identified an unsustainable funding gap in resourcing the development management system. The recent fee increase begins to address this but was welcomed only as an interim measure. It should be noted that this was supplemented by additional one-off funding for renewables in some councils. This is not a sustainable solution and an appropriate fee increase, as proposed in the Scottish Government's consultation last year, is what is required.

Some councils advise that the fee increase has meant the pace of anticipated cuts has been slowed. However the planning service is subsidised by the taxpayer, it does not currently operate on a full cost recovery basis and the fee regime does not address the funding gap faced by authorities particularly when dealing with complex or locally controversial applications, such as for wind turbines, two examples of which are appended to this report.

Moreover, even if good performance is to be dictated by the time taken, under this proposal Planning Authorities are being held accountable for all delays even when they have no control over them. As shown by the Scottish Government's planning data (Appendix Two) a key problem lies in securing legal (S75) agreements, not in reaching a Planning Permission (which is granted subject to legal agreement). The requirement for a legal agreement for major applications consistently doubles and almost triples the time taken to issue a decision. Such delays in this proposal are being attributed to planning authorities whereas they may be due to other stakeholders and arise due to a failure to secure development finance in the current financial climate. The planning penalty clause does not ensure that responsibility is appropriately attributed given the potential number of stakeholders and variables involved.

Additionally there is no indication of or limit on the potential level of fee reduction and it is therefore possible that the Minister could prevent a planning authority from charging any fees, which could have a serious impact on a local authority and all the other services they provide. This will have a detrimental effect on service quality or any shortfall would have to be met from other front line services in local government, further impacting on outcomes for communities.

Regularly changing fees within local authorities if they become 'poor performers' will not help local authorities improve and will make it difficult for them to plan future spending, nor will it benefit businesses who may face varying fee levels. This will create inconsistencies across Scotland, and is at odds with as one of the principles of better regulation, to promote consistency.

The Financial Memorandum recognises that there is no clarity as to whether reducing fees may have a consequential impact on the number of applications submitted to poor performing authorities, if this were to reduce the number of

applications this would have serious negative consequences for local economic recovery. We do not believe that the planning fee is the defining factor in determining development viability. There is no indication that the fee of £40,000 cited by one local authority for a £0.75 billion investment would have altered the investment decision, nor that lower fees lead to an increase in developments as fees are such a small part of major schemes. However, reducing fees is more likely to result in under resourced planning authorities which are unable to make quality decisions for communities.

Moreover, a penalty clause is not consistent with the principle of preventative spending and dilutes local democratic decision making and accountability. An approach which enables appropriate consideration of applications leading to quality outcomes, would in turn lead to reduced resources later relating to reduced failure demand. Focusing on speed is inconsistent with this and will lead to poorer outcomes for communities and increased costs for local government. This runs contrary to COSLA's vision and objectives for local government.

High Level Group

COSLA and local authorities are committed to improving the performance of the planning system and are working to that end through a number of routes:

- COSLA proposed the establishment of a high level group with the Local Government and Planning Minister to specifically look at how to improve planning performance within the context of continuous service improvement. This group brings together the political representatives (Minister and COSLA Spokesperson) plus officer representatives from HOPS, SOLACE and Key Agencies. Connections are being made via SOLACE to other professional officer groups. Other bodies such as Standards Commission are involved in specific work streams in relation to improvement in the clarity of guidance to local government elected members.
- COSLA endorsed the Planning Performance Framework (PPF) developed by Heads of Planning which provides a more qualitative assessment of planning authority performance.
- COSLA have worked in the high level group to agree the key markers of good performance. This will be used to enhance the PPF. This positive approach underscores our commitment to continuous improvement.
- The high level group is already investing efforts in promoting good planning practice around the country, recognising however the legitimate role of local authorities to structure their services appropriate to their own priorities and consistent with local democratic decision-making.
- COSLA has participated at the Ministerial road-shows for planning officers around the country to reinforce our commitment to planning reform and culture change. The penalty clause is not consistent with that approach and is striking a negative note in what should be a positive message.

In summary COSLA are pleased with the collaborative approach taken by Scottish Government with regards to national standards, the economic duty and most aspects of planning reform and COSLA will continue to work to deliver better outcomes for communities. However, there remain serious concerns with the planning penalty clause which we do not wish to see introduced given we are already working in partnership with Scottish Government and professional colleagues in local government to promote continuous improvement.

Appendix One – Planning Costs

Case study 1

Single 74m Turbine – Local Development – Fee £638

- 167 Letters of Objection
- 59 Letters of Support
- Landscape, Biodiversity and Archaeological Advice
- Neighbour Notification, Acknowledgement of representations and Notification of Decision (this alone exceeds the fee paid)
- Coordination, Assessment of submissions and proposal, site visit(s) report by Planning Officer

Total Cost to Council minimum £3,000

FUNDING GAP of at least £2,372

Case Study 2

Commercial Wind farm of 12 x 126m turbines – Major Development – Fee £14950

- 247 Letters of Objection
- 198 Letters of Support
- Environmental Impact Assessment requiring Roads Engineering, Noise, Landscape, Natural Heritage, Archaeological Advice…etc.
- External consultation with SNH, H&SE, MOD….etc.
- Public Meetings
- Neighbour Notification, Acknowledgement of representations and Notification of Decision
- Coordination, Assessment of submissions and proposal, site visits, report by Planning Officer
- Committee process including Committee Site Visit

Total Cost to Council minimum £45,000

FUNDING GAP of at least £30,000

Appendix Two – Scottish Government paper to the High Level Group

Statistics – Headline Figures

Major Developments without processing agreements (e.g. applications over 2ha or 50 houses)

- In Q1 decisions on all 83 major developments took an average of 65.4 weeks, by Q3 this had reduced to 58.9. When applications made before August 2009 (legacy cases) were removed the timescale reduced to a 36 week average.
- Average timescales for major housing developments had reduced from 104 weeks in Q1 to 66.8 weeks in Q3 (an 8 month reduction). This latest figure is almost halved when legacy cases are removed showing a 33.8 week average timescale
- The requirement for a legal agreement for major applications consistently doubles and almost triples the time taken to issue a decision. 98 weeks in Q1, 131 in Q2 and 103 in Q3. This compares to 45, 54.8 and 36.4 weeks respectively for those applications not requiring a legal agreement.

Local Developments without processing agreements (e,g, applications under 2 ha or 50 houses)

- Decision making on local developments has remained fairly static with around a 12 week average.
- Local developments with legal agreements have reduced from 83 weeks in Q1 to 65.2 in Q2, this is still almost 6 times longer than those applications not requiring an agreement (11 weeks). When legacy cases are removed this falls to 48.5 and 10.9 weeks respectively.
- Local development (non-householder) reduced by just over a week between Q1 and Q3, from 16.9 to 15.5 weeks. This included data on 30 applications submitted prior to August 2009. When removed this reduced timescales to 14.1 weeks.
- Across all 3 quarters, decisions made under two months in this category have remained static at around 55% with 7 weeks the average time taken to come to a decision on these applications. Applications taking longer than 2 months have reduced by 2 weeks to 26.4 across the same period, this is reduced to 23 weeks when legacy cases are removed.
- Across all 3 quarters local housing developments have shown a 5% increase in the number decided within 2 months from 45.4% to 50.4%, and the average timescale for these has fallen slightly from 7.4 to 7.1 weeks.
- Householder applications remain fairly consistent across all quarters with an 8 week average for decision making, reducing to 6.6 weeks in 86% of applications in Q3.

Processing agreements

- 33 applications during the period had processing agreements attached to them. 28 of them were decided within the agreed period.

	Quarter 1		Quarter 2		Quarter 3	
	No. of Apps	Avg (weeks)	No. of Apps	Avg (weeks)	No. of Apps	Avg (weeks)
All Major	83	65.4	89	80.6	80	58.9
With Legal Agreement	22	98.6	30	131.3	27	103
No Legal Agreement	49	45	59	54.8	53	36.4
Major Housing	27	104	34	83.5	32	66.8
All Local	7815	12.6	7656	11.7	7385	12.3
With Legal Agreement	129	83.4	94	66.1	110	65.2
No Legal Agreement	6979	11.1	7562	11	7275	11.5
Local non-householder	4054	16.9	4069	14.9	4110	15.5
Under 2 months	2221 (54.8%)	7.1	2184 (53.7%)	6.9	2295 (55.8%)	7
Over 2 months	1833 (45.2%)	28.8	1885 (46.3%)	24.2	1815 (42.2%)	26.4
Householder	3761	8	3587	8	3275	8.2
Under 2 months	3269 (86.9%)	6.8	3064 (85.4%)	6.7	2819 (86.1%)	6.6
Over 2 months	492 (13.1%)	16	523 (14.6%)	15.8	456 (13.9%)	17.7
Processing Agreements	No of Apps	% met	No of Apps	% met	No of Apps	% met
Major	16	66.7	8	100	6	100
Local	2	n/a	0	-	1	100

All figures include legacy cases prior to 2009 for consistency. Staff in CAS are working on revising figures from Q1 and Q2 to remove applications submitted prior to August 2009.

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 5 June 2013

[The Convener *opened the meeting at 10:00*]

Regulatory Reform (Scotland) Bill: Stage 1

The Convener (Murdo Fraser): Good morning, ladies and gentlemen. I welcome members and our witnesses to the 18th meeting in 2013 of the Economy, Energy and Tourism Committee. I also welcome visitors to the public gallery.

I remind everyone present to turn off—or at least turn to silent—all mobile phones and other electronic devices.

Item 1 on the agenda is continuation of our stage 1 scrutiny of the Regulatory Reform (Scotland) Bill. We have one panel of witnesses: Andrew Fraser, who is the head of democratic and administration services at North Ayrshire Council; Councillor Michael Cook, who is the vice-president of the Convention of Scottish Local Authorities; Jim Galloway, who is service manager for economic development at the City of Edinburgh Council; and David Cooper, who is environmental health manager in infrastructure services at Aberdeenshire Council. I thank them all for coming along.

Before we get into questions, Councillor Cook wants to say something briefly by way of introduction.

Councillor Michael Cook (Convention of Scottish Local Authorities): I do not have a prepared statement, but I am the one politician on the panel, so perhaps it falls to me to say something first.

COSLA's view is that it is worth focusing on the three items that we have highlighted in our written submission: national standards, the economic duty and the planning penalty provisions.

It is fair to say that, although at the start the first two issues raised some difficulties for local government by cutting across local democratic accountability and, perhaps, complicating duties that we already have, there has been some movement and we are more comfortable with where we have got to on them.

However, significant difference between us and the Government remains in relation to the utility of the penalty provisions on planning and the wisdom of introducing such measures when we all have the same objective, which is to ensure that we get quality planning decisions in the quickest possible time.

I know that you will want to ask questions about all of that, and I and my colleagues are happy to answer them.

The Convener: Thank you.

The witnesses will be familiar with the bill, which is quite wide ranging, and we have a broad range of issues that we want to cover—Councillor Cook touched on some of them. I know that the application of national standards is of interest to members, as is the new duty to promote sustainable economic growth. We will also address some of the issues on the code of practice. Councillor Cook touched on another issue—planning—and we will also discuss street traders' licences. I also want to pick up on primary authority partnerships. They do not feature in the bill, but there is some pressure for their introduction.

As ever, I ask members to keep their questions short and to the point. Similarly, it would be helpful if the answers could be short and to the point, in so far as that is possible. I also ask members to direct their questions, if they can, to individual witnesses. If all four witnesses try to answer every question, we will quickly find time getting away from us. In many cases, Councillor Cook might find himself first in the firing line, but he should not feel embarrassed by that in any way. That is what he is here for. If others on the panel want to come in and respond to a question that is directed to somebody else, they should just catch my eye, and I will bring them in if I can.

I will ask about the memorandum of understanding that has been signed between the Scottish Government and COSLA on the exercise of regulatory functions and future national standards. I see from the memorandum of understanding that the Scottish Government proposes to fund a policy manager post in COSLA to assist with delivering the new system. I take it that that post is now in place. [*Interruption*.]

Councillor Cook: Yes, it is in place.

The Convener: It was helpful to hear someone in the gallery volunteer the information that she is that person, although such participation is probably not strictly in accordance with standing orders. It is good to know that the person is in post. Thank you.

I also see from the memorandum of understanding that there is provision for the minister to discuss with the relevant COSLA spokesperson issues to do with local variation, nationally set fees and charging regimes. How will that work in practice, Councillor Cook? The

COSLA spokesperson will be an elected councillor from a particular local authority. How will they ensure that discussions with the minister properly reflect the views of council groups across Scotland, rather than their own particular interest?

Councillor Cook: We must start at the beginning. The first iteration of the bill contained fairly significant and sweeping powers that ministers could utilise in relation to as yet undefined legislation and areas of activity. Since then, there has been considerable discussion between the Scottish Government and local government about the approach.

I think that we have reached a compromise. Is it the ideal position? It is much better than the position that we began with, but I would not characterise it as ideal. However, we must proceed on the basis of what seems to me to be a reasonable compromise. The Scottish Government has moved some way and we have moved some way towards finding the areas that are relevant in this context.

If we are talking about national services in relation to which we expect consistent provision across the board, it is right that there should be national standards. I think that we all expect consistent provision. However, there are many areas of local government service provision in which we would expect some local variation. Our council has 600 or so areas of service provision. What we do in Scottish Borders Council is different from what is done in Aberdeenshire Council or the City of Edinburgh Council. That is a reflection of democratic local accountability, and it is appropriate that democratically elected local politicians are involved in the decision making in that regard.

You asked about how the COSLA spokesperson will negotiate and relate to the minister. We have a structure in COSLA: there is a leadership group, and the spokesperson is in the firing line—to use your phrase—in respect of the area of activity that they represent when it comes to negotiating and dealing with Government.

We must make certain assumptions about the Government's intent in committing to the memorandum of understanding, which is pretty clear: there should be a collaborative approach, with a genuine effort to find out what is fit for purpose in particular areas of activity.

For example, on alcohol licensing, it might be desirable to use different yardsticks in different parts of the country. Knife dealer licensing is another example. The approach in Glasgow might be different from the approach in Highland, and that might be entirely right—there are probably fewer shops selling sgian dubhs in Glasgow than there are in Highland. We need an approach that reflects local circumstances and an understanding of the issues on the ground. That is what local government can bring to discussions with central Government.

The Convener: Are you confident that a COSLA spokesperson, even though they might not come from an authority that is seeking a local variation, will be able properly to represent such a view to the Scottish Government?

Councillor Cook: I am in no doubt about that. It is an obligation of a COSLA office-holder that they must sink any particular political feeling that they might have, because they have a wider responsibility, which is to represent local government as a whole. I have no anxiety about that.

The Convener: That is helpful.

Rhoda Grant will ask about national standards and how things will operate in practice.

Rhoda Grant (Highlands and Islands) (Lab): First, we heard from the regulatory review group last week about processes that had been put in place and followed on a voluntary basis. Has that approach been successful? Do we need legislation to make things happen?

Councillor Cook: I take it that your question was directed at me.

Rhoda Grant: Yes—sorry.

Councillor Cook: Yes. As I set out at the beginning, local government's attitude is probably that legislating to reserve powers to ministers to deal with as yet undefined propositions is not the ideal way to proceed. It is clear that Scottish ministers want to achieve levels of consistency of approach in areas that they feel are appropriate, although there has been movement by them on their willingness to discuss much more collaboratively with local government where those areas should be.

In my earlier answer, I suggested that it was a question of horses for courses. There may be some areas in which the introduction of legislation—and the setting of national standards as a consequence—may be appropriate. It may be that other areas of activity should be dealt with by simple protocols and a general form of guidance. It really depends on the issue. That would be an appropriate approach.

Our anxiety about the whole proposition to begin with is that if ministers reserve generalised powers, they imply that one size fits all, which simply is not the reality.

I have already referred to the fact that my council provides more than 600 services. That is true of every council in the land. To imagine that it is possible to set general propositions that will

control all that activity from the centre is misconceived; it also ignores the reality—which we are sometimes too quick to ignore—that councils are local democratic accountable bodies. The politicians on councils have a responsibility to the constituencies that they represent, to which they are accountable. It is important that that has currency in the debate too and, sometimes, the setting of generalised powers ignores that reality.

Rhoda Grant: Does the bill deal sufficiently with that aspect of local democracy? Does it take into account local circumstances? Is there enough flexibility in it to allow councillors to exercise local democracy and reflect local circumstances?

Councillor Cook: We are heading down the path that I have already hinted at. We would not regard the existence of those generalised powers as the ideal situation. On whether we are satisfied that the efforts to create a memorandum of understanding and certain balances and controls within the system are an appropriate way to proceed in the light of the Government's determination to have generalised powers, we are in a better place—there are no two ways about that.

I am sure that we will move on to questions about the economic duty, which is a good example of the issue. I simply say to you that no one in any council in this land is under any misapprehension about the importance of sustainable economic growth. There is no ambiguity about that at all. However, it is misconceived to create a situation in which things are made subservient to that duty so that equally important balancing considerations, whether they are social or environmental, are potentially subverted.

Again, ministers have shown a willingness to move on that. I have no doubt that Andrew Fraser will comment on some of the legal aspects of the economic duty. We have got to a better place on that proposition as well, which suggests compromise and would allow councils to take into account other responsibilities that they have, such as community empowerment and best value.

The important point is that those responsibilities already exist, and some of them are creatures of statute. Simply to supervene the existing situation with a new legislative responsibility could cause noise in the system and simply confuse the issues. The fundamental reality is that none of us is under any illusions about the importance of economic growth.

The Convener: We will come on to address that issue in a moment.

Rhoda Grant: You said that legislation is the right way forward, but I also pick up from you a bit of concern about local democracy and local circumstances. What would you have preferred? What is missing or what should not be in the bill?

Councillor Cook: Actually, I did not say that legislation was necessarily the right way to proceed. I am saying that legislation that has generalised powers at its heart is, to be frank, not the right way to proceed.

The implication of that is that the appropriate way to proceed is to take a horses for courses approach. That means that we have a look at the area of activity, then we create appropriate legislative duties or regulatory guidance, depending on the area of concern. That is how we should deal with matters, because it always depends—I am an ex-lawyer—on the evidence. We should look at the evidence and then draw up our legislative propositions in the light of that evidence. Unfortunately, the bill does not quite do that, even though there have been efforts to mitigate some of its more sweeping propositions.

10:15

Rhoda Grant: So what you are saying is that the legislation is not required but that further legislation on more focused areas is required. Is that right? I am not entirely clear about what you think should be done instead.

Councillor Cook: What you have done is very gently put words in my mouth.

Rhoda Grant: I am trying not to.

Councillor Cook: That is entirely fair, but you will appreciate that I am trying to give you a compromise response, because that is local government's attitude: a general proposition in legislation is not the ideal way forward. However, we have negotiated a more moderate approach that is okay and with which we are satisfied—that is it in a nutshell.

The Convener: I think that Mr Fraser wants to come in.

Andrew Fraser (North Ayrshire Council): It is unusual for legislation to require a non-statutory memorandum of understanding to make it acceptable and workable. That emphasises the sweeping powers that ministers would have, under sections 1 to 3, to amend pretty much any regulatory regime. In my view, no real justification has been given as to why that is needed. In effect, the powers would bypass Parliament to an extent.

The other point is that there have been some mixed messages. First, the consultation was about national standards, and I think that we believed that we were talking about high-level stuff, such as the national planning framework. Now, however, we are talking about inconsistencies, which might be low-level stuff. There is no complete

justification of why that is needed. I know that we have some low-level examples, such as the food certificates issue, but that sort of thing comes from bad drafting or lack of consultation on the drafting. I do not think that there is a rationale for ministers to take huge powers over the regulatory regime and, in essence, bypass Parliament.

Rhoda Grant: I am still slightly at a loss as to what your overall view of the bill is. What I am getting from you is that you think that the bill is okay and that now that we have had some compromises it is fine. Is there something that you would prefer in its place?

Councillor Cook: I am perfectly happy to have another go. Clearly, I have to give a nuanced response that embodies the whole of local government, which I am here to represent. Andrew Fraser hinted that the reality is that, ideally, we would not wish to see the generalised power in relation to national standards. That is the starting-off point. However, we accept that there has been a discussion with the Scottish Government that has got the bill to a better place, though not an ideal place. I would not pretend for a moment that local government is ecstatic about that result, but we have got to a better place in terms of what we think the legislation now says. That is because the more sweeping aspect of the legislation has—to an extent and perhaps unusually, as Andrew Fraser said—been mitigated by a memorandum of understanding. We believe that the spirit of that will be accepted by ministers. Frankly, on that basis of that good will, we are happy to proceed as things are set out.

Is it ideal? The answer to that question is no, it is not, as far as we are concerned.

Rhoda Grant: I suppose that we see our job as making it ideal. That is what committee scrutiny is about. What I am trying to get out of you is what needs to change to make it ideal.

Councillor Cook: The implication of that is that you would remove the generalised duty. What you would have is an expectation that the Scottish Government would introduce appropriate legislation, guidance, protocols or whatever in relation to discrete areas.

Mike MacKenzie (Highlands and Islands) (SNP): My question is for Councillor Cook—

Councillor Cook: I am surprised.

Mike MacKenzie: I did not expect you to be surprised.

Today's discussion and the arguments in the written submissions seem to be quite theoretical. I think that we all understand the theory behind local democratic accountability, with decisions being taken at the local level. That sounds nice, but I am struggling to come up with practical illustrations of the theory. Perhaps you can provide the committee with two or three examples of a community, such as the Tiree community, campaigning—[*Interruption*.] I will stop while you have your conversation.

Councillor Cook: I am sorry. We were checking examples that we can give you.

Mike MacKenzie: Let us imagine that the community of Tiree or North Ronaldsay comes together to lobby the local authority and say, "We don't like how you're applying regulation. It's inappropriate for our area." Can you give an example of a local authority responding to such a campaign by modifying its approach to regulation? I am struggling to come up with concrete examples, although the need to be able to respond in such a way seems to be the gist of the theoretical arguments that have been put, if I understand them correctly. Perhaps you can give us three examples.

Councillor Cook: I will give you a general understanding of the reality, after which I will give a couple of examples. I will then ask Andrew Fraser to give you another example.

Let us think about the issues that the communities in Tiree or North Ronaldsay might have in relation to regulation and the propositions in the bill. Let us say that a community is subjected to an application for a significant wind farm. It matters to the community how the council deals with the application. The timescale for consideration of the application matters—

Mike MacKenzie: May I stop you there, please? I am sure that we will talk about planning, but nothing in the bill suggests that there could be a modification to the approach to planning other than a modification to the fee regime.

Councillor Cook: I am sorry. You are wrong. The economic duty potentially has implications for planning. We need to appreciate that if we create generalised duties, they might have implications later on.

Mike MacKenzie: Okay.

Councillor Cook: That is one example. It is clearly important for people on the ground that we balance, in a proportionate way, considerations that are important to communities. I say candidly that the people who are best at doing that are those who are closest—I see that you are shaking your head, but that is the principle of subsidiarity: the people at the lowest level, who are most proximate to the decisions to be made, are usually best in that regard.

I gave a couple of examples earlier. Alcohol licensing was one. There might be particular issues—

Mike MacKenzie: Please forgive me. That was not a specific example. Can you give a specific example of a community lobbying its local authority for regulation to be applied in a different way, to reflect local circumstances? You talked about licensing in general terms, but that is not a concrete example.

Councillor Cook: Let me give you a specific example. Alcohol licensing is highly relevant in the Borders, where I am from. This is a slightly different take on the issue, perhaps, but Scottish Borders Council is the only local authority area that does not have alcohol byelaws in urban settlements, and there is active discussion with communities about whether they want that kind of regulation. The view of the largest community in my area is that it wants such regulation, but that is not necessarily the view throughout the region. I am aware that other towns take a slightly different view. It is entirely appropriate that we ascertain the views of people on the ground and then make judgments, and that is what we will seek to do.

Andrew Fraser has another example.

Andrew Fraser: It is about liquor licensing again. The liquor licensing system is driven by policy. A licensing policy statement is prepared every three years, which involves mapping the figures for the impact of alcohol on health, crime, disorder, fires and so on.

The figures for my former authority, West Dunbartonshire Council, showed that 6 per cent of the population was addicted to alcohol, 2 per cent was addicted to drugs, and four to five people were directly impacted by every case of addiction. That meant that 30 to 40 per cent of the population was directly impacted by alcohol and drugs addiction—that excludes loads of other alcohol impacts. Alcohol was clearly having a major impact on West Dunbartonshire, and the position was similar in many other authorities in the west of Scotland. The authority decided on an overprovision policy, and it decided that in 15 out of 18 council areas there would be no more licensed premises.

However, areas such as Morningside have entirely different needs, so we have ended up with a postcode lottery and inconsistent policy across Scotland. If someone wants a licence in West Dunbartonshire, there is a presumption that they will not get one. If they want a licence in East Dunbartonshire they are highly likely to get one. Policy is targeted at local needs and requirements.

This is about the idea of looking at place, which feeds into the community planning agenda. Community partners' resources should be targeted so that together they address the big problems in society. A consistent regulatory regime throughout Scotland does not do that.

Mike MacKenzie: Thank you.

Chic Brodie (South Scotland) (SNP): We have heard that councils listen to communities, but at the end of the day they apply a general rule. An individual council will arrive at a decision that will apply across the council.

Councillor Cook: Not necessarily.

Chic Brodie: Are you telling me that there have been situations in the Borders in which a community has been either for or against a wind farm and the council has gone along with the wishes of the community?

Councillor Cook: That is a completely different proposition—

Chic Brodie: No, it is not a different proposition—

Councillor Cook: I am sorry. It is a different proposition—

Chic Brodie: With all due respect, it is not.

Councillor Cook: Well, it is, because that is a regulatory function and clearly the planning committee needs to make a judgment that is based on the merit or adverse effects of the application—

Chic Brodie: Are you saying that national Government should do the same in terms of applicable regulations across all councils?

Councillor Cook: I am sorry; you will have to clarify what you mean.

Chic Brodie: You are saying that in a local authority it is all right for the regulation or the guidance to be set for communities but it is not okay for national Government to set the applicable—

Councillor Cook: I am sorry. I think that you misunderstand. No one is saying that—

Chic Brodie: Perhaps I was not clear.

Councillor Cook: I think that what you said was clear. No one is saying that national guidance is inappropriate. We are saying very clearly that there are circumstances in which national guidance is appropriate and that that should be a matter of discussion, evidence, forethought and planning. The more general proposition—

Chic Brodie: Is that not what we are doing today?

Councillor Cook: The question is whether you take the view that either generalised powers in terms of national guidance are prudent, or it is better to look at the evidence in relation to discrete areas and then make a judgment. I tend towards the latter view; I appreciate that others might tend towards the former.

Chic Brodie: Communities might say the same thing vis-à-vis local authorities.

The Convener: I have one other question on national standards. The financial memorandum says that local authorities will experience

"No net impact on costs"

in relation to part 1 of the bill. Do the witnesses agree?

Councillor Cook: It is difficult to be certain at this point, because we do not know how the standards will be applied or to what areas they will apply. The expectation that has been created around the memorandum of understanding is that there will be discussion with the Scottish Government about anticipated cost impacts as a result of something that the Government wants to bring forward.

The Convener: Thank you. Let us move on and consider the issue of opting into or out of national standards at a local level.

Rhoda Grant: Should councils and other bodies that the bill covers be able to opt into or out of regulations that are put forward under the bill?

10:30

Councillor Cook: Again, it is quite difficult to give a straightforward answer to that, as it depends on the circumstances. It goes back to the original proposition that setting national guidance means that, generally, a minister can come along and set a series of propositions. It is far better that we look at the individual area of law and then make judgments about it.

Inevitably, there will be differences between communities. There is now a significant emphasis on place in policy determination and community planning is a fundamental principle of the Government's public sector reform agenda. All of that is right, but the implication is that we have to look at the circumstances on the ground and make judgments on that basis, and the tool for doing that is single outcome agreements. Whether in pursuing economic growth, health outcomes or whatever, using the tool of single outcome agreements, which are agreed with local partners but are also sanctioned by the Government, is how we should proceed in dealing with those issues.

Rhoda Grant: This goes back to your answer to the previous question. You feel that there should be no overall duty in the bill and that each thing should be legislated on separately. However, if we have an overall duty, should councils be able to choose whether to opt in to individual pieces of regulation or should there be some criteria to allow them to opt out, taking local circumstances into account? Would that help to make the bill more workable for you?

Councillor Cook: Potentially. I will be candid—I am finding it difficult to think of an example of that. It really depends on the issue. You would need to look at a particular issue and make a judgment about whether we need a national standard with no ability to opt out or whether we could have something that was sufficiently flexible to allow councils or communities to opt out. In certain circumstances, some form of opt-out may be appropriate.

Rhoda Grant: You said that outcome agreements may be a basis for opt-outs in looking at the delivery of services. Should there be other criteria? If we are going to legislate, we do not want everyone to opt in or out as they see fit. We want something that stands up to scrutiny of the reasons why people would choose to opt out. What would those reasons be?

Councillor Cook: It is a question of evidence. One of the founding propositions behind single outcome agreements is that they say to local communities, "Know thyself," to use a biblical expression. They should know what the evidence is in their area, whether it relates to health issues, demography or educational attainment. They should have an understanding of those things. In looking at a particular area, any judgment should be based on what the evidence tells us, and an opt-out may flow from that judgment. That would be an appropriate way in which to proceed.

Rhoda Grant: Our duty as a committee is to scrutinise the bill and propose amendment as required. What you suggest sounds fine but, frankly, it is a bit woolly as a basis for legislation. How could we write into the bill the criteria for opting out and state what councils must match or have concerns about, which would allow you to go back to the Government and say, "We wish to opt out of this legislation"?

Councillor Cook: It is inevitably a bit woolly because you are asking me to speculate on things that—I am sorry—I am just not capable of speculating on. There are things out there that I do not know about, such as circumstances that suggest that different approaches should be taken in different communities. I cannot see what those are.

We would be happy to think further about that and see whether we can provide you with further written evidence that gives you a flavour of when an opt-out might be appropriate. It would be fair for us to do that. You are asking me—quite justifiably—to look into a crystal ball, but that is, unfortunately, not one of my greatest skills. I find it difficult to imagine what those scenarios would be,

but we can have a think about it in the office and try to give you something additional on that.

Rhoda Grant: That would be helpful.

The Convener: Two thirds of the local authorities that responded to the consultation said that they should have the right to opt out on the ground of exceptional local circumstances. Councillor Cook, you have just said that you can see opt-outs in certain circumstances. Leaving aside the question of examples, who do you think should decide whether a local authority should get an opt-out?

Councillor Cook: The implication of the memorandum is that that would be a matter for discussion between local and central Government. That would probably be appropriate.

The Convener: But ultimately the Scottish Government would have to make the decision.

Councillor Cook: The Scottish Government would inevitably have a decisive say on whether an opt-out was accepted and whether the exceptional circumstances justified such a move, unless—here I return to Rhoda Grant's proposition—the bill contained a definition that was sufficient to make the ground rules clear. In such circumstances, we might be able to have an automatic opt-out on the basis of certain kinds of evidence. However, even in the responses that you mentioned, it is quite difficult to see the exceptional circumstances that local authorities are describing. They refer to them in a fairly general way. I have to say that we are short of examples in that respect.

The Convener: Alison Johnstone has some questions on an issue that you have already touched on—the new economic duty that will apply to local authorities.

Alison Johnstone (Lothian) (Green): Good morning. I would appreciate hearing the witnesses' views on why the majority of local authorities that responded to the Government's consultation oppose the introduction of the new economic duty. The analysis of consultation responses on what was then called the better regulation bill shows that 12 local authorities are against the proposal and that only Edinburgh supports it. Why is that the case?

Councillor Cook: I will begin with a general proposition, if you want, and I am sure that others will be able to fill things in.

First, the duty to promote economic growth cuts across local democratic accountability. The fact is that councils are clearly able to balance interests and make judgments in their localities about the activities that they should pursue.

Beyond that, there is a potential inconsistency with other local authority duties. For example, we consider community empowerment, wellbeing and community benefit, but there is no clear definition of how the legislative requirements will interact. Moreover, how will the new duty relate to, say, our best-value responsibilities?

There has been an effort to mitigate the very generalised proposition that lies behind the economic growth duty. It started simply as a bald economic growth duty, and I have to say that the move to sustainable economic growth has merit. After all, the creation of a situation in which transient economic growth trumped local social or environmental concerns would be a serious issue for us, and I think that further attempts have been made in the bill to mitigate the duty's effects by making it clear that it needs to be measured against other local authority responsibilities. That is certainly a step in the right direction.

That brings me back to the previous question about whether we regard the national duty as ideal, our response to which is simply no. I said earlier that councils are under no illusion about the importance of sustainable economic growth. This might be a risky observation, but members are sometimes more preoccupied with that than they are with other issues. I believe that we need balance in the system and proportionality in decision making.

To create the proposed precept, which is also cropping up in relation to other legislative and guidance propositions such as the national planning framework 3 and Scottish planning policy, would be to go down the wrong path. We need a balanced approach that recognises the full gamut of things that local authority decision makers need to take into account.

Alison Johnstone: Thank you. Can I hear the other witnesses' views?

The Convener: Mr Galloway, do you want to say something?

Jim Galloway (City of Edinburgh Council): I am surprised that my authority is the only one that reported in favour of the duty. From an economic development service point of view, anything that helps to promote economic development has to be a good thing. In Edinburgh, we have a deliberate policy to try to make it easier for people to do business. We have brought together our business support services and co-located them alongside some of our regulatory services, principally the business-facing ones. That has enabled a new dialogue between business support, planning, licensing, environmental services and even finance and non-domestic rates, which collectively seek to support the business customer.

The duty is broadly in line with our strategy and operations in Edinburgh, so we broadly support it. However, the checks and balances need to be in place to ensure that, for example, in the planning application process, the economic benefit argument is in balance with the other arguments, and that the duty does not lead to a presumed consent type of situation. I know that my colleagues in the planning department would be concerned about that. The flavour of the bill is to try to make it easier to do business in Scotland, to make it easier for businesses to understand and comply with regulations and, in turn, to make it easier for councils to apply them. In that respect, the economic focus is broadly to be welcomed.

Andrew Fraser: There are concerns about the wording of the duty from a legal point of view. We should bear it in mind that the pre-consultation mentioned introducing the principles of better regulation into legislation. I think that everyone would be happy with that. The consultation paper mentioned a duty whereby local authorities would have to consider and report on the impact of regulatory activities on business, but it has crept into being a duty except where it would be inconsistent with the exercise of those functions.

Regulatory issues are not like policy decisions. Regulatory issues end up in court because they cost money in licensing and planning. I think that the duty will end up as a lawyers' charter and will be argued over. I will give a practical example. Sections 25 and 37 of the Town and Country Planning (Scotland) Act 1997 state that a planning decision has to be made in accordance with the development plan unless material considerations indicate otherwise. The new draft Scottish planning policy in April this year proposed that the economic benefit of developments should be a material consideration, but in the light of the bill, will economic benefit have greater weight as a material consideration? Will it be an overriding consideration? I think that that is fertile ground for lawyers.

If a question arose on licensing or another regime, the courts would say, "What is the purpose of the legislation?" They would need to determine that in order to determine whether the economic benefit power is inconsistent with it. In liquor licensing, in the Brightcrew case, the courts made a complete and total hash of trying to determine an underlying principle. In spite of the fact that the legislation had five underlying principles in it, the court said that the purpose was the sale of alcohol. Could we say that the sale of alcohol is inconsistent with economic growth when we have, on the one hand, health arguments against granting premises and, on the other, arguments that new premises bring jobs? It just creates a complete mess and it will take ages for the courts to sort it out.

If you are in any doubt, apply the test to the issue of bank deregulation 10 years ago. The approach would have resulted in huge deregulation. If the duty in the bill had been about introducing the principle of better regulation, there would have been no dispute whatsoever. The proportionate exercise of regulation is well understood.

At the very least, the duty needs to be watered back to the proposal in the consultation paper that it is a balancing consideration and not an overriding one. Regulation is often about protection of the public; it is not necessarily about economic growth. There has to be a balance.

10:45

David Cooper (Aberdeenshire Council): Aberdeenshire Council deals with a lot of businesses from an environmental health point of view with regard to the condition of premises, food health and safety, impact on neighbours and so on. We are not here to put obstacles in the way of those businesses and we do not want to harm them. The council's approach is to work with businesses, and I am sure that the same applies in most councils. We also work in partnership with the Food Standards Agency and the Health and Safety Executive to ensure that we apply regulation consistently and fairly. We have good partnerships with local businesses and we try to promote the ones that meet certain standards—for example, with eat safe awards—which can have a financial benefit for them.

As has been said, our main role and purpose is to ensure that there is compliance with regulations that are set through legislation and that there is no adverse impact on the public. I am not sure how our role in environmental health ties in with the things that we are discussing, but I am sure that there are other aspects of council services to which the duty could apply.

On your point about why only one council supports the proposal, it might depend on who contributed to the consultation responses when they were put together. Perhaps we should take them with a pinch of salt, although that is just my point of view.

Alison Johnstone: I have two more questions. Mr Fraser, you commented that, if a developer applies for a consent to build houses and is refused, they could object to the decision on the ground that the development could lead to economic growth. If a council refuses permission to develop, there is a chance that the developer could come back and say, "You have a duty to promote economic growth, so I'm going to challenge that."

Andrew Fraser: Yes. They could possibly hang their hat on that in court and say that the planning authority did not pay sufficient regard to the duty to ensure economic growth or that that duty should have been given more weight as a material consideration than, for example, the environmental impact and the local plan. It becomes terribly muddy. Given that the duty is in an area of regulation that can end up in court, it will take a few years in court to find out, finally, where we are at.

Alison Johnstone: Last week, the committee heard from Scottish Natural Heritage, among other bodies. The convener asked what difference, if any, the new economic duty will make to the current organisation and delivery of SNH's services. Roger Burton of SNH said:

"I do not think that it will make any difference, given that we are already working towards the national performance framework within which it sits."—[*Official Report, Economy, Energy and Tourism Committee*, 29 May 2013; c 2933.]

Do you believe that non-legislative approaches are working and that, with single outcome agreements, for example, that is happening anyway? That seems to be the thrust of what I have heard from some of the witnesses this morning.

Councillor Cook: My answer is yes. We have been through an evolutionary process in relation to single outcome agreements and community planning. We are starting a new chapter in relation to those things. In the past, there was a duty on local authorities by consequence of statute in relation to community planning. It looks as though that duty will be extended under the bill to other public sector partners. Local authorities welcome that because it will oblige all stakeholders to bring their resources and talents to the table to deal with issues that are important in localities. As a direction of travel, that seems to us to be entirely appropriate. In some ways, the approach that is hinted at by the imposition of specific duties runs counter to that approach.

The Scottish Government is—rightly, in my view—keen on the place-making agenda, which is a fundamental proposition for community planning and single outcome agreements. That is the right direction of travel as far as we are concerned. The duty in the bill intrudes on that and infringes on what we seek to do there.

Andrew Fraser: I think that it is worth while to quote from the March 2013 Audit Scotland report "Improving community planning in Scotland", which contains some quite trenchant comments. For example, it states:

"The Scottish Government is currently involved in a wide-ranging programme of public service reform. This includes reviewing community planning, integrating health and social care services, establishing national police and fire services, college regionalisation, and community empowerment. Several of these developments, such as health and social care integration and the review of community care planning, share a common focus on partnerships, place and integrating services. Others, such as police and fire reform have a significant national dimension. Others still, such as college regionalisation, have a regional focus. This complex network of reforms may present challenges in establishing local community planning arrangements that are the foundation within which wider reform initiatives will happen in line with the expectations of the Statement of Ambition. Overall, Scottish Government public service reform developments do not appear to be well 'joined up' when viewed from a local perspective."

That criticism applies to sections 1 to 4 of the bill, because what is proposed is not joined up with other public sector reform, particularly from a local perspective.

The Convener: Does Marco Biagi want to come in?

Marco Biagi (Edinburgh Central) (SNP): No. My question has been answered quite well.

The Convener: Before we leave the issue of economic benefit, I have a couple of questions just for clarity. The first is for Councillor Cook. COSLA's written submission addresses the economic duty, but it is unclear exactly what your position is. Perhaps you can make it clear. Does COSLA support the duty being in the bill, or not?

Councillor Cook: I am trying to ride two horses, as you found earlier.

Chic Brodie: Not very well.

Councillor Cook: I did not quite hear that.

The ideal would be that the duty was not in the bill. The evidence that you have heard today is that we would prefer not to have the complication and the potential duplication and confusion that will flow from introducing additional duties in the bill. However, the position that we have resolved upon is that, because there has been an effort on behalf of the Scottish Government to reach a compromise and mitigate some effects, we have moved to a much better position. Is it the ideal position? No, but it is certainly a much better position.

The Convener: It is helpful to get that clarity. However, can you or anybody else tell me what sustainable economic growth means?

Councillor Cook: That is a very good question. The phrase is undefined, as are one or two other propositions in the bill, which is an issue.

The Convener: Does anybody else want to volunteer a definition?

Andrew Fraser: That is the point. It would be helpful to have a definition of the phrase before the courts make one.

The Convener: Thank you. We need to move on and look at the code of practice on regulatory functions.

Chic Brodie: Sections 5 and 6 cover the code of practice and the code of practice procedure. They allow the Scottish ministers to issue a code of practice in relation to the exercise of regulatory functions by specified regulators. Do local authorities and COSLA have any concerns about the code of practice?

Councillor Cook: It is broadly okay. The same issue arises in relation to section 6(3)(b), where you will see the economic duty repeated, in effect. The concerns that we have articulated previously arise in relation to that as well.

Chic Brodie: We could have a longer debate on the matter and ensure that everyone understands what is meant by sustainable economic growth in terms of employment and productivity. However, we will leave that issue for the moment.

Apart from that, is there anything else that gives you concern, for which you would seek ministerial guidance on the application of the code?

Councillor Cook: Subject to the collaborative or partnership approach that is outlined in the memorandum of understanding, the answer would be no.

Chic Brodie: That is fine.

The Convener: Do you have any concerns about section 7, which gives Scottish ministers the power to modify the list of regulators and regulatory functions?

Councillor Cook: The difficulty is that these are all generalised propositions about things that we cannot yet see. There is a lingering anxiety that things that we do not yet have sight of could be modified, particularly if they are not mitigated through the memorandum of understanding.

A key proposition for us is that any effort to change something that is as yet unseen would be a matter for partnership discussion instead of something on which an individual minister would simply come to a view. It would be better to have the ability to have that sort of discussion. The lingering issues about the generalised nature of some of the propositions bring us back to a point that we have made delicately so far about anxiety over the generalised nature of the power and the fact that it would be better if it related to discrete items that are visible and based on evidence.

Andrew Fraser: I have two points. First, there is a slight doubt about whether licensing boards are included in the list of bodies that are covered by the bill. They are not listed. It might be worth checking whether the intention was to include them.

Secondly, on generalised powers, I note that the only restriction on the powers in section 1 is that which is contained in section 2(3), which I find difficult to understand. Perhaps the committee will have a closer look at that provision at some point.

The Convener: Another area that we have mentioned briefly in passing is planning fees, which I know is an area of concern for COSLA. A couple of members have questions on the issue, and I will begin with Margaret McDougall.

Margaret McDougall: First, I should declare that I know Andrew Fraser from my previous life as a North Ayrshire councillor, when he was an officer with the council.

The bill refers to sanctions that would be imposed on local authorities that did not meet certain criteria and timescales on planning. Do you have a view on that?

Councillor Cook: There is no question but that we have serious concerns about that, some of which are matters of principle and others matters of practicality. We have already hinted at the issue of principle. The measure smacks of a high-handed and undesirable arbitrariness; it infringes local accountability and is actually inconsistent with the bill's chief objective of consistency.

On issues of practicality, as yet there is no definition of many things that would be important in clarifying the direction of travel on the matter. For example, there is no clarity on what is good or bad performance. There is also no reference to full-cost recovery or to the fact that planning services are heavily subsidised by the taxpayer in other ways, which means that fewer resources are available for other services.

To be frank, planning authorities are not responsible for all the delays in the planning system. Typically, the time taken to resolve a planning issue can be doubled or even tripled by the requirement for section 75 legal agreements, and the committee will have seen evidence suggesting how major a component that is. There is also no indication of the period over which the penalty would apply. Beyond that, even if we were to accept that there should be some kind of penalty, it is not clear what would be penalised.

11:00

There seems to be an implication that timescale and the speed of processing applications would be assessed. I am sorry, but I have to say that such an approach is utterly misconceived; in our view, the important thing is quality decision making. Timescales are certainly important—I do not think that anyone will pretend otherwise—but quality decision making is in many ways much more important.

We must also be mindful of the outputs from planning decisions. The simple fact is that 93 per cent of planning applications are approved, but that is because of the level of industry that goes into making those applications acceptable. How does that happen? Often, it happens through constant conversation and dialogue between the applicant and the planning authority, which gets an application that might have had issues into a shape in which it can be accepted and approved. That might take more time, but does it produce an altogether more satisfactory result? I do not think that there is really any issue but that it does.

As I have said, the overall approach in the section on planning penalties is misconceived. A high-level group populated by the COSLA spokesperson Stephen Hagan and the minister is looking at planning performance issues. It is right that the group examines those matters, but we are still some distance apart on the issue of penalties. We are keen for the position to change and, again, for a much more balanced and proportionate approach to be taken to the matter.

Margaret McDougall: So that is a no, then, to sanctions.

Councillor Cook: I think that you can safely say that. In fact, that is the most unambiguous that I have been today.

Margaret McDougall: You said that a group involving COSLA and the Scottish Government is looking at how performance on planning applications is monitored.

Councillor Cook: Yes.

Margaret McDougall: Is that the only way in which these things are being monitored? How do local authorities monitor their own performance and deal with a poor-performing planning authority?

Councillor Cook: Local authorities collect data on the issues all the time, and I think that you have received evidence on the timelines for that. Indeed, I regularly look up my council's planning performance. I routinely expect to be able to see how we are performing and we then make judgments about the level of investment in the department. All planning departments across the country—without exception, I think—are heavily subsidised. Back in 2004-05, councils recovered 81 per cent of their planning costs from the charging regime, while in 2010-11 the figure had fallen to 56 per cent. In short, the other 44 per cent of the provision is effectively subsidised with other resources, which means that other areas of activity go light.

Who has an interest in ensuring that a planning authority performs well? Actually, in my local authority, I have an interest in that. The people who are directly accountable for whether Scottish Borders Council performs well as a planning authority are me and my 33 colleagues. The same holds true for the City of Edinburgh Council and every other council across the land. The people who are vested with the responsibility are democratically accountable for it.

Margaret McDougall: Of course, Audit Scotland will comment on the performance of the council as a whole.

Councillor Cook: Indeed. Planning performance is a regular feature of Audit Scotland's regular audits of the council.

Margaret McDougall: In that case, is Heads of Planning Scotland's planning performance framework an appropriate mechanism for assessing planners' performance?

Councillor Cook: There is an aspiration across the country to improve performance. I do not think that there is any ambiguity about that. The question is how we do that—we do it by looking at the evidence and by investing in improved performance.

There is an argument that what is sauce for the goose is sauce for the gander. To give an interesting comparison, the energy consents unit, which is an arm of the Scottish Government, said in August 2012 that it was not performing too badly, as it had a nine-month target for processing applications and was averaging 26 months. As you will see from the evidence, the performance of local authorities is far superior to that.

Margaret McDougall: To what extent should the type and complexity of planning application be taken into consideration when evaluating whether a planning authority has performed satisfactorily? Does the bill take that into account, and how would it be monitored? You say that you are not in favour of sanctions, but what could planning authorities use instead and how should they measure performance?

Councillor Cook: An approach that is favoured by the Scottish Government in certain areas, and which is worth looking at, is the processing agreement model, whereby there is an agreement between developers and the planning authority with regard to the processing of the application. I understanding that the Amazon development in Fife was a product of that system. I do not want to put words into Amazon's mouth, but I expect that it would have wanted quality decision making, even if it took slightly longer—seven months in that case—rather than trying to thrash something through in three months and not getting the result to which people aspired, or actually getting the wrong result, which can sometimes be the consequence of trying to set arbitrary timelines.

Margaret McDougall: Do other panel members have views on that?

David Cooper: I am from Aberdeenshire Council's environmental health department, not from planning, but the council receives a large number of wind turbine applications. We measure performance by considering the number of applications that are processed within two months, and it is the wind turbine applications that are harming the figures. A lot of that is down to the work in which my department is involved in assessing noise. As Councillor Cook mentioned, the fault does not always lie with the service or the council; some of the information from developers and applicants is less than desirable. There is a multitude of reasons for the time taken, but it is far better to get an application properly assessed, taking on board objectors' views, rather than rush it through. A lot of pressure is put on us to process applications within a short timescale, just to make the figures look good, but that is totally wrong. There has to be a framework through which we can properly measure the time taken by a council or a service, rather than just looking at the time taken.

Councillor Cook: There is the question of where fault would lie. For example, when a significant planning application is going through the process and we reach a section 75 legal agreement, as a result of which a developer contribution is payable, sometimes, the unwillingness of the developer to make that contribution can completely thwart the process. As the bill stands, it looks as though the local authority would be held accountable for that, which would not be appropriate at all, because that would not be where the fault lay. As David Cooper says, that is not infrequently the position.

Andrew Fraser: To come in at a slight tangent, I wonder about the extent to which the increases in fees would result in new money to the local authority. It might be worth the committee's while to check that there would be no reduction in the grant-aided expenditure allocation from Government to local authorities to reflect the increased fees. If that was the case, local government planning would not be getting any more money, Government would be saving and business would be losing. I am sure that that will not be the case, but it might be worth checking.

From a commonsense point of view, it seems counterproductive to take money away from poorly performing planning authorities. If we do that, they can only get worse.

Mike MacKenzie: Councillor Cook will be delighted to know that I agree with him that the quality of decision making is paramount. Pretty much everything that was built before the Town and Country Planning (Scotland) Act 1947 is listed or protected in a conservation area. We all agree that that is terrific. However, I wonder whether the planning system has delivered much quality development that will become the listed buildings and conservation areas of tomorrow.

The Convener: I am not sure that that question is desperately relevant to the bill, to be honest.

Mike MacKenzie: I agree with Councillor Cook that an important outcome of the planning system is the quality of what it delivers. Does he think that we can be proud of what the planning system has been delivering?

Councillor Cook: It is not possible for me to answer that. I am not sure how relevant it is to the committee's deliberations.

Mike MacKenzie: Okay. It was you who raised the issue of the quality of decision making, but I will move on. Do you feel—

Councillor Cook: I can answer it if you want. Planners can deal only with the applications that come before them, and a dud application is a dud application—that is the simple reality. If planners receive a quality application, they will deal with it appropriately.

The Convener: The point is that there is a difference between the quality of the application, the quality of the process and the quality of what is built. I suspect that the bill will not have any impact on what is built.

Councillor Cook: That is correct.

Mike MacKenzie: Do you agree that the planning system delivers a public good by safeguarding the quality of the environment and perhaps improving it, including safeguarding the quality of the built environment and perhaps improving it?

Councillor Cook: Indeed—I agree.

Mike MacKenzie: Is it therefore right that an applicant—somebody who is building an extension to his house, for instance—should fully fund the planning system?

Councillor Cook: The issue does not relate to applications at that level. You will see in the annex to our written submission that it relates to significant applications, which is where the real deficit is. Our anxiety about full cost recovery is less about the lower end of the scale of application size; it is the big applications that we are talking about. For a conservatory application, most of the cost of the process is likely to be recovered through the fee, but that is not true for a 126m turbine application or something of that nature. There is a big discrepancy there. We are keen for the matter to be taken forward, and it is being discussed through the high-level group. We want to get to the point of full cost recovery and a much

more appropriate funding level. Audit Scotland has said that the present funding of planning departments is unsustainable.

Mike MacKenzie: We find ourselves in difficult economic circumstances. There are reports in the news today that house building is at its lowest level since the great depression. I hasten to add that that includes private sector house building, which has experienced the largest falling off. Is it realistic for the house-building sector to fully fund the planning system for larger applications?

Councillor Cook: Planning fees for major applications are only a tiny proportion of developers' overall cost envelope. The annex to our written submission gives the example of a wind farm. The difference in fee for that particular example would be an increase of £30,000 for the developer. That is a relatively small-scale increase for the kind of large-scale developments that we are talking about. Also, the problem with the falling off in house building is nothing to do with the planning system; it is to do with the economic climate. We need to recognise that reality.

Mike MacKenzie: I might dispute that with you. On the principle, though, given that the planning system delivers a public good, do you still feel that it should be paid for by developers?

Councillor Cook: Do you want a properly funded system that produces quality results, or not?

Andrew Fraser: The issue is that somebody has to pay. Either the general taxpayer, who is nothing to do with the developer, pays; or the developer does. The decision on who pays is essentially for the Government.

11:15

Mike MacKenzie: The COSLA evidence states that there have been improvements in planning performance, such as an increase in the percentage of applications that are determined within the statutory two-month period from 45.4 per cent to 50.4 per cent. That statutory obligation to determine applications within two months has been about for as long as I can remember—it predates this Parliament—yet we are only at that level. COSLA seems to be boasting somewhat about the increase to 50.4 per cent, but I regard that as a very poor result. Do you?

Councillor Cook: Clearly, that result represents an improvement. Historical legacy applications, which impact on the figures, are contained within it. The issue goes back to Andrew Fraser's proposition a moment ago: if we want a fully effective system that produces quality results in a desired timeframe, that system needs to be properly funded. That is not the position at present. If anything, local government has done well to improve performance in a context of even greater pressure on funding. There is also the context of an enormous number of wind farm applications, which puts a distinct pressure on planning departments, yet performance has improved. In that regard, the result is not bad.

Mike MacKenzie: Surely that runs counter to the principle, about which we talked earlier, that the choice about how local authorities spend their budget is a local one and should be based on what they believe to be important. Given that somebody has to pay for this public good and that local councils want to retain local decision-making powers, surely local councils should pay for the planning system, which delivers a public good?

Councillor Cook: Is that an entirely serious question? Where do you think most of our money comes from? Given that 85 per cent of our funding comes direct from central Government, planning and other departments need to make judgments about all the services that we fund. We try to do that in the most appropriate way, taking into consideration all the local circumstances. We have pressures on social work, burdens on education and so on.

Mike MacKenzie: Do you regard 50.4 per cent as a good result?

Councillor Cook: You are asking me a closed question.

Mike MacKenzie: A one-word answer will do.

Councillor Cook: It is a fairly pointless question. It is clearly an improved result in very difficult circumstances.

Chic Brodie: I represent the south of Scotland, and Berwick-upon-Tweed is part of that. When you get into discussions about wind farms—

The Convener: Not Berwick-upon-Tweed, surely—

Chic Brodie: East Berwickshire.

Councillor Cook: I might agree with you that Berwick-upon-Tweed would be better off in Scotland, but that is another issue.

Chic Brodie: I agree with that.

The point that Mr Fraser made—in fact, COSLA makes the point in its submission—is that if we take money away from planning authorities, that will only make matters worse. In my experience from business, it is not necessarily additional funding that is needed. I have figures for planning performance across each council in the south of Scotland. On wind farms, for example, the biggest problem is that we have seen too many single turbines, as opposed to the development of proper wind farms. What action would you take, other

than on funding, to address the issue of poorly performing planning authorities?

Councillor Cook: Clearly, there is management action to take, as well as the framework that was mentioned before. There is an aspiration to improve performance. I described earlier the high-level group where COSLA and the Government meet to discuss improving performance; I expect products from that group that are geared towards how we can significantly improve performance. There is no question but that, at the heart of it, there is a funding deficit that is an issue for the running of the service.

Andrew Fraser: A lot of good work has been done, over previous years, by the Government and local authorities in looking at the whole system—for example, in dropping some of the lower-level stuff into the state where it is permitted development, to clear it out of the system, and in many of the appeals being handled in-house by the local authority rather than going up to the Scottish inquiry reporters. You need to look at the system as a whole to see what can come out of planning control and the processing of applications, rather than looking just at the timescales and not tweaking the system.

Councillor Cook: In my local authority, we have significantly changed the level of delegated decision making. Applications that might hitherto have gone to members for consideration—with all the delay in the system that that necessarily entails because of meeting cycles and various other things—are now processed by officers. That has led to a significant improvement in performance. Such things can be done to make a difference.

Chic Brodie: Do you not agree that changing the process, as a consequence of changing the regulations, and improving the efficiency not only of planning but of bodies that impact on that, would help?

Councillor Cook: Yes, but we have made a judgment about how the system operates, and we have had to weigh up different considerations in making that judgment. We have had to weigh up how objectors play into the system, perhaps not having their day in court, as it were, but with items going before the full planning committee. We have created mechanisms in the system that deal with that. However, by and large, most applications can now be processed on the basis that they are dealt with under delegation.

Chic Brodie: I appreciate that and think that it is effective. However, do you not agree that looking at the rules and regulations governing bodies such as SEPA and improving the understanding and communication to get some sort of consistency will improve the efficiency of planning, thereby achieving sustainable economic growth?

Councillor Cook: You are obviously trying to push me in the direction of saying that everything in the bill is hunky-dory.

Chic Brodie: No, I am not trying to push you in either direction.

Councillor Cook: As we have said consistently throughout the discussion, there are circumstances in which discussion with the Scottish Government about things that could be set nationally to give proper impetus and direction would be appropriate. However, we need to look at the discrete area in question to work out the appropriateness of it. That remains as true at the end of this discussion as it was at the start.

The Convener: Let us move on from planning, as there are other areas that we need to cover. Section 42 deals with street trader licences.

Dennis Robertson (Aberdeenshire West) (SNP): Good morning, gentlemen. I direct my question to Mr Cooper, given his background in environmental health. Perhaps we are moving on to a less complex and controversial issue. The bill proposes a single-licence approach to street traders, especially mobile food operators. What is your view on that?

David Cooper: Aberdeenshire Council would support that proposal. At the same time, we have concerns about councils' ability to carry out inspections of those businesses while they are operating. When a van is assessed for the certificate, that usually takes place either at a council premises or at the base, not when it is operating. However, we see how well and how safely a business is operating only when it is operating and open to the public. If something can be built into the legislation that still allows the authority in whose area a business is operating to carry out inspections, we will be happy with that. There is a need for national standards in the area before the proposal is acceptable to local authorities. The principle is accepted, but there are concerns about the ability of councils to carry out inspections.

Dennis Robertson: That is the first time this morning that we have heard that there could be a need for national standards.

David Cooper: On other aspects of food safety, councils are working closely with the FSA to implement what we call the cross-contamination strategy, which involves the targeting of certain food businesses. That has been shown to work very well.

Councillor Cook: I do not think that there is any surprise in that response. It conforms exactly to what we have been saying. When you consider

any particular area, you might see that there is a need for national standards and national guidance. In such a case, it is appropriate to talk to the Scottish Government and create something that is fit for purpose in that particular area. That is entirely consistent with our evidence from top to bottom.

Dennis Robertson: When Alison Johnstone and I met an environmental health officer, one of the concerns that were raised was that there could be a dilution of standards. It was suggested that Edinburgh, Aberdeen, Aberdeenshire and Glasgow had higher standards than other authorities. What level would you be thinking of for the national standard?

David Cooper: It would build on the guidance that we have in the cross-contamination strategy in terms of the standards that are expected from businesses. I know that the consultation paper referred to inconsistencies between local authorities and the requirement for particular facilities to be provided in advance. The national standard must be clear in terms of food safety, health and safety, gas safety and so on. Even then, there must be scope for some flexibility, as not every business operates in the same way or is structured in the same way. However, we believe that the main issue should be covered by national standards.

Dennis Robertson: Is there any specific guidance that you would like to see?

David Cooper: Not personally. If you seek specific comments, I will ensure that our food specialist gets back to you.

Dennis Robertson: It would be helpful to get some guidance about areas of concern and what you would like to see as the final outcome.

Councillor Cook: I have to say that this is not one of my areas of expertise. Andrew Fraser might have something to add.

Andrew Fraser: My only comment would be a generic one that the problem in this particular area arose because of deficiencies and inconsistencies in the drafting of the legislation. Different local authorities thought that they were bound to do different things. In my opinion, giving ministers the power to make broad, sweeping regulations without parliamentary scrutiny is more likely to produce further bad legislation than good legislation.

Dennis Robertson: I think that you would agree that, at the moment, there is some degree of inconsistency. Am I right in thinking that you welcome the approach that involves having one particular licence issued by a local authority so that people can be more mobile and do not have to apply for additional licences when they move into other local authority areas?

David Cooper: My understanding is that the certificate of compliance is the only aspect that that touches on. The operator would still have to apply for a licence to operate in each council area.

Councillor Cook: That would be appropriate because the circumstances in which they chose to operate would be a matter of local consideration.

David Cooper: Certainly, the national standards that I mentioned can be brought in without this particular piece of legislation. Local authorities are being praised by the FSA for the way in which they work in partnership with each other and with the agency. That is an avenue through which we can establish the national standards.

The Convener: You will be pleased to hear that we are coming to the end of our time. However, I would like to bring in one more area of questioning before we close. It relates to two matters that are not in the bill but which, it has been indicated, might be introduced to the bill through amendments at stage 2.

The first is the concept of primary authority partnerships which, as I am sure you are aware, have existed in England and Wales since 2009 but have not yet been established in Scotland. Fergus Ewing has indicated his intention to introduce a stage 2 amendment to adopt primary authority partnerships here. Would COSLA support that?

Councillor Cook: That is something that could be a matter of discussion. Clearly, the object of all local authorities is to improve performance, and following the best practice of a leader in a particular area of activity is something that could be considered in that regard.

The Convener: You are being non-committal.

Councillor Cook: I am, and I am going to continue to be. It is certainly something that we can look at.

The Convener: But you do not have a firm view on it at the moment.

Councillor Cook: That is correct.

11:30

Andrew Fraser: It would have been better if that proposal had been in the consultation paper and the bill to start with, which would have allowed us to see what is intended. In principle, it could be a good idea, depending on the regulatory system that is involved. It is used in building standards, for example. It can be a good idea, but it needs work.

The Convener: In a letter to the Rural Affairs, Climate Change and Environment Committee, Paul Wheelhouse indicated that the Government

might introduce a stage 2 amendment that would extend the powers of public bodies other than local authorities to issue fixed-penalty notices for litter. Does COSLA have a view on that?

Councillor Cook: That is not something that forms part of my brief. I can give you a personal view on it, but I do not imagine that that is what you are looking for.

The Convener: Not really.

Councillor Cook: I do not have a COSLA position to give you on that.

The Convener: It would be helpful to the committee, in anticipation of those amendments being introduced at stage 2, if you were able to come back to us at some point on those issues.

Councillor Cook: I am happy to do that.

Andrew Fraser: There is a general point to be made, which is that some of the efficiencies in regulatory regimes are about having one inspector carrying out a number of inspections on behalf of planning, building standards, environmental health and so on, using mobile technology. The idea of having different agencies and officers being able to serve litter notices feeds into that. In principle, therefore, for them to have that power is no bad thing.

Councillor Cook: Interestingly, in our authority, officers of all descriptions can issue notices at present. That is an adjustment that we have made.

The Convener: As we have no further questions, we will draw this session to a close. I thank our witnesses for their time and for offering to get back to us with one or two pieces of information.

11:32

Meeting continued in private until 11:48.

Example of a national standard

Protect Your Business from *E. coli* O157

Bacteria, such as *E. coli* O157 may cause serious illness or death. They may enter your food business on raw meat, or fruits and vegetables which have been in contact with the soil. They are invisible to the naked eye, so they can easily spread to other foods without you realising.

This is known as cross contamination and is one of the most common causes of food poisoning. It happens when harmful bacteria are spread onto ready-to-eat food from other foods, surfaces, hands or equipment.

If your business handles food which could be contaminated with *E. coli* O157 in the same establishment as ready-to-eat food, there will be greater risk. Raw meat, fruit and vegetables which have been in contact with the soil, and are not supplied as ready-to-eat, must be handled as if they are contaminated by *E. coli* O157. This includes potatoes, carrots, onions, leeks, swede, parsnips, cabbage, marrows, squashes, radishes, spring onions, lettuce, celery, parsley (and other fresh herbs), fennel, artichoke, cucumber, mushrooms, melons, strawberries. This is, however, not an exhaustive list.

This factsheet highlights the strict measures that are necessary to control *E. coli* O157. Local authority enforcement officers will consider these measures as part of their inspections.

Note: The key control measures involve:

- separation of raw and ready-to-eat foods by separation of work areas, equipment, packaging and cleaning products
- effective cleaning and disinfection of contaminated items
- personal hygiene and handling practices (including hand washing technique).

If ready-to-eat foods are exposed to the risk of *E. coli* O157 contamination, enforcement officers will take appropriate action to protect customers. Depending on the situation, the officer may impose one or more of the following control measures;

- the prohibition of certain activities
- immediate cleaning and disinfection of surfaces, equipment and utensils
- quarantine, rework, disposal or seizure of food
- modification of food preparation activities
- retrieval of customer's meals or product withdrawal or recall

Always Separate

The best way to prevent *E. coli* contamination is to ensure separate work areas, surfaces, and equipment for raw and ready-to-eat foods as follows:

Work areas: Provide separate working areas ('clean' areas) for the preparation of ready-to-eat food where raw meat or unwashed fruit/vegetables are forbidden. Ideally separate staff should be allocated to such areas but this may not be practical in which case staff should be provided with clean protective clothing for work in the 'clean' area, or the ready-to-eat food preparation should be carried out at the start of the working day/shift.

Storage: Use separate storage and display facilities, including refrigerators and freezers for raw and ready-to-eat foods. Where separate units are not provided, the ready-to-eat areas should be sufficiently separated and clearly identifiable. A colour coded shelf system (with corresponding guide) labels or a refrigerator diagram may assist. Whilst items such as tomatoes, peppers, marrows and strawberries may have surface contamination and are not considered 'clean' until peeled and/or washed, the risk is considered lower and they should be stored away from more likely contaminated items such as dirty root vegetables like carrots and potatoes etc and raw meat, but also away from ready-to-eat foods such as cooked meats and desserts.

Equipment: Use separate machinery and equipment, such as vacuum packing machines, slicers and mincers, for raw and ready-to-eat foods. Where this equipment is used for ready-to-eat food, it should be kept in the designated clean area.

Utensils: Separate dedicated chopping boards, equipment and utensils must be used for raw and ready-to-eat foods. These should be easily identifiable, e.g. colour coded with corresponding chart or suitably marked.

Packaging: Packaging materials for ready-to-eat foods should be stored in a designated clean area and the outside surfaces of any wrapping materials for ready-to-eat food brought into a clean area must be free from contamination. Items such as cling-film used for ready-to-eat foods must be kept separate from materials used for raw meats or potentially contaminated fruits and vegetables which have not been washed.

Hand Contact Surfaces/Items: Cash registers, weighing scales and other equipment which staff are required to touch should not be shared by staff handling ready-to-eat food and staff working in other areas. You should provide separate equipment for use with raw food and ready-to-eat foods. A single piece of such equipment may be used if appropriate measures are taken to prevent the spread of bacteria, e.g. if a cash register is kept outside the clean area, staff from the clean area must wash their hands after using it or before returning to the clean area.

Cleaning products: Separate cleaning materials, ideally colour coded, including cloths, sponges and mops should be used in the designated clean area. Use disposable, single-use cloths wherever possible.

Clean and Disinfect

Effective cleaning and disinfection destroys bacteria and stops them spreading to food. There are two suitable ways to disinfect contaminated areas or items:

1. **Chemical Disinfection of sinks and work surfaces** - Where you have no choice but to use a work surface or sink for raw and ready-to-eat food, these

must be effectively cleaned and disinfected between tasks. This involves carrying out a **'two-stage cleaning process'** as follows:

1st Stage - clean surfaces with an appropriate 'food safe' cleaning product which removes grease, visible dirt, food particles and debris, and rinse to remove any residue.

2nd Stage – disinfect using a 'food safe' product which meets the standard of **BS EN 1276:1997, or BS EN 13697:2001**. Ensure you follow the manufacturer's instructions in relation to the correct dilution and contact time for the chemical to be effective in killing bacteria and thereafter rinse with drinking water, if required.

Note: If you use a single sanitiser designed to clean and disinfect at the same time you will have to carry out the same two stage cleaning process with that product.

2. **Heat Disinfection of Equipment and Utensils -** Food containers, chopping boards, knives and other equipment and utensils will always require disinfection by heat after use if they are to be subsequently used for ready-to-eat food preparation. Heat is one of the best ways of killing bacteria, but the temperature and contact time must be sufficient to destroy harmful bacteria.

   A commercial dishwasher can be used to wash raw food equipment alongside items which will be used for ready-to-eat foods (Otherwise separate cleaning processes for the raw food equipment and the ready-to-eat equipment will be necessary.

Note: Dishwashers must be thoroughly cleaned (including jets and filters) at suitable frequencies, it must be in good working order, fit for purpose and the appropriate setting must be used.

Cloths - The safest way of cleaning is to use single-use, disposable paper towels. If, however, re-useable cloths are used, you must have separate, clearly identifiable cloths for clean areas, .e.g. a colour coded system. Without such a system, cloths must be single use only. All re-useable cloths must be washed and disinfected to remove grease, visible dirt and food particles. This should be achieved by using an appropriate cleaning agent and subsequently boiling them, or washing them on a hot cycle at 82ºC or above. They must then be suitably dried.

Handle Food Hygienically

It is vital for staff to follow good food handling and personal hygiene practices to help prevent harmful bacteria spreading to ready-to-eat food by cross-contamination.

Food Preparation

Additional care should be taken when handling foods such as carrots, onions, and cabbage if they are to be eaten as a ready-to-eat food (without cooking). For example, grated carrot used in a side salad or as a constituent of coleslaw. The surface layer of carrots may have numerous cracks and crevasses which could harbour *E. coli* O157. They must be washed to remove contaminants, then peeled and rinsed before grating. Thereafter strict separation control is required between these prepared foods and raw foods to ensure they are not exposed to a risk of contamination from any unwashed/unprepared root vegetables or raw meat.

Some fruit and vegetables such as unwashed/unprepared tomatoes, grapes, apples, pears, raspberries and blackcurrants are less likely to have been in contact with the soil and will therefore be less likely to be contaminated with *E. coli* O157. Less stringent washing of these types of food is acceptable although care is required to prevent contamination prior to consumption.

Handwashing

Effective handwashing using a recognised technique, E.g. from the Department of Health or the NHS, is always required prior to handling ready-to-eat foods in order to control cross-contamination. It must also occur after: going to the toilet, handling any food that may be a potential source of *E. coli* O157, hand contact with equipment or other surfaces that may have been in contact with raw foods, handling waste, eating and cleaning.

The use of non-hand-operable taps is strongly advised, but if they are not available, taps should be turned off using a paper towel. A non-hand-operable mixer tap is convenient for providing water at the desired 45°C for effective handwashing.

Soap must always be available and should be in liquid form from a dispenser. Soaps which conform to BS EN 1499:1997 are recommended.

Single use towels from a dispenser are considered best for drying hands hygienically. They should be disposed of in a manner which does not cause recontamination of the hands, e.g. in a foot pedal operated bin.

Note: Anti-bacterial hand gels should not be used instead of thorough handwashing, but only as an additional measure after handwashing. A range of **free online training videos** including correct handwashing technique are available to view at http://www.food.gov.uk/business-industry/caterers/hygiene-videos

Handling Food - Safety Tips:

Keep hands clean to prevent contamination.

Minimising direct contact with food will reduce the risk of harmful bacteria spreading. Handle food with regularly cleaned and disinfected tongs and other utensils.

Wear clean protective clothing. Frequently change contaminated outer protective clothing (e.g. aprons and gloves) and wash hands thoroughly before putting on clean clothing and entering a clean area used for handling and storing ready-to-eat foods.

Use disposable gloves but change them between tasks, as well as at every break and when they become damaged. Wash hands thoroughly before putting gloves on and after taking them off.

If its not possible to have separate preparation areas for raw and ready to eat foods, use ‘time separation’ as a control i.e. handle/prepare all raw meats or unprepared vegetables at a specific time separate from ready-to-eat preparation (with disinfection of areas and equipment afterwards).

For more information on good food hygiene please refer to the food hygiene information pack at www.food.gov.uk/goodbusiness. Alternatively, contact your local council Environmental Health Service.

COSLA

Economy, Energy and Tourism Committee: Request for Additional Evidence

1. As requested by the Economy, Energy and Tourism Committee please find additional evidence from COSLA below.

Local Variation

2. COSLA have consistently argued throughout the Bill process that we support increased consistency and the introduction of national standards when appropriate but that local communities should remain empowered and have the right to differing standards to reflect different local circumstances and desired outcomes.

3. There are many reasons why it can be appropriate to have local variations with regards to regulations, there may be different local priorities as set out in SOA's, different local inequalities that need to be addresses or there may local issues with specific types of businesses which require a different approach or standards.

4. Local authorities rightly make local decisions as to whether to approve liquor licences dependant on local circumstances looking at health, crime, community wishes and the economy. Local authorities also take targeted action when they are faced with issues that are important to communities, for example several councils have strong enforcement policies regarding doorstep selling where this has been a concern locally. Similarly some communities are more likely to be targeted by illegal money lending or pay day loans and therefore it is appropriate for councils to react differently, as shown by the recent Glasgow City Council initiative.

5. Equally there are times when local authorities should have the flexibility not to regulate businesses where they do not present any problems locally. A good example of this is the Knife Dealers Licensing. The intention of this was to reduce knife crime by requiring those who sell non-domestic knives to have a licence however, as the recent review reports, it has resulted in a disproportionate effect in rural areas with a significant number of licenses being needed for establishments in areas such as the Highlands (22 licences) which have high levels of hunting and fishing but low levels of knife crime and a very small number in Glasgow (2 licences) which does have serious problems with knife crime. Indeed, the review of the Knife Dealer Licensing scheme recommended that consideration should be given as to whether the knife dealer's licensing scheme should be discretionary rather than mandatory. As a discretionary scheme it could be used by local authorities in a more proportionate and targeted manner which also takes account of local circumstances.

6. Moreover there are times when local authorities in particular areas seek to encourage particular types of activities or businesses or important local cultural events. For example, T-in-the-Park faces high charges for its public entertainment licenses while the Leuchars air show has minimal costs, this is due to the different decisions made by councils as to whether some events should be subsidised and supported by the councils due to impact they have on local communities. Similarly due to high demand in Edinburgh during the festivals street traders licences are regulated more closely and may be subject to more conditions, this is to ensure that local and visiting people experience high quality and to keep a level playing field to prevent unscrupulous

businesses taking advantage of the increased tourism and damaging other legitimate businesses.

Primary Authority

7. In relation the proposal to extend the ability to contract Primary Authority relationships to devolved regulatory matters as part of stage two amendments COSLA understands that a consultation will be published in the near future and will respond in full to that. To inform our response we intend to hold an event for local authorities to discuss the advantages and disadvantages of such arrangements.

8. We would not wish to pre-empt the outcome of the full discussion at our event however, our initial view is that we find no difficulty with this proposal as local authorities can chose whether to enter into this relationship and in return businesses provide resources which enable the relationship to be a success. For example, Glasgow City Council have a primary authority agreement with Arnold Clark, who provide resources enabling the employment of two officers for 80% of available time to deal with and advise on regulatory issues solely for Arnold Clark. As a result both partners value the relationship which has assisted in preventing any issues arising and thereby assist in compliance with all the relevant legislation. However we are aware that there needs to be a balance between advice and enforcement to ensure that the relationship is a success for all parties.

Fixed Penalty Notices for Litter

9. At this time we do not have a view on extending the power to issue fixed penalty notices for litter to other bodies, local authorities are already able to do this and council officers use this power when appropriate.

10. We understand that the Scottish Government will be consulting on Scotland's first national litter strategy this year which will consider the responsibilities of all agencies with regards to litter. We will be responding in full to this consultation. We would hope that this issue will feature as part of that and once we have seen the proposals to extend this power in greater detail this will enable consideration with the agencies concerned.

SUPPLEMENTARY EVIDENCE FROM COSLA

I've been considering the request and on balance feel that we do not have anything significant that we can add in addition to the previous written and oral evidence we have provided to committee along with our original consultation response.

Local authorities are already committed to improving the economic prospects of their areas and enforce proportionately. An example of this I can give is that there was an incident in a local authority area where a business had misprinted their labels, Trading Standards could have required them to recall all products and reprint all the labels at significant cost to the business but decided that since the misprint did not present any health and safety risks to public that they would not do this, but simply require that the business print all future labels correctly. Moreover, all public bodies are also required, under the Climate Change Scotland Act, to act sustainably and we view this over the whole of social, economic and environmental considerations.

A key point is that the current wording of the RRB is 'contribute to' and not 'promote' sustainable economic growth and this was a change that we argued for. We have argued strongly that economic consideration cannot take precedence over social and environmental duties that local authorities, and other public bodies, must also comply with and intend to see this reflected in the supporting Code of Practice once that is drafted. Promoting growth, in our opinion, appeared to set it above these other duties and therefore we would not support a return to that wording.

COSLA
July 2013

SUBMISSION FROM PLANNING AID FOR SCOTLAND

Planning Aid for Scotland (PAS) is a national organisation, working across Scotland to help people engage with the planning system. PAS is a charitable organisation, operating on social enterprise principles.

As an independent organisation, impartiality is PAS's most important guiding principle – one that we will not compromise. PAS does not comment on individual cases nor advocate for a particular outcome in the planning process; rather it supports meaningful and effective engagement process for all those who use the planning system.

PAS has built up a wealth of experience through delivering training and a free planning advice service, and has tapped into the local knowledge of communities all around Scotland and their experiences of the planning system. In the twenty years of its existence, PAS has worked with over 1,000 community councils, helping individuals and communities understand the extent to which they can influence decisions about their local environment.

Introduction

Planning Aid for Scotland (PAS) is pleased to be invited to submit written and oral evidence to this enquiry. Our evidence will focus on Part 3 Section 41 of the proposed Bill – Planning Authorities' Function: charges and fees.

As an organisation which is focused on promoting effective public engagement with the planning system; provides advice, training and education about planning matters to members of the public and hears about their experience of the planning system; and which has a volunteer base of 350 built environment professionals, the majority of whom are planning professionals working in the planning system, PAS is in a unique position to comment on the impact of this aspect of the bill.

A summary of points that PAS would like to raise is given below. Further elaboration will be provided in the oral evidence session.

Comments

- Planning Aid for Scotland is not in favour of the provisions of this aspect of the Bill.

- Since planning reform in 2006 the Scottish Government has focused on achieving an efficient and inclusive planning system based on effective community engagement. PAS believes that the principle of penalising planning authorities considered to be performing poorly is counter-productive and not in the spirit of planning reform.

- The efficient planning system promoted since 2006 has generally been predicated on the promoting and sharing of good practice rather than imposing punitive measures. If poorly performing planning authorities are to be financially penalised, it is not clear from the Financial Memorandum accompanying the Bill how "financial loss to specified local authorities" - should the planning fees provision be used - equates to achieving improved performance. A better approach would be to provide appropriate support to planning authorities to perform better.

- It is not currently clear how poor performance will be defined or measured, or even whether it is possible to do this in an equitable manner. There are many factors which may lead to a perception of poor performance, some of which the planning authority may have no control over. The Financial Memorandum accompanying the Bill is purely speculative about the benefits of improved performance exceeding the costs of implementation. Planning fees relating performance to speed of decision making, for example, risks quality of decision making.

- If some planning authorities are penalised and have reduced income they may be less able to deliver their planning service as inclusively as possible. PAS is concerned that this may lead to less effective engagement being undertaken, particularly in respect of development plan consultation, and a general loss of accessibility of information and assistance, and of transparency and of consistency across the board.

- PAS is also concerned that with reduced income, planning authorities will have reduced financial resources to undertake training to improve their performance.

- Poorly performing planning authorities will be publicly identifiable. The proposed measures may lead to some planning authorities feeling stigmatised and demoralised.

- Planning already often receives negative media coverage and it is likely that stories about poorly performing planning authorities will further feed this trend. PAS does not believe the proposed measures will help promote planning as a positive means of shaping places and communities.

Support from PAS
We would be pleased to assist the Inquiry further with any aspect of its work in relation to better engagement with the planning process.

Petra Biberbach
Chief Executive, Planning Aid for Scotland
June 2013

SUBMISSION FROM THE ROYAL INSTITUTION OF CHARTERED SURVEYORS

General Comments

RICS Scotland is broadly supportive of the core principles contained in the

Regulatory Reform Bill as they represent a sensible risk-based approach to regulation building on better regulation principles, particularly around consistency, targeting and proportionality. RICS Scotland made these points in our formal response to the Scottish Government Consultation on the then Better Regulation Bill in autumn 2012.

Specific Comments

Part 1: Regulatory functions:

Generally, RICS Scotland supports the proposals in Part 1 of the current version of the Bill to introduce a regulation making-power for Scottish Ministers. This should encourage or, ideally, improve consistency in the exercise by regulators of regulatory functions, to exercise those functions in a way that contributes to achieving sustainable economic growth, and the proposed code of practice in relation to the exercise of regulatory functions.

The code of practice should encourage regulators to be mindful of the potential impact of their activity on business and economic growth, without being so onerous as to distract them from, or prejudice, their core regulatory activity. The code of practice will need to be worded clearly and coherently in this regard to avoid potential unintended consequences.

With regard to ensuring consistency and transparency, RICS Scotland would emphasise that it will be important for local exceptions to be determined by Ministers based on advice from the Scottish Government's existing Regulatory Review Group using publicly available selection criteria.

These criteria will need to be based on local social, environmental and economic factors. RICS Scotland recognises that such an approach may require reform to the membership of and secretariat support for the Regulatory Review Group to enable that Group to have the necessary capacity and capability to provide robust and fit for purpose recommendations to Ministers.

Part 3: Planning Authorities' Functions

With regard to planning authorities linking planning application fees to performance, RICS Scotland had previously stated, in its response to the Better Regulation Bill in autumn 2012, that there are two differing ways to consider the issue:- keep as is (i.e. no change), or establish powers; each has its own merit:

Keep-as-is: Establishing a clear link between planning fees and performance may help to encourage a culture that is focused on continuous improvement. The link might ensure that performance is considered in wider discussions on resourcing the planning services.

Establish powers option: Reducing the fees of individual authorities would mean that those authorities would need to find additional resources to cover the costs of relevant services. For applicants submitting an application in those authorities, this would mean a reduced planning application fee which may reflect the quality of service.

RICS Scotland stated that whichever pathway was chosen, it was imperative that any implemented policy brings forth the positive aspects of both sides of the scenarios mentioned above, and a balance struck between the two if necessary.

In light of the recent 20% increase in planning fees that came into effect from April 2013, RICS Scotland believes that any increase in fees beyond this sum needs to be tied to a measured improvement in planning authority performance in the determination of applications. This would mean that planning authority performance needs to be measured and monitored.

In sitting alongside the measurement and monitoring of performance, there would need to be a system or scheme in place to improve the operations of underperforming authorities, particularly smaller authorities. Resource sharing among authorities to exchange experiences, specialist skills and best practice should be encouraged, if not required.

RICS Scotland supports the idea that those authorities which have embraced culture change, adjusted procedures to focus resources on the ‘major’ developments which have the greatest impact on the economy and environment, and have adopted a positive approach to ‘managing’ rather than ‘controlling’ development should be rewarded for putting in place an efficient process that delivers decisions within statutory timescales. Additionally, it may not be reasonable for those authorities that have not committed resources to doing so to expect to receive the same level of fee.

Efficiency and affectivity of services provided should be rewarded. It is acknowledged that sometimes delays are out with the control of the planning authority, be this due to applicant delays, or input from statutory consultees. Such events would, of course, need to be taken into account when monitoring performance.

Royal Institution of Chartered Surveyors
6 June 2013

SUBMISSION FROM ROYAL TOWN PLANNING INSTITUTE SCOTLAND

Thank you for the invitation to provide written and oral evidence to the Committee's roundtable session on the proposals contained within the Regulatory Reform Bill to make provision to alter planning fees for specific planning authorities depending on performance.

Our oral evidence will be presented on 12 June by Alistair MacDonald who is Convenor of RTPI Scotland. Our written evidence is set out below.

The Royal Town Planning Institute (RTPI) is the champion of planning and the planning profession. A charity registered in Scotland and England and Wales we work to promote the art and science of planning for the public benefit. We have around 2,200 members in Scotland and a worldwide membership of nearly 23,000. We:

- support policy development to improve approaches to planning for the benefit of the public
- maintain the professional standards of our members
- support our members, and therefore the majority of the planning workforce, to have the skills and knowledge they need to deliver planning effectively
- maintain high standards of planning education
- develop and promote new thinking, ideas and approaches which can improve planning
- support our membership to work with others who have a role in developing places in Scotland
- improve the understanding of planning and the planning system to policy makers, politicians, practitioners and the general public.

The Role of Planning

Planning is about creating great places for people. It does this through providing vision on how best to shape our communities over the short, medium and long term. Scottish Government is currently reforming the planning system and a key part of this is the move towards a plan-led system where development plans provide the direction on the future of places.

It should be borne in mind that the customers of the planning system are not only those applying for planning permission. Any discussion on planning performance needs to recognise that planning is a public service that provides a service for society at large, as well as those who are directly engaged with it.

Performance

RTPI Scotland does not condone poor performance. We share the aspirations of Scottish Government, and others, for the improved performance and resourcing of the planning system. Our mission is to promote the art and science of planning for the benefit of the public which inherently means that we aim to ensure that the performance of planners is exemplary. We believe that a properly resourced planning system, working within the right framework, is key to achieving ambitions for sustainable development, economic growth and successful places across Scotland. It should be remembered that for the planning service to be effective, all three aspects of its statutory activities, namely Development Planning, Development Management, and Enforcement, must be functioning properly.

RTPI Scotland is disappointed that Ministers intend to pursue a statutory mechanism to penalise authorities who they consider under perform in the longer term. We are of the view that a consistently excellent planning system can only be delivered through continuous improvement which, amongst other things, involves support for poorer performing planning authorities to learn from those that are performing well. We do not think that the proposal will work for a number of reasons, namely:

- It would be counterproductive to withdraw funding from planning authorities that need to improve
- It is currently unclear how Scottish Government will assess whether a planning authority has 'passed' or 'failed'
- There is a danger that measuring performance will not recognise the complexity of situation and the number of players involved and focus only on specific aspects of the planning service
- Varying planning fees between authorities could potentially cause huge confusion

Withdrawing Resources

RTPI Scotland is firmly of the view that it will be counterproductive to withdraw funding from planning authorities that need to improve. We feel that Scottish Government should seek to incentivise rather than penalise and look to reward good performance. It would be unthinkable that an educational service, for example, would have its budget cut because of failure to meet national standards of educational attainment. Given this, we feel that it is imperative that a national continuous improvement programme, including a knowledge portal, should be put in place, involving all players in the planning system.

We also consider that it is essential that income from planning fees should be ring-fenced, used only to fund the planning service or functions supporting it. It would be perverse if any uplift in fees was not passed onto the planning service, since this could hinder the goal of performance improvement in planning authorities.

The assessment of planning authorities' performance must also be looked at in the context of a reduction in planners in post in local authorities. The most recent figures available on staffing levels in planning departments are from the Scottish Government Planning Workforce Survey 2010 and show that the number of Full Time Equivalent planning staff in local planning fell by over 10% between 2006 and 2010 (from around 1700 to 1575). It is likely that staff levels have decreased further, and probably faster, since then given continued redundancy programmes.

Measurement

It is currently unclear how Scottish Ministers will assess how they judge when they *"are satisfied that the functions of the authority are not being, or have not been, performed satisfactorily"*. There is currently no indication of the timeframes that are to be considered for measuring performance – are planning authorities to be assessed over a year or a number of years? Does the assessment need to show a continued trend before Ministers intervene?

There is also no detail on the criteria and performance indicators to be used. There is a danger that the lowest common denominator of measures will be given most attention, namely speed of decision making. Speed is an important aspect of performance but it is not the only one. The Planning Performance Framework

developed by Heads of Planning Scotland may offer considerable scope to ensure a broader and holistic approach to assessing performance is taken given its focus on planning authorities being open for business; supporting high quality development on the ground; providing certainty; ensuring they have good communications, engagement and customer service; having efficient and effective decision-making processes; having effective management structures; providing good financial management and local governance; and embedding a culture of continuous improvement. However, it will take time to refine processes to a point where there can be clear agreement on results and, almost more importantly, agreement on priorities for action to generate measurable improvements across a planning service. The Institute is willing to work towards such a constructive end, and indeed as the representative of the planning profession, we see this as one of the most important duties of this professional body.

It should be borne in mind that the performance of a planning authority is dependent upon others, including planning applicants, Statutory Consultees and other parts of local authorities. In this context there is a wider need, in the medium to longer term, for local authorities, COSLA and Scottish Government to agree a consistent and coherent methodology which best assesses the costs of providing the whole planning service.

Another concern is that the performance indicators chosen may focus on the development management aspects of the planning system, given that they are often seen as the 'front face' of planning service. This would be unfortunate given ambitions to promote a plan-led system.

It is also unclear as to who will be responsible for assessing planning authorities' performance and how they will undertake this. How will the process of identifying poor performance be undertaken and what is the role of high level group formed by Scottish Government and COSLA?

Varying Fees

The suggestion that each planning authority could have its own set of fees would run counter to any move to simplify and unify. It could potentially cause huge confusion across the industry. Applicants often cite the need for the planning service to provide certainty and predictability. This proposal, if implemented, may make this more difficult.

Implementation

RTPI Scotland is of the view that the proposals contained in the Regulatory Reform Bill on varying planning fees are not necessary. However, if Ministers are still minded to take this forward these proposals they must ensure that:

- the criteria which establish whether a planning authority has 'passed' or 'failed' are clear, measurable, evidence-based and outcome-focused and examined within the context of the newly adopted Planning Performance Framework
- the assessment of a planning authority's performance is independent and professional and undertaken by a capable organisation with individuals that have an in-depth knowledge of planning and the planning system.
- the process should involve an assessment that works towards constructive and continuous improvement

- there is a clear, staged process undertaken which includes opportunities for the planning authority and Scottish Government to discuss issues raised from the audit and to agree improvements to be made.
- the assessments are taken forward within a national continuous improvement programme, which provides the opportunity for planning authorities to mentor one another, to share good practice and innovation, to shadow one another and to share experiences.
- performance improvement strategies bring together all sectors to ensure that they are all aware of one another's needs and perspectives.

Royal Town Planning Institute Scotland
5 June 2013

SUBMISSION FROM THE SCOTTISH TRADE UNION CONGRESS (STUC)

Introduction

The STUC has broadly approved of the Scottish Government's approach to 'better' regulation and has been an active member of the Regulatory Review Group and its predecessor bodies for some years. The Scottish Government's approach contrasts favourably with that currently being pursued by the UK Government through its 'red tape challenge'; an approach which panders to the more extreme elements of the employer community and commentariat and risks profoundly damaging the interests of workers, communities, the environment and ultimately long term economic development.

The STUC strongly believes that trade union participation is essential on 'better' regulation initiatives; whilst we don't doubt the Scottish Government's good faith on this matter it has been apparent for years that too many other stakeholders regard 'better' or 'light touch' as euphemisms for further damaging deregulation.

The Regulatory Reform Bill

The STUC struggles to discern a genuine need for this Bill and has no strong opinion on some of its provisions. Our two primary concerns are as follows:

- The language used to justify the Bill further entrenches the view that Scotland is an over-regulated business dystopia; a view that is impossible to reconcile with the serious international comparative evidence. Scotland is a good place to do business: part of the second least regulated product market in the developed world and the third least regulated labour market. The World Bank currently rates the UK as the 7th best country in the world in which to do business. *It is therefore essential that any consideration of regulatory change is undertaken on the understanding that Scotland's economy is already very lightly regulated.* Of course, the UK's deregulated product market is precisely why it was at the centre of the banking crisis and the deregulated labour market is a major contributory factor in the UK's comparatively high level of income inequality.
- The unintended consequences of the introduction of a '*regulator's duty in respect of sustainable economic growth*' are potentially significant. The STUC has seen no evidence that justifies such a duty. We strongly believe that recent regulatory failures demonstrate the dangers of handing a regulator a conflicted remit.

The STUC's view of the business regulatory environment and its concerns over the Bill are outlined in some more detail in an earlier submission to the Scottish Government[1].

How will 'better regulation' affect growth and jobs?

Although Better Regulation may in very specific circumstances produce positive dividends in terms of company growth it will not materially affect Scotland's long-run growth rate – no evidence has been presented that justifies the centrality of a better regulation agenda to future growth in Scotland. The assumption that it could is

[1] http://www.scotland.gov.uk/Resource/0040/00409470.pdf

detrimental to mature discussion about sustainable economic development; it identifies the wrong problem and solutions.

Economic Growth Duty

The STUC strongly opposed the Scottish Government's initial proposal to '*introduce a generic statutory duty on Scottish regulatory authorities to consider (and report on) the impact of their regulatory activity on business and/or promote regulatory principles which could further encourage and support economic growth without undermining their core objectives*'.

The wording contained in the Bill as introduced represents something of an improvement on the above. Yet there is still no compelling rationale to hand regulators a duty to '*contribute to achieving sustainable economic growth'*. Indeed, the wording change does little to assuage our earlier concerns.

The STUC believes that handing regulators this duty:

- assumes Scotland's regulatory authorities are currently acting in a way that unreasonably and substantially prevents legitimate business growth. The Scottish Government has singularly failed to present any credible evidence in support of this proposition.

- fails to learn the lessons of recent history – a major contributory factor to the UK's (ongoing) banking crisis was the abject failure of the regulatory regime. A key reason why the regulatory regime failed was the Financial Markets and Services Act 2001 which prevented the main regulatory authority – the Financial Services Authority (FSA) – from introducing 'new regulatory barriers' or 'discouraging the launch of new financial products'. Lest there be any doubt as to the balance of power between regulator and industry, the Act also stated that the FSA 'had to consider the international mobility of financial businesses' and avoid 'damaging the UK's competitiveness'. ***The lesson to learn here is that any organisation handed a conflicted remit (to regulate and promote!) will struggle to effectively discharge its core duty***. Effective management of any organisation with a conflicted remit is bound to be very difficult to achieve.

- could introduce a whole range of legal uncertainties and ambiguities. Firms will surely feel increasingly empowered to challenge planning/regulatory decisions given that any negative decision could be regarded as a failure to meet the new duty. At the very least potential legal implications need to be addressed by the Scottish Government; the earlier consultation simply ignored them.

- further embeds the view that there need not be a conflict between, for instance, growth and environmental sustainability or profit and health and safety. Again, this works against the development of a mature, evidence based development agenda.

In its earlier consultation, the Scottish Government asked if a better balance between business growth and effective regulation could not be achieved in 'non-legislative' ways. Surely the work which has been ongoing through the RRG is exactly such a 'non-legislative' mechanism?

Planning authorities' functions: charges and fees
Having already been through significant reform in 2009, the last thing that under-resourced planning departments require is further changes to their performance management. The proposal to link fees to the performance of planning authorities is yet another dilution of local democracy by central government.

The STUC would refer the Scottish Government to UNISON's response to this consultation; as the representatives of those working on planning issues their concern that these changes will undermine rather than support positive performance should be noted and acted upon.

Transferable certificates of food hygiene compliance for mobile food business
The STUC accepts that transferable certificates may be appropriate but it is essential that this change doesn't lead to regulatory arbitrage i.e. businesses seeking out the local authority area with perceived weakest regulation/least capacity to enforce effectively. In order to avoid this occurring it will be necessary for each LA to retain the right to inspect any business operating in their area.

Scottish Trade Union Congress
June 2013

SUBMISSION FROM UNISON

Introduction
UNISON is Scotland's largest public sector trade union representing over 160,000 people delivering services across Scotland. UNISON members deliver a wide range of services in the public, community and private sector. They also perform key regulatory roles in local authorities and Non Departmental Public Bodies (NDPBs). UNISON Scotland is able to collate and analyse members' experience to provide evidence to inform the policy process. We therefore welcome the opportunity to provide evidence to the committee.

Evidence
UNISON is concerned that rather than improved regulation the proposed bill is aiming for less regulation. The emphasis is still more on the needs of businesses rather than the public, despite the government stating in the consultation that there is little evidence to support the view that regulation is harming businesses: "At this stage we have been unable to quantify costs and benefits in any proper way." Nothing in the Bill papers indicates that any more evidence has been uncovered to support the view.

Everyone supports clear unambiguous legislation, particularly our members who have to implement it. However, complaints of red tape are rarely about the detail of specific legislation, instead they are about regulation in general. This is because some employers' organisations promote the myth of a 'red tape' crisis to try to dissuade governments from defining minimum standards for workers' rights; consumer rights and safety; protection for the environment and safety. The UK version of this approach is specifically being used as an excuse to weaken employment rights and undermine health and safety.

Regulations don't just protect the public from unscrupulous and dangerous practices they protect other businesses as well. Companies who don't follow the rules can offer a cheaper and/or faster service. This makes it difficult for those who do the right thing to compete. Fly tippers can charge a lot less than those who pay to have their waste disposed of or recycled. This drives down profit margins and increases costs for taxpayers who have to pay to have streets cleaned.

The OECD has developed measures of the administrative burdens on business and whether regulation is more or less strict. The UK ranks lower than virtually any other OECD economy on all the indicators. UK government research also suggests that the methodology used for employer organisations' surveys is flawed; in that they are most likely to be answered by a group of small business employers who are over-pessimistic about regulation. For most businesses it simply isn't an issue. The consultation quoted support for change from the Federation of Small Businesses (FSB) but even their report indicated that less than a third of those who responded see regulation as a problem for their business. The examples given in the consultation, like the misunderstanding about refreshments, showed poor understanding of regulations by individuals not poor regulation. A national standard is not the best route to tackle performance management.

UNISON is concerned that despite a minor change of wording the Bill still places regulatory reform in terms of economic growth rather than protecting the public:

"*It places a duty on listed regulators (...) to exercise functions in a way that contributes to achievable sustainable economic growth (in so far as this is not inconsistent with the exercise of those functions). These regulators must also have regard to any guidance issued by the Scottish Ministers in relation to the duty."*

"It also provides for a code of practice in relation to the exercise of regulatory functions. The purpose is to encourage the adoption of practices that reflect the better regulation principles and the principle that regulatory functions should be carried out in a way that contributes to achieving sustainable economic growth."

The government's key aims to make Scotland "healthier" or "safer and stronger" should be the focus for a Bill claiming to improve regulation not "wealthier". While the inclusion of "*in so far as this is not inconsistent with the exercise of those functions"* is at least an acknowledgement that there could be a conflict it does not go far enough in supporting the staff that will be doing the work (and protecting the public). Many are concerned that it will leave their decisions open to a range of challenges when they give priority to ensuring public safety or that of the environment.

Scotland has the highest level of E-Coli infection in the world. Three people died in the last outbreak of Legionnaires' disease in Edinburgh. Days are lost at work through accident or ill-health caused by poor food hygiene, substandard housing and accidents at work. All of these are a greater burden on our economy than adhering to regulations. The majority of businesses surveyed by the Federation of Small Business did not see regulation as a major problem for their businesses. Cutting back on vital regulation and inspection can and will cost lives. This Bill is chasing the wrong target. All the evidence shows that businesses succeed because they have a good product or service to sell, which is delivered in a well-organised way. In contrast, deregulation favours 'cowboy' employers who want to race each other to the bottom of the hill.

UNISON does have feedback from our members working in food hygiene and environmental health that cuts are impacting on their ability to protect the public. Adequate funding for services, like food hygiene and environmental health, is a better way to avoid the issues raised by the FSB than cutting back or centralising.

The government's role in supporting business and the economy is through building and maintaining infrastructure, a functioning legal system and through providing education and healthcare so that employers have a well educated population to provide employees and customers. Regulations are part of that legal system; they ensure that businesses operate on a fair playing field and that ordinary people are protected.

Define and implement national standards and systems

These proposals have particular relevance to local authorities and NDPBs who carry out regulatory functions like environmental health and planning. The Scottish Government is proposing to take major powers of direction that could further undermine local democracy. UNISON has on occasion been critical of local authorities for reinventing the wheel, when some strong guidance from CoSLA would have ensured greater consistency, without undermining genuine local responses. However, the solution to that difficulty is better coordination and best practice guidelines, rather than imposition from government.

Local Government has its own democratic mandate. The Scottish Government's proposal will further centralise services and limit the scope of local government to respond to its citizens. Authorities must be able to set their own standards and respond to local situations. National standards and systems conflict with the bottom up approach recommended in the Christie Commission report which the Government welcomed. Local authorities have a range of different aims for the sustainable development of their communities. This is more than just an urban rural split, although this does exist, Glasgow's regeneration priorities are very different from those of Aberdeen.

Transferable certificates of food hygiene compliance for mobile food business
UNISON believes that there may be some merit in transferable certificates for mobile food businesses. Currently the government is planning to set up a new food standards body and UNISON is concerned that this Bill is not properly co-ordinated with that proposal. Given the many problems Scotland has with food hygiene this cannot however be allowed to weaken the protection people need. What is essential is that businesses can't be allowed to "shop around" for the lowest standards. They would have to have a reasonable attachment to the area where they are inspected and issued a certificate. Members expressed some concern that smaller councils may find large numbers registering in their area when they would not have the resources to deal with the increased workload that would bring. Local authorities must still have the right to inspect any business operating in their area to ensure that there is no danger to the public.

Linking planning application fees to the performance of the planning authority
Despite the radical reform of the planning system in 2009, the government is proposing further changes to the performance management of planning authorities. The proposal to link fees to the performance of the planning authority is a management approach that is normal for NDPBs, but this would be a major interference in the role of councils. Such scrutiny is the role of democratically elected councillors.

This is the area which caused most concern for our members as it could impact severely on the already constrained planning budgets. Delays are due to underfunding and heavy workloads. Members also point out that there is a range of community planning partners involved in the process. There are no proposals to introduce carrots or sticks for these organisations. They deal with a range of issues from large developments to house extensions. The number of planning disputes and often bitter and lengthy neighbourhood feuds over boundaries, extensions and hedges show how important it is for planning decisions to be right in the first place. This requires adequate funding. UNISON is not aware of any evidence that punishing the public or private sector in this way drives real improvement. This comes instead through adequate funding and staffing levels' empowering staff and giving them the time to reflect, learn and implement change.

The system could become a route for the government to set priorities for local government rather than letting the directly elected councils set their own. Overly focusing on the timescales rather than getting the right outcomes could also "punish" departments for delays that are out with their control. This would also require a performance measuring and management system to be developed; wasting money

and taking resources from the core work of departments. Even comparing across planning department will be difficult given the range of in-house experts available to each council and the range of demands on departments. For example larger councils have in house archaeologists while others have to source this externally.

Land no longer to be considered as contaminated land

Members working in this area believe that it is important that land which has been decontaminated is still shown as having been previously contaminated. This ensures that there is a clear record of previous contamination and remedial action. The current register makes it clear that the land is no longer considered contaminated. The register is clear showing– remediation statements, declarations, remediation notices, prosecutions etc. Anyone inspecting a register could therefore see what (if any) remediation had been carried out. Anyone buying/using land therefore is able to make decisions based on full knowledge of its history. Members see no value in changing this process.

Fixed Penalty Notices for Environmental Offences

While members understand that fines and penalties are key parts of enforcing legislation they believe that more needs to be done to protect the individuals who will impose any new and current fines. Members highlight waste regulation as an area where members can find themselves dealing with criminal gangs who have been known to use intimidation of individual officers to dissuade them from enforcement. These workers regularly experience abuse and sometimes violence. These examples are from the Health and Safety Executive website:

- While visiting a site, an inspector was badly bitten by a guard dog.
- An inspector was threatened with a shotgun while approaching someone who was tipping illegally. The inspector immediately retreated from the scene.
- Two inspectors were investigating illegal tipping and became separated while looking for the owner of the site. When the owner was found he was brandishing a knife in a threatening manner. Fortunately, the inspector was able to handle and effectively defuse the situation.

Those expected to impose the new penalties will require training and protection from employers. This will require appropriate risks assessment including around risks of lone working and funding for training, equipment for example parking attendants in some areas now wear cameras to film encounters to both aid in preventing aggression/violence and prosecution of perpetrators of attacks.

Conclusion

UNISON members deliver a wide range of regulatory services including environmental health, food hygiene, meat hygiene and planning. UNISON is concerned that by prioritising economic growth this Bill will weaken the essential protections needed to ensure that Scotland is a safe place to live and work. We therefore welcome the opportunity to submit evidence to this committee.

UNISON
4 June 2013

Regulatory Reform (Scotland) Bill: Stage 1

09:31

The Deputy Convener: Item 2 is evidence from our witnesses on the Regulatory Reform (Scotland) Bill. I invite the witnesses to introduce themselves and to make brief opening statements, if they wish to do so.

I remind members that they should keep questions fairly short and concise. Likewise, I ask our witnesses to keep their answers fairly short and concise, as that will mean that we can get through more questions.

I invite Mr Kelly to go first. We will then move on to Mr Boyd and the other witnesses.

Fraser Kelly (Social Enterprise Scotland): Thank you for the opportunity to give evidence to the committee. Social enterprise is a business model that is already heavily regulated, whether in relation to the discipline in which organisations participate or in the construct of the organisations. I suggest that there is already heavy regulation in the context of housing, financial services, social care, health, criminal justice, employability, tourism, retail and hospitality. On the construct of organisations, a whole range of regulation already affects the way that community interest companies, Scottish charitable incorporated organisations or companies limited by guarantee that have charitable status do business.

I am happy to discuss with the committee a number of issues that our members have identified with the regulatory reform requirements.

Stephen Boyd (Scottish Trades Union Congress): I am an assistant secretary with the Scottish Trades Union Congress. Given the focus of the discussion, it is probably also relevant to say that I am a long-standing member of the Scottish Government's regulatory review group.

I have no great need to make an opening statement, as our views are all in our written submission. It is probably worth highlighting that the bill overall is not a huge issue for the STUC at this point; the provision in the bill that is preoccupying us is the economic duty. I do not claim to be massively well informed about other aspects of the bill.

Trisha McAuley (Consumer Futures): I am the director for Scotland for Consumer Futures, which is the new name for Consumer Focus Scotland. In light of the United Kingdom Government's reforms of the consumer landscape, we now work only on energy, post and water, but we have a remit to apply our insight to regulatory markets in general.

We have had to curtail or stop our work in some of the other areas covered by the bill, such as planning, food safety and environmental issues, so we did not put in an extensive written submission. Nevertheless, we are happy to talk about the bill's general principles and, like Stephen Boyd, our main concern and specific interest is with the economic duty.

Dave Watson (Unison Scotland): I am the head of bargaining and campaigns at Unison Scotland. We represent the staff who administer most regulation. We made the case in our submission for the value of regulation to be recognised. Like others, we are concerned about the confusion that the economic growth proposal creates. We are also concerned about the centralisation proposed in the bill, particularly through national directions and planning fees.

The Deputy Convener: If witnesses and members wish to make a point, they should catch Diane Barr's attention. She will pass the information on to me and we will move on from there.

I will start the questioning. Is legislation the way forward to improve the consistency of regulation in Scotland?

Dave Watson: In simple terms, the answer is no—needless to say, I will expand on that. Regulation is different in different fields and in different parts of the country. Most of our members are involved in local regulation and have to reflect the needs of not just businesses but the community. If you read the planning sections of the bill, you would think that the only customers of a planning department are developers, when, in fact, the customers are us—the community. Planners have to take into account a wide variety of interests. That is difficult when community interests come up against commercial interests; nonetheless, it is the job of planners to look after us, not simply to look after businesses' interests.

Trisha McAuley: We agree with the proposal to place a duty on local authorities, but we feel strongly that there needs to be provision for an evidence-based case for exceptions. We think that national standards will bring consistency, fairness and transparency, which we think will benefit consumers and business and should result in clear national priorities and better co-ordination and dialogue between agencies. We think that that will offer benefits to consumers and maximise efficiency and effectiveness.

We think that there is a clear case for evidence-based exceptions. I echo precisely the points that Dave Watson made. We need to think about local variations, because we have diverse communities in Scotland. From that point of view, we do not think that ministers should have a duty to determine exceptions, because it would be a burdensome, time-consuming process and would mean that the people who set the standards were also the people who created the exceptions, which we think should be done objectively and with a bit more flexibility.

The Deputy Convener: You do not believe that centralisation of the standards would be objective.

Trisha McAuley: We are not saying that centralisation would not be objective. The standards themselves are set in the context of their being centralised. That is fine. However, we are not entirely convinced that having the same framework that set the standards then being responsible for agreeing the derogations requires legislation.

Stephen Boyd: I certainly endorse Dave Watson's comments. In the past, trade unions have often been lone voices in making the positive case for regulation, which I do not think we hear often enough, but we have always acknowledged that to keep pace with a dynamic economy, regulation has to be proportionate and dynamic, and it has to be applied flexibly. I do not believe that the provisions in the bill are in keeping with that approach to better regulation.

One of the great paradoxes for the STUC is that the Scottish Government already has a decent approach to better regulation, which is applied through the regulatory review group. I am not quite sure what the bill adds to that better regulation agenda. Despite my having had the opportunity to discuss the issue at length with the chair of the RRG, ministers and senior officials, nobody has been able to make the case to me in any coherent fashion why we need the bill to supplement RRG activity.

Fraser Kelly: I echo Stephen Boyd's comments. Our members' view is that it is probably ill considered to leap to legislate further before the existing legislative and regulatory framework is reviewed. As David Watson said, the argument is around whether individual communities and structures are involved in the design stages, the review stages or in trying to achieve simplification, clarity and flexibility around existing regulation. Rather than leap to legislate, we have a desire to review what we have already.

The Deputy Convener: Thank you. I think that you have all set out your position quite clearly. I will ask members to tease out certain areas. We will start with Rhoda Grant.

Rhoda Grant (Highlands and Islands) (Lab): The argument about the difference between better regulation and less regulation comes across in some of the submissions. There seems to be a concern that the bill will lead to less regulation, which might impact on people carrying out those

duties but might also impact on the public. I suppose that the Government would argue that the bill is about better regulation, not less regulation. Are there things in the bill that lead you to be concerned that it will lead to less regulation?

Dave Watson: It is important to make the case for proper regulation. We should remember that the purpose of regulation is to protect the public and legitimate businesses. Good businesses have nothing to fear from regulation. In fact, they suffer from the cowboys. In our submission, we use the example of fly tipping, which does not help legitimate businesses. Regulation is valuable for business, and it is certainly valuable for the rest of us.

Our problem with the bill is to do with centralisation and direction setting from Edinburgh. We have no problem with regulators getting together in the regulatory review group, the Convention of Scottish Local Authorities issuing guidance in consultation with regulators, or best practice standards. Those are all good things, but they are not the same as top-down performance indicators. Have we learned nothing from the Blair Administration years at the UK level, during which a delivery unit was created with hundreds and then thousands of targets?

With such approaches, two things happen. First, other services suffer while everyone chases a target. Hospital waiting lists are a good example of that. Secondly, people game targets. I will take planning as an example. Today, we launched some survey results that show how busy and stressed planning departments are at present. If we set a target of, say, six weeks for a planning application, there will be a temptation for planning officers to reject a bid because it does not meet the regulations, rather than going down to the householder, saying, “Look, if you tweak it a bit here, it will get through”, and waiting a few more weeks. That would be a good use of regulation as it would involve engaging with the applicant, whereas targets simply drive a rejection philosophy, which pleases nobody.

Trisha McAuley: We welcome the Scottish Government’s overall approach to regulation. It is trying to achieve better regulation. It gets it that regulation is a means to an end and not an end in itself, and it has a clear policy objective and a vision of what it is trying to achieve. However, we are disappointed by the limitation of its vision of regulation as a means of supporting business and economic growth. The suggestion that the objective of better regulation is only to deliver that and to provide a favourable business environment in which companies can grow and flourish, which is clear in the policy memorandum, ignores the fact that better regulation is as much about consumers as it is about businesses, and that it benefits both.

Stephen Boyd: To add to what Dave Watson said, I think that it is important to draw a distinction between what the UK Government is doing—it is pursuing a nakedly deregulatory process through its risible red tape challenge and associated activities—and the Scottish Government’s agenda, which I am certainly not trying to suggest is about anything other than better regulation. The problem is that, as well as the economic duty, the bill covers issues around primary authorities and transferable certificates, and it opens up opportunities for regulatory arbitrage between different parts of Scotland. I do not believe that that is the intention, but when we look at regulation we always have to be careful about unintended consequences, as we have seen from numerous examples over the years. Those aspects of the bill certainly open up opportunities for that even if it is not the stated intention—and I do not believe that it is.

Fraser Kelly: I do not think that there is an argument that people are championing less regulation; it is about better regulation and the issues that I mentioned earlier—consistency of approach, simplification and clarity. An organisation that operates in the housing sector will be regulated by the housing regulator, and if it establishes economic activity through a subsidiary that operates in social care, it will have regulatory requirements in relation to social care as well. If it is established as a charitable organisation, it will also have to operate within the Office of the Scottish Charity Regulator guidelines. It is the merging of those requirements and the need for a consistent approach among each of those regulatory frameworks that are vexing our members.

There is a real challenge in creating economic advantage through business models that make a difference both in terms of the economic outcome and under the preventative spend agenda, and regulatory frameworks potentially get in the way of that.

09:45

Rhoda Grant: Are there things that can be done through the memorandum of understanding between the Government and COSLA? Indeed, certain regulation opt-outs will be available. Would that alleviate fears, or do we need to go further to make the bill work?

Dave Watson: Working with COSLA to bring national standards together is the way ahead. I would distinguish that from the bill, which seeks to give ministers the power to direct from Edinburgh—that is the difference. There is a clear

approach. We have a regulatory reform group, on-going work with COSLA, guidance that has been issued and all the professional bodies that have been set up in the different areas. All of that can be pulled together with best practice and so on. That is the way to drive improvement; it is not for a minister in Edinburgh to sit there and say, "You will do X and Y." The consequences of that would be as I described before.

The Deputy Convener: The economic duty was mentioned in some of the opening remarks. Alison Johnstone will ask about that.

Alison Johnstone (Lothian) (Green): We have heard evidence about the economic duty from previous witnesses. Scottish Natural Heritage felt that the promotion of an economic duty would have no impact at all on what it is already doing. There is a feeling among many that non-legislative approaches are working and that legislation simply is not necessary. However, concern has also been expressed that there is a conflict between the economic duty and other duties that regulators have.

In their written submissions, the STUC and Unison make it abundantly clear that they do not favour the economic duty. Unison's submission states:

> "Many are concerned that it will leave their decisions open to a range of challenges when they give priority to ensuring public safety or that of the environment"

over the economic duty. What challenges to decisions do you fear?

Dave Watson: Let us be clear. Most regulators take economic factors into account. Sadly, as a result of the cuts in staffing, they are increasingly having to act in a policing role rather than in their main role of educating and supporting. That has come out clearly in recent surveys. Our members would prefer to spend time with businesses and others, helping them through regulation rather than policing them. However, that is largely where we are, as we have shown with environmental health and planning in particular.

Our members are concerned about putting the economic duty in statute because it is ill defined. As many others have asked, what exactly does the duty mean to a regulator? A regulator knows that, if a chemical company pours chemicals into a river, that can be measured and appropriate action can be taken. There might well be an economic impact on the chemical company if it is prosecuted on that basis, but what balance is the regulator supposed to strike? The concern is that it will get dragged into a series of legal challenges. The company might say that the regulator took account only of the chemical spillage in the river, not the economic impact, and the case could end up traipsing through the Court of Session, which would tie up our members in days and months of legal work at a cost to the local authorities involved.

Given that prospect, would the regulator say, "This is a big chemical company that is going to tie us up for months in work on the case. Maybe we should just turn a blind eye to the spillage and go after smaller companies"? I am not saying that it would do that, but that is the risk because companies have deep pockets and can use the legislation. The economic duty is ill defined and could have consequences that I do not think were intended by those who drafted the bill.

Trisha McAuley: I support what Dave Watson has just said. We think that there is a lack of clarity about how the duty might work, and we are concerned that introducing the new statutory duty might override regulators' core functions. It is not well defined.

We think that sustainable growth is not just about economic growth; it is about social and environmental welfare. I am not suggesting that we introduce yet another statutory duty on regulators, but we are concerned that there is a growing trend.

A few months ago, I attended a meeting of the Infrastructure and Capital Investment Committee at which several organisations made representations about similar duties being imposed on Scottish Water in respect of the hydro nation agenda. The Scottish Government consequently lodged an amendment. We want to strike a balance, as sustainable growth is not just about economic growth but is also about social and environmental welfare.

The situation is ill-defined at the moment, from the point of view of end users and people who are regulated. We would be concerned that one duty would override another.

Stephen Boyd: I tend to agree with the view that was espoused by the SNH representative to whom the committee spoke recently. As we say in our written submission, there is no evidence that Scotland's regulators are acting in a way that is preventing sustainable economic growth. No one has provided evidence in that regard. Our concern is that the introduction of the duty tips the balance further the other way. We need to learn the lessons of recent economic history of one regulatory failure after another. In our written submission, we talk about what happened when the Financial Services Authority, at a UK level, was given a specific duty almost to promote the financial services sector. That made it difficult for it to discharge its core remit, as there was a fundamental conflict between promoting the sector and regulating it.

Beyond that is a wider issue about the further embedding of the view—which is, unfortunately, broadly shared—that regulation is a fundamental barrier to economic growth in Scotland. Scotland is an extremely lightly regulated economy. The labour market is the third most deregulated in the developed world and the product market is the second most deregulated in the developed world. That is why we were at the epicentre of the banking crisis and why we have more low-wage jobs than any similar jurisdiction. We need to be clear about the downsides.

Marco Biagi (Edinburgh Central) (SNP): The initial proposal that was consulted on was changed to make the duty for sustainable economic growth apply only to the extent that it is compatible with the exercise of a body's functions. Do you think that that represents a material change in how the duty will impact on regulators?

Dave Watson: In fairness, I think that we would all agree that the present wording is better. The responses to the original consultation were very strong on that point. However, the new wording still has the risks that I have indicated. The issue is not so much that there will be legal challenges; it is that there might be, and that will have an impact on regulators. Although the wording is a bit softer and gives regulators a little less concern in those areas, the unintended consequence will still be that regulators will be concerned about how companies—particularly big companies with deep legal pockets—will make use of this provision to the detriment of the public.

Alison Johnstone: Is it clear to the panel that there is an agreed definition of sustainable economic growth? Does it mean the same to everyone? Would it make sense to have clarity on that term and ensure that it is fully understood before we impose a duty on regulators to promote it?

Stephen Boyd: I saw that there were some questions about definitions of sustainable economic growth, so I dug one out, which I will read to you:

> "Sustainable development refers to a mode of human development in which resource use aims to meet human needs while ensuring the sustainability of natural systems and the environment, so that these needs can be met not only in the present, but also for generations to come."

That accords very closely to what most of us would understand by the term "sustainable economic development", but it also reflects the fact that there are likely to be some legal problems with regard to implementation, particularly, as Dave Watson said, when it comes to large companies that have significant legal resources. Would it be possible to come up with a less woolly definition of "sustainable economic growth" than the one that I just read out?

The Deputy Convener: Where did that definition come from, Mr Boyd?

Stephen Boyd: Wikipedia, I am afraid. [*Laughter*.]

Trisha McAuley: Did you write it?

The Deputy Convener: I just thought that we should be clear where the definition came from.

Stephen Boyd: From memory, I think that it is very close to the definition that has been in various Scottish Government documents.

Dave Watson: I think so, too.

Alison Johnstone: The definition that Mr Boyd gave appeared to be a definition of sustainable economic development. It might be that "sustainable economic growth" should be replaced by "sustainable economic development". I am sure that the committee will explore the issue at some length.

Mr Kelly, what is your view?

Fraser Kelly: You have made a valuable point. Trisha McAuley commented on the issue, too. It is about who understands the phrase. What do the people who use services—our customers—understand by "sustainable economic growth"? When we design the delivery of services within a regulatory framework, it is important that people can understand why services are designed and delivered in the way that they are.

That brings me back to issues that our members have with existing legislation. We are encouraged by the proposals for bills on procurement reform and community empowerment and renewal, which will put duties of care on organisations to procure and commission services in a different way. I challenge the approach a little, in that I think that there is already sufficient power for organisations to do things differently. We do not need more legislation. However, as those bills are introduced, people will understand better what is trying to be achieved.

We must think about the audience to whom we want to get the message out about what sustainable economic growth means. I do not think that anyone would argue with Stephen Boyd's definition, but if we read it out to someone in the street I think that they would switch off and fall asleep before we got to the end.

Marco Biagi: For clarity, does "sustainable economic growth" need to be defined in statute for the approach to work?

Dave Watson: The difficulty with that is that if we are struggling—even with the benefit of Wikipedia—we should put ourselves in the shoes of an environmental health officer, a planner or a Scottish Environment Protection Agency inspector

on the ground. How will a new professional in such an area make such judgments on the ground? It is difficult.

I am a lawyer, and I can tell you that if I was a commercial lawyer, that kind of phrase would be wonderful and would keep me tied up in the Court of Session earning fees for a long, long time. Frankly, we have better things to spend public money on.

Marco Biagi: That is slightly aside from my point, which I suppose is about whether the power, if it is introduced, needs to carry a definition with it. Is that immaterial, because the legal challenges will happen anyway?

Dave Watson: I think that they will happen anyway. If you put a phrase in legislation, it is helpful to include a definition, because legislation has its own lexicon in the laws of statutory interpretation. However, the difficulty is that any definition that you come up with will be very general and fairly woolly and will be open to challenges as to, first, what it means, and, secondly, how it is applied in particular circumstances. Those are the two legal challenges on something as nebulous as sustainable economic growth.

The Deputy Convener: Did Trisha McAuley want to come in?

Trisha McAuley: Yes, but the conversation has moved on, so I will just say that I support what Dave Watson just said. Any definition that would clarify things would help, but we question whether the duty is required at all. That is our key point. If the duty remains in the bill, it should be better defined than it is at present.

Chic Brodie (South Scotland) (SNP): Mr Watson, why do trade unions have rule books?

Dave Watson: We have rule books because they regulate the rights and responsibilities of members, as does regulation in other areas that our members regulate.

Chic Brodie: You agree that there is a need for regulation.

Dave Watson: Absolutely. We make the case for regulation.

Chic Brodie: To promote the union and ensure that it works effectively.

Dave Watson: No, no. The rule book is there to regulate the rights and responsibilities of members and the organisation. It regulates behaviour, as it were, on that basis, as does regulation in the community.

Chic Brodie: I have difficulty with where you are coming from. You have talked about policing as opposed to regulation. Your submission talks about deregulation favouring cowboys. We sit here six years after a debacle in the banking industry because of light-touch regulation and deregulation. What is your position? Are you in favour of regulatory reform or not?

10:00

Dave Watson: We are in favour of good regulation. That is pretty clear in our submission. The banking industry is a good example of the risks of light-touch regulation. Good regulation is to the benefit of good businesses and the community. That is what we say in our submission, so we are all in favour of regulation. We are not in favour of oppressive or unnecessary regulation. Scotland has a lightly regulated economy, as Stephen Boyd rightly pointed out, but the regulation that we have exists for a good reason. Our members who administer it understand that and that they are there to do that on behalf of the wider community.

Chic Brodie: Are things working well? Why do you think that the proposed regulatory reform undermines local democracy?

Dave Watson: It undermines local democracy because ministers in Edinburgh would set out their version of national standards, not the local authority that is elected to do that in its communities. Secondly, particularly under the planning proposals, ministers will set out their view of performance in each and every local authority. Again, that is the role of the democratically elected local councillors.

It is a question not only of democracy but of practicality. We have been through the stage of top-down performance targets, and virtually everybody, from the systems thinkers onwards, has argued that it has not worked. Even people who worked in the Prime Minister's delivery unit now write books saying that it did not work, so it seems strange that we are suddenly leaping to a model that failed abysmally during the previous UK Administration.

Chic Brodie: I do not wish to draw any parallels with how London operates. I am confident that we could do a lot better.

Mike MacKenzie (Highlands and Islands) (SNP): Mr Watson, I am not sure whether you are absolutely up to speed with the planning regime. Are you aware of the Heads of Planning Scotland planning performance framework?

Dave Watson: Yes, and it is a good example of getting together best-practice standards from people who deliver the service at the sharp end. That is not the same as a minister and senior civil servants in Edinburgh setting the standards. There is nothing wrong with having national guidance

and practice or with people getting together and working out the best way of dealing with things. There are structures and frameworks to do that. However, that is not the same as top-down performance targets that are decided by a minister and civil servants in Edinburgh. They are two different things. The HOPS approach is the right one; the top-down one is the wrong approach.

Mike MacKenzie: You must, then, be unaware that the HOPS approach is very much the one that the Government is encouraging.

Dave Watson: I am sorry, but that is not the approach that is in the bill. I agree that, to date, that is exactly what Governments of all colours have done since 1999—they have worked to improve performance—but the bill has a specific proposal in it, and people right across the board, including planners, have pointed out the consequences of taking that top-down approach, which is set in the centre.

Mike MacKenzie: What, then, do you think of the first annual planning performance report? I urge you to consider the fact that it is the first one, so it has been encouraged by the current Government, not by all Governments since 1999.

Dave Watson: I have no problems with that report. The general approach of improving standards, improving delivery and co-ordinating is fine, but that is not what is in the bill. I do not know whether it was intended to be in the bill, which gives ministers clear powers to set their own performance framework from Edinburgh. That is not the same as the approach that has been taken to date, which has been to improve performance across the board.

Chic Brodie: In talking about a particular issue, your submission states:

"Cutting back on vital regulation and inspection can and will cost lives. This Bill is chasing the wrong target."

Later on I can try to define what I mean by sustainable economic growth, but part of the problem is that there has been a lottery in terms of performance management. I will come to Trisha McAuley in a moment about the implication of planning fees. How do you propose that we create a dynamic economy that can do all the things we are talking about in terms of the environment, sustainability and so on without having to support the national economic strategy that has cascaded down? How do you propose that we measure performance?

Dave Watson: When we say that the bill is chasing the wrong target, we mean that the surveys that we have done, particularly in the past couple of months—on environmental health and on planning—demonstrate significant cuts in staff. Both the numbers and types of inspections have had to be cut and we have seen consequences of that in environmental health and in food inspection, with E coli and legionnaire's disease, for example. We are also seeing a big cut in the education and support role that regulators have in relation to businesses and the community. That is the target that we think should be chased; it is about that sort of service. We do not believe that the way ahead lies with ministers deciding the performance of each and every local authority in Scotland.

Chic Brodie: The bill does not say that.

Dave Watson: I am sorry, but the bill does say that; that is exactly the power that it gives to ministers. In our view, that performance approach from the centre is wrong. We can see from guidance on approaches and best practice that we can develop a narrative around economic growth and how regulation fits into that. I have no problem with the broad Scottish Government strategy on that basis. The problem is that if we put that in a piece of legislation that can be legally challenged—in fact, every single regulatory decision could be legally challenged on that basis—that is an entirely different ball game from the sort of approach that has been supported by the Scottish Government to date.

Chic Brodie: I will go back to performance, if I may.

Trisha McAuley, in your submission you expressed concerns about the proposals. You said that you do not support the view that there is a direct link between planning fees and performance. What is the basis for that comment?

Trisha McAuley: It is difficult for me to answer that question at the moment, because we no longer work in that area and I have no remit. Therefore I have not looked at the bill with that in mind, nor made any preparation to talk on that subject. I can certainly go back to it.

Chic Brodie: The STUC, too, commented about the constraints on planning departments. Stephen Boyd, do you have any comments on performance and how we monitor that?

Stephen Boyd: I have very little to add to what Dave Watson has said, apart from saying that, as I go about my business, speak to developers and observe long-established businesses around the country, I see that the planning issues that constrain development concern skills, resources and the capacity of planning departments, as Dave Watson has said.

Professor Russel Griggs spoke before the committee a couple of weeks ago. He regards the work done on the surface coal-mining sector as one of his great achievements with the RRG. I have engaged very closely with that sector over

the past decade. I will give you an example of the problems that the sector has come up against when it comes to planning. I was visiting the managers of Scottish Coal a number of years ago. They said that they had taken on a great new planner who had worked for South Lanarkshire Council. It was excellent: the person had great skills and tacit knowledge and knew the industry inside out. They were coming to understand, however, that it was probably not a good thing for them and that it would be better to have the planner still at South Lanarkshire Council dealing with the applications. They knew that it would be problematic for South Lanarkshire to replace the individual and for the new planner to build up the tacit knowledge of the sector that the former employee had garnered over a number of years. The constraints that they were coming up against did not concern the application of the planning process in general but the capacity of the departments that they dealt with daily to engage with them knowledgeably.

Chic Brodie: I am not sure where that places planners. On your example of the coal mine, the current situation is that we have a problem with the restoration of redundant open cast coal sites.

Stephen Boyd: Absolutely.

Chic Brodie: If there were better and clearer regulation, we would not be in the position that we are in now.

Stephen Boyd: I am not entirely sure that that was a regulatory issue. The regulation was in place, and both local authorities and developers knew what they should have been doing, but they chose not to do it. They chose not to keep the bonds as resourced as they should, and that has come back to bite them. Could tighter regulation have ensured that the bond was kept up to date? Perhaps, but it would not surprise me to learn that they would have found a way around that as they have done in the past.

Chic Brodie: So the regulation was ignored in that case.

Stephen Boyd: I am not entirely sure. The regulation was in place, but both partners in the process chose not to keep the bond up to date. I am not that up to date with the detail of the case. Could the regulatory system have been changed in such as way as to make sure that the bond retained its full value? If so, that should have happened, and this is another example of slack regulation that blights our economy and communities.

Chic Brodie: It blights our growth.

Stephen Boyd: It does blight our growth, and that point is often overlooked. We tend to assume that less regulation means more sustainable economic growth but, sadly, it does not.

Chic Brodie: On that basis, then, better enforced regulation would not have blighted our economic growth.

Stephen Boyd: Absolutely.

Chic Brodie: Can I have one last question, convener? It is for Fraser Kelly.

The Deputy Convener: Yes.

Chic Brodie: Good morning, Fraser. Your sector has grown hugely in the past two years. A couple of weeks ago, the committee heard from the representative of OSCR, the charity regulator, who was here explaining its role. When did you last meet him?

Fraser Kelly: Within the past two months.

Chic Brodie: Do you know how often he or his function engages with your members and new members to help them to understand the regulations surrounding charity operations?

Fraser Kelly: Infrequently. The guidance that comes from the charity regulator is sometimes poorly understood by social enterprises.

If I can pick up on one of your points, I do not recognise social enterprise as a sector. It is a model or way of doing business rather than a sector. In my opening remarks, I mentioned that a number of organisations are so constructed that they require a regulatory relationship with OSCR. The most recent guidance that we have received from OSCR was about whether and how organisations are permitted to participate in the constitutional debate and the rules surrounding that. I suspect that that guidance is a little bit blunt. It is not as sophisticated as I think is necessary for our members. Indeed, that is some of the feedback that we have received. Some of our members have also challenged the point that the guidance does not reflect their legal position, and some of them are likely to challenge that, particularly around areas in which the legislation is set by the UK Government.

For example, we have some issues with the construct and implementation of the Welfare Reform Act 2012. We have member organisations that wish to challenge that but are scared of doing so because they think that it impinges on what they are allowed to do under the OSCR guidance. We need that guidance to be better understood, which is why I come back to my earlier comments. They might seem to be very simplistic, but we need clarity of design of regulatory frameworks and the reviews of those frameworks. We need simplification, clarity and flexibility. I apologise if that seems to be a bit of mantra.

Chic Brodie: No no. We can agree to disagree about whether social enterprise is a sector, but the important thing to note is that social enterprises and the third sector are adding value to the economic growth of this nation, and that might increase. You are saying that there are difficulties because the "regulator"—I put that in inverted commas—is meeting you infrequently and not giving enough guidance.

Fraser Kelly: I go back to Rhoda Grant's question about less versus better. For us, the issue is about better legislation and regulation. Those regulatory bodies need to speak to one another more frequently and to speak to the organisations to which they have a responsibility more regularly. Everyone has rehearsed the issues of time and resources, and every organisation and every person in this room and beyond has those problems. That is why the simplification process and getting better regulation and legislation are far more important than getting less, or indeed more, regulation.

Margaret McDougall (West Scotland) (Lab): Section 41 deals with planning charges and fees in connection with performance. What are the witnesses' views on the proposal to link planning charges and fees to performance? How would it affect planning authorities?

10:15

Dave Watson: I covered that to some extent in an earlier answer. We really do not see how that proposal will help matters. Evidence from a number of organisations has asked how removing cash because of poor performance will improve performance in a particular area. It is important to understand that planning fees are only part of the subject. The role of planners is not simply to respond to developers but to take an interest in the whole community. Sometimes, the actions that are required to get a planning application through require engagement with a wide variety of other agencies, not always the local planning authority that will deal with the application.

My real concern about the proposal is the idea that targets can be set from Edinburgh and, somehow, planners will change their behaviour. They may well do that but in a way that you might not wish.

Let us say that we have the six-week target that I mentioned earlier. Staffing cuts in planning departments will force planners to behave in a certain way when the high heid yins above them say, "We mustn't breach the target because we will lose money and I'm going to get grief from the council." In that type of situation, planners tend to stick strictly to the regulatory rules, so they are more likely to reject an application than go out and help the applicant to amend it to get it through—that is what planning departments do at the moment if they have the staff and the time to do it. If they have a six-week or eight-week target, they will play to it. We have seen that with hospital waiting times.

In its work on systems thinking, the Vanguard Group analysed the top-down target performance culture across the public sector in the UK in huge detail. The group has shown time and again that that type of culture does not work and has pointed out strongly that it is the wrong approach. In fact, a previous minister, Jim Mather, was probably the biggest advocate of that argument. We also say that it is the wrong approach. It will not achieve what people think it might achieve and, in fact, it could have unwarranted consequences.

The Deputy Convener: Do you acknowledge, however, that there is a need to measure performance?

Dave Watson: We can say that it would be a broad gain if applications were dealt with promptly—within six or eight weeks. That is absolutely fine, but if we have strict targets, people game the targets and other services lose out as a consequence. The issue is the framework and how we measure performance. We know from experience that having penalties in the way that is proposed in the bill does not work.

Margaret McDougall: Could I hear from other witnesses on that?

Stephen Boyd: I have nothing to add to what Dave Watson said. I reiterate the point that we know from the experience of the past 15 years that targets change behaviours but do not improve systems. The evidence is unchallengeable.

Trisha McAuley: As I said when Chic Brodie asked a question about that, we have no further remit in that area, so I cannot talk about planning. What we said in our response to the consultation still stands, so the best thing to do is to refer back to that for information.

Margaret McDougall: What alternative changes could be implemented to improve planning performance?

Dave Watson: Many of the things that the Scottish Government has done over the past few years to encourage better liaison, more sharing of best practice and peer review, which was suggested in one of the submissions, can all improve practice. However, the biggest requirement is to resource planning departments properly.

We will send the committee the survey that we are publishing today. We asked planners at the sharp end what their experience was. Overwhelmingly, they say that they have to drop

things, have to rush things and are unable to deliver the standard of service that they wish to provide. That is the real issue in planning departments at the moment. We can do a range of things from the centre, but the reality is that, if there are not enough people on the ground to do the work, the quality of service will fall for those who make planning applications and for the wider community that relies on planners to ensure that the built environment is protected.

Margaret McDougall: Is the decision about how they fund the service not one for local authorities?

Dave Watson: I am sure that if a COSLA representative were among the witnesses, they would give you a quick lecture about local authority cuts and the scale of the problem. We might have some sympathy with that view.

All that I can tell you is what the people who deliver the services at the sharp end say. They make it clear that they are currently very stressed, that they are hard-pressed to deliver the basic service and that they are having to drop things that are to the benefit of the service.

Margaret McDougall: Is there an adequate mechanism to allow for engagement with consumers on planning decisions?

Trisha McAuley: I refer back to our consultation response. We said, as Consumer Focus Scotland, that there was not adequate engagement. I cannot expand any further on that.

Margaret McDougall: Should planners and local authorities have the right to appeal ministers' decisions?

Dave Watson: We do not have a policy view on that issue, as we have not considered it.

Margaret McDougall: Does no one else have a view? If not, I thank witnesses for their previous responses.

Mike MacKenzie: On a slightly different theme, I am sure that we all support the principle of local democracy and support decisions being taken locally. Can the witnesses help me by providing examples of when a local community has campaigned against national regulations and the local authority has said, "Yes, you have made a very good case. We will exercise our power to vary the way in which the regulations are applied"?

I am thinking about some of our more far-flung communities, such as Shetland, Orkney and the Western Isles, where some regulations are least appropriate, because those communities are radically different from Edinburgh. Can you give examples of where local democracy and local regulation have been used wisely and well to take account of very different local circumstances?

Dave Watson: Off the top of my head, I cannot picture a particular example but, when we talk to our planning officers group, the officers talk about how they apply regulation. Not every regulation is black and white, so there is scope for discretion in a number of areas. A planning officer who works in Shetland will understand the local circumstances. They obviously cannot break a particular regulation but, when they have flexibility to meet local circumstances, they will use it. That is what planners do.

Mike MacKenzie: I take that answer to mean no, given that you cannot think of any examples. Can any other witnesses think of concrete examples of what I have described?

Given the silence, I thank you very much. I am sure that you will agree that that is very significant and pertinent to our discussion.

Dave Watson: I am sorry, convener, but I do not think that that is at all pertinent to our discussion. I answered the point in general terms. I am not sure what point Mike MacKenzie is trying to make. The fact that we cannot produce a specific example from a specific local authority is not material. I am sure that every planner in every local authority in Scotland could give you an example—

Mike MacKenzie: I would like to thank you and move on to other questions, if you do not mind.

Stephen Boyd: I endorse Mr Watson's point.

Mike MacKenzie: Can you think of a situation in which members of the public might be distressed by being faced with a postcode lottery, because onerous regulations apply in one area but a few miles across the border, as it were, the regulatory regime is different? Would people be distressed or unhappy about that situation?

Dave Watson: I can see that people might feel that, but the point is that there are national laws for a lot of these issues, although there might be discretion in areas. The problem with the concept of a postcode lottery, which is used in a number of areas, is that one person's postcode lottery is another's local discretion. To be honest, I always cringe when politicians of all colours—it is not just Mike MacKenzie—use the phrase "postcode lottery", and I have given others a hard time for it as well, for that very reason. I understand the issue about regulation being applied differently but, in the main, most regulation is dealt with locally and people exercise sensible discretion when they can do that under national laws, which are consistent throughout Scotland.

Fraser Kelly: Mike MacKenzie raises an interesting point. Our understanding of the Scottish economy is that the issues that affect communities are broadly similar. They are

housing, health, economic sustainability—do people have jobs?—and environmental sustainability. The issues are similar, but communities need different solutions in many cases. The issues in Helmsdale or Elgin are not the same as the issues in Greenock or Port Glasgow.

We have a number of organisations that deliver services nationally across Scotland and the UK, be it in housing, health or employability. I suspect that they are concerned about inconsistency in the application of some regulation. They want to achieve a greater understanding of whether proposals and developments will be achieved in the same timescale and at the same quality in one local authority area as in another.

I apologise for not answering any of the questions on planning. I am not a planner, so I did not want to come in on any of the town planning issues. However, careful consideration of local solutions is needed in a number of areas. That is why, as I mentioned, I am encouraged by the proposed community empowerment and renewal bill, because it will place back in communities control over the design of services and how they are delivered to meet communities' needs.

I am interested in the comments that Dennis Robertson made about what we can measure. I am a great believer that, if we cannot measure it, we cannot manage it. Our members are involved in disciplines from housing through to health services, and many of them are telling us that the measurement frameworks that are applied are inconsistent and that they have almost to have a number of attributions to achieve a sensible assessment of economic or social outcomes.

The Deputy Convener: You will be seeking outcomes with reference to your measurements.

Fraser Kelly: Yes.

Mike MacKenzie: Mr Kelly, I thank you for making an important contribution to the debate. In your earlier comments, you seemed to point out that the regulations that impinge on a business or organisation often differ from or contradict each other. Can you or the other panel members think of any examples of that?

The Deputy Convener: Mr Boyd wants to come in first.

Stephen Boyd: I would like to make a general point about complaints. We often hear about inconsistent application of regulation. I have been a member of the RRG and its forebears since the inception in—

Mike MacKenzie: Can I stop you? It would be much more helpful if, rather than making the point that you were going to make, you answered the question that I asked. That is usually how this operates.

Stephen Boyd: You are making points of an extremely general nature, so I am responding in kind. I think that it would be polite, having invited—

Mike MacKenzie: I am asking for specific examples that you are aware of.

Stephen Boyd: I am going to come to that.

Time and again at the RRG, we hear complaints about inconsistent application of regulation. Time and again we ask for the detail of the complaints, and time and again it is not forthcoming. As I think Russel Griggs said to the committee a couple of weeks ago, in the whole time for which the RRG has been going, we have received fewer than 10 specific complaints about inconsistent application of regulation. I cannot give specific examples because we do not get them following general complaints. We hear general complaints time and again but, when we ask for the detail, it is just not forthcoming.

The point that I am making is that to try to pretend that business growth in Scotland is significantly constrained by the inconsistent application of regulation is ridiculous. There is no evidential basis whatsoever to justify that proposition.

10:30

Mike MacKenzie: Mr Watson, given your concerns about planning, I expect that you can give me numerous examples.

Dave Watson: If you are looking for examples, we have set them out in our evidence and have provided other information on that basis. I have not come armed with 20 examples in 20 authorities. Our evidence is based on the views of those on the ground who do the work every day—they are not sitting in Edinburgh watching this meeting—and they say that deciding the regulation in Edinburgh then imposing it on everyone in the country is not the right approach. All that they would say is that they seek to apply regulation flexibly to meet local circumstances.

Mike MacKenzie: But you cannot give any examples.

I note that Trisha McAuley has not had much to say, so I will steer my final questions into an area that she might be able to comment on. The bill will allow regulators—particularly SEPA—to focus more on big business and big organisations. The struggle that SEPA has sometimes faced in devoting sufficient resources to their regulation might have disproportionately affected small businesses. From her days in Waterwatch, does Ms McAuley remember the fiasco—

Trisha McAuley: I was not in Waterwatch.

Mike MacKenzie: I am sorry—I must have misunderstood.

Trisha McAuley: I am happy to answer your question, though.

Mike MacKenzie: In general terms—I think that Mr Watson has touched on this—do you think that big business and big organisations have been tying regulators in legal knots and that, as a result, regulations have disproportionately affected small businesses and small organisations, which do not have the legal resources to fight them? Does the bill's thrust give the regulators more teeth to deal with bigger businesses and organisations and, if so, is that a worthwhile direction of travel?

Trisha McAuley: I am not sure that the bill gives regulators more teeth, but I am certainly concerned that the overriding duty—if it is overriding—would make regulators focus on big business at the expense not so much of regulating small businesses as of going out to help them. The committee will need to speak to the small business sector, but we represent such businesses in the regulated markets that we work in and we know that they are under severe pressure.

In any case, you make a very interesting point that we would support. If the bill is to contain an economic growth duty, it must be applied proportionately to support smaller businesses and should not be simply a tick-box exercise for the regulator.

With the convener's permission, I will return to the previous debate on national standards without, I hope, getting drawn into the need to give examples, because I have to tell you that I cannot remember too many. As a consumer organisation focusing on grass-roots support, we have struggled long and hard with the dichotomy between local democracy and national standards. Although consumers reside in a particular local authority area, they still move around and buy their food from restaurants elsewhere and so on. In doing so, they are at risk from varying environmental health or SEPA operations. Based on research that we have carried out, we feel that consumers benefit from a consistent approach.

We came down on that side because of Consumer Focus Scotland's work on local authority enforcement services in key areas such as trading standards, environmental health and food safety—and, in saying that, I realise that I am stretching outwith our current remit. It is the fault not of local authorities but of the times in which we live that, over the years, what is very much a patchwork of services for consumers has developed in those areas. Some local authorities have been able to devote resources to such issues, while others have no resources whatever, and the ageing workforce is not being replaced. As a result, consumers are very much at risk.

We thought about looking at the issue from a national perspective so that we could nudge local authorities into looking at those areas more, as they are the poor relation of some services. Some would say that that is quite right and that it is perfectly understandable that local authorities must concentrate on front-line services. However, some pretty critical issues are in the background. That is why we took the approach that we have taken.

Chic Brodie: I will comment on the important point that Trisha McAuley made about the patchwork consequence of some developments and on Stephen Boyd's point about interpretation. Mike MacKenzie asked for an example, so I will give one, which concerns a potential wind farm development in South Ayrshire. A community there interpreted what one regulation, PAN 47, said about the role that it could play before the application, but the local authority took a different view. Another planning regulation, PAN 3/2010, detailed what could be done post-application. The community council took one view; the local authority took another. There is a lack of clarity in the documents; that has taken up loads of planners' time, has created angst in the community, and it certainly has not been productive. The consequence might well be that that does not add value to economic growth.

Based on what has just been said, is that an example of the need to streamline and reform regulations? It is not a case of the minister dictating. The minister can use and revise codes of practice, but is that not an example of the sort of thing that goes on day after day?

Dave Watson suggested that the bill is a manifesto for solicitors and lawyers across Scotland, but that is exactly what we have today. Somehow, we have to consolidate and embrace the position so that we still enjoy local democracy but get some efficiency in the system, because it surely is not there today.

Dave Watson: I am not sure what the question is—

Chic Brodie: It was not a question; it was a statement.

Dave Watson: My point is that, yes, regulation will always be applied differently. There are mechanisms and frameworks and there are various ways of addressing different interpretations of arrangements. The conflict involves the development of national standards and the minister sitting in Edinburgh deciding what he or she thinks should be the approach on that basis. We need local authorities and others to

work and engage with the communities that are affected in order to reach understandings on common practice, rather than the top-down approach that is promoted in the bill.

Chic Brodie: I think that Dave Watson needs to look at sections 43 to 45, which relate to the minister's role in developing a code of practice when changes apply.

The Deputy Convener: I welcome the convener, Murdo Fraser, who will take over the chair.

The Convener (Murdo Fraser): My apologies for not being here earlier; I am grateful to Dennis Robertson for stalwartly holding the fort in my absence.

Trisha McAuley: We are still discussing the key tension involving local democracy and community capacity. That is critical, but there is inconsistency. I will not rehearse some of that, as it sits in what we mean by sustainable economic growth. If we are looking at putting a duty on regulators, taking the wider view is definitely the way to go.

The code of practice is interesting, as are some of the processes that underlie the bill. We are concerned about the overriding driver and a skew towards supporting business growth rather than supporting consumers and communities.

For example, the consultation paper that was published in October said that the Scottish Government would have a dialogue with regulators, the Convention of Scottish Local Authorities and the business community. As a consumer organisation, we responded to that consultation and asked for a meeting, but we were not involved in engagement on how the bill developed after that. That engagement was limited to people who were undecided on the duty and did not include people who had concerns about it. The consumer and community side of how we address the dichotomy has not really been involved in the process.

The code of practice could be one way of addressing that, because the policy memorandum states:

"The code will be developed collaboratively with business representatives, public bodies, regulators and COSLA."

However, it does not mention collaborating with people who represent consumer interests and citizen interests or with Fraser Kelly's sector. There is more work to be done, but a code of practice might be a way round that, so that communities are properly consulted within the framework in the bill. I pick up on what Chic Brodie said; maybe the process afterwards needs to be looked at to ensure that communities are properly consulted.

Chic Brodie: I agree.

The Convener: Trisha McAuley mentioned the code of practice, which I do not think has come up before. Does anybody else have concerns about the code of practice, or are the witnesses content that it is provided for in the bill?

Trisha McAuley: We are content that it is provided for in the bill, but ministers are not required to consult bodies that represent end users of the code of practice. Section 1 requires end users and the recipients of regulation, including businesses, to be consulted on regulations, but there is no requirement to consult those people on the code of practice. Such a requirement could be included.

Stephen Boyd: I should probably point out that unions will be involved in the development and implementation of the code of practice; there have been discussions to that effect.

Dennis Robertson: Should the memorandum of understanding be underpinned by legislation? Should it be in the bill?

Stephen Boyd: I do not have a view on that, to be perfectly frank.

The Convener: Does anybody else want to comment? The witnesses are all shaking their heads, Dennis.

Dennis Robertson: That is fine. We will just take it that that could be the case.

Alison Johnstone: The STUC's submission states:

"The STUC struggles to discern a genuine need for this Bill".

Is that still your position? I would also like a view from the others on the panel about the need for the bill.

Stephen Boyd: It is absolutely our position. I stress again that we have had extensive discussions with ministers, Russel Griggs as chair of the RRG and senior officials over a considerable time and we have never heard a rationale for the bill that is remotely compelling and would force us to change our mind in any way whatsoever. I stress that strongly.

Dave Watson: Our position is the same. The bill has been used to tidy other bits and pieces, which is fair enough. Such a bill is an opportunity to tidy other things that were waiting for a suitable opportunity to come along. However, we see no need for the main thrust of the bill on national standards, the direction power, planning fees and so on.

Legislators can give all sorts of people a range of powers, which may be good or bad, but what matters is whether it is possible to enforce the

regulation. The evidence, which we have shown clearly, is that our people are saying that they cannot enforce regulations as they stand. They are struggling to do that, not just because of the quantity of people but because, as the survey results that we published today show, they have lost experienced planners who had knowledge and experience in key areas. More junior staff are trying to cover those more senior roles.

That is the difficulty, which we have already seen in many other areas—for example, we have too few wages inspectors to enforce the minimum wage. I am afraid that the situation is the same in planning, and it is certainly the same in environmental health. Our surveys of our members have shown that time and again. By all means give regulators all the powers that you want but, if they are not given the resources to enforce the application of those powers, we are—frankly—just raising expectations that nobody can meet.

Stephen Boyd: I should have said that our concern is not only because we cannot see a rationale for the bill but because, in Scotland, we have pursued a distinct approach to better regulation for a number of years that has considerable buy-in from a range of stakeholders who have put a lot of time and effort into developing our different approach. Our concern is that the bill might drive a coach and horses through that. The consensus has been difficult to establish and maintain—it has required a lot of sensitive discussions across a range of areas—and the bill, particularly the economic duty, could upset that, which would be a real shame.

Trisha McAuley: For the reasons that I outlined about protecting vital services, I support what Stephen Boyd said, with the exception of the section on national standards. I support what he said in that the key thrust of section 1 and the bill's general principles being concerned with the economic duty skews regulation towards one aspect of the work of regulators, possibly at the expense of protecting some of their core functions.

10:45

Fraser Kelly: I come back to my original comments. The issue is the balance between an enforcement bill and an enabling bill.

We understand fully the principles behind the economic duty. Trisha McAuley's comments are fair in that that perhaps skews regulation in one direction. However, the first paragraph of the Scottish Government's national planning framework refers to a strategy for growth. We need to encourage greater economic growth and understand how the regulatory framework enables rather than constrains it.

We need to examine the existing legislation before we leap to new legislation. Many of our members struggle with the application of the existing legislation and existing regulatory frameworks. If they have to begin to understand other legislation that is introduced, they will have to devote their resources to that rather than the design of the services that communities and people need.

Our view always comes back to what local services should look like. If regulatory reform improves them, that is good. If it does not and leaves us with the status quo, it will not move us much further forward.

Margaret McDougall: I will take the witnesses back to planning. We have heard a lot about how underresourced planning departments are and about their capacity. Setting aside the underfunding of local authorities, should the fees for planning applications for wind farms, for example, be increased?

Dave Watson: I would not want to state a particular level. It is argued that planning fees seem to be in excess of the cost of administering a particular aspect of an application. However, those who pay planning fees need to recognise that the fees are not just for the administration of their planning applications. The planners' role is to take account of the wider community's interests. Therefore, planning fees are an important source of income to fund planning departments to have the necessary range of skills.

That is a challenge, particularly in new areas of which planning officers might need to have specialist expertise. Particular local authorities, such as Aberdeenshire Council, have lots of wind farm applications. Planners start to develop expertise, but they also have specialists in areas of expertise, such as the effect on the environment or on wildlife, that a generic planner might not have.

The value of fees is that they are an important contribution to the funding of planning departments so that they can—I emphasise this—not only respond to the developer's wishes but ensure that the whole community is engaged. I will not say that fees should be 10 per cent more or 10 per cent less. I do not know the answer to that, but they must be at a level that, together with general local authority funding, ensures that planning departments can carry out their function. If they cannot do that, there will be problems, which will have an impact on economic growth. We accept that.

The Convener: Fergus Ewing has indicated to us that the Scottish Government is minded to lodge a stage 2 amendment to adopt primary authority partnerships, which are a concept that

exists in England and Wales. Does anybody have a view on whether that measure should be in the bill or have concerns about it?

Stephen Boyd: I said at the start that my concern is that the proposal opens up another opportunity for regulatory arbitrage. Over time, companies might gravitate towards local authority areas where regulation is regarded as being less stringent. I am not saying that that is the bill's intention, but we have learned from regulation over the past couple of decades that there are often unintended consequences of such proposals, so I would be very concerned.

As part of the RRG's work, we have had officials up from the Department for Business, Innovation and Skills on a couple of occasions to talk through the primary authority system, and they have never been able to furnish us with any evidence of its benefits to sustainable economic growth over the longer term. In fact, their position on how it will work seems to be largely theoretical. We have seen little hard evidence about how it has benefited companies in practice.

Dave Watson: We were told about the proposal a couple of days ago, so we have been able only to discuss with colleagues down south their response to primary authority partnerships. The general view is that nobody has seen any great benefit from the system.

When somebody looks at the primary authority system, they assume initially that it is for the benefit of very big businesses that want consistency across a country as large and diverse as England but, actually, there seems to be a mix. About half the users are large firms with more than 250 employees but, other than that, a strange mix seems to be involved. It is not entirely clear who thinks that the system is a good thing. We have not seen much evidence about it.

Another thing that we need to consider is the impact that the proposal will have on the transferable food safety certificate, as it seems to chase a similar issue. Like Stephen Boyd, we would be concerned about the proposal.

We must ask what would be needed to administer primary authority partnerships. The UK Government has a better regulation unit. It is not quite a quango, but it is another great department full of civil servants deciding on and setting out guidance, instructions and everything else. It has a role in setting which authority is involved, so that is directed from the centre. In light of that, I suspect that the committee would want to know from the financial memorandum whether such centralisation would have cost implications.

Whether the system was directed from the centre or whether businesses had a choice, we would be concerned about the capacity in some authorities to deal with it. In our written evidence on the transferable food safety certificate, we made the point that one of our concerns is that some travelling food units winter up in small local authority areas. A small authority such as South Ayrshire Council or Clackmannanshire Council could end up having quite a big burden of regulation to address with quite a small environmental health department.

Finally, I suggest that the committee should question whether a country the size of Scotland needs such a centralised approach and whether it is small enough for us to be able to achieve the purpose in a different way from the centralised, top-down approach that England has adopted in the primary authority partnership arrangements.

The Convener: If nobody wants to add anything, we will call a halt. I thank the witnesses very much for coming and giving their evidence, which was helpful to the committee.

We will suspend the meeting until 11 o'clock.

10:52

Meeting suspended.

10:58

On resuming—

The Convener: I welcome our second panel of witnesses on the Regulatory Reform (Scotland) Bill.

On my left, I welcome Colin Smith, who is director of Turley Associates and who is representing the Royal Institution of Chartered Surveyors; Malcolm Fraser, who is director of Malcolm Fraser Architects and is representing himself; Nancy Jamieson, who is vice-convener of Heads of Planning Scotland's development management sub-committee; Alistair MacDonald, who is convener of the Royal Town Planning Institute Scotland; and Alison Polson of Brodies LLP, who is representing Planning Aid for Scotland.

We have a large panel, so I ask members to direct questions to particular witnesses or members, rather than throwing questions open. If we throw them open, all five of you might want to answer the same question and we would be here until 3 o'clock. Could members keep their questions as short and concise as possible; if we could also have concise answers, that would be helpful.

We will start with planning fees, which is probably the biggest concern for most of the panel.

11:00

Rhoda Grant: My question is for Nancy Jamieson. Should fees be ring fenced to planning departments so that any fees that are charged go straight into resourcing that service?

Nancy Jamieson (Heads of Planning Scotland): That is a point of view. The Audit Commission's report in 2010 said that it was very keen that the planning service be fully funded by planning fees. The planning service has different aspects: there is development management, which deals with planning applications, and development planning, which deals with development plans, and there is no fee income from the latter. To make the whole service self-sustaining, which is what the Audit Commission says we should be working towards, we would need some sort of ring fencing. Whether that would be acceptable in the real world, where councils' budgets are diminishing, is another matter. Chief executives would have to take a view on that.

Rhoda Grant: What proportion of the cost of planning departments is currently paid for by fees? Where does the balance lie?

Nancy Jamieson: I am acting development management manager in the City of Edinburgh Council. We have an overall budget of about £7 million; about £4 million of that comes from planning fees, so the council has to make up the remainder. Some smaller councils perhaps are able to make up 100 per cent; that might just be the development management side. In Edinburgh, however, just over half the budget is provided by planning fees.

We have a lot of major planning applications in Edinburgh, so we need a big resource to deal with that. There are issues about the types of developments with which we deal; the smaller councils might not have so many major applications. The major applications service does not pay for itself to any extent, because the maximum fee in Scotland is tiny, compared with that in England.

Rhoda Grant: If that is the case, would the solution to the problem be to have the cost of the fee reflected in the cost of processing the applications, or to have either a general increase in fees or a level which you then top up, depending on the cost of the application?

Nancy Jamieson: The HOPS view is that the fees system in Scotland needs to be restructured. We had a 20 per cent increase in fees in April, which helped; but it does not get over the problem that we have, in that the maximum fee is about £19,000 for any application, unless it is for a mixed development. In England the fee can progress up to £250,000, as a maximum.

For some big developments in Edinburgh we have done exercises to show the costs in the application. An example is the proposed sick kids hospital at Little France, which was a planning permission in principle. We got a fee of about £8,000 for that application, but worked out that it cost us about £76,000 in officer time, so in some major applications there is a huge gap. We need to address that by restructuring fees so that we can fund both the pre-application advice—which at the moment we in Scotland do not charge for—and the actual processing of the application. We need a system that gives that proper pre-application advice so that we can make the planning application process as speedy as possible.

The Convener: Mike MacKenzie is muttering.

Mike MacKenzie: Thank you. I mutter a lot, as you may have noticed. However, I am happy to ask some questions. I recently read the first annual planning performance report, which makes pretty grim reading as it shows that significant numbers of applications were still in the system after 99 weeks and that less than a third of planning authorities used the planning system to negotiate better design standards. How can we improve planning in Scotland?

The Convener: Who is that question for?

Mike MacKenzie: It is for anybody—it is for all the panel. It is a pretty open question.

The Convener: Right. If it is going to the whole panel, can we please have fairly short answers? Who would like to start?

Malcolm Fraser (Malcolm Fraser Architects): Mr MacKenzie has asked a very big question. I suggest that the answer is not to try to force the issue and tell planning authorities how to do planning. I think that bureaucracy reacts poorly to that and, even, to the carrot-and-stick approach. I should say that I am very pleased to have been asked here to represent the applicant at the coalface, so to speak. Those of us at the coalface applaud the intentions of the carrot-and-stick approach, but bureaucracy finds its own way and there are all sorts of ways around that. We have a situation in which there are fewer planning applications and in which planners are even worried about their jobs. Applications have a tendency to take longer, just to ensure that planning is seen as important. I am not being particularly online with my colleagues' message here, but that is the way of the world and it is how things happen.

Despite the bad target performance that Mr MacKenzie mentioned, we have many situations in which nothing happens on a planning application but, when it is about to run out of time, we get a letter telling us of all the things that are wrong with

it, that it has been automatically turned down and that we are invited to make a second application, which of course is free. A planning authority then has the great benefit of deciding on two applications on time instead of deciding on one very late, which is where the application was going in the first place.

On the carrot-and-stick approach, we have had situations in which environmental impact assessments have been asked for, although I have not thought that they were necessary. However, requiring them of course allows the application decision time to be extended. It becomes difficult for me to think of ways of making a better application—and difficult for this committee to see better performance—when the planning authority's tendency is to make life more complicated on the ground, or to require us to jump through more hoops, which will then be taken seriously as somehow making the process more important. Again, I apologise to my colleagues on the panel, because that comment may appear to be unsupportive. However, what I describe is just the way of the world.

I like to think that less regulation and fewer attempts to make the planning process work better would enable heads of planning to take more responsibility. If each head of planning and local authority really wanted their authority to be the best at dealing efficiently with applications and seeing things happen more efficiently, that would be a marvellous way to go.

I am not sure how helpful those comments are—again, I apologise to colleagues. However, the planning system is not designed to assist itself. I think that sometimes less, rather than more, tampering can assist.

The Convener: Does Nancy Jamieson want to defend the planners?

Nancy Jamieson: I definitely do. One of the problems that we have just now is that the current system of performance recording is very crude. Basically, we have to give Victoria Quay all our figures. We have this rather odd instruction that if we think that the applicant has been sitting on the application and not doing anything, we have to tell the people in Victoria Quay how many weeks we think should be excluded from the performance time.

However, we do not know what the applicant has been doing with the application. We will know that we put the application through and that we have a decision in principle that might be subject to a legal agreement so that the infrastructure can be put in place to deliver the development; and we might know that the developer is quite happy with that and does not want to sign the legal agreement, which means that the decision is not issued until the developer is willing to sign the legal agreement. That is one of the main causes of delay. We have at least 50 applications in our system that are sitting at "pending decision" because we are waiting on the developer to sign the legal agreement before we can issue the decision.

Mike MacKenzie: On that point, do you think that too much use is made of section 75 agreements? We have certainly taken evidence from witnesses to that effect.

Nancy Jamieson: In Edinburgh, we have an economic resilience plan so that, if there is a proposed section 75 agreement and the developer feels that it would make their development unviable, we discuss that with them, and we ask for the development viability appraisal. There have been a number of cases recently when we have taken applications back to committee and said, "No, you don't have to pay the contribution." There is a very detailed circular on planning obligations and the specific circumstances in which a planning obligation—that is the correct term for a legal agreement—can be asked for. It must be related to a development and must be necessary for that development. Planning authorities in general must scrutinise that circular and ensure that they are requiring developer contributions in accordance with that circular. We must be clear about that.

The other thing that you mentioned was legacy cases—you are concerned that there are a lot of old applications in the system. One of the issues with the current planning legislation is that a planning authority has to determine an application. We are not allowed to just withdraw an application because we think that it has been in the system for too long. Planning authorities frequently send out letters to applicants saying, for example, that their application has been with the authority for five years, that they have tried to get amended plans, and asking whether the application can be withdrawn. However, the applicant might say that they want to keep it on the books. In Edinburgh, we have applications dating from 2002 that we have tried to get withdrawn, but the developer refuses.

There are many reasons for delays in the planning system. Sometimes it is difficult to get the big picture if we look just at bald statistics.

Mike MacKenzie: I am conscious of the fact that, as I understand it, the planning performance report was based on the planning performance framework that was drawn up by Heads of Planning. Despite the fact that it looks at quite a broad range of things other than efficiency and speed of determination, some of the results are very bad.

To return to my original question, given that Heads of Planning has drawn up the performance framework—with a view, I presume, to improving the system, by which I do not mean simply increasing the speed with which applications are processed—if that is not enough, what more do we need to do to improve the system? I am talking not just about efficiency, but about quality.

Nancy Jamieson: The planning performance framework was a joint framework between Heads of Planning Scotland and the Scottish Government. In 2012, for the first time, all the planning authorities submitted their planning performance frameworks. Just last week, we got a review of ours from the Scottish Government. We had not previously had any feedback on it. The picture that was given was that performance is about not just speed but a range of things that a planning authority must deliver. Is it open for business? How is it delivering sustainable economic growth? What initiatives does it have in place? I have not read all the other planning authorities' planning performance frameworks. The City of Edinburgh Council got a very good rating, but we need to work to improve.

We must be careful because, as Malcolm Fraser said, a planning authority could just refuse an application before the deadline and it would get a big green tick, because it had met its performance criteria. However, we in Heads of Planning are dedicated to delivering good customer service.

Mike MacKenzie: Surely local planning authorities would not massage statistics in the way that you suggest.

Nancy Jamieson: That would not be massaging the statistics; because we have to deal with an application within two months, it would be meeting the performance target that was set by the Scottish Government.

Mike MacKenzie: I am led to believe, however, that despite that statutory obligation to determine within two months, well over 50 per cent of applications are not determined within two months. That is not a new thing. There seems to have been a two-month determination period since I was a wee boy, yet we achieve less than 50 per cent of that. How do we improve it?

11:15

Nancy Jamieson: Where does that statistic come from?

Mike MacKenzie: It came from the first annual performance report, based on the HOPS planning performance framework.

Nancy Jamieson: The HOPS planning performance framework is a framework for every planning authority. Each planning authority has its own planning performance framework.

Mike MacKenzie: Yes, but you will be aware that the first national planning performance report has been published, and the statistic came from that.

Nancy Jamieson: What development type is the 50 per cent? I do not recognise the figure.

Mike MacKenzie: It is actually a 5 per cent increase on what it was. Just over 50 per cent of all applications are now determined within the statutory two-month period. There has been a 5 per cent increase, so there is a bit of a pat on the back there, but it is still only 50 per cent.

Nancy Jamieson: Perhaps I can hand over to Alistair MacDonald to say something.

Alistair MacDonald (Royal Town Planning Institute Scotland): I was chair of Heads of Planning Scotland in 2011-12, so the first planning performance framework came through when I was chair. I was also head of planning for Glasgow City Council and I retired earlier this year.

We have to be very careful about the use of the statistics. When we, as local authorities, sent the statistics to Government, we warned the Government that the statistics would be skewed by old applications coming through the system. Our experience in Glasgow is exactly the same as the experience in Edinburgh. We tried to remove applications from the system and found that when our committees had resolved to grant consent—when applications were subject to a section 75 agreement—the delay started to build in. That has happened during the current recession, particularly in the house building industry. The house builders would be pleased that they had got to committee and a resolution to grant a consent. It means that consent is there—you cannot really take that away unless we, as planners, go back and recommend refusal of it.

We are then left with negotiating all the legalities. That could be financial contributions, which might be staged payments over a long period. I am thinking of 1,000 or 2,000 homes—those could be built over a 10 or 15-year period and might involve community facilities or roads infrastructure. All that has to be charted through a planning agreement, and that can take time.

We are also a hostage to legal transactions in buying of the land. The house builder, or others, might not want to go forward to that end point, which commits them to various items. We end up with a hiatus, in which the application lies there—it has not been withdrawn—and the house builder is ready to move on it. We then resolve the section 75 legal agreement and after it has been issued,

the planning consent is issued. That is what we are judged on.

Mike MacKenzie: Is it not the case, though, that a lot of planning authorities are still kind of in denial about the credit crunch and the different economic circumstances that we are now in? They are imposing section 75 agreements that may have been appropriate prior to the credit crunch but which are, post-credit crunch, not workable.

Alistair MacDonald: Again, I have to disagree with you. In 2008—

Mike MacKenzie: I am only asking the question.

Alistair MacDonald: In 2008, in Glasgow, we put reports up to committee to change how we deal with financial contributions. That happened throughout the country. We would not expect payment up front, because no profit had been made, so we would stagger payment, perhaps even right to the end of the project, before it came back into, say, community benefits. That was how we tried to assist developers. Like Nancy Jamieson, we queried whether we needed to go down the road of section 75 agreements. Is there another way that would lessen bureaucracy? We knew that the industry was going through a very hard time. My experience with Heads of Planning Scotland was that throughout the country we were looking at how we could assist people, particularly house builders, to get through the very difficult situation in which they found themselves.

Malcolm Fraser: Let me make two points. The issue that Alistair MacDonald and Nancy Jamieson brought up is a real one. It would be good if the committee challenged HOPS or Scottish Government planners to find a way of removing from the statistics applications in which the applicant is holding things up.

We all want accurate statistics on how many applications are not dealt with in time, which we can discuss with planning departments. Perhaps the current situation means that the figure is so fuzzy that it can be defended; departments can say, "That is not really how many applications have been delayed." Challenging the figures and ascertaining how to get figures that accurately reflect how many applications planning departments, as opposed to applicants, are not dealing with in time would be a good, simple, straightforward output for the committee.

Mike MacKenzie: My question was really about how we can improve the planning system. It is obvious from the planning performance annual report that some planning authorities are pretty good and others are not as good. I have heard all kinds of reasons why the system is not as good as we want it to be. How can we improve it?

Malcolm Fraser: I appreciate that that is your main question, but I want to make my second point, because section 75 agreements have been floating about in the discussion.

I should have said that I chair the Government's national review of town centres, so I am also here with that hat on. One of the things that we are trying to do is to talk about section 75 agreements, because out-of-town developments carry a substantial burden to the public purse if a section 75 agreement is not properly applied. I am talking about infrastructure such as sewers, roads, roundabouts, parks and new schools.

If we say that economic development is imperative, we might find that the public purse will have to bear the cost not only of building all those things but of closing down the old school in the town centre, which could have been sustained if the proper cost had been applied to the development and the development was therefore pushed into town. I ask the committee to be aware that the economic imperative should not mean that taxpayers have to fund part of the cost of development, when in-town development would have assisted the public purse.

Alison Polson (Planning Aid for Scotland): Planning Aid's view is that improvement happens in the system when people understand how it works. To some extent, to talk about how the figures appear to show that decisions take much longer when a section 75 agreement is involved is to misunderstand how the system works to deliver what everyone wants, at the end of the day.

Communities, which are very much integrated into PAS's work, want to understand what infrastructure will be delivered and what benefits will come as a result of a development. Developers, who have difficulty securing funding in the current market, see it as an advantage to have a "minded to grant" decision, because that enables them to shop around and to work out how to deliver the development on the ground. Such a decision is a plus for developers, who do not actually want the planning permission, because that comes with a three-year time limit for implementation. With big developments, permission comes with expensive conditions that must be met, many of which will be to do with infrastructure.

Whether we are talking about conditions or section 75 agreements, the system is better than it used to be, because reforms have meant that planning agreements are open to challenge by way of modification and discharge. Post-reform, even the discussions that take place very much concentrate on what relates to the development that is being sought and what will be delivered—

Mike MacKenzie: You have made your point. It is all the developers' fault.

Alison Polson: No, it is not necessarily—

Mike MacKenzie: Is that not your point? Are you not saying that developers are exploiting that?

Alison Polson: It is about understanding the system. Everyone is getting something out of the so-called delay, because it suits them.

Mike MacKenzie: I am a wee bit disappointed because I am not hearing much about how we can make improvements. I will rephrase the question and talk about judging the system by its outcomes.

As a result of the modern planning regime that was ushered in by the Town and Country Planning Act 1947, I see many listed buildings and conservation areas that I think we all agree are terrific. However, other than Malcolm Fraser's work, where will the listed buildings and conservation areas of tomorrow come from? Has the system succeeded in any way in delivering the quality of built environment that all of us would wish it to deliver? If it delivered a built environment of genuine quality, I, for one, would be happy to wait a bit longer and expect applications to take longer. However, it seems to me that it does not. How do we improve that?

The Convener: That is a broad question. We are focusing on the provisions of the bill, so I ask the witnesses to try to focus in their responses on the issue in the bill, which is to do with planning fees. This is not a discussion about how to improve the planning system in general, because that is beyond the remit of the bill.

Colin Smith (Royal Institution of Chartered Surveyors): I will try to identify some positive measures for improvement.

Part of pushing culture change towards delivery and improvement concerns fees. I was interested to hear Nancy Jamieson's figures on the major applications in Edinburgh, which is an example of best practice in applying culture change and focusing on the major developments that will deliver economic growth.

There are many good examples in Edinburgh of very high-quality buildings and projects not far from the Parliament. The planning department provides a high level of service that costs a lot more than it gets in fees. Clients with whom we have worked on delivering projects in the city centre would be perfectly willing to pay a higher fee for the standard of service that they get in Edinburgh on major applications. That would be an example of varying fees up on good performance rather than varying them down on poor performance.

There is incredible scope to share best practice—there is a lot of good practice around across authorities—and even the potential to consider sharing services where one authority has the scope to sustain a service that is required only occasionally by other authorities. Those measures might allow resources to be directed most appropriately in different authorities.

Chic Brodie: Good morning. Malcolm Fraser's initial comment was like a breath of fresh air. We were told earlier that planning authorities were constrained, and he said that some planners are worried about their jobs. The disconnect in the information that we are getting confirms that we need some sort of disciplined regulation in the system.

The penultimate paragraph of Mr Smith's excellent submission mentions how councils that are working well and those that are not working well might not

"expect to receive the same level of fee."

Planning Aid Scotland's submission says:

"The efficient planning system"—

we can all question whether it is efficient or not—

"promoted since 2006 has generally been predicated on the promoting and sharing of good practice".

My experience of going round the councils in South Scotland is that they do not share good practice. In fact, their interpretations on wind farm developments and housing developments are not the same. It comes down very much to the local planner. Is that not a strong argument for having meaningful regulatory reform, substantiated and supported by a ministerial code of practice, that will ensure some level of consistency? As I said to the earlier panel of witnesses, that would take out some of the angst that goes on between communities and local authorities, between developers and local authorities, between communities and developers and between local authorities and local authorities.

11:30

It is a no-brainer. The problem, notwithstanding the fact that we do not—and apparently cannot—measure anything, is that we do not have in place at least some sort of framework in which we can operate with flexibility but with similar objectives in mind.

Malcolm Fraser: On wind farms, it is certainly a no-brainer. The Government should set a context and not allow applications to be argued through the planning system, in which lawyers and everyone else go through enormous hoops only for different and bizarre decisions to be made. The context should be set nationally.

On the wider point, the convener is right to bring us back to the central proposition, but I suggest that it is no different from Mr MacKenzie's prompting that this is really about delivering a more efficient and cost-effective planning system. We would get better conservation areas and more of them in the future if planning restricted itself to planning. Part of the problem and part of the frustration for architects is that we are not challenged to come forward with beautiful, new, extraordinary ways of doing things. There is no joy in the system; it is planned from top to bottom.

Planning should set the context for development; it should talk about gathering places, roots, movement, general envelope, height and so on, and the mix. Architects, designers and developers should be challenged to respond to that. Instead, I have had very simple planning applications that have been stuck for six months while a planning officer tells me how to design. I find that quite frustrating. The planning officer draws plans and says what this should be, what material should be used, how the window should join with the wall and so on.

All of that should go. That would make the planning system cheaper, more efficient and much quicker. Architects, designers and developers would have to think again about how to make beautiful and appropriate buildings in Scotland. The system does not design those; the system should set the context for them and encourage architects and developers to bring them forward.

Alistair MacDonald: I would not disagree with Malcolm Fraser's last point. Unfortunately, not all the plans that come across the table from applicants are as good as Malcolm's architecture, so they need to be worked on.

Having said that, I come back to resources. In a Glasgow context, and no doubt also in an Edinburgh context, large authorities can resource such work by having architects and landscape architects in the team. They work with the applicants and give them design advice. In Glasgow—the practice has now spread to other parts of Scotland—there are urban design reviews, whereby major applications can go through a design review process that can inform the agent or the applicant who comes forward with a planning application. Various mechanisms can be used to improve the outcome. Mr MacKenzie talked about how to get quality into the system and thereby improve the place making that we get in the end.

On Mr Brodie's point, each of the 32 local planning authorities has either one development plan or its own individual development plans within its area. That relates back—

Chic Brodie: Can I stop you? Do we have too many local authorities?

The Convener: That is a little bit wide of the mark.

Chic Brodie: No, it is not.

The Convener: It is wide of the mark for the bill. By all means answer the question, Mr MacDonald, but it is not relevant to the bill.

Alistair MacDonald: I am sorry but, in my position at the moment, I am reluctant to answer that question.

Chic Brodie: That is fine.

Alistair MacDonald: There is then a democratic process with local consultation and the planning committee approves the local plan. A different emphasis in how a rural authority, an urban authority or a mid-range authority approaches a particular type of application might account for some of the apparent disparity that you have experienced in the south of the country. I cannot say that for sure, but I hope that all planning authorities aim to have up-to-date development plans. That is important, as it guides development and it guides people such as Malcolm Fraser and RICS members when they invest in an area.

Planners recognise the importance of economic investment for regeneration of an area. I spent more than 30 years working in Glasgow and we were desperate to get the city regenerated; that was core to our business. Planners think about regeneration, economic development and assisting people in that process. The process can be very complicated. The various add-ons that come with a planning application have been mentioned. Some of the add-ons come from national legislation, but European legislation also guides that. There is, in effect, no way out of that; it has to be part and parcel of the application.

Nancy Jamieson: It is difficult to provide a picture of what it is like to work in a planning service that delivers development. For example, for the Craighouse development that has been in the news recently, we spent a year giving pre-application advice, but the application that was submitted just was not acceptable. I hear what Malcolm Fraser says—I have worked with him on many schemes in Edinburgh, and he is great to work with—but there are an awful lot of architects out there who are difficult to deal with because their clients want a level of development on the site that is not acceptable.

The Craighouse development includes listed buildings, so our listed buildings staff have been involved. The site includes an area of great landscape value, so our nature conservation people and landscape architects have been involved. Our designers have also been involved

because the proposed buildings were too high and would have impacted on the setting of the listed building. We have been working for about nine months now trying to get an acceptable solution for that site. We also have a community that wants to have its say—we have about 1,000 objections to the application—so it is not easy managing some of these bigger applications.

Colin Smith is right that Edinburgh has been at the forefront of working with developers on processing agreements. We see that as a way forward for delivering major applications within a timescale that is agreed with the developer. The key is that we need to work co-operatively with developers to deliver the type of development that the country needs.

However, an authority such as Shetland Islands Council will have only six or seven people in its planning service. If Shetland receives a major application for an oil development, it needs to take all its planners off the smaller developments and put them all on to that one development. That is what it is like in practice.

In Edinburgh, we have our own resourcing problems. On your question about what can be done to provide a better service, we seriously need to look at the resourcing of planning authorities to ensure that we have the people in place. In Edinburgh, we have two teams that deal with major developments and we receive about 30 major applications a year. In the background, we will have discussions on at least another 30 applications at pre-application stage. When the team leaders tell me that we have another pre-application discussion coming forward, my teams are dealing with so many other things that I do not know who I will put on to that. There is a resourcing issue. We need more planners on the ground if we are to be able to deliver that excellent service.

Alison Polson: I agree that there is a broader resourcing issue. As Nancy Jamieson said, planners must not only co-operate with the developers on the ground but take on board the community's interest in the application. Planning reform was predicated on that—there is no third-party right of appeal—so we need to take the community with us. Both the developer and the planning authority need to explain what their roles are and what is happening. That takes investment, as it involves an additional burden on the decision maker and on the applicant. If we get that wrong, that will make the application process last longer because people will always look for what challenges they can bring. The game plan is to make the process as open as possible and allow people to have their say at the start, so that the application can be refined at that point, rather than people discovering only halfway through and then lobbing in any challenge that they can to hold up the application.

Chic Brodie: I will come back to the issue of investment versus efficiency in a minute.

Malcolm Fraser: Having made my pawky comments, let me now make some positive ones. My wife has an architectural practice, too, and she does a lot of work in Scotland and some work in England. I work with large developers that are based in England but work in both England and Scotland.

Our practice is far better than English practice; Scotland is starting from a much more positive situation. We certainly should not think that the system is broken and that everything is in a terrible mess. My developers say that, compared with England, this is a fantastic place to work; in fact, they prefer working in Scotland because they have better pre-application discussions, the context is set in a better way and the process is run more efficiently. My wife, who does domestic small works, says that it is impossible to talk to a planner in England and that the situation there is very difficult. I just want to make a little positive point that, in seeking to improve the system, we are starting from a relatively positive place.

With regard to the need to set the context, my experience is that Edinburgh does that sort of thing well. It has good design officers and landscape officers, but the important point is that they are involved in setting the context and therefore do not fiddle with things afterwards. The council should set the context and then should stand back to a certain extent and allow developers and their architects to work through the system. Although we have suggested that this approach is good for practices such as mine, I should point out that many developers out there are saying, "Listen—the council does all that. It has design officers; amenity groups say this and we change things like that; and people input into the process. We don't want a good architect or designer; we want an architect who'll do something weak enough to bend in the wind." As a result, we end up with developments—and we can see a lot not very far from here—that do their very best to be as dull as possible so that they can be kicked about by everyone along the way.

Coming back to Mr Brodie's question, I do not think that there are too many councils, but I certainly believe that the good practice in the larger councils needs to be disseminated better to ensure that other councils are aware of it. The important point is to set the context in a way that does not close down any wonderful, marvellous things that might come along or does not make developers think that the design is done for them. Moreover, the context should be set in quite an open way. I know that that will be quite difficult, but

I go back to my point that this is all about roots, gathering places, connectivity, sunshine and views of things. Planners need to challenge developers to make places that not only are full of amenity and do certain basic things but make life joyful for the people who use them, because that sort of planning context would make developers think, "I don't quite understand what this means. Perhaps we need Malcolm Fraser, Elder and Cannon, Sutherland Hussey or whoever." There are tons of architects out there who are as good as me but who are not getting the jobs and we want them to come forward and make the places that we will be proud of in future.

Colin Smith: I agree with Alison Polson that there is a resourcing issue. If we are to have a system that focuses resources on major applications, which of course have the biggest economic, social and design impact, I think that there is a reasonable case for having differential fees to reflect the resources that planning authorities require to put into that work.

I also agree with Malcolm Fraser's comments. An English developer client who was developing in Edinburgh for the first time was initially sceptical about the formality of the pre-application consultation but now regards the process as time well spent. They can raise and deal with issues and engage with the community, societies and everyone else to ensure that what is ultimately submitted is as well thought through as possible.

As for the question whether there are too many councils, my answer would be yes.

Chic Brodie: I hear what you have all said about resourcing, but I robustly question the efficiencies that can be made in that respect. I do not want to discuss the number of single turbines in the south of Scotland and how much time they have taken up vis-à-vis what we should have been doing, but I note that in its submission the RTPI calls itself

"the champion of planning and the planning profession"

partly through maintaining

"high standards of planning education".

My question is about direct investment in that sort of thing rather than direct investment to provide additional resources. Are we doing enough on planning education? If we introduce some discipline in terms of regulatory reform and training, and ensure that there is good communication, not just among planners but among planners, developers and local authorities, we might not require the level of resourcing investment that some people are calling for. What are the standards that are applied?

The Convener: I am not sure that planning education is terribly relevant to the bill, even though it is mentioned in the RTPI's submission, so I ask Mr MacDonald to address the issue quickly.

11:45

Alistair MacDonald: We accredit the courses across the UK that provide training for planners, whether at postgraduate or undergraduate level. In my experience, the young planners who are coming through—as RTPI Scotland, we work with an association of young planners—are impressive: they are highly enthusiastic and highly skilled. I have strong hopes that the graduates and the young planners who are coming through at the moment will serve the country well.

Chic Brodie: When the bill is implemented, I presume that it will be part of the formal education process.

Alistair MacDonald: It will be part and parcel of their education in planning and other Government matters.

I would like to pick up on Malcolm Fraser's point about English investment companies coming to Scotland. In my experience, the reaction from the planning service has been entirely positive. Many of those companies have to pay several thousand pounds for pre-application discussions with some of the councils down south. Westminster City Council, for example, charges thousands of pounds for a pre-application discussion. Many companies complain that they cannot meet the planning authorities.

My concern is that if there are not resources for the planning authorities in Scotland or if resources are taken away from them because they are underperforming, we might see a situation in which an authority—as it can do under the legislation, as was mentioned earlier—simply determines an application within the two-month period. The resources that go into the pre-application process might just disappear. The new Southern general that is being built in Glasgow involved a year of pre-application discussion. Post-consent, it took six months to deal with all the attached conditions. A tremendous amount of resource goes into some large applications. My concern is that if we start to penalise authorities by taking away the fee, they may react by saying that they cannot resource all the good add-ons that go with a culture of welcoming investment.

Margaret McDougall: You have hit on the question that I was going to ask about penalising underperforming authorities. Do the other members of the panel agree with Mr MacDonald that it would be wrong to penalise authorities that underperform? How do you think that underperforming authorities should be dealt with? What would be best practice when it comes to

encouraging them to perform better? In addition, how should performance be measured?

Alistair MacDonald: The planning performance framework that was brought out last year represented a first step in the process of establishing a broad range of qualities for planning authorities to be measured against. I think that that is the test bed that we need to start working from. Although problems will be thrown up with the stats, that will gradually work its way through the system. Heads of Planning has responsibility for the framework, as it brought it forward; Nancy Jamieson can speak about that. I think that Heads of Planning can act as a mentor and assist by passing on good practice by the exemplar authorities to smaller authorities, which will benefit from that experience.

The Government could do more in that regard, too. Sadly, the Improvement Service funding for training in planning, which had been provided for the past three or four years, ceased this year. That was quite important—local authorities could get 50 or 25 per cent funding to assist with the training of their staff. In Glasgow, we used that enormously. We put staff through training programmes across the country. The removal of that programme is an issue for the continued provision of such training.

In addition, local authorities need to bring in new graduates. That is what Mr Brodie was talking about. Succession planning will help to bring in new ideas.

The Convener: Does anyone else want to comment on the reduction in fees?

Nancy Jamieson: The reduction in fees would have a major impact on some authorities. Planning is not all about electronic working—you cannot get round the need to have people on the ground to assess the application. The case officer must visit the site, look at all the policies and make an assessment. A machine cannot do that.

It was asked why we all do things differently. The number of planning regulations and circulars are a complete minefield. I think that we are to get new environmental impact assessment amendments, which will make life even more difficult. We have also had to start analysing planning applications to take account of equalities and human rights. Over the years, more has been added to the planning system, and it is difficult to do all those extra things and speed up the process at the same time.

The main action that we can take is to prioritise the major applications. Most authorities deal quickly with householder applications. The Scottish Government has tried to take a lot of householder applications out of the system. That has been successful in some areas, but it has made a minimal difference in Edinburgh because of all the conservation areas.

The Scottish Government could assist us by taking out of the system applications that do not require planning authority input because they do not have any added value, such as smaller developments. That would increase the speed of decision making and allow us to prioritise.

Authorities could do other things, such as in relation to pre-application advice. At the moment, most authorities give pre-application advice on all types of developments, whether they are large or small. Some councils have stopped their pre-application advice service on, for example, householder applications for house extensions, and planning authorities could do the same. I am not convinced that that would be good customer service, but it would speed up the process.

We try to learn from each other as much as possible. For example, Heads of Planning Scotland's development management sub-committee meets every three months; 20 to 25 authorities are represented and share best practice.

Edinburgh benchmarks with Glasgow, Aberdeen and Dundee. We meet every six months. We look at how we deal with issues, compare figures—Glasgow and Edinburgh usually look at who is doing best on householder developments; I think that Edinburgh is on top at the moment—and why we are getting different results. For example, although Aberdeen might score lower on its speed of decision making, the authority is clear that, when it is dealing with an application and it can see how to make amendments that are acceptable rather than refuse it, it will go over the time target to achieve that because it thinks that that is good customer service.

Therefore, there are things that we can do, but they are difficult.

Alison Polson: Planning Aid is concerned about those very things, particularly if they squeeze community engagement right from the start. It is vital that the community is involved and gets a chance in the pre-app stage to understand what the applications are about. If people do not get that chance, the risk is that there will be more challenges that have to go through the system.

The system should be about incentivising rather than penalising. How to go about incentivising is more a human element—it is about the morale in planning authorities. No one wants planners to feel stigmatised when they are doing their job, so they need to be educated and encouraged to do it better and to learn from best practice elsewhere.

I wanted to mention one other thing, but it has escaped my mind.

The Convener: We will come back to you if you remember.

Colin Smith: The RICS supports the connection between planning fees and performance. It is far better to reward good performance, best practice and delivery, and there are a lot of good examples of that in our experience and from elsewhere.

There is no issue with the principal of penalising long-running demonstrably poor performance in some way by reduced fees, but assessing, justifying and ultimately implementing that is a complete minefield, given the huge fog around how application determination is assessed. The issue includes the number of applications that are sitting in the system because a site is going nowhere, the company is in administration and the bank is in control—the legal agreement might have been drafted, but no one will sign it because there is no one to sign it. Applications can run on for very good reason if everyone is working towards a solution.

It is a very difficult area in which to assess, but in principal the RICS would support a link between performance and fees. We believe that it is better to reward good performance, particularly on major applications, which are the most important, but, if there was persistent poor performance and lack of effort to improve, the RICS would support a reduction in fees, tied to instigation of measures to improve that performance.

Malcolm Fraser: The question is of incentivisation and clarity of statistics. It would be positive if councils were allowed not to record applications that applicants are sitting on.

It would be very nice to see incentives or rewards for councils to not immediately reach for environmental impact assessments. I appreciate that an external agency advises on that issue, but councils are as much a part of the bureaucracy and are patted on the head for being extra careful. It would be good if local authorities and planning apartments did not necessarily go to a Scottish historic environment policy—SHEP—test for various things, reach for more legislation or say, "We need to do this, so it will take longer, but we are allowed to take longer." It would be nice if authorities were incentivised to deal with things quickly and simply and were rewarded for doing that.

Dennis Robertson: Would it not be better to have a consistent approach across all the planning authorities? That would aid the measurement of performance. If there was a consistent approach to planning, the measurement would give the like for like. At the moment, the situation is a mess.

Alison Polson: That is because each planning authority has its own development plan. That is what planning reform is about: local decision making. That is why there is a local review body. It is not pan-Scotland.

Dennis Robertson: In a sense, with the bill we are looking for consistency of approach.

Alison Polson: Planning Aid would like consistency, but the system is set up as it is.

Nancy Jamieson: We do have consistency: how we deal with planning applications is set out in regulations, which say what a valid application is, how long there is to deal with it and what form the decision letter should take. It is the assessment of the application that will be different in each planning authority, because as Alison Polson says—

Dennis Robertson: Is it that the application is not happening consistently?

Nancy Jamieson: Do you mean processing of applications?

Dennis Robertson: Yes.

Nancy Jamieson: It is pretty straightforward, really. Once we receive the application, we make sure that it is a valid application. One of our big problems is that about 30 per cent of applications are not valid when they are submitted to the planning authority—we then have to chase up all the things that are needed to make it a valid application. After that, we assign the application to a case officer, and we have to do neighbour notification and arrange advertising. The case officer visits the site and we have to look at and deal with all the representations that come in. The application has to be assessed against the development plan.

The whole process is set out in regulations, but the assessment part—where we are deciding whether an application complies with the development plan—can be the crunch point. Further, there might be lots of representations on a scheme and, if so, we will have to decide whether something is a material planning consideration and whether we have to ask for amendments. If we decide that we have to do so, we have to discuss those amendments with the applicant and negotiate and agree a scheme before, finally, dealing with it under delegated powers or taking it to a committee that might take a different view.

12:00

Margaret McDougall: Do you think that monitoring and scrutinising performance should be the role of local authorities and councillors, or should it be done by the Scottish Government?

Nancy Jamieson: It is probably best if Malcolm Fraser answers that.

Malcolm Fraser: It should be done by the Scottish Government. It is interesting to think about what things should be devolved downwards, with more local representation, and what things should be dealt with at a higher level. National indicators and guidance are the sort of things that are best done by central Government, which can spank bottoms and skelp heids when necessary, and perhaps shame organisations in certain situations.

Quite interesting and useful things are being said about what can be taken out of the planning system to ensure that it is more efficient. Those things include the applications for extensions to the backs of people's houses and for wind farms; the fiddling with applications that some authorities still do; and the tendency to overdesign and to overcontrol people like me or, worse, architects—we will never get better architects involved if we always say, "We are going to compensate for you." I suggest that this committee should recommend that a lot of stuff should not be in the planning system. Certain things, such as wind farms, can be dealt with at a national level, and other things can be either dealt with more simply in the planning system or not dealt with by the planning system at all.

The issue is about setting the context. It is quite right that all our resources should be focused and that, thereafter, planners should not let go of section 75 obligations, in order to ensure that, for example, the necessary public routes across a site or public squares in the middle of a development are included. Planners need to hold on to that duty and be fully resourced to ensure that they can make clear the obligations at the start of the application and to enforce and police the situation during the process. Other things are better left to others.

Nancy Jamieson: Like most councils, we put our planning performance framework to our planning committee. If our performance was not good, it would have something to say about it. There is scrutiny at council level, and we also have to provide the statistics to the Scottish Government.

We see the figures once the number crunching has been done, but we do not get a lot of reaction. The figures that are published are just bald figures. As Alistair MacDonald said, legacy applications can completely skew the figures, and last year the Edinburgh statistics did not look good. At that point, we were not allowed to exclude anything, so there were headlines in the papers about how poorly Edinburgh was performing when, actually, the reason for the figures was simply that there were two or three very old applications in which the legal agreements had not been signed.

There has to be scrutiny at local level, and it is useful for there to be some scrutiny at national level. However, that has to be on the basis of what Malcolm Fraser was talking about—actual statistics, not potentially skewed figures.

Alistair MacDonald: There is no doubt that we need national scrutiny of how well legislation is working, as that represents Scotland to the wider world and is important for inward investment.

At local level, there is no doubt that the planning service needs to be fully accountable to the planning committee chairs. All council services have to be accountable, and planning is no exception.

The planning performance framework is now used by planning authorities across the country; the framework is taken to committee members and they are shown the performance for that particular year. Nancy Jamieson is right that, if the service is not performing to targets that the chief executive has set, the officials will be asked questions about what is happening to their service.

That process is also a good way of promoting planning in local planning authorities. Obviously, I would say this because I am from the RTPI, but I think that we need to promote planning further up the hierarchy in authorities to ensure that the development plan is not just for the planning service but for the whole local authority service and that, for example, the education authority and social services buy into it.

Malcolm Fraser made a point earlier about whether we need to close a school in a town centre or whether it could be a focal point for bringing services back into the town centre rather than pushing them out of town. The development plan can be an all-encompassing umbrella in that sense. Planning must be able to bring such plans through at a higher level in a local authority. I would naturally say that, but that is my view.

The Convener: Okay. We will move on to questions from Alison Johnstone.

Alison Johnstone: It is unclear at the moment whether section 4 of the bill, on the regulator's duty in respect of sustainable economic growth, will apply to planning authorities. Do panel members have a view on whether the sustainable economic growth duty should apply to planning authorities? If you think that it should, what issues might that raise? I ask Nancy Jamieson to answer first, and then Alistair MacDonald and Colin Smith.

Nancy Jamieson: I guess that my answer comes back to what we said earlier, in that planning is regulated by strata of different regulations and acts. The Scottish planning policy—especially the new draft policy that is going through its consultation process just now—is

very much focused on sustainable economic growth. That is something that we will have to take on board as we progress. I think that planners often forget about sustainable economic growth when trying to balance all the different policies that they deal with.

Alistair MacDonald: I would say that our job is to come forward with sustainable development for the benefit of the country. That cannot be left out of planning: it must be part and parcel of the core response for any planning application. I think that you will see more and more councils looking at a sustainable economic model. They will have to consider that as part of their overall response to a particular application. There are checks and balances in the system, and one will be consideration of sustainable economic growth.

Colin Smith: The delivery of sustainable economic growth is critical because Scotland competes with other countries and Edinburgh and Glasgow, for example, compete with Bristol and Manchester. If we do not compete and attract business investment in a sustainable way, it will go elsewhere. There needs to be a real focus on the delivery of sustainable economic growth. In all the regulatory functions—again, there is a link to planning fees—we need to focus on competing in a sustainable way.

Alison Johnstone: Is the panel of the view that the duty should apply to planning authorities?

Nancy Jamieson: Yes.

Alison Polson: Yes.

Alison Johnstone: We have heard from witnesses previously that the duty may be a lawyers' charter. I was on the planning committee in Edinburgh and can remember an example of planners recommending refusal for a supermarket development. In that case, the councillors gave it the go ahead and did not heed the planners' recommendation. If such an application was refused in the future, would the developer be more likely to come back and say that the council had a duty to promote economic growth and that it was clearly not doing it in that case? How do you weigh up other considerations if you have conflicting duties?

Nancy Jamieson: One of the complex duties on the planner is to weigh up all the many different aspects, including the possible economic benefits. For instance, for a recent application for a hotel down at Crewe Toll in Edinburgh, concerns were raised about whether the amount of parking on site was sustainable, because it would encourage people to use their cars, and whether there would be issues about air quality.

We had a big debate on whether to refuse the application, but we weighed up all the different aspects and decided that, because the hotel would provide economic growth on that site, we would recommend approval despite the sustainability issues. The duty to promote sustainable economic growth would be just one of various factors that a planner must weigh up in deciding whether one issue outweighs all the other issues.

Alistair MacDonald: You gave the example of an out-of-town superstore, which might contend that its application should be granted because it would provide economic development and bring jobs to the area. The downside to such a development might be that those jobs are taken from other businesses, which might then close because of that potentially unsustainable activity. That is part and parcel of looking at the best fit and the best location for such a facility.

Alison Johnstone: If planners already take sustainable economic development into account anyway, is it necessary to legislate for the duty? I would like to understand how the bill will make planning better.

Alison Polson: Including the duty in the bill will raise the profile of the issue.

Alison Johnstone: I have a concern that the bill may lead to the economic duty overriding other concerns. Do you share that concern?

Malcolm Fraser: I do. The issue comes down to how you define the term "sustainable", which is often defined in a way that is exactly the opposite of what it means—it is a classic example of a word that has been turned into its doublespeak opposite.

The superstore example is extraordinary. No one can argue that a superstore will create any more wealth in Scotland. There is a finite amount of shopping that goes on. If we put more shopping in one place, we will take it from another place. The issue is not even whether the store moves from the town centre, because the simple fact is that just moving the economic activity elsewhere means that somewhere else in Scotland will suffer.

Development should create wealth, creativity, places for people, homes and good environments. All of that is economic development. However, we need to be very careful about how we define the term "sustainable", because those who are doing unsustainable things will understand that they need to couch their argument in such a way that enables them to continue doing them. Development for development's sake is not sustainable. We should not use the word "sustainable" unless we define it in an appropriate way.

Alistair MacDonald: Malcolm Fraser's point is right. If people want to invest in an area by, for example, opening a new centre that creates 500

jobs, they will look at the quality of life in the area, the transport connections, the provision of housing, the provision of shopping and the local environment. All those things become part of their decision, which is based not just on the sheer economics but on the place where their employees will be well looked after.

I can think of examples in which business development has struggled because it was not located within or near a town centre. At lunch time, people want to go out to shop. Most households now work, so people often need to go out shopping for their family during the day or after hours. They also go out to socialise, and people stay within the same village, town or city. There is a difficulty if businesses are located outwith towns: those places are not sustainable in the long run.

For some considerable time, planners have been making judgment calls on sustainable economic development. We do that at the moment, so I would not have a fear that including the duty in statute would cause a difficulty.

Colin Smith: Having the duty up front might lead to an improved level of evidence. Rather than promoting developments purely on the basis of the level of investment involved or the fact that they will create X number of jobs, the duty will drive the provision of evidence that shows that a development will provide a net economic impact and not just a headline figure. There will be a better understanding of what the actual economic impact might be.

12:15

Alison Johnstone: I have a final question for Nancy Jamieson, who deals with planning on a daily basis. How will the bill make life easier for you?

Nancy Jamieson: We already have discussions with our economic development colleagues about how they can assist us in the planning process. If we have a major development, we need to know what its economic impacts are. Perhaps the bill puts that into a more regulatory function and we will be able to incorporate it into the report.

Marco Biagi: My question follows on from Alison Johnstone's question about what the sustainable economic growth duty does. It is often analysed in terms of a potential tension with the environment or in terms of the legitimacy of the economic dimension, and that is how you all looked at it. Is there any potential tension between the duty and the preservation of the built environment and heritage? Perhaps Malcolm Fraser would be a good person to answer that.

Malcolm Fraser: Yes, there is. You are quite right. There are all sorts of tensions. I continually make the point about VAT. Powers over that are unfortunately not available to us, but at present, if we repair and renew a building, we are charged 20 per cent VAT, but if we knock it down and stick up a new building, even on the green belt, it is 0 per cent. There is a massive economic lever that is used agin repairing and renewing buildings, which is a simple, obvious and not just sustainable but heritage-led approach.

I would like to see more old buildings being joyfully renewed—that is what we do, and we need more people doing that—and not knocked about in a horrible way. We want the old church halls to be renewed, and if they have to be a Tesco, so be it. It would be nice to think that a supermarket might want a site in town that has a building that they could adapt, and that they will relax their standards. Planners could bundle up sites and take them to the market. Part of what my town centre review is trying to do is to use business rates incentivisation to get councils to parcel up sites and take them to the market. We are trying to get people into towns, to bring commercial uses such as offices and leisure centres into old buildings, to use the old fabric and to join up the footfall in communities. There are definitely tensions around that.

We need planners to relax about these things and not to think, "This is a listed building, so I'm going to make sure that not a thing is changed." That still happens in some of the less celebrated smaller councils, which perhaps need to be grooved up a little and brought into the modern world. [*Laughter*.] I might be going off at a tangent a little, but in response to your question, I think that the bill can perhaps be used to remind councils that old buildings and conservation areas are not places where rings of steel are put up and development is discouraged but places whose virtues should encourage investment and places where planners should be open, setting the context but letting developers come forward with joyful renewals that assist everyone's economic development.

Colin Smith: There is a link between economic growth and heritage. One of the principles in the SHEP test for demolition of listed buildings speaks directly about viability. There is a real link there between economic testing and viability testing, so that raises a heritage issue.

Alistair MacDonald: I like Malcolm Fraser's comments about the joyful reuse of listed buildings. The skill of the architect can bring some modernity to an old building such that it can still be recognised but we can play about with it. Buildings do not have to be regarded as sacrosanct. We have lots of building stock in the country that can successfully lend itself to that reuse. I whole-heartedly support Malcolm's view that we should

use our built environment in an inventive and joyful manner.

Alison Polson: The bill gives with one hand and it also emphasises the element of balance, which is what planning is about. It states:

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

If there are other things to be taken into account, it emphasises the balance but puts the spotlight on the fact that all this is about development—about things that are actually happening. Otherwise, all these things are rules stopping things happening.

Alistair MacDonald: I give you the example of a lovely listed façade that remained propped up on a street. Various reports said that it could not be repaired and that, if anyone tried to repair it, it would fall down. There were engineers' reports that stated that, and a public inquiry was going to be held on it. However, another engineer's report blew that out of the water and there was no public inquiry. That façade has been retained and now has a completely new building behind it, with shops on the ground floor and flats above. The case gave rise to a whole debate about economic viability, but we were able to prove that things could be done in another way. Land values came into that as well—the owners' expectation of what the piece of land or building is worth in the marketplace. Sometimes, owners have to reduce their expectation to allow a profit to come out of the end. It can work if you question in the right manner.

Malcolm Fraser: The economic viability test—the SHEP test—is deeply problematic because it assumes that we live in the world before 2008. We have a site in Edinburgh that looks like the surface of the moon, which has one listed building sitting on it and nothing else for some distance around it. The developer can say that the site cannot be developed because of the listed building, and the listed building therefore becomes a whipping boy for the way that the market is. An application is submitted to demolish the building and it can be demolished at any minute as a result of that, but that is clearly not its fault. The one piece of heritage—a substantial, strong-walled reusable thing—gets blamed for the market's problems and gets demolished.

In St Andrew Square, there is a beautiful modern building from the 1960s—there are such things—that, in 100 years' time, will be looked back on as an absolute jewel. It is listed, but there is an application in at the moment to demolish most of it and leave just the façade. Then, in three years' time, an application can be submitted to demolish the façade because a façade has no integrity and can be demolished simply because the floor plates are not enough.

Listing exists in order to ensure that developers do not do the dumbest thing possible to buildings. The developer with the larger site just needs to think more creatively. I would like to think that, in general, the economic situation that we are in does not mean that we blame the current market conditions on old buildings and do bad things to them. We need joyful reuse. The alternatives at the moment are either a too-prissy reuse or to knock them down. We need to find a way between those.

The Convener: This has been an interesting discussion, although rather discursive and somewhat wide of the mark. Mike MacKenzie has a supplementary question, which I hope is relevant to the Regulatory Reform (Scotland) Bill.

Mike MacKenzie: I assure you, convener, that all my questions are relevant.

The Convener: I also hope that it is very short.

Mike MacKenzie: It is relevant to the duty to promote sustainable economic growth that seems to be dominating discussion of the bill. I am glad to hear you say that that duty is not a problem and that you have been doing that for years anyway. I welcome that part of the bill, and I must question whether you have been doing that for years. If that were truly the case, why do we have so many out-of-town supermarkets—more than any other country except, perhaps, the United States? If sustainable—I emphasise that word—economic growth and development is how you have been operating, how do you account for that?

The Convener: What difference will the bill make by introducing an obligation to promote sustainable economic growth? How does that compare to what has happened in the past? I ask for brief answers, please.

Malcolm Fraser: If we could define sustainability in a reasonable, correct way, taking in the greater good for a whole community, the on-costs for a local authority and Government in general and the potential for growth, money and wealth, that would be a positive thing. It would not allow out-of-town supermarkets to be built. At dinner, I sat next to the head planner of Highland Council and asked him why he had stuck an enormous supermarket outside Fort William, which is going to destroy the remaining parts of the town. He said that the planning lawyers had made a very good argument for it. We need planners to have the equipment and the definition of sustainability to kick such arguments into touch.

Alistair MacDonald: There is now a stronger recognition by Government, in advice that is given to local authorities, that the sustainable approach

is the one that we should be taking. The application for the Braehead shopping centre was called in and refused but went to appeal and was granted by the reporter at the time, despite the fact that various councils in cities and towns were saying that it might have an impact. That application was granted on appeal.

Nancy Jamieson: Such a shopping centre would need a retail impact assessment, and I have never seen a developer submit a retail impact assessment that says that the development will impact on a local shopping centre. It is difficult, because the process is based on the evidence that they provide and our being able to say that, yes, the development will impact on the local shopping centre. In Edinburgh, however, the councillors often do not agree with our opinion on such things.

The Convener: Thank you. Unless there is anything that you desperately want to add, we will call it a day. Thank you for your evidence, which is very helpful to the committee.

12:26

Meeting continued in private until 12:43.

UNISON Scotland response to request for further information from the Economy, Energy and Tourism Committee Meeting - 12 June 2013

Planning staff survey results

Please find the link to the survey briefing I referred to this morning on planning staff concerns.

http://www.unison-scotland.org.uk/briefings/b035_BargainingBrief_CutsInPlanning_Jun2013.pdf

Primary Authority Partnerships

On primary authorities I have just received some feedback from colleagues in England. They say:

"In our recent survey of members in trading standards concerns were expressed about primary authority:

a) Because in some authorities the service was very reliant in funding terms on the money coming in from the agreement – leading to worries about what would happen to the service if the company decided to withdraw the agreement – and concerns about possible conflicts of interest arising from that.
b) Primary authority agreements require the service to deliver value for money for the company – but that activities undertaken might be things the company would do anyway taking time and resources away from prevention and enforcement work elsewhere.

On the plus side they do enable streamlining of enforcement activity – on the downside as the cuts bite information and intelligence sharing is suffering. They can also cut across local accountability mechanisms."

Examples of local enforcement guidelines

Legislation is set in parliament and local authorities have no power to amend or modify legislation. However each authority will have developed its own strategy for enforcement of legislation and this will likely vary due to a number of influencing factors: staffing levels, inspection priorities, geographical area, population, audit requirements, rural or urban areas, etc. Authorities publish guidance to set out how they will implement the legislation.

In response to your request for examples UNISON conducted a brief survey of local authority planning departments. We selected house building guidance comparing an:

- island authority : Orkney http://www.orkney.gov.uk/Service-Directory/P/planning-and-the-environment.htm
- rural authority : Argyll and Bute http://www.argyll-bute.gov.uk/node/37
- suburban authority: East Renfrewshire http://www.eastrenfrewshire.gov.uk/index.aspx?articleid=1558
- urban authority: Glasgow http://www.glasgow.gov.uk/index.aspx?articleid=3338

These areas provide an overview of the Scotland's planning landscape. Unsurprisingly given their differences in geography, population density and economy there are substantial difference in their guidance and the support they are able to offer to those applying to house build in their areas.

The most obvious issue is that Argyll and Orkney have guidance of septic tanks whereas the expectation in the east Renfrewshire and Glasgow is that new units will be connected to the sewerage system.

In Glasgow and East Renfrewshire, the guidance reflects the fact that their planning departments are dealing with projects for building substantial developments whereas Orkney is focused more on one-off builds. While all give guidance of developments fitting in to the "look" of the area where building is planned they deal with this in very different ways.

In Orkney the guidance is very detailed, specifying that houses should be rectangular, not square, the angle and colour of the roof, the shape of windows. They do though encourage modern design. There can be no roadside developments, nor any "ribbon developments". There are to be no builds which would add a "suburban" look to the area. Clearly the opposite is the case in the suburbs.

Argyll and Bute, which relies substantially on tourism and the natural beauty of the area to sustain that industry, is keen to maintain its "look" too. They do though have a housing shortage and are keen to encourage house building. Their guidelines therefore focus on encouraging small to medium developments in areas where there are already settlements. They do not want any development that would radically change population numbers in settlements given that that would impact on the lifestyles of current residents. Like Orkney Argyll and Bute want to avoid anything that would suburbanise the countryside. Given the nature of the road system no development will be allowed that creates on road parking, children playing near busy

roads or the need for pavements. Argyll and Bute guidance for retail development is also focused on maintaining the look of towns and villages so guidelines advise against illuminated and plastic fascias on shops, there is presumption against canopies and where they are allowed the size and shape is also specified.

Glasgow's house building guidance links to its plans for regeneration. They therefore have set out four areas where they wish to see building. Beyond these areas they are keen to promote wider building on other brown field sites and conversions of other properties such as industrial units no longer suitable for modern workspaces. Unsurprisingly Glasgow allows for a much wider variety in its house design guidance. Orkney looks for buildings to be unobtrusive and hidden in the landscape. This is not an issue as such in an urban environment. Glasgow therefore focuses on proportions, so the height of building must be within certain boundaries round the width of the existing or planned streets. (1:1.5 and 1:3) Higher builds are allowed in central areas but if you want to build higher than 6 storeys then there are extra rules; developers must plant street trees, have wider streets and take action to mitigate on street parking. Glasgow wants houses looking out on public spaces, including streets and small street blocks. In order to prevent front gardens being used as parking spaces in the long term front gardens should be between two and four meters. Glasgow also states parking space ratios for residents and visitors for any new developments.

Unlike Argyll and Bute and Orkney whose guidelines are about avoiding a suburban look East Renfrewshire will not allow "backland" development: new builds must have roadside frontage. They are looking to support house builders to create larger developments, like Glasgow on brown field sites as maintain what green space they still have is a high priority. They also focus heavily on rules for conversions and extensions. Where units are closer together this is clearly significant as expanding properties can impact on near neighbours much more directly than in rural areas. Height restriction for new builds is lower than Glasgow and anything above three stories will require tree planting. Housing developments in East Renfrewshire must maintain a clear hierarchy of public, semi private and public space. This is not mentioned by the other authorities looked at but reflects the need for privacy and clear boundaries where people live close together in housing developments. New developments must also include pay areas for children: one play areas for every 20 units and one with play equipment for every 50 houses.

All of the guidance papers set themselves in the context of appropriate legislation and refer to relevant sections of the Acts to explain the reasons for the guidelines. While we have not provided details on the guidelines in other areas in this response, other regulatory responsibilities like Environmental Health and Food Safety operate in the same way.

I hope you find this information useful.

Dave Watson
UNISON
June 2013

SUPPLEMENTARY EVIDENCE FROM UNISON

Our view is that sustainable development is a well understood concept around for at least twenty years, if we start from the Brundtland Report definition. Those regulators, primarily planning, understand it well and it has been incorporated into policies and practice for some time. They also point out that it generally qualifies rather than offering a potentially contradictory requirement such as economic growth.

Obviously there aren't any practical examples as yet of the economic growth requirement, or how you might balance the two. But I did in our evidence highlight the concerns that our members have. In particular, the risk of litigation and the impact that might have on the speed of decisions and the decision process itself. Similar concerns have been expressed by other organisations.

UNISON
July 2013

SUBMISSION FROM THE FEDERATION OF SMALL BUSINESSES

Introduction

The FSB is Scotland's largest direct-member business organisation, representing around 19,000 members. The FSB campaigns for an economic and social environment which allows small businesses to grow and prosper.

We welcome the opportunity to submit comments on the Regulatory Reform Bill to the committee.

Comments

General principles

While few businesses would claim to enjoy the process of complying with regulations, most appreciate the need for legislation to protect people and the environment from harm and to prevent irresponsible and unscrupulous trading. But, when it begins to look as though business owners' time and money is being spent on box ticking with no clear benefit, they become frustrated.

In a recent survey asking about the impact of regulation on their business, just under half (45%) of Scottish members indicated that the cost of complying with regulation had increased over the previous year, while just under a third (29%) felt the time taken to comply had increased. 51% indicated that the most challenging aspect of regulation was interpreting which regulations applied to their business, closely followed by 50% who felt the sheer time dealing with it was most demanding.

As a result, we believe that more could be done to reduce the cost and time difficulties experienced by small businesses, as well ensuring regulators behave in a way consistent with the principles of better regulation. Ultimately, this makes it easier for businesses to comply with regulation and allows them to spend more time focusing on growing the business.

Last year, we published a report setting out how some aspects of Scottish regulation could be improved, specifically examining local regulation.[1] In many instances this highlighted the need for better processes within councils. It also highlighted the need for closer working between councils, as well as the need for better national co-ordination of local regulatory activity.

We are pleased that the Bill addresses a number of these points.

Lastly, we recognise that our report and subsequent submissions refer to a number of examples of unhelpful behaviour and criticise current approaches to local regulation by both national and local government. Nevertheless, it is worth highlighting that most small businesses find frontline officers, for example, from Environmental Health or Trading Standards, to be generally helpful and supportive to their business and value the advice delivered by officers. We believe that working constructively with regulators to ensure a better co-ordinated, advisory approach across Scotland is the best way to achieve compliance.

[1] FSB Scotland, Local regulation – the case for change, 2012

Part 1: Regulatory Functions

Improving consistency

As outlined in the Scottish Government's consultation document, the Regulatory Review Group (RRG) has identified inconsistency as a recurring theme during the course of its work. The FSB has also come across this problem, particularly in relation local interpretation and implementation of national regulations. Our report recommended that:

"To end the practice of unnecessary duplication of effort by local authorities implementing new regulations, there should be a presumption in favour of a single, national approach. This could be assisted by the development of template or model regulations."[2]

Consistency is identified as one of the five key principles of better regulation. It refers to the consistent application of regulations so that businesses can more easily understand regulatory requirements. Consistent application of regulation has to be balanced with the other four principles; proportionate, targeted, transparent and accountable.

The correct regulatory balance recognises that, for example, some inconsistency is appropriate in order to achieve proportionate regulation. This might be demonstrated by the difference in opening hours for licensed premises in a city centre compared to a small town.

However, inconsistent approaches do not achieve this balance when they apparently exist for no particular policy reason. In our view, none of the cases of inconsistency identified by the FSB and the RRG are due to responding to local circumstances. 3

Instead, they usually relate to different interpretation of regulations and different processes and paperwork. Often they occur simply because of different custom and practice in individual local authorities.

The RRG review of implementation of the Licensing (Scotland) Act 2005 identified particular problems with inconsistency.[3] The recently published RRG review of the Knife Dealer's Licensing Scheme also highlights problems of inconsistency. For example, differences in the definition of a 'non-domestic knife' and differences in conditions applied such as acceptable proof of age.[4] In addition, Part 3 of the Bill concerning Street Trader's licensing specifically addresses the problem of different requirements by different authorities for a mobile food van operating across more than one area. Additional examples of inconsistency reported by FSB members are included as an annex to this submission.

In our view, one agreed approach would make it easier for businesses – large and small – to understand how to comply with regulation, regardless of which local authority area they were in.

[2] ibid
[3] Regulatory Review Group, Review of the Licensing (Scotland) Act 2005, 2010
[4] Regulatory Review Group, Review of the Knife Dealer's Licensing Scheme, 2013

Despite good work by professional organisations and individual officers to share information and best practice, ultimately many councils have developed their own approach to regulation. There have been attempts to address individual differences but doing these retrospectively is time-consuming and disruptive.[5] The recent Audit Scotland report on trading standards and food safety highlighted the precarious nature of some current joint working:

"A number of these joint working arrangements are informal; they do not have written agreements, and they depend on councils voluntarily contributing their share of expertise, staff time or other resources."[6]

Where appropriate, opting for a national approach at the outset would be simpler.

There is precedent for greater coordination of locally-regulated activities. For example, the Food Standards Agency works with local authorities and professional bodies through the Scottish Food Standards Enforcement Liaison Committee (SFELC) to identify national priorities, set national standards through a code of practice and provide information and guidance for enforcement work. Last year the Scottish Government also published a document on good practice in relation to licensing taxi and private hire cars, setting out various areas of licensing taxis where certain approaches and standards would be considered helpful.[7]

Time spent unnecessarily having to clarify advice, or costs associated with applications which may not be necessary, not only eats away at precious time from a small business owner but makes additional work for regulators. Neither is helpful when resources are stretched and our shared focus should be on returning our economy to growth. We therefore wholeheartedly support the Scottish Government's proposal to adopt a new approach.

Duty to contribute to sustainable economic growth

The Scottish Government has outlined its commitment to creating a supportive business environment, thereby making it easier to do business in Scotland. In this context we believe it is sensible to consider the role played by regulators in creating this environment.

A duty to contribute to sustainable economic growth could provide stronger focus on improving how regulators interact with businesses, with the aim of facilitating compliant growth. In our view, such a duty could best be met by regulators demonstrating, both at a strategic and operational level, that they have integrated the principles of better regulation into their regulatory functions. For example, we would encourage councils to develop better regulation plans. This would enable them to better co-ordinate action across a range of regulatory functions. More generally, regulators might demonstrate this through the following practices:

[5] Following the RRG's report on the Licensing Act a working group was established to address some of the identified problems, notably in relation to the use of standard application forms. This good work is resource-intensive and progress relies to a large extent on the good will of individual officers.
[6] p19, Audit Scotland, Protecting Consumers, 2013
[7] Taxi and private hire car licensing: best practice guidance for local authorities, 2nd edition, the Scottish Government, April 2012

- Provision of clear, up to date, guidance to businesses on requirements
- Payment of regulator fees flexibly to support cashflow
- Advance booking of routine inspections to enable sufficient staff cover
- Establishing a single source for advice 'one stop shop' approach
- Training (through secondment/visits) of frontline staff to small businesses

The code of practice referred to in the Bill should help provide more detail about how the duty will work in practice. The code could also help provide guidance on how such a duty would interact with other requirements and duties placed on regulators.

We recognise the risk of placing further reporting burdens on local authorities at a time when resources are stretched. Nevertheless, we would welcome further dialogue with the Scottish Government and regulators about how compliance with the duty could be monitored.

Part 3: Miscellaneous

Planning fees

The FSB raised several concerns about conferring powers on ministers to vary fees in its response to the planning fees consultation in June 2012. These concerns were raised in the context of how the vast majority of our members would interact with the planning system.

As a rule, small businesses rarely interact with the system and do so for one-off developments. Their plans tend not to be as flexible in terms of location as those of large developers. If they want to extend their business premises, or build a small housing development, for example, the likelihood is that the location has already been fixed before plans come to application. They would therefore not be at liberty to review different authorities' performance and decide where to site their development. Variation in fees depending on performance therefore has the potential to disadvantage local businesses either because of performance issues or because of higher fees. The FSB does not support this type of inconsistency.

In relation to the specific proposal our concerns were as follows:

Firstly, the original planning fees consultation indicated that fee variation for poorly performing authorities would very much be used a last resort. Support and guidance for poorly performing authorities should be the priority. Should this provision ever be used by Ministers the FSB is concerned that varying fee levels across the Scottish Planning System may have several adverse effects:

- on poorly performing authorities, which risk falling further behind required standards;
- on applicants who will be faced with inconsistent fee rates in different parts of the country; and, potentially
- on how and where development takes place in Scotland.

Secondly, the purpose of ministerial monitoring of planning authorities and any eventual intervention is to hold the planning system accountable to the Scottish Government. It does nothing to address the impact of poor performance on individual

applicants. It is therefore illogical for the intervention to have an effect on future applicants' experience of the system.

The FSB would prefer a system where ministers monitor performance as proposed but impose a different sanction on authorities that continue to fail to perform adequately without varying the fees paid by applicants.

Finally, while the performance framework has done much to define good planning practice and quality service, it remains unclear at what point performance would be deemed to fall below expected levels or indeed whether this would be relative to other authorities or based on a basic service-level expectation. This does little to instil confidence in users of the system that it is being fairly and equitably monitored.

Street traders' licensing for mobile food businesses

As discussed above, the proposal in the Bill addresses inconsistency in one aspect of regulating mobile food businesses. The consultation document outlined the investigation of the issue, including the range of inconsistencies uncovered.

We welcome the sensible suggestion to move to a system with each authority recognising a certificate of compliance issued in the home authority of the business. This would not, as we understand it, detract from the ability of an authority to inspect a business operating in a particular area.

Federation of Small Businesses
6 June 2013

Annex A

Examples of regulatory problems relating to inconsistency reported by FSB Scotland members

Case study 1

“x is a hardware shop in council A. We sell various types of knives to the public and trade customers.

I was asked to take out a licence to sell knives by the council. It cost £120 for 3 years. We also have to keep a record of all non domestic knife sales in a book. We have to take a name and address of the person and ask for ID. The problem is that not everyone has been asked to do the same thing.

It is all to do with the interpretation of the conditions. In particular the word “domestic”.

A builder can come into my shop and ask for Stanley blades, which are kept behind the counter and are in pre packs. I have to ask him for ID and take down details etc....That same builder can go into B&Q in neighbouring council B and council C and remove from the shelf the same blades, go and pay for them and not have to give any ID to the person behind the counter. Why am I being penalised by having to pay for a licence that others don’t have to pay for and to add insult to injury my customers are penalised having to hand over ID and have their name taken down as if they were under suspicion.”
Hardware store, north east Scotland

Case study 2

“I run a chain of day spas and beauty salons. I have had three visits from environmental health officers in as many months in three different Scottish cities.

One city’s council said we had to register as a food business because we serve tea and coffee to our clients! When we asked them to tell us under what particular regulation they were saying this, they couldn't answer and then came back and said they were mistaken. In another city, the environmental health officer said we needed a public entertainment licence at a cost of over £2k per annum, but again when asked under what regulation this was required they couldn't answer.

These visits have taken up a vast amount of management time and effort for inaccurate and misleading issues from the council officers. This does not help small businesses like ours and costs a lot of time and effort that could be used in concentrating on our business and growing employment.

If officers are going out to small businesses, I think they should be provided training on dealing with small businesses and not be wasting our time with ridiculous regulation that doesn't even apply to us. I wonder how many businesses they go round saying these things, who don't question the advice given and end up complying needlessly for licences or regulations that don't even apply.”
Day spa chain, city locations

Case study 3

"I have held a licence for body piercing under council A for 4 years now but have recently been encountering problems whilst trying to expand my business into mobile territory. I would like to expand further afield as well which would involve applying to each individual district council in which I would like to work.

However, due to certain laws this is very problematic as each council will have completely different rules and regulations. I find this very frustrating."
Body piercing studio, south of Scotland

Case study 4

"We operate two mobile fish and chip vans...initially we operated only in council A but last year expanded with a second vehicle. To function we are required to have street traders licences, both in council A and separate ones for council B (at a separate cost).

Each council has different restrictions on the licence, like the time you are allowed to stop in each area. If you speak with individuals at the licensing offices they differ as to who needs a licence, some say the person trading, that is the person actually handing the food over, others will say best if everybody has one (easy when you don't have to pay for them)... We also have council C, they also have completely different rules and contacting them they seem reluctant to encourage business."
Mobile fish and chips, north east Scotland

Case study 5

"Lettings is a very legislative business and seems to be getting more and more legislation with more rules and regulations making our job very difficult to maintain.

I have property in various areas throughout Scotland and each council does work ever so slightly differently, why, I would like to know!"
Letting agency, Edinburgh

SUBMISSION FROM SCOTTISH ENVIRONMENT LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 30 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. We welcome the opportunity to offer views on those parts of the Regulatory Reform (Scotland) Bill requested by the Committee. This should be read in conjunction with our written submission to the RACCE Committee on Parts 1 & 2.

Summary

- **We support the need for effective, targeted and transparent regulation for the benefit of Scotland.**
- **We strongly oppose the introduction of a duty on regulators to contribute to achieving '*sustainable economic growth'* - the duty should refer instead to '*sustainable development*'.**

General Comments

The 2011 UK National Ecosystems Assessment[1] clearly highlighted the wide variety of benefits provided by the natural environment in terms of economic prosperity, human health and well-being; the risks posed to the delivery of these benefits through inadequate protection and management of the natural environment; and in particular, the importance of regulation in safeguarding and enhancing the delivery of these key services.

Scottish Environment LINK supports the need for effective, targeted and transparent regulation and is broadly supportive of any steps that can be taken to streamline regulation provided that this does not happen at the expense of environmental protection. The consolidation of the existing regulatory regime has the potential to fulfil both the aims of the Bill and the overarching 'Better Regulation' agenda to create more favourable business conditions in Scotland and deliver benefits for the environment and society.

While we acknowledge that regulators should, and already do, account for the social and economic impact of their actions, the pursuit of economic growth must not override environmental protection or well-being. We support the Carnegie UK Trust's Report of the Round Table on Measuring Economic Performance and Social Progress in Scotland[2], which recommended that focusing on delivering economic growth as the end rather than the means is inadequate, concluding that '*we need to break our focus on economic growth and instead focus our effort on delivering well-being, now and into the future.'*

We are therefore greatly concerned by the inclusion of a duty on regulators, including environmental regulators, to contribute to achieving '*sustainable economic growth'*. Indeed we question the need for a duty to include reference to sustainable economic growth at all, given that the environmental regulators already have legislative requirements to consider social and economic factors while fulfilling their primary functions. They also have extensive statutory duties for '*sustainable*

[1] http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx
[2] http://www.carnegieuktrust.org.uk/publications/2011/more-than-gdp--measuring-what-matters

development' and it is very far from clear that these duties are compatible with a duty for '*sustainable economic growth'.*

No evidence has been presented that regulation in Scotland is a significant barrier to economic growth. Environmental regulation can in fact improve well-being, drive innovation, reduce risks, create jobs, create new business opportunities and boost Scotland's international reputation and competitiveness.

We know of no legal definition of sustainable economic growth and, therefore, have no assurance that it aligns with the sustainable development definition and principles, which already have a sound basis in international, EU, UK and Scottish law. Its inclusion in environmental regulators' statutory purposes could undermine, confuse and compromise the regulators' work and their achievement of environmental protection and improvement. Any statutory purpose for SEPA and other environmental regulators should refer to sustainable development as this has a clear legal framework and a set of principles which the Scottish Government has signed up to.

Should the duty remain as drafted, guidance on the meaning of sustainable economic growth, and how regulators will meet the requirements of the duty must be introduced urgently, in consultation with all affected bodies. We would expect any guidance to clarify how a growth duty would relate to current duties, and how to overcome implementation issues. There exists a grave risk here that it will prove impossible to reconcile duties for sustainable development, which **balance** economic, social and environmental development concerns, with a growth duty which clearly gives **added weight** to economic concerns alone. Parliament should take great care to ensure that any law they pass achieves a high standard of justiciability.

Part 1 Regulatory functions
Section 2 – Regulations under section 1: further provision
Provisions in the Bill would allow regulations to be made to amend or revoke existing regulatory requirements. Although the Bill proposes that such changes would only be permitted when equivalent regulatory requirement exists, we question how this judgement would be made. Robust and sufficient safeguards would be needed to ensure that the provisions do not reduce levels of environmental protection. All secondary legislation arising from the final Act should be made subject to the affirmative procedure.

Section 4 - Regulator's duty in respect of sustainable economic growth.
We strongly oppose the introduction of a duty on each regulator, and in particular, SEPA and SNH, to contribute to achieving sustainable economic growth because it threatens to damage environmental protection by conflicting with regulators' existing primary purposes. Sustainable economic growth is not defined in the Bill or anywhere else in Scottish, international, EU or UK law. If a duty is considered necessary this should be to contribute to achieving sustainable development.

Sustainable development is well defined, globally recognised, underpinned by clear principles, and the Scottish Government is a signatory to the UK's shared framework

for sustainable development.[3] There is also a strong precedent for a duty to contribute to achieving sustainable development in Scottish law. In exercising functions under the Planning (Scotland) Act 1996, the Water Environment and Water Services (Scotland) Act 2003, the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010, Scottish Ministers and others must do so with the objective of contributing to or furthering the achievement of sustainable development.

There is danger that placing a sustainable economic growth duty on regulators introduces a bias towards economic aspects over the other two pillars of sustainable development: the environmental and social. As effective, independent and respected authorities, SEPA's priority should remain the protection and improvement of the environment, and SNH's to secure the conservation and enhancement of natural heritage. We note however, that those regulatory bodies already have various duties to consider economic and social issues or duties to achieve sustainable development. Under the Natural Heritage (Scotland) Act 1991, SNH has a clearly defined duty to take into account *'the need for social and economic development in Scotland or any part of Scotland' in exercising its functions.*'[4] Similarly, under Section 32 of the Environment Act 1995 (that outlines general environmental and recreational duties and is proposed for repeal in this Bill), in performing its functions, SEPA must '*have regard to the social and economic needs of any area or description of area of Scotland*'[5]. Statutory guidance on sustainable development issued under Section 31 of the 1995 Act (not to be repealed) requires that SEPA work '*to ensure that its actions do not unnecessarily constrain economic development and do not impose a greater than necessary burden on those it regulates.*'[6] Furthermore, the Water Environment and Water Services (Scotland) Act 2003 states that SEPA must '*act in the way best calculated to contribute to the achievement of sustainable development*'.[7]

On the reporting of economic considerations by regulators, the Public Services Reform (Scotland) Act 2010 imposes a range of duties on the Scottish Government and listed public bodies (including SNH and SEPA) to provide information, including an annual statement on the steps taken to '*to promote and increase sustainable growth through the exercise of its functions*' and '*to improve efficiency, effectiveness and economy in the exercise of its functions.*'[8]

The introduction of an additional reporting requirement could result in increased costs and decreased efficiency and therefore increase burdens on businesses. In its consultation on the proposals, the Government stated that it was keen to avoid new reporting requirements which may divert time and energy away from front-line environmental duties. A number of local authorities responded to the consultation with concerns that the introduction of a new generic duty, and the additional burden of reporting associated with it, would do just that and undoubtedly stretch limited resources.

[3] One future – different paths: The UK's shared framework for sustainable development
[4] Natural Heritage (Scotland) Act 1991, section 3(1)(c)
[5] Environment Act 1995, section 32(1)(d)
[6] Statutory Guidance to SEPA on sustainable development made under section 31 of the Environment Act 1995
[7] Water Environment and Water Services (Scotland) Act 2003, section 2
[8] Public Services Reform (Scotland) Act 2010, section 32(1)(a) & section 32(1)(b)

Additionally, there is also a risk of increased incidences of legal challenge where a business believes the regulator has failed to comply with the statutory growth duty, or concerned citizens believe the regulator has failed to comply with sustainable development duties. Additionally, there is a potential risk that by applying the new duty when making decisions or providing advice, public bodies would be open to legal challenge that the duty has been wrongly applied. This would inevitably deflect resources and undermine the aim of more effective regulation (see table).

We note the inclusion of the qualification that the duty would apply '*except to the extent that it would be inconsistent with the exercise of those [regulatory] functions to do so*', but would query how this would be applied and tested in practice. Where a regulator faces conflict between compliance with primary functions and achieving sustainable economic growth we would like there to be a clear guidance for resolution and priority given to fulfilling the primary functions.

Part 3 Miscellaneous

Section 40 - Marine licence applications, etc.: proceedings to question validity of decisions

LINK is concerned by the provisions on marine licensing and the attempt to standardise the appeals process. We are extremely disappointed by the ad hoc nature of the marine licensing provisions in the wider context of inconsistencies among the appeal provisions for environmental legislation. There is a real need for a joined-up approach to judicial reform and, in this regard, we wholeheartedly agree with the points made by Professor Colin Reid in his evidence submission. [9] Contrary to the binding provisions of the Aarhus Convention, it remains difficult for parties to challenge governments and developers in the courts. We note that, prior to forming the current Government, the SNP made a manifesto commitment to explore the option of an environmental tribunal or court that could simplify appeal provisions into one system. This would provide an opportunity to introduce a fairer, more efficient and more cost effective initial procedure for interested parties to challenge Scottish Ministers' decisions and remove the need for immediate recourse to the courts. In our report Governance Matters[10], we suggest that there is a strong case to be made for an environmental and land court.

Section 41 - Planning authorities' functions: charges and fees

LINK is opposed to a system that would financially penalise planning authorities that failed to meet targets. We are well aware of the need to have timely, efficient and consistent processing of applications and planning authorities must have sufficient resources and expertise to do this. Taking money from underperforming planning authorities will not help to improve the service and there is a real danger that this would lead to an increased divergence in the quality of service between planning authorities. Such a move is likely to increase the pressure on authorities to grant permission before an application has been fully assessed, potentially resulting in significant detrimental environmental impacts and possible breaches of legislation such as the Habitats Regulations. Should Ministers be minded to introduce a link between fees and performance despite the clear risks involved, it would be essential

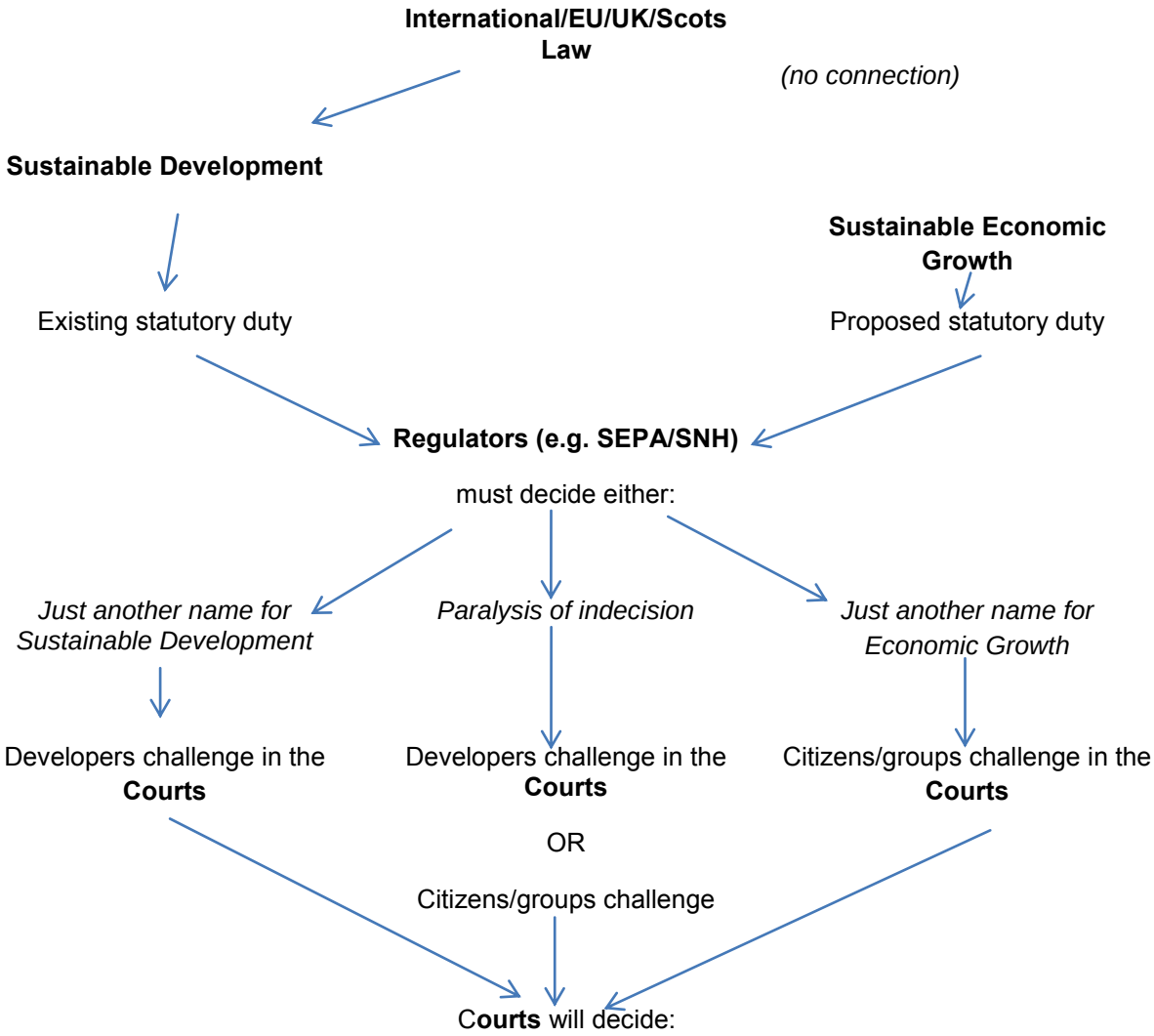
[9] http://www.scottish.parliament.uk/S4_EconomyEnergyandTourismCommittee/Bills/RRB_-_Professor_Colin_Reid.pdf
[10] http://www.scotlink.org/files/publication/LINKReports/LINKGovernanceMatters.pdf

for some mechanism to be introduced to ensure full compliance with environmental legislation.

Conclusion

The comments in this submission cover our principal concerns with the Bill as introduced. There may be other matters of substance, amendment and drafting which give rise to further contributions to the passage of the Bill.

Table: Sustainable Development *versus* **Sustainable Economic Growth**



Regulators have a duty to promote **SUSTAINABLE** economic growth (i.e growth with balancing environmental and social development). Regulators do NOT have a duty to promote **UNSUSTAINABLE** economic growth (i.e growth without balancing social and environmental development). **Scottish Courts don't like to make decisions on the "merits" – only that the correct process was followed.**

Scottish Environment LINK
6 June 2013

SUBMISSION FROM THE SCOTTISH COUNCIL FOR DEVELOPMENT AND INDUSTRY

SCDI is an independent membership network that strengthens Scotland's competitiveness by influencing Government policies to encourage sustainable economic prosperity. SCDI's membership includes businesses, trades unions, local authorities, educational institutions, voluntary sector and faith groups.

The principles of better regulation set out the requirements for regulatory functions which are transparent, accountable, proportionate, consistent, and targeted only at cases where action is needed. SCDI welcomes these principles, and the overarching purpose of the Bill to further improve regulatory consistency and to support sustainable economic growth.

There is limited detail surrounding which regulations and regulatory bodies Ministers intend to apply these proposed new powers. Therefore it is difficult to comment on the extent to which we believe it will streamline regulation. If implemented effectively with a focus on outcomes rather that processes, the Regulatory Reform Bill should improve the regulatory environment for business to operate effectively and grow without jeopardising the social, environmental and economic objectives of regulation.

It is essential that any secondary legislation arising from the implementation of this Bill is subject to in-depth consideration, and as such we welcome the inclusion in Part 1 Section 1 that any regulations made by Scottish ministers to encourage or improve consistency in the exercise of regulatory functions are subject to affirmative procedure, and that Scottish Ministers must consult with the regulators to which the regulations would apply, as well as persons or bodies which represent the interests of persons affected by the proposed regulations, or any other persons or bodies deemed appropriate.

Part 1: Regulatory Functions

Section 1: Power as respects consistency in regulatory functions

SCDI welcomes the objective of the Bill to further improve regulatory efficiency. Current inconsistencies across certain areas of regulation result in inefficient use of resources for both regulators and business.

However, while national standards can increase certainty and improve consistency, they may not be the most appropriate solution for every regulatory issue, and the social, environmental or economic realities of place or sector.

The Bill states that regulations made under Section 1 may not include provision that would (a) amend a regulatory requirement which, by or under an enactment must be complied with, met, attained or achieved, and, a regulator is required to impose or set, and (b) repeal or revoke a mandatory enactment. However, there is little detail on any further circumstances under which a regulator could seek to opt-out from a national standard. As such, we believe it is essential for Scottish Government to continue to work collaboratively with regulators in order to develop appropriate national standards which are also transparent, accountable, proportionate and targeted.

We also welcome the proposals in Section 5 of the Bill for a Code of Practice as a further way to develop and promote consistency within and between regulators, including the use of national standards.

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

SCDI welcomes the move to align regulation and sustainable economic growth. The Scottish Government has an overarching purpose to make Scotland a more successful country though increasing sustainable economic growth, and regulators can play an important role in this. The time taken to acquire permits as well as the cost of doing so is clearly important to business and development, as is the quality of engagement around compliance, support for innovation, and certainty surrounding decisions. Many regulators already consider how they as a regulator can contribute to a resilient economy through better regulation, advice and guidance and supporting innovation, and SCDI believes that the duty in respect of sustainable economic growth will support greater impetus and an improved and joined-up focus across all regulators listed in Schedule 1.

SCDI agrees it is essential that such a duty does not undermine the regulator's statutory objectives, not least to uphold the principles of good regulation. Regulation plays an essential role in maintaining a level playing field, and in order to be transparent, accountable, proportionate and consistent, regulators must offer compliant operators a service which upholds these principles.

SCDI believes there is a need for further clarity. Subsection (4) states that the duty does not apply to a regulator "*to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect*". As sustainable economic growth is not defined within the legislation, duties of 'the same effect' are open to interpretation. For example, will regulators already paying regard to sustainable development duties be exempt from this section? As such SCDI can only offer cautious welcome, as the extent to which this duty will drive operational change remains unclear.

Section 5: Code of Practice

SCDI welcomes the development of a Code of Practice, the high level focus of which should be on sustainable economic growth.

<u>Part 3: Miscellaneous</u>

Section 40: Marine Licence Applications, etc.: proceedings to question validity of decisions

Currently the appeal landscape is complex, and the Regulatory Reform Bill offers an opportunity to ensure consistency across infrastructure appeal mechanisms. SCDI believes that the overall objective of legislative changes in this area should be to speed-up infrastructure delivery in order to encourage investment and reduce uncertainty for investors, businesses, public bodies and communities.

The introduction of a six-week time limit for statutory appeals provides a means of improving consistency between onshore and offshore development. Developers must be clear where challenge opportunities exist in order to adequately prepare for

delays, and the six-week window allows certainty and security after the appeal period is over. It is worth noting however that contractors will often begin work before the six week window for appeal is up, and that this will likely be factored into project risk registers and could result in contractors adding a premium to cover this.

Further detail on the apportionment of costs as well as any provisions in place to prevent vexatious use should be outlined. For example, who will pay for appeals, and if unsuccessful is there any recompense for unnecessary delays?

41: Planning authorities' functions: charges and fees

SCDI is supportive of the principle of linking fees with performance. However, in the way in which this power is currently structured there is a risk that reducing fees for poorer performing planning authorities will simply reinforce and lead to a cycle of poorer performance as their resources fall in comparison with other authorities. This would have a negative impact on their customers and the economy.

To use one example, the Scottish Government has set ambitious targets for renewable energy, and the developers of renewable infrastructure require decisions delivered within a reasonable timescale, as well as cost certainty from the planning system. However, those councils which receive some of the largest applications for renewable developments are likely to be smaller rural authorities with fewer resources to tackle these. This reduction in their resources is unlikely to achieve the desired outcome of improved performance. As such, SCDI stated in its submission to the Fees for Planning Applications 2012 and the Better Regulation consultation that it would prefer the incentivisation of good performance with applications, for example through a system of a base fee followed by further staged payments when agreed milestones with the application are achieved and which are linked to customer satisfaction.

One of the most consistently positive messages on planning amongst SCDI's membership is the value of pre-application engagement with planning authorities. Such engagement can identify issues and opportunities, allow adaptation, and ultimately improve the quality of applications submitted. If fees are reduced, it is likely that resource for these valuable but non-statutory activities will be reduced first. This would be a negative step for the performance of the planning system in Scotland.

SCDI believes that there is still essential detail missing from Section 41 of the Bill. For instance, the Bill states that Scottish Ministers may make regulations for the charge or fee payable to different planning authorities to be of different amounts where Scottish Ministers "are satisfied that the functions of the authority are not being, or have not been, performed satisfactorily". There is no indication, however, of how satisfactory performance will be judged. Linking fees to performance may encourage a focus on outputs rather than outcomes, and create false incentives to prioritise speed over optimal results.

It is better that a good decision is delivered in a reasonable time than a bad decision delivered quickly. In 2012, Heads of Planning Scotland developed the Planning Performance Framework in an attempt to introduce a balanced scorecard for planning, in which "*speed of decision making will still feature as an important factor*

but it will be set within a wider supporting context of quality, workloads, resources, organisation and outcomes achieved on the ground". To reduce duplication, it would seem appropriate that the PPF is used to develop a similar Code of Practice as proposed for Part 1 of the Bill in partnership with planning authorities and other stakeholders, in order to ensure that performance is focused on outcomes.

SCDI also understands that not all processes within a planning application are entirely within the planning authorities' control, for example Section 75 agreements in the Town and Country Planning (Scotland) Act 1997. This presents a difficulty for linking fees to performance. On the one hand, it would be inappropriate for planning authorities to be held responsible and subsequently have their resources cut due to the performance of other stakeholders in the planning process. On the other hand, to exempt certain types of application from performance considerations could create perverse incentives to focus more on non-exempt applications at the expense of those exempt. The Scottish Government must work closely with planning representatives and other stakeholders in the planning system to ensure that the provisions achieve their desired outcomes.

Finally, there is no indication of the scale of any penalty or the length of time it would apply for. Certainty of cost is important for developers and planning future investment decisions, and certainty of income will allow planning authorities to better plan spending, both on operational costs and improvements.

Due to the above points, SCDI believes that, without amendments, the power to reduce fees should only be implemented after all other positive engagement has failed to improve performance. Again, developing a Code of Practice would allow an opportunity to discuss and develop appropriate thresholds to judge performance against, as well as opportunities for positive intervention prior to considering a reduction in fees. One example would be support for training and lifelong learning. Planning is a critical skill for supporting sustainable economic growth, and continued development and support is essential to ensure that planning authorities can improve their performance.

Scottish Council for Development and Industry
5 June 2013

SUBMISSION FROM SCOTTISH WATER

Overview

Scottish Water is responsible for providing clean, safe drinking water and disposing of waste water over 95% of the households and businesses in Scotland, 365 days a year. With thousands of assets and tens of thousands of kilometres of networks across Scotland, Scottish Water represents the largest single organisation regulated by SEPA. We hold over 2,500 licences for activities regulated by SEPA and pay £11m annually to them in regulatory charges.

Scottish Water is supportive of the broad principles and objectives of the Regulatory Reform (Scotland) Bill as it provides the basis to deliver risk based, proportionate regulation. Additionally, we welcome the intention to deliver an integrated framework of environmental regulation in an effort to simplify the current regimes and deliver consistent regulation. We also acknowledge a need to broaden the range of regulatory powers at SEPA's disposal, recognising that at present in many cases SEPA may have limited options for enforcement other than to refer incidents for prosecution.

It is our understanding that through this SEPA's regulatory approach will vary according to the risks and actions of operators. There will be strong regulatory enforcement against those that wilfully operate outwith regulation and cause environmental harm, through to supportive work with operators actively seeking to improve their performance. We welcome this approach.

We would though like to have a greater understanding of how some powers in the Bill may be utilised, such as for SEPA to levy monetary penalties and courts to impose publicity orders. We would therefore welcome early sight of the guidance that SEPA would be required to publish on the use of their enhanced enforcement powers.

Specific Comments

Part 1 – Regulatory Functions

Section 4 – Regulator's duty in respect of sustainable economic growth

We support a duty on regulators to exercise their functions in a way that supports sustainable economic growth. In many respects this may be seen as an extension of the public body duty that exists under the Climate Change (Scotland) Act. The three pillars of sustainability (environment, economy and society) need to be considered in an integrated way if we are to protect the environment such that it continues to sustain a healthy society.

Section 6 – Code of Practice Procedures

We are supportive of the development of a Code that is consistent with the principles of Better Regulation and supporting sustainable economic growth. We note that this Bill is intended to take forward key proposals from the previous consultation on a Better Regulation Bill, as well as the proposals for Better Environmental Regulation.

As such, it would be important to confirm the principles of Better Regulation within such a Code of Practice.

Part 2 – Environmental Regulation

Section 10 – Regulations relating to protecting and improving the environment

We would support the broad principles of this element of the Bill. The consolidation of regulatory regimes has the potential to simplify the regulatory approach across regimes. However, we would caution that it is important that in delivering such a consolidated regulatory approach it does not default to the more stringent regulatory regime. A proportionate approach to environmental regulation based on the risk to the environment should be implemented. We would be keen to work further with SEPA to understand how this might apply in the water sector

Sections 13-16 – Fixed and Variable Monetary Penalties

We would like to have a greater understanding of how fixed and variable fines will operate. In terms of fixed monetary penalties, we understand these are primarily targeted at low level environmental crime, but it is important that clarity is provided on the range of activities and offences that may be covered.

For variable monetary penalties we understand these may be targeted at more serious environmental crime, but as above additional information on the circumstances where they may be applied is important. In addition, it must be recognised that transferring the power to fine operators to SEPA carries with it a lower burden of proof than a court sanctioned fine.

Given this, we would welcome early sight of draft guidance that SEPA intends to issue on these enhanced enforcement powers.

Section 22 – Cost Recovery

Whilst we understand and support the polluter pays approach, we have some concerns regarding how the cost recovery element will be implemented. As an operator seeking to adhere to the regulatory requirements, we contribute considerable sums each year to SEPA to enable it to regulate our activities. We would expect this to cover routine investigations into non-compliance and to work with us on other aspects of environmental performance. It will be important to understand the financial and operational framework under which cost recovery would be implemented.

Section 23 – Guidance as to use of enforcement measures

We welcome the intention to issue guidance to SEPA in relation to the exercise of its powers, and would expect consultation with operators to support the development of such guidance. The guidance should seek to clarify issues such as the appropriate enforcement actions, level of monetary penalties and cost recovery.

Chapter 3 - Court Powers

Section 26 – Compensation Orders

Scottish Water wishes to have a better understanding of how these orders may operate in practice. As a national water and wastewater undertaker, Scottish Water has thousands of assets and tens of thousands of kilometres of pipeworks across Scotland. We are concerned that the implications of additional compensatory powers beyond the present system of fines may not be fully understood.

Section 28 – Publicity Orders

As for Compensation Orders, we would expect a clear framework for issuing publicity orders to be developed through further consultation.

Chapter 5 – General Purpose of SEPA

Section38 – General Purpose of SEPA

We support the making of a general purpose for SEPA as laid out in Section 38.

Scottish Water
20 May 2013

SUBMISSION FROM THE SCOTTISH RETAIL CONSORTIUM

About the Scottish Retail Consortium

The Scottish Retail Consortium (SRC) is the lead trade association for retailers operating in Scotland and has been representing the interests of the retail sector since the Scottish Parliament's inception in 1999. The SRC membership accounts for over 80 per cent of the retail sector comprising retailers large and small selling food and non-food and operating on the high street, in rural communities, out of town and online.

The importance of the retail sector to the Scottish economy is clear. In 2010, retail was one of the three largest contributions to services Gross Value Added (GVA), contributing £5.8 billion (10.6%) of total services.[1] Scottish retail sales totalled £28bn in 2012 and over one third of consumer spending goes through shops.[2] The retail sector remains one of the largest private sector employers in Scotland employing around 235,000 people.[3]

The SRC has been invited to provide oral evidence to the Committee on Wednesday 19 June where we will be happy to expand on the key points in this brief submission.

General Comments on Regulation

The SRC supports a consistent and co-ordinated approach to regulation because like the Scottish Government we believe that the regulatory environment must achieve two important aims. First, it must successfully protect individuals, consumers, the environment and businesses. In doing so, regulation can be viewed as necessary and useful for ensuring equivalence across all businesses, removing rogue elements and enforcing competition rules which, in turn, can help promote economic growth.

However, whilst regulation can often be necessary and helpful it can also become costly and onerous where it lacks clarity and consistency. Regulations which may be purposeful and well-meaning in aim may become expensive and burdensome in application. That is why we believe that the second, but not subsidiary, aim of any regulatory environment must be to support businesses to sustainably grow and expand. This often translates into reducing the administrative burdens and costs of doing business.

It is our view that these aims will be best achieved by pursuing the following four key objectives.

A partnership approach on regulatory matters between the public and private sectors

Given the large number of businesses operating across a plethora of sectors and regulated areas there can often be – quite understandably – a lack of understanding and misconception about businesses and their operating procedures. This can result in regulatory authorities pursuing enforcement practices which can be unnecessarily arduous and inefficient.

From the other – business - side, competing authorities with contradictory approaches and advice can often result in businesses either over complying or under

[1] Scottish Government, (2012), *Scottish Annual Business Statistics 2010*
[2] Extrapolated from: Office for National Statistics Retail Sales Index
[3] Office for National Statistics, March 2012

complying, a situation which is perpetuated when there is also little communication or coordination between enforcing authorities. From a retail perspective for instance, there are a number of examples arising from alcohol licensing law, knife licensing, test purchasing, product safety and the recently implemented tobacco display ban.

Many businesses tell us that there is no robust and simple mechanism through which to gain the assurance and clarity when there are so-called legislative "grey areas". There is, of course, guidance but this can also vary in detail and clarity. Guidance is open to interpretation by different regulators and it has no statutory basis through which to provide certainty. There is also little guarantee that a regulator, when discharging its duties, will even observe the guidance.

The view of a number of retail businesses is that the only avenue open to them for establishing clarity and consistency in the way in which the application of a regulation is pursued is by challenging a decision in court and establishing a precedent: a solution which is neither in the interest of the enforcing authority or the business especially given the resources involved and the reputational impact. This is a situation which is particularly frustrating to business and could be ameliorated through better communication and understanding facilitated by a partnership approach, not just between the public and private sectors, but also between enforcing authorities.

A more risk-based, targeted approach to regulation

In the Better Regulation consultation preceding the Regulatory Reform Bill the Scottish Government stated that one key driver in its better regulation policy has been to apply a risk-based approach to regulation. A move towards a risk-based approach has been evident across the UK since the early 1990s with the Hampton Review reiterating its importance in 2005.

The main advantages of risk-based regulation have been widely acknowledged as being three-fold. First, by addressing potential risk and targeting resources on activities and businesses assessed as being higher risk, regulatory authorities can reduce the administrative burden associated with a blanket approach to enforcement. Second, this reduces costs on the regulatory authority and frees up more resources to be targeted against those risk-assessed as likely to be non-compliant which, thirdly, results in a more effective regulatory regime.

Making it easier for businesses to operate across local authority and national boundaries

If we want businesses to sustainably grow and expand then considerations of cross boundary operations, be that across local authority areas or national boundaries, must be central to our discussion on better regulation.

A key consideration for investment by retailers is whether the costs of opening a new store are significantly offset by the benefits achieved. Given the difficult trading and economic environment this cost benefit consideration has become more decisive. Moving into another area can present significant regulatory issues. The more that compliance and enforcement expectations vary between areas the more likely it is that operational costs will increase and the relative benefits of investment will diminish. That is why, in order to promote growth and expansion and incentivise

businesses to operate across administrative boundaries, regulatory authorities should be sympathetic to the advantages of consistency and economies of scale.

Providing more certainty for businesses complying with the law

There are two clear advantages of certainty within a regulatory regime. First, it means that a business can spend less time and resource responding to complaints and preparing defences because it can be sure that it is not breaking the law or an interpretation of how the law should apply. Instead a company can spend more time working proactively to identify best practice and rolling that out across the entire business.

Second, certainty means that a business is less likely to over comply and go beyond what is simply best practice in fear of breaking the law. In terms of retail, this means that a company can use its resources more fully and to better advantage against competitors whilst cognisant of remaining within the regulatory framework. This means that one of the main advantages of regulation – ensuring equivalence across all businesses – is achieved.

Specific Comments on the Regulatory Reform (Scotland) Bill

Part 1: Regulatory Functions

Sections 1 & 2 - Regulations to encourage or improve regulatory consistency

We believe that the provision in the Bill to provide a regulation-making power to encourage or improve consistency in the exercise of regulatory functions, defined as "national standards" in the Better Regulation consultation, will go some way in achieving the aims we delineated above and therefore help to achieve more consistent and co-ordinated regulation. Our reading of the Bill suggests that the provisions under Sections 1 and 2 could lead to a national and consistent approach to a range of regulatory areas including for example: a) application forms for licences; b) timescales for the granting of licences; c) the development of standardised definitions where such a definition would not undermine the autonomy of local decision making, and/or; d) the aims to be achieved by a regulatory function.

It is our view that, depending on how Ministers choose to utilise this power, the Bill could be an important driver for greater consistency in regulatory matters and therefore has the potential to reduce uncertainty and unnecessary deviations and provide greater clarity around what is expected in terms of compliance to both the regulator and the regulated. Ultimately this should reduce the administrative and cost burden on companies, and enforcing authorities, which can then free up more resources to ensure compliance and roll out best practice across the entire business.

Notwithstanding our support for the provisions under Sections 1 and 2 of the Bill we have identified some limitations to this approach in achieving our aims as outlined above.

First, the provisions in the Bill, whilst providing some degree of welcomed consistency would only apply, by definition, at a national level and in those areas decided upon by central government. This would be a government, rather than business-led, solution which would not offer the same degree of flexibility and adaptability across different regulatory areas as, for instance, Primary Authority.

Second, whilst useful for establishing a standardised definition, for example "domestic" or "non-domestic knife", or achieving a standardised approach in, for

example, forms and procedures, it is less clear how the Bill would provide greater assurance of compliance and therefore facilitate more of a risk-based approach to enforcement.

Finally, the Bill is solely concerned with improving consistency and co-ordination *within* devolved regulatory areas and does nothing to create a more consistent and certain regulatory environment where Scottish regulators are charged with enforcing reserved regulation. It also does little to facilitate the promotion of best practice where there are differences across national boundaries. For the overwhelming majority of our members which operate across the entire UK, the way in which Scottish regulatory bodies approach reserved regulation is just as significant as how they approach devolved regulatory matters.

It is for these reasons, whilst supporting the provisions under Part 1 of the Bill we would also support the introduction of Primary Authority arrangements for devolved regulatory matters in Scotland. We believe that the current proposals in the Bill and Primary Authority could co-exist and indeed work to be complimentary in achieving a more consistent, co-ordinated and, crucially, more certain business environment. For instance, where the Bill seems to fail to provide a solution for the inconsistencies experienced on reserved regulatory matters, or the facility for regulators to share best practice across national boundaries, Primary Authority would achieve this. Furthermore, as discussed in more detail below, Primary Authority is a business-led solution which does provide greater assurance of compliance and would better facilitate more of a risk-based approach to enforcement.

The SRC understands that the Scottish Government is to launch a public consultation into proposals for Primary Authority in Scotland and we would support an amendment to the Bill at Stage 2 which would allow businesses to enter Primary Authority partnerships with Scottish local authorities for devolved regulatory matters.

Primary Authority Arrangements

Given the limited space here to develop in any detail a discussion about Primary Authority arrangements the SRC would be happy to provide further detail during oral evidence to the Committee. The Committee is also respectfully directed to the Better Regulation Delivery Office[4] for further information.

Primary Authority is viewed positively by our members (Annex A provides retailer comments on Primary Authority) and other businesses and was introduced by the UK Government under the Regulatory Enforcement and Sanctions Act 2008 to meet many of the same concerns businesses have been identifying in Scotland vis-à-vis an inconsistent, and sometimes arbitrary, approach to the implementation and enforcement of regulation. Although a voluntary scheme, Primary Authority has been successful in attracting businesses large and small to enter a partnership with a local authority (the Primary Authority) in England and Wales. Primary Authority also applies to reserved regulatory matters in Scotland (existing partnerships are detailed in Annex B).

Around 758 businesses are in partnerships with 103 local authorities across the UK.[5] A majority of the partnerships (52%) exist between small and medium-sized (SME)

[4] http://www.bis.gov.uk/brdo
[5] http://www.bis.gov.uk/brdo/primary-authority/about-pa

businesses and a primary authority. The remaining 48% are with large businesses (≥ 250 employees).[6] Businesses which enter such a partnership will commit to working collaboratively and proactively with the Primary Authority and to follow guidance and advice which is drawn up jointly.

To build on the success of Primary Authority the UK Government has extended the scheme by a) allowing more businesses to join by extending the eligibility criteria and, b) strengthening inspections plans. These changes were introduced under the Enterprise and Regulatory Reform Act 2013 which comes into force on 1 October 2013.

There are a number of key advantages of Primary Authority which are both reported by our members and are evidenced through evaluation of the system. The main advantages we have identified of Primary Authority are three-fold.

Fostering a partnership approach and better understanding
All too often a common complaint from business is that those enforcing regulations do not fully understand the operational and technical issues associated with each and every business. A criticism which is understandable given the myriad different businesses and sectors that local authority and other enforcement agencies must deal with. However, through working together to develop assured guidance and inspection plans Primary Authority relies on a more cooperative, partnership approach between business and enforcing authorities.

Creating more consistency and clarity for businesses
Primary Authority deals with inconsistency in enforcement between local authorities and supports a fundamental shift in the way regulators and businesses interact. Through assured guidance and by having a single point of contact which can be used to develop inspection plans and provide advice and support businesses can be confident that they are neither over nor under complying with regulations. Where a conflict arises Primary Authority provides a more robust mechanism. Currently in Scotland there is no robust mechanism which businesses can use to gain clarity where there is regulatory uncertainty on a national scale – or at least across several local authority areas, without going to court and seeking to establish a precedent. Primary Authority partnerships allow retailers to identify and resolve issues at an earlier stage that would impact upon them nationally.

Reducing the administrative burden and costs of regulation
Primary Authority reduces the administrative burden and cost of regulation in three main and important ways: by facilitating a risk-based approach to regulation, creating more certainty and clarity around regulation and reducing the propensity for businesses to seek judicial review of enforcement actions.

Once inspection plans are in place, earned recognition and assured guidance means that blanket and overlapping approaches to enforcement can be abandoned in favour of a targeted and risk-based approach to enforcement. This reduces the compliance costs to business because the proactive and responsible work they are undertaking to comply with the law is recognised and backed up by the PA. This means that the pressure on local authorities, which are being asked to do more with less during this difficult economic period, is reduced because they can focus their

[6] Ibid

resources on those businesses risk assessed as less likely to comply or are less likely to have the resources to set up compliance procedures without help and advice.

Furthermore, businesses can be charged on a cost recovery basis for the services they receive from their Primary Authority. It has been estimated that the Primary Authority scheme delivers net benefits of £19.9m annually to businesses and local authorities.[7] Overall, for every £1 of costs incurred in operating Primary Authority a benefit of £3.60 is generated. The net benefits to business alone are estimated at £12.5m per year. An independent evaluation of the system by RAND Europe found that *"Primary Authority reduced the burden for over one third of businesses complying with local regulation and did not increase the burden on any businesses."*[8]

Sections 4, 5 & 6 – Exercise of regulatory functions: economic duty and code of practice

The SRC supports the principle of placing a requirement on local authorities to focus the attention of locally elected and appointed officials on what they can do, in specific terms, to promote economic and business growth and to reflect on how their actions impact on the better regulation agenda. We therefore support this provision in the Bill.

Notwithstanding this support, we also believe that there is a danger that such a duty, particularly if enshrined in statue, may become intangible unless full and proper guidance is provided by the Scottish Government in partnership with businesses on how this duty should be fulfilled. Furthermore, we would be interested in how a local authority would be assessed in terms of achieving its obligations and what recourse would result if a local authority was found to be failing its duty.

Similarly, the SRC welcomes the provision of a code of practice for the exercising of regulatory functions. We support the principle that regulatory functions should be exercised in a way which is transparent, accountable, proportionate, targeted and consistent. As discussed earlier, there are a number of examples of where these five principles of Better Regulation are not being achieved and if invited the SRC will be pleased to support the Scottish Government in the development of the code.

Scottish Retail Consortium
6 June 2013

[7] BRDO
[8] Scraggs, E., et al., (2011), *Evaluating the Primary Authority*, RAND Europe, Pg. 50

Annex A: Retailer Comments on Primary Authority Partnerships

Marks and Spencer

"Marks & Spencer is supportive of the Primary Authority scheme. In our experience the scheme represents good value for the business and local authorities alike and the relationships are productive for both parties, bringing considerable efficiency into the regulatory regime. An example of when we have found Primary Authorities to be a particularly useful model would be the roll out of our refurbishment programme over the past couple of years. This project has been central to our business plan, and by working with Westminster Council, our Primary Authority for Food Safety and Trading Standards, we were able to agree the technical requirements and processes accompanying the changes, and then apply these to stores across the country. This saved us, and local authorities, time as Westminster took the lead in understanding the detail, meaning other local authorities didn't need to, freeing up their resources, whilst also enabling them to have confidence that the requirements and processes had been discussed and approved."

Tony Ginty, Head of UK & EU Public Affairs, Marks and Spencer

Sainsbury's

"The Primary Authority Inspection Plan is an important element of the PA scheme. It enables very useful information about our business compliance activities to be shared proactively with regulators who are inspecting all our business outlets and therefore helps them better focus their inspection resources where they are most needed. The Inspection Plan enables feedback from inspectors to be channelled back to our Primary Authority and to the business itself, which provides accurate information for us about how our compliance systems are operating. This is an invaluable 'reality check' for us, making sure our systems are working on the ground, for the benefit of employees and consumers alike. As an example, to date our combined food safety / health & safety inspection plan has been used by well over 100 different Local Authorities in our stores with very strong positive feedback, and has been used as a model example by BRDO[9] for other Primary Authority relationships."

Neil Lennox, Head of Safety, Sainsbury's

Home Retail Group (Argos, Homebase, Habitat)

"We were looking at introducing a trade-in deal on video games and then selling on those games that were part exchanged. Section 24 of the Civic Government (Scotland) Act 1982 dealers of second-hand goods meant that in Scotland we required a licence, issued by a local authority. Each local authority is at liberty to approach this how they see fit and there is the immediate risk of different forms, fees, licensing conditions etc. With the complexity created by there being no standard process, or a Scottish PA that could drive a consist approach, we decided against continuing with this initiative."

Paul Downhill, Consumer Affairs Manager, Home Retail Group

Asda

"Prior to the implementation of the tobacco display ban in England, Asda was able to test its display solution with its Primary Authority, West Yorkshire, to ensure it met the regulations and guidance from the UK Government. The Primary Authority

[9] Better Regulation Delivery Office

approved details of our display solution, including our shelf edge labelling and price list, allowing us to roll out our display solution across the entire chain with the confidence that different authorities were unable to challenge our solution. While we believe that our solution meets also Scottish Government expectations, we do not have a Scottish Primary Authority to give the business that assurance, and seeking approval from 32 different trading standards departments in advance of the ban would be unduly onerous."

Polly Jones, Corporate Affairs Manager, Asda

The Co-operative Group

"As a national retailer we find it advantageous to draw up one set of policies and procedures to be used across the business. This makes training easier and allows more rigorous internal enforcement of our policies. To enable this one definitive set of processes and protocols we need the best advice available: assured guidance. Working in partnership with a Primary Authority allows us to ensure that our processes are as effective and water-tight as possible. The feedback we have received from some of the smaller authorities is that our use of Primary Authority helps them to target their resources more effectively. They are satisfied that we have the necessary processes in place and so they are able to focus on identifying retailers which pose greater risks locally."

Liam Hetherington, Trade and Legislation Officer, Co-operative Group

Waitrose

"Having a Primary Authority relationship allows us to meet on a regular basis to discuss issues including our internal test purchasing results for age restricted sales and what action we are taking to improve or deal with any branches with a poor performance. This allows enforcing authorities to concentrate on other more risky retailers with the confidence that we will deal with any issues we may have. It also allows them to concentrate on other areas of risk and enforcement."

Sue Steele, Department Manager Legislation, Waitrose

Scottish Grocers' Federation

"Many of our members operate stores across several Local Authority areas in Scotland. Our members will welcome any measure which will ensure to a greater level of clarity, consistency and assurance for business. We have consistently argued that Primary Authority has the potential to achieve these benefits particularly in relation to reducing compliance costs, developing inspection plans and partnership working between Local Authorities and businesses. Where our members currently have a 'Home Authority' arrangement with Scottish Local Authorities (as several of our key members do), these arrangements work extremely well and have shown us the potential for developing more formalised arrangements across Scotland on the Primary Authority model."

John Drummond, Chief Executive, SGF

Annex B: Existing Primary Authority Partnerships in Scotland

Arnold Clark Automobiles Ltd
Glasgow City
Age-restricted sales, Consumer credit, Explosives licensing, Fair trading, Health and safety, Metrology, Petroleum licensing, Product safety.

Arnold Clark Finance Limited
Glasgow City
Age-restricted sales, Consumer credit, Explosives licensing, Fair trading, Health and safety, Metrology, Petroleum licensing, Product safety.

Arnold Clark Insurance Services Ltd
Glasgow City
Age-restricted sales, Consumer credit, Explosives licensing, Fair trading, Health and safety, Metrology, Petroleum licensing, Product safety.

Boots Management Services Ltd
Highland
Health and safety

GTG Training Ltd
Glasgow City
Age-restricted sales, Consumer credit, Explosives licensing, Fair trading, Health and safety, Metrology, Petroleum licensing, Product safety.

Harry Fairbairn Ltd
Glasgow City
Age-restricted sales, Consumer credit, Explosives licensing, Fair trading, Health and safety, Metrology, Petroleum licensing, Product safety.

Source: Better Regulation Delivery Office[10]

[10] http://www.bis.gov.uk/brdo/primary-authority/primary-authorities

Regulatory Reform (Scotland) Bill: Stage 1

09:31

The Convener: Under item 2, the committee is continuing our scrutiny of the Regulatory Reform (Scotland) Bill at stage 1. We have two panels. On our first panel, I welcome Susan Love, policy manager for Scotland, Federation of Small Businesses; Andy Myles, parliamentary officer, Scottish Environment LINK; David Watt, executive director, Institute of Directors Scotland; and Gareth Williams, head of policy, the Scottish Council for Development and Industry. Good morning, all.

We will go straight to questions, as our time is slightly constrained. As ever, I remind members to keep their questions concise and to the point. Concise responses will help us to get through the broad range of issues that we want to cover in the time available. If members direct their questions to a particular individual, that will help. If anyone on the panel would like to respond to a question that is directed to somebody else, just catch my eye and I will bring you in as best I can.

You will all be familiar with the bill. A number of issues are of interest to members. There is the broad issue of why we need better consistency of regulation and how that will work in practice in relation to local variation; how opt-outs might work; and the duty to promote sustainable economic growth. There are questions about the code of practice; about planning and the proposal to reduce planning fees in the event of poor performance by planning authorities; and about the licensing of mobile food businesses. We will try to cover those questions if we can, as time allows.

The bill is designed to improve regulatory performance. Why is greater consistency needed across Scotland? Can you highlight an example of a particular problem that needs to be addressed? That is a general question. We will start with Susan Love from the FSB.

Susan Love (Federation of Small Businesses): The committee may be aware that the FSB has done quite a lot of work on consistency of regulation. However, most of that work relates to local regulation and local regulatory frameworks, and I appreciate that the bill applies to regulation in the round.

Last year, we published a paper that looked at aspects of local regulation in Scotland and how we felt that it could work better. We highlighted a degree of inconsistency in how certain regulations

are applied, in particular by local authorities—we set that out in our paper.

We included case studies in our written evidence to the committee, to set out how those inconsistencies manifest themselves. That relates largely to processes, procedures and conditions—if they were applied more consistently across the country, it could be simpler for businesses to understand what is required of them. The instances that we have highlighted relate to issues that are not really to do with local circumstances—they are largely to do with custom and practice—so we think that consistency could be achieved and that the bill is a way to achieve it.

The Convener: As you mentioned local circumstances, can you give an example of an area where local circumstances would justify local standards as opposed to national ones?

Susan Love: Sure. We do not suggest in our evidence that the goal should be consistency to the extreme of putting consistency above all the other principles of better regulation. Better regulation is about achieving a balance among the different principles to achieve effective regulation. It is understandable that there are occasions when different approaches are required to achieve a balance between consistent regulation and proportionate regulation.

For example, in liquor licensing, we have highlighted that it is understandable that there could not be a national approach on opening hours, because there will need to be different opening hours and different conditions attached depending on a place's situation and geography. The issues that we have highlighted relate more to procedural matters.

The Convener: That is very helpful.

Andy Myles (Scottish Environment LINK): I agree with a considerable amount of what Susan Love said. I add that consistency is needed not only on local issues but at the national level.

Scottish Environment LINK is very pleased to support the measures in the bill, which we have discussed with the agencies and others as they have been developed, to ensure that there is a consistent playing field for business across environmental regulation. It is important that we all understand that businesses have a level playing field. We are assured that those provisions will mean that the agencies concerned will come down like a ton of bricks on those who create inconsistency by cutting corners and that we will allow businesses that are playing by the rules to carry on, promote the economy and do all the other aspects of their work.

We are very much in favour of such consistency and better regulation. As members will have seen from our written evidence, where we have a problem with the proposals is that we think that there should also be consistency in the law and that there is a danger of serious inconsistency and confusion over the duty in respect of sustainable economic growth.

The Convener: We will come on to that shortly.

David Watt (Institute of Directors Scotland): I agree with the comments made by other witnesses. The key issues for us relate to the implementation of legislation and the promptness of the response to inquiries. That applies across a number of areas.

Obviously, planning is often talked about at length, and we will provide some examples on that later, but consistency and the speed of response from agencies are also issues in other areas. As you asked for specific examples, I will give you an example of a builder who cannot develop a building site on which 50 houses are planned to be built, because Scottish Water and the Scottish Environment Protection Agency cannot decide what the best form of drainage is. That sort of delay does not help anybody; delay means costs. Even when planning permission and everything else have been agreed to allow the project to go ahead, that fairly sizeable technical delay is causing problems. That example is of a real case, but such delays are not unknown and have happened more than once.

We consider that to be a high priority; I will come back to sustainable economic growth. The issue is consistency—it is important that businesses know exactly where they stand. The bill could help to address that, although we are never very keen on legislation as a whole. If ministers are empowered to ensure that bodies sing from the same hymn sheet and act more promptly, that will be a step in the right direction.

Gareth Williams (Scottish Council for Development and Industry): As an organisation that represents not only businesses but regulators, we recognise the benefits of greater consistency for both. We welcome the changes that have been made to the bill since the initial consultation. We had concerns about the imposition of inflexible national standards and we think that the bill now takes into account some of those concerns.

The FSB's submission highlights a number of specific examples. When we sought evidence from our members, it seemed as though many of the concerns were more at the scale of small and medium-sized enterprises. We tend to represent larger businesses, although not exclusively so, and the concern that they raise most frequently is to do with the planning system, as David Watt highlighted.

The Convener: We will come on to that in due course. That was just a softball to warm you up—now we will get into the hard stuff. I will bring in Chic Brodie.

Chic Brodie (South Scotland) (SNP): I am not sure whether that is appropriate, convener.

I will challenge the notion of consistency. We all agree that there needs to be consistency, yet we have talked about local variations. Where do we draw the line between the two?

The Convener: Who is that question to?

Chic Brodie: It is to all the witnesses.

The Convener: Start with someone, then.

Chic Brodie: I will start with Susan Love.

Susan Love: It is inconceivable that we could achieve national standards without a collaborative approach. The examples that we have given of where there could be national standards concern issues on which we envisage the regulators, the regulated, the Government and local government sitting down together to agree the balance.

Chic Brodie: We have tried that and it has not happened, has it?

Susan Love: I do not think that we have tried it.

Chic Brodie: So you believe that there is anarchy out there in how local authorities and other bodies interpret regulations.

Susan Love: No. At the moment, the local implementation of regulations has a presumption in favour of a principle being passed by the Scottish Parliament and then all the details being more or less left up to the local authority to determine. There is a limited number of examples of discussion taking place between the Scottish Government and local authorities to attempt to agree on more consistency in how primary legislation is implemented. As we set out in our submission, in most cases implementation is left up to each local authority. A sensible way forward would be to have a process that compelled everyone to sit down and agree on which parts of the implementation process they could all do in the same way and which parts should be left up to local discretion.

Andy Myles: On consistency, I speak up for the system as it stands. The level of consistency in our planning and regulatory systems is relatively good. It could be improved but, if we improve it, developers will still say that there is inconsistency. Inconsistency rather depends on where we start from. A developer will tell you—

Chic Brodie: I am sorry to interrupt, but are you telling me that you believe that, in the current system, there is consistency in approach even between neighbouring councils on, for example, wind farms?

Andy Myles: No, I am not suggesting that at all; I am suggesting that there is relative consistency. I was going to go on to say that, if a renewable energy developer is developing an in-stream hydro generation product and there happen to be freshwater pearl mussels in the river where the development is to take place, the approach might not be consistent with that to the river in the next glen, which does not have freshwater pearl mussels. A businessman or businesswoman would be likely to be aggrieved because there would be an inconsistency in the system.

I am suggesting that a great deal of the points that we hear about inconsistency are in fact caused by the facts of the matter and where the developments are. I will not join my colleagues on the panel in saying simply that we have the most terribly inconsistent system. There are glitches but, however much the committee improves the system, people will still come to members to tell them about inconsistencies. That is a moveable feast.

09:45

Chic Brodie: Surely the whole point of having meaningful regulation is to minimise the confusion in the system, which currently leads to inconsistency about issues such as dealing with pearl mussels, which were discussed yesterday in the chamber.

The way that I see it is that you are trying to have it two ways. You are saying that the system almost works, although there are some inconsistencies, and that there is therefore no need to regulate. Is that what you are saying?

Andy Myles: No. I am in favour of regulation, particularly environmental regulation to protect freshwater pearl mussels. However, the regulation is not consistently applied to every stream in Scotland.

David Watt: I well understand the need for local democratic input into choices and decisions that are made, and it is perfectly understandable that something might be seen as being more suitable for one area of Scotland than another. I can best illustrate the point by giving an example.

A significant hotel development company had two meetings in one day in two cities that shall remain nameless for the purposes of this discussion, but which are not far apart. The meetings concerned a proposal to build a 200-bedroom hotel. At one meeting, the company was told, “We are delighted to have you here. We are here to see how we can do this as quickly as possible and in a way that is as suitable as

possible for you and for us." At the other meeting, the company was told, "Oh, I don't know if we can do that. It may be 18 months before we can even talk about it." That is not a consistent approach, and that lack of consistency is not good for Scotland or for either of those cities—it puts people off. That is a factual case. I can give members the details off the record.

Another point is that there appear to have been more planning call-ins to ministers. That might suggest—following on from the point that Chic Brodie just made—that there is a bit less consistency in the system, which means that developers are not sure what they will face when they try to develop in various areas of Scotland.

Chic Brodie: I suspect that I know what your answer will be to my next question, Mr Watt, but it will be interesting to hear the reactions of the other members of the panel. In the panoply of what we are trying to achieve, where do you put economic growth versus economic development, or sustainable growth versus sustainable development, in any planning decision?

David Watt: Truthfully, in life and in business, I would that say I am visionary. We absolutely must drive forward. I must say that I find some of the debate that is going on to be quite arcane. We need to have a clear vision that Scotland needs sustainable economic growth. I am happy to discuss the semantics of the word "sustainable", but I am not sure whether that will get us far.

My members—1,700 of them in businesses across Scotland, large and small—are working 24/7 to grow businesses that will bring money to this country, to their communities and to their employees. The people in this building, the Government and the Government's agencies should work with them to do that. That is the number 1 thing that can be done for the benefit of this country and for employees and their children. To be blunt, politicians can decide how to spend money—that is how the system works—but we need to earn the money first.

I am not suggesting that businesses should be able to earn that money in an unrestrained way. I understand that some regulation is needed, because some people will otherwise bend the rules, to put it mildly. However, the fundamental thing is that, if our members do not have the opportunity to make the money, we do not have it to spend. Therefore, we are all going in the same direction. Surely everyone in this building and this country must believe that. What annoys me about the debate is that some people do not appear to realise that.

We can fine tune the wording that we use, but we must focus on what I described, from which we all benefit. How the benefits are shared out is for you guys to decide, not me. It is for me to help my members to work with you to create the wealth, which you can decide how to allocate to members of our society. The situation is not very complicated. That is where we are trying to go.

Chic Brodie: I have some sympathy with that view.

Gareth Williams: On national standards, we seek a change in emphasis. There should be a presumption for national standards but, when evidence can be put forward in favour of local flexibility, that should be available.

Our remit is to do with promoting sustainable economic growth, so we welcome the proposed duty. I think that it makes sense, given the Government's overarching purpose for public services.

I agree with much of what David Watt said. I simply add that, like many economies in the western world, we in Scotland have over the past 10 to 15 years had economic growth rates that have been very low, historically. We are still in that position. A number of long-term spending commitments and entitlements have been based on growing the economy so, if we want to be able to afford them, we need economic growth. That is one reason why we believe that that needs to be emphasised across a range of Government functions.

Chic Brodie: So you believe that we need to have sustainable economic growth—if anyone wants a definition of that, I have several—to underpin things such as sustainable development. Is that what you are saying?

Gareth Williams: Some people's interpretation of sustainable development perhaps emphasises the sustainability of a given project. When we talk about sustainable economic growth, we can look at the totality of a range of developments and how each contributes to meeting longer-term targets. The inclusion in the bill of a duty on sustainable economic growth is important because it will change the emphasis not at the top level in regulators; it will give a signal throughout regulators that supporting sustainable economic growth is a priority for the Government. It could change the relationships that regulators have with businesses.

Chic Brodie: Does Mr Myles agree?

Andy Myles: I am not quite sure that I understand what I am being asked to agree with.

Chic Brodie: Well, let me try to help you. Where does the priority lie in regulation when it comes to sustainable economic growth versus sustainable development?

Andy Myles: I see sustainable economic growth as a subset of sustainable development; I do not think that they are different things.

Chic Brodie: So we disagree.

Andy Myles: We disagree.

Chic Brodie: Thank you.

Dennis Robertson (Aberdeenshire West) (SNP): I have a question for Mr Myles. Is there a conflict between environmental issues and sustainable economic growth, or are you content that the reform that the bill proposes meets your objectives?

Andy Myles: When it comes down to it, fundamentally, members of Environment LINK will follow the scientific evidence. It is a fundamental ecological principle that every species exploits its environment. If a species exploits its environment sustainably, it will survive and thrive, but if it exploits its environment unsustainably, it will be on the way to the exit—to extinction. That applies to the human species as much as it applies to any other species.

Our belief in sustainable development follows from discussions that have taken place at global level and in the European Union, United Kingdom and Scots law contexts. A long and distinguished scientific background says that our development—whether economic, social or environmental—should be sustainable and that we should not drive ourselves over the cliff of climate change, for example, or any of the other environmental disasters that we might press ourselves towards through the blind pursuit of economic growth.

I am not saying that the environment movement opposes economic growth, because it does not, but it definitely opposes unsustainable economic growth. Distinctions need to be made and regulators need to be present to ensure that, alongside the sustainable economic growth, we fight unsustainable economic growth and maintain the balance with the social and environmental developments that we need if we are to maintain a state of sustainability.

Dennis Robertson: That was a long answer, but I am not quite sure whether you told me whether the regulatory reform meets your objectives.

Andy Myles: Do you mean the regulatory reform that is proposed?

Dennis Robertson: Yes.

Andy Myles: The regulatory reform in the bill would meet our objectives very nicely but for the duty in respect of sustainable economic growth.

Dennis Robertson: I think that the first part of your answer was fine. [*Laughter*.]

The Convener: As we have moved on to the issue of sustainable economic growth, I will bring in a couple of other members who want to ask about it, starting with Alison Johnstone.

Alison Johnstone (Lothian) (Green): Good morning, panel. In the evidence that we have taken over the past few weeks, we have heard from the Scottish Trades Union Congress, which believes that the bill is not necessary, and Scottish Natural Heritage, which believes that the imposition of a duty to promote sustainable economic growth will not affect what it does at all and will not make any difference. We have had some debate about whether the duty is necessary. I know that Scottish Environment LINK strongly opposes the introduction of such a duty and that the SCDI cautiously welcomes it, stating:

> "As sustainable economic growth is not defined within the legislation, duties of 'the same effect' are open to interpretation."

How do you see the economic duty sitting alongside other core functions and duties that are already placed on regulators?

Andy Myles: I will try to follow the issue through and say what will happen if you pass the bill with the duty in respect of sustainable economic growth. First, good relationships have been building up between environment and conservation groups and others at local and national level across many years. Many of our members have worked with many developers on many projects to ensure that problems are ironed out, and we have worked with the regulators and Government officials to ensure that developments can go ahead smoothly. We are interested in continuing that process rather than creating any bad blood between us and developers. We are not in the business of dashing into conflict at the first opportunity. We understand the need for economic development along with other development.

The second practical point is this. You might have noticed that, in the evidence that we presented, we included a flow chart on what might happen. Duties in relation to sustainable development are already placed on all the regulators. They come from a clear background of international law and are already in EU law, UK law and Scottish law. However, sustainable economic growth has no connection with international law.

We could go into all the arguments about what "sustainable" means, which are sometimes called semantic arguments, although I believe that they are fundamental. However, the danger of the proposed statutory duty is that different parts of the Scottish community will have different perceptions of the law. That will end up in the courts. If developers think, "We're trying to promote economic growth, but we're not getting it

because an environmental protection agency is trying to protect the environment," the tendency will be for them to take the matter and challenge it in court. If an environmental group sees an economic development that it believes is unsustainable, it will say, "The developer has a duty of sustainable development," and it will take the developer to court. Either way, we will end up with the courts deciding, and the courts in Scotland have a reputation for not taking a decision on the substance but merely deciding on the merits.

We do not know what will come out at the end of the process. The one thing that I would suggest is that, at a practical level, you will end up without the clarity that businesses and environmental groups need. You will pass a law that is confused and unclear. That is the danger at a practical level: that instead of decreasing conflict in the system of business developing the economy and environmentalists trying to protect the environment, we in fact will have created less clarity and more chance for conflict. I would not like to see that, neither would the members of Environment LINK.

10:00

Alison Johnstone: May I ask the same question of Mr Williams?

Gareth Williams: I agree with Andy Myles about the positive relationships that have been developed at a local level between businesses and environmental groups. That has facilitated developments in a better way than would otherwise have happened. In our written evidence, we raised concerns about how the duty would be applied and about the definition. I understand that the minister has sought to provide information on how sustainable economic growth will be defined. We commented on the need to ensure that the duty does not undermine the regulator's statutory objectives or the principles of regulation.

The point that I was trying to make earlier was that, in recent years, we have seen SEPA and SNH work more closely with business and play a more positive role as new industries have emerged. They have encouraged innovation.

We recognise the positive role that regulation can have in the economy. Our members still raise concerns, however, about how regulations are applied at a more operational level. Andy Myles would say that that will depend on practices by businesses. Our members say to us that they have challenges because of regulators; that is why we believe that this new duty could have a positive effect and encourage the growth that we need.

Andy Myles: I want to add a point to my answer to Alison Johnstone.

I would hate it to be thought that this is just the environmental organisations coming along and having a wee greet on this issue. I think that you will find that the argument that I am making about the consistency and clarity of the law is substantially backed by the Law Society of Scotland and the UK Environmental Law Association in their submissions, which I have seen from the Rural Affairs, Climate Change and Environment Committee—I do not know whether they were also submitted to this committee.

Alison Johnstone: We heard earlier about the example of the hydro scheme and the freshwater pearl mussel. In a case like that, how would compliance with the duty be monitored and failure to comply addressed? If there is a case where a developer feels that something is not being allowed because there is a particularly important species in that area, how will the regulator's performance be monitored, by whom will it be monitored, and how will any concerns be addressed?

Andy Myles: Apart from anything else, it is Parliament's job to scrutinise and monitor the regulators as agencies of Government, so I hope that this committee and the other committees of Parliament will be able to scrutinise the performance.

On the freshwater pearl mussel, it is not always a case, for instance, of a hydro scheme coming along and wrecking the pearl mussel. In Mary Scanlon's parliamentary debate a few weeks ago, she highlighted the case of a Scottish distillery that worked in conjunction with academics and an environmental non-governmental organisation and, because of a freshwater pearl mussel colony in the river, redirected the outflow from a new distillery that was planned. That distillery is now going ahead and will call its whisky "the pearl of Speyside". That is an example of making the quality of our environment a feature in promoting sustainable economic growth, because the development took account of what biodiversity was present.

The environment is not a block on business or development. Vast amounts of our economy depend on the quality of our environment and its sustainable development, and I just hope that, in scrutinising agencies and in their work over the short, medium and long term, MSPs remember that the environment is where we all live, work and attempt to make our livelihood.

Mike MacKenzie (Highlands and Islands) (SNP): Mr Myles's reading of the bill makes me very curious. I would have thought that he would welcome those aspects that seek to free up resources for environmental regulators, take them away from some of the petty things and allow them to deal with the bigger problems that they

seem incapable of dealing with at the moment. As an illustration of that, my mailbox invariably gets filled up with communications from very small businesses that—to use Mr Myles's metaphor—get a ton of bricks falling on their heads for very minor infringements; equally, members of the public write to me about big organisations that seem to be able to pollute the environment with impunity and about regulators lacking the teeth or resources to deal with them. Do you not welcome the bill's refocusing of resources as a better way of protecting the environment?

Andy Myles: Yes—and we have done so in our written evidence and the work that we have done with SEPA and elsewhere. We are very much in favour of better regulation. After all, we believe in environmental regulation and want it to be as good as possible. If that means working with and assisting business to ensure that it flows in the right direction and that firms observe environmental regulations and follow the law perfectly, that is fine. As I said in my opening statement, agencies can then come down on the other businesses.

Mike MacKenzie: We have a lot of business to get through this morning, Mr Myles, and your first word—yes—answered my question.

Do you not accept that, sometimes and for the best of intentions, regulation can overlap and that businesses can be stuck in a difficult place between one regulator saying, "You have to do A," and another saying, "You have to do B," and can find themselves unable to proceed because of a lack of clarity? Do you not welcome the aspects of the bill that seek to deal with that situation? Do you understand their frustration?

Andy Myles: Yes, because our members can find themselves in the same situation. One agency will tell them one thing about a European regulation or piece of legislation and another will tell them something else. As I have already said, I am totally in favour of dealing with that lack of clarity, but that does not mean that I am in favour of a sustainable economic growth duty.

Mike MacKenzie: You said earlier that you thought that a sustainable development duty would be all right, but not a sustainable growth duty, but I have to say that I am struggling to think of a practical application to illustrate the principle that you are talking about. We could argue the theory and semantics of this for weeks but, as Mr Watt said, we would be no better off and it might help us to understand what you mean if you were able to give a practical example to illustrate the point.

Andy Myles: I thought that I had already given you a very practical example. There was an unsustainable development that destroyed a freshwater pearl mussel colony in Glen Lyon and there is another that is producing sustainable economic growth. I think that that is a fairly practical example of exactly what I am talking about.

Mike MacKenzie: I am struggling with that example because, as I understand it, the freshwater mussel has been protected for a long time by legislation. The fact that people might break the law does not seem to take the case that you are trying to make forward. Unfortunately, people will on occasion break the law, but I do not see how that impacts on the bill, because its focus is to free up the regulators so that they can provide resources where it really matters, such as in protecting the freshwater mussel.

Andy Myles: I am struggling to understand whether we are dealing with the bill as a whole or with parts of the bill. In general, Environment LINK is perfectly happy with the bill and has been involved in its development and discussions on it. We are not here to oppose the bill, although you seem to be saying that we are opposed to it.

Mike MacKenzie: No—I am suggesting that you perhaps misunderstand the point and effect of the bill. I take you back to the question that I asked. The freshwater mussel does not illustrate the point at all well, as it has been protected by legislation for a long time. If the regulators are not doing or cannot do their job, that is a separate issue. I asked you to give me a specific example that illustrates the point that the application of the principle of sustainable economic growth, rather than the principle of sustainable development, leads to a problem. Give me a concrete example of where the problem lies.

Andy Myles: I am sorry, but I fail to understand. Could you explain why there is a difference between the two? I have said clearly that, from our point of view, the key word is "sustainable". I have made a distinction in saying that sustainable economic growth is a subset of sustainable development, but without separating them into two opposing things. You seem to believe in that, but I do not. I thought that the exchange with Mr Brodie in which, in effect, we agreed to disagree had said that. The same applies here—we will just have to agree to disagree. We believe that there is unsustainable growth, and the Parliament has already passed legislation saying that it is against unsustainable growth.

Mike MacKenzie: We are possibly talking at cross-purposes. I have a final question on the point, because it is important that we get the issue correct. Are you suggesting that you have no problem with sustainable economic growth?

Andy Myles: I would not say that. We have no problem with the idea of sustainable economic

growth, but that is not the same as putting a duty in the bill. The distinction that I make is that, with the duty of sustainable development, which has been put into law by the Parliament in other bills and is in the foundational duties for many regulators including SNH and SEPA, the sustainable development that is talked about is developed from the Brundtland commission, the Rio de Janeiro treaty and down the line of international law—

Mike MacKenzie: Sorry, Mr Myles, but I think that you are making the point about a legal definition. You have made that point already.

Andy Myles: No, that is not the point that I am trying to make.

Mike MacKenzie: Okay—sorry.

Andy Myles: The point is that sustainability is about ensuring that, when we consider such matters, we look at economic, social and environmental development together and that, within reasonable terms, there is a balance between them. If we start saying that one bit of sustainable development—economic development—is the most important bit because, for example, we are in the middle of an economic crisis, unfortunately, that is trying to divide up a concept that cannot be divided. It is not divisible. Sustainable development means achieving balance, and that cannot be done by imposing imbalance.

Mike MacKenzie: I am sorry, but you will have to help me out here. Can you point to the part of the bill where there is a suggestion that there will be greater emphasis on any part of the term or that the word "sustainable" is to be discarded in future?

Andy Myles: No, but by saying "sustainable economic growth" you are saying that economic growth is somehow more important. If I told you that, to balance that up within the concept of sustainable development, you had to take all the legislation for Highlands and Islands Enterprise, Scottish Enterprise and Scottish Development International and give those bodies, on top of their existing duties, a specific duty to respect environmental limits, that would be the equivalent of what you are doing in imposing a duty in respect of sustainable economic growth on the environmental agencies without reference to the duties in respect of sustainable development.

10:15

Mike MacKenzie: Thank you very much. You have more than answered the question.

The Convener: Before we leave this point, I will ask Susan Love and David Watt about it, because they have been quiet. In its written submission, the Federation of Small Businesses welcomed the duty to promote sustainable economic growth. Is that correct?

Susan Love: Yes.

The Convener: What is the IOD's position?

David Watt: We very much welcome it. I am at a bit of a loss to say why anybody would be against it. That is another issue and perhaps a separate discussion.

To go back to the point that was made about vision and focus, putting the term in the bill focuses people's attention on sustainable economic growth. It is fine to say that we are all focused on it. However, in truth, I am not convinced that local authorities are. If we look at our town centres and ask whether the town centre has been the focus over the past 25 or 30 years, the answer is that it has not. Is it the focus in the City of Edinburgh Council when it puts my parking charges up by 80 per cent every so often? That is not sustainable economic growth. It does not help the shops in John Street. There are some issues there.

The Convener: Do we need a definition of sustainable economic growth?

David Watt: Personally, I would prefer not to have one. However, I agree with Mr Myles that there is a possibility that we could end up in court if we do not have one. We could sit here and discuss the word "sustainable"—we have already started—and the difference between growth and development all the time. To be blunt, the term is self-explanatory: it is sustainable, it is economic and it is growth. It is pretty simple to me, but perhaps I am just pretty simple.

Susan Love: Reflecting on the conversations that have taken place about it, I am not convinced that the definition of sustainable economic growth is really the problem. There are various definitions floating around, but they more or less equate to the same principles. The difficulty is the parameters within which the duty will apply, regardless of the definition. Will it apply at a strategic level? Is it about regulators having the correct procedures and processes in place to demonstrate that they are complying with the principles of better regulation and, therefore, contributing to a supportive business environment, or is it about individual operational decisions that could be challenged if they are felt to go against the definition that is agreed for sustainable economic growth? I am not sure that a definition takes us much further forward. The debate is about the parameters of the duty and the extent to which the code of practice will sort those out and reach a suitable conclusion. I agree that there are concerns about that.

Marco Biagi (Edinburgh Central) (SNP): To follow up on that reference to operational decisions, one of the examples that were given about where there might be such a challenge was an instance in which a supermarket development was refused and the company was able to argue that the decision was against the principle of sustainable economic growth because the development would create jobs. Do you have any concerns that smaller businesses might not have the same ability as larger businesses, which have generally been better at fighting their corner on regulation, to challenge such decisions or take them to court?

Susan Love: I agree that, if the parameters within which the duty applies are not clarified and there is any uncertainty in law, it might be an unintended consequence that larger companies with deeper pockets will use the duty to challenge decisions. However, I come back to the point that it is about the parameters within which the duty applies. I envisage that the planning authority would have to demonstrate that the correct balance had been struck and that it had put in place procedures to consider the economic impact. I do not think that there is any suggestion that the duty means agreeing to any economic growth and any jobs at any cost.

Margaret McDougall (West Scotland) (Lab): There is provision for opt-out in the bill, but the criteria are not clear. Do the witnesses think that there is sufficient information on opt-out in the bill?

Susan Love: It is not clear in the bill, but my understanding is that that will be worked out as part of the code of practice with the group that has been set up to discuss that. In the discussions on how this will work, it has been envisaged that the opt-out would be for situations where there is a clear local circumstance that requires a different approach. Again, how that is defined will be up for discussion, but it comes back to the issues that we spoke about before; for instance, there could be an opt-out if something was particularly related to a particular place or community and a different approach was clearly required. Certainly, in the scenarios that we have envisaged, it is fairly easy to see where an opt-out would be asked for and where it might be granted.

The Convener: Do not feel that you have to contribute unless there is anything in particular that you want to say. Andy Myles?

Andy Myles: Environment LINK would not be particularly keen to see an opt-out in the code of practice.

On a more practical level, following on from the discussion and from the question, one question has to be asked. Would it not be better if clear direction could be given to the regulators in the grant in aid letters rather than by putting it into law? As I understand it, the clear political direction on the need for economic growth and the need to take into account local circumstances could quite easily be put in the text of a grant in aid letter, so there are alternatives to creating this whole challengeable structure within the law of Scotland.

Margaret McDougall: If Scottish ministers are setting the regulations and also deciding where there should be exemptions from them, is there a potential conflict of interest?

Susan Love: Coming back to how we hope the bill can be used in relation to local regulation, I think that Parliament has tended not to take a view on the kind of matters on which an opt-out would be granted, so I am not sure that there would be a conflict for Scottish ministers if they were making a judgment on an opt-out. Again, it is my hope that it would be a collaborative process.

The Convener: On a couple of technical matters, section 1 has provisions about compliance with and enforcement of regulations. Does anyone have any concerns about that?

Also, does anyone have any concerns about the code of practice on regulatory functions and procedure to be followed in issuing the code—for example, about the level of consultation—or are you all quite happy with that?

Andy Myles: On behalf of Environment LINK, I expressed concerns to the Rural Affairs, Climate Change and Environment Committee that various caps were being put on penalties and that those were questionable. I refer this committee to the detailed evidence that I gave to that committee.

The Convener: Okay, thanks. Are there any concerns about the code of practice?

Susan Love: Various aspects of it are unclear at the moment, but a process is set up to determine what it will look like. We certainly have our view on what we hope the code of practice will contain and what it will achieve, but we are happy with what is set out. However, if others feel that the consultation is not wide enough as set out in the bill, we are quite happy for that to be looked at.

Andy Myles: It is difficult to make any comment on the code of practice without seeing a draft of it, and it must be difficult to create legislation on the matter without seeing the code of practice first.

Chic Brodie: On that point, I understand what you are saying, but I think that the question is the principle. Some might say that collaboration is difficult because the code of practice, which the minister will issue, will ask regulators to comply with certain practices. Do you disagree with the principle?

Andy Myles: Of the code of practice?

Chic Brodie: Yes.

Andy Myles: No.

The Convener: We have heard a lot of evidence so far on planning fees, and particularly the proposal to, in effect, penalise poorly performing planning authorities by reducing the planning fees that they can charge. Margaret McDougall was going to ask about that, I think.

Margaret McDougall: I wanted to get the panel's views on whether the proposal to sanction underperforming planning authorities is a good idea. I know that you commented on that in your submissions, but it would be useful to have your views on the record. Also, how would you define unsatisfactory performance?

David Watt: I have been unusually quiet, so I will jump in first.

I welcome the penalising of poor performance. The number 1 problem that people come to speak to me about is still the banks, but pretty close behind that is planning—I suspect that MSPs hear about it a lot as well—and the number 1 problem with planning is delay. There is sometimes confusion about the interpretation of regulations and so on, but delay is the biggest issue. People would rather hear an early, "No,"—although they might have a problem with that—than hear, "Oh, it might be okay," as that means that they are unsure about what will happen, which can be frustrating.

Inconsistencies are frustrating for developers who seek to develop in various parts of Scotland—I mentioned the example of the 200-bedroom hotel earlier. Obviously, there are local variations—different staffing levels or opposing political views on councils—but there should not be a massive difference between areas. That is not acceptable and it is not good for the whole country. Therefore, I am very much in favour of penalising poorly performing planning authorities.

Planning is still a big issue. The previous planning bill began to change the culture, but I feel that planning departments still do not feel that they are part of the effort to develop the country through sustainable economic growth. They are not there to constrict the country; they are there to develop the country in a sensible and sustainable way, and to do so as quickly as they can, in a positive way.

Margaret McDougall: Would you define an effectively performing planning authority as one that processes applications quickly, rather than one that emphasises the quality of the process?

David Watt: Quality is quite hard to judge. I work in this city now and I cringe when I look at some of the buildings that have been approved in the past. Quality is hard to define in retrospect, when you actually look at physical buildings. I am not quite sure who would be the judge of quality. The time that is taken, however, is an absolutely key factor.

I am not suggesting that we rush through bad decisions. However, when a development is proposed, we should ask how we can do it, not whether we can do it. If we decide that we cannot go ahead with the development because it breaks the rules and regulations, damages the environment or is not going to be worth while, we should make that decision early on, or should move the development to another location that might be more suitable. That is fine. However, we should approach the proposal in a positive and timeous way, because business loses interest when there are delays.

We could sit here all day talking about delays in the process, but you do not need me to tell you about them. I am sure that you get complaints about them all the time. If you do not, I will start sending you some.

Andy Myles: I agree with David Watt that there is a problem here. If there is differential performance between planning authorities, that is not just a problem for developers; it is a problem for everyone. Some planning authorities are very good and some are less good.

In our submission, we suggested that we are not sure that the evidence suggests that imposing fines and taking money away from the poorly performing planning authorities will solve the problem. Indeed, it might add to the problem by causing corner cutting.

Environment LINK supported the single outcome agreements that the Scottish National Party Government introduced several years ago, which are negotiated regularly between the Government and each local authority. They might be a much better mechanism for improving performance than putting into law—through the bill—a provision that is more clunky and legal than it is administrative and admonitory. The process of Government and local authorities working together to improve their performance is more likely to work than is using a mechanism that might have consequences that are unforeseen or which make the problem even worse.

10:30

Gareth Williams: This is the area of the bill that we have most concern about. We warmly welcome the principle of linking fees with performance, but we are concerned that what is proposed is a bit of a blunt instrument. We would prefer it if there was a link between certain milestones being achieved through the process and overall customer satisfaction. Our concern

with reductions in planning fees is that that would reinforce a cycle of underperformance, which would have negative consequences for the areas in question.

We are also concerned about how the provision would be applied. The time that is taken to reach decisions is an extremely important aspect, but it is not the only one. It is more of an output than an outcome, and we want the right outcome in the planning system. We are conscious that how long such processes take is not simply in local authorities' hands so, on the face of it, it would be unfair to penalise local authorities for every delay.

In addition, we worry that emphasising the time that is taken might reduce the resources that are devoted to other areas, such as the pre-application process, which is very important for business and can lead to developments that are better from both perspectives. Some other areas of the planning system might be deprioritised as a result of not being covered by the proposed change.

Susan Love: I completely concur with what Gareth Williams has said.

The Convener: Mike MacKenzie has a brief supplementary.

Mike MacKenzie: I am concerned about a number of misapprehensions. From my reading of the bill, my understanding is that the framework for monitoring the performance of planning authorities is the planning performance framework that has been drawn up by Heads of Planning Scotland; it has not been drawn up by the Government. Time is one aspect of that.

I am interested to hear what Susan Love has to say, because the FSB's submission makes the very important point that small businesses are often rooted in their communities, which means that they are not in the position of bigger developers who want to build wind turbines or whatever, who can look around the whole country to see where they might do that. Because small businesses tend to be rooted in their communities, they do not have that choice.

Susan, I note that you suggest that although you might not be dead against it, you are a wee bit unsure about using the stick of a reduction in planning fees to improve a badly performing planning authority. How do you suggest that we should tackle the problem? When we look at the first national report on planning performance, it is evident that although there are some good planning authorities, there are undoubtedly some that are very bad. How could we tackle that?

Susan Love: I wish I had a great answer to the planning problems. The type of things that we would regard as being good-quality planning for small businesses are recognising small business applications, recognising the additional consultation and checking that might be required at early application stage, and recognising the specific financial constraints that a small business might have, with regard to delays between planning permission and construction. Those things tend to be about culture and processes, and we are not sure that they will be assisted by penalising the authority in which a business is based. We just do not see the connection—how reducing an authority's fees will bring about the changes that we would like to see. I do not have a magic answer to how to do it, but we are not convinced that doing that is the answer.

Mike MacKenzie: David Watt made a very good point about town centres, where regulators have not adapted sufficiently quickly to changing economic trends or circumstances. Would flexibility in the planning system allow the kind of adaptation that is required to keep pace with economic times?

The Convener: I am not sure that that is relevant to the provisions of the bill.

Mike MacKenzie: It is pertinent to the general discussion, convener.

The Convener: I am afraid that we do not have time for a general discussion.

Mike MacKenzie: Okay.

The Convener: Does anybody want to make another specific point on reducing fees and the impact that that might have on local authorities?

David Watt: Although I understand some of my colleagues' reservations, I have not seen any other impetus that has produced the goods in certain situations. This is a massive business frustration, and that should not be underestimated. Not only that: I cannot quote specific examples, but I have heard of a number of cases of certain areas in Scotland losing businesses and employment because of the slowness of planning. We cannot accept that the situation is okay—it is not okay and it must improve. I can understand the reservations about saying that cost is the only factor, but it is a factor and it is not unfair to say that some local authorities have looked at fees on that front, as an income earner. There are issues around that.

Reducing fees is probably quite a sensible step. It might not solve the whole problem, but it is a step in the right direction. We should not underestimate the crucial importance of improving the process. It is simply not good enough at the moment.

Dennis Robertson: This is probably a fairly straightforward question, and I will start with Susan Love. A proposal in the bill would allow the

issuing of a single certificate, which would let mobile food traders move from authority to authority. Do you agree with that proposal or do you have any concerns about it?

Susan Love: I completely agree with it. It is a sensible solution that has been worked out after a problem was reported to the regulatory review group. It is a sensible solution that highlights the kinds of problems that exist and how we need to tackle them.

I am aware that others have had concerns about the need to continue to enable inspections in whichever area businesses operate; that issue is completely understood and no one has ever argued against it.

Dennis Robertson: In principle, you are saying "Absolutely," and that local inspection of food hygiene is probably still an essential factor.

Susan Love: Yes, and I do not think that anyone has disagreed with that.

Dennis Robertson: Does anyone else have any comments on that? No. That is fine.

The Convener: I would like to ask Andy Myles about section 40, which is on marine licence applications. In its written submission, Scottish Environment LINK raises some concerns about marine licensing, in particular the question of the appeals process and the legal framework around that. Will you say briefly what your concern is?

Andy Myles: The concern is that we are getting another ad hoc solution, piled on top of an ad hoc solution. What we really need is a more comprehensive solution.

We believe that there will be consultation on the possibility of an environmental tribunal or court or at least changes to the system to allow for a comprehensive solution to environmental law that would give everyone more clarity.

Section 40 amends the Marine (Scotland) Act 2010. It turned out that, because Marine Scotland was not an entity separate from Government ministers, ministers would be hearing appeals against their own decisions, and because it was felt that that would cause problems, a complicated structure was put in place to deal with the situation. However, the structure has not been used; indeed, we do not know whether the solution set out in the 2010 act has been broken and therefore whether it needs to be fixed. A new system is coming in, but we think that there are better ways of dealing with the issue either through court reform or through reform of the overall structure of environmental law and environmental courts law reform.

There are also a number of serious problems that we highlighted in discussions with civil servants during the business regulatory impact assessment. For a start, we think that the Aarhus convention might be seriously damaged, particularly with regard to the time limits for appeals. Although we understand exactly what the Government is trying to do, we think that this is definitely the wrong way to go about doing it. It is also not necessary because the provisions in the 2010 act have still to be brought in and we need to find out whether or not they actually work.

The Convener: As members have no more questions, we will draw this session to a close. I thank the panel for their evidence; your views will be helpful to the committee.

Are members happy to move item 5 up the agenda and discuss it now?

Members *indicated agreement.*

10:42

Meeting continued in private.

11:04

Meeting continued in public.

The Convener: We move on to our second panel of witnesses. I welcome David Martin, who is head of policy at the Scottish Retail Consortium; Belinda Oldfield, who is regulation general manager at Scottish Water; and Paul Waterson, who is chief executive of the Scottish Licensed Trade Association. Our witnesses are happy to move straight to questions.

We would like to touch on a number of areas, including consistency in interpretation of regulations, opt-outs and how they are to be administered, the duty to promote sustainable economic growth, the code of practice, planning fees, street traders' licences and primary authority partnerships, in which I know the SRC is particularly interested.

We are a little tight for time this morning as we have a busy agenda, so I ask members to direct their questions at specific witnesses. If witnesses would like to respond to a question that has been directed at somebody else, they should catch my eye and I will bring them in as best I can.

I begin with a question on the bill's general purpose to improve regulatory consistency. Will it achieve that? Is there a fundamental need for better regulation?

Paul Waterson (Scottish Licensed Trade Association): Regulation is very difficult in our area of the world, which is licensing. Our members have more than 17,000 licenses and their businesses include hotels, pubs, nightclubs, supermarkets and other types of off-sales. About

70 per cent of those outlets are individual-owner operated and each has its own operating plan. Even since the Licensing (Scotland) Act 1976, consistency has not been something that we have found within licensing. Also, we have all the different licensing boards. Some local authorities have more than one board, and they compete.

We really need consistency—probably in three areas. There are problems with policy, which is bad enough, but we also hope that the bill will help to improve the position with the fees, paperwork and processes, and with definitions. We certainly need that. In many ways, the Licensing (Scotland) Act 2005 did not learn from the 1976 act. It gave a lot of power back to local licensing boards, which did not help.

Belinda Oldfield (Scottish Water): Scottish Water is intensely regulated economically and in relation to the quality of drinking water and the environment. Consistency of regulation and national measures have featured highly across all the Scottish Government consultations on better regulation in the past year. As the largest single organisation that is regulated by the Scottish Environment Protection Agency, we have worked closely with it to ensure that we have clarity and consistency. We will welcome any additional consistency that the bill brings.

David Martin (Scottish Retail Consortium): We welcome the bill for two main reasons. First, better regulation is incredibly important for achieving equivalence across Scotland for Scotland-wide and UK-wide retailers. If we have clarity in regulation, it enforces competition law and means that our businesses can operate more effectively and competitively.

The second reason why the bill is important is that there are problems; as Paul Waterson mentioned, there is a problem with alcohol licensing legislation. There are a range of issues around the 2005 act and the Criminal Justice and Licensing (Scotland) Act 2010.

We have also had problems with the definitions of domestic and non-domestic knives. The SRC developed guidance on that but, being guidance, it has not been adopted by all local authorities, which emphasises the need for legislation.

We have also had problems around the tobacco-display ban. Again, there has been inconsistent interpretation of how members should comply with that. There are problems with a raft of other things, including video games and sell-by dates. I could go through a list of issues that my members have had.

The Convener: Thank you. We want to consider local opt-outs and how that will work in practice.

Margaret McDougall: The bill states that there will be opportunities to opt out, but there is no definition of the criteria. Should there be?

David Martin: If the legislation is to achieve consistency across the areas in which we want that, the criteria for opt-outs need to be clear. Given that we are looking at national standards for processes, we could get into a debate about whether national standards are about binding local decisions or about creating consistency in processes and in enforcement of national legislation. To be honest, from an SRC perspective, we would like to see as few opt-outs as possible, because that will ensure greater consistency. Our proposals on primary authority feed into that approach.

Belinda Oldfield: Opt-outs are not really an option for Scottish Water. We welcome a consistent national approach allied with the ability to be more flexible when local factors need to be taken into consideration.

Paul Waterson: We would have to see the detail of proposed opt-outs to gauge how we feel about them. However, given that we seek consistency, we want as few opt-outs as possible.

Margaret McDougall: Yes, but flexibility and the opportunity to take a collaborative approach would also be useful.

Paul Waterson: There is always room for local input, but use of it will depend on what it is.

Margaret McDougall: Do you have any concerns about Scottish ministers setting the regulations and also deciding who should be exempt?

David Martin: We do not have a problem with that proposal. However, it perhaps highlights one of the disadvantages of national standards, as they have been defined, in terms of what the bill is trying to achieve. The fact that a top-down approach is being taken to driving consistency means that the Government decides on the standard and drives the process. In our submission we propose the primary authority principle, which means that the approach is very much business-led, although businesses obviously work in co-operation with the regulators and with local authorities, so a bottom-up approach would be taken.

In principle, I have no problem with ministers running the system if we have national standards, but the point highlights one of the defects of national standards being used to drive consistency.

Paul Waterson: David Martin is correct in respect of national standards, but when we are dealing with individual operators the situation

becomes a bit more difficult. We must look at the issue in more detail.

The Convener: One aspect of the bill that has generated quite a lot of heat among other witnesses is the duty on public bodies to promote sustainable economic growth, so we have questions on that.

Alison Johnstone: My question is for Belinda Oldfield. Scottish Water's submission seems to suggest that you are content with the introduction of the duty to promote sustainable economic growth as long as it is taken in its proper context. However, the Law Society of Scotland is less content and its submission points to the

"uncertainty of what this phrase means".

It also states 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."

Furthermore, it suggests that

"it is unclear what yet another duty on public bodies will achieve and how it is to fit with their other statutory duties. This raises questions of legal enforceability".

How will Scottish Water manage to balance duties that may from time to time be in conflict?

Belinda Oldfield: Section 38 of the bill introduces a general purpose for SEPA to carry out its statutory function of

"protecting and improving the environment"

and contributing, as far as is consistent with its functions, to improving

"health and well being"

as well as

"achieving sustainable economic growth."

I understand from previous evidence that the provision has introduced some confusion, but our view remains that no negative implications should arise from it.

We believe that the bill makes it clear that SEPA must act in a way that is consistent with its main aim, which is first and foremost to protect and improve the environment. There are regulatory instruments around the water framework directive, for example, that involve economic tests. That means that SEPA can use economic tools such as disproportionate-cost assessment to ensure that investment in the environment is proportionate.

11:15

SEPA should use those tests whenever the legislation allows, and our interpretation of the bill is that the incorporation of the additional aim of achieving sustainable economic growth gives SEPA additional permission to do that. Our view is that there is a hierarchy: first and foremost, SEPA has to protect the environment and public health; then, as a regulator, it has to implement the regulations; and then it should consider supporting the economy, as far as that is compatible with those other two. However, given the confusion, it would perhaps be helpful if guidance or additional clarity were given.

Alison Johnstone: Other witnesses have suggested that the bill is a lawyers' charter and that if we put environmental concerns above the duty to promote sustainable economic growth—clearly, we have had a lot of debate about what that means—we might leave ourselves open to legal challenge. Do you have any concerns about that?

Belinda Oldfield: I am not legally qualified to comment on that. Scottish Water sees the approach as a balancing of all the duties.

The Convener: It would be fair to ask the SRC and the SLTA whether they have a view on the measure and whether they support the principle of having a duty, whether or not the term "sustainable economic growth" is sufficiently well defined.

David Martin: We support the duty in principle and what it is trying to achieve. Most regulators that we come across do such balancing of economic considerations daily. However, pragmatism is not always guaranteed, whereas legislation is a guarantee. We see the duty as concentrating minds on that purpose and on the approach that regulators should take.

I agree that there is a degree of vagueness about how the duty will play out in practice. For example, we have five licensing objectives in the Licensing (Scotland) Act 2005 and we are considering the interplay between them and the new duty. Some people have suggested that there should be a sixth objective, which would be on economic growth. Would the duty become a de facto sixth objective?

The Convener: Is the term "sustainable economic growth" properly understood? Should it be defined in law?

David Martin: I think that it is absolutely properly understood. It fits into the narrative that the Scottish Government has had for about four years. Everybody is pretty clear on what is meant by "sustainable economic growth".

Paul Waterson: David Martin touched on the Licensing (Scotland) Act 2005, which exists to control sale and supply of alcohol. If we start to put economics and economic growth into that, we will have problems. People can gain a competitive advantage by being irresponsible and can perhaps use economic growth as an excuse. If economic

growth were a sixth objective, it would be difficult to balance it with the other five. That is our experience. Licensing board decisions that are based on the objectives have been successfully challenged. It is a difficult balancing act to get the economics right and to adhere to the objectives.

The Convener: Is the term "sustainable economic growth" well enough defined?

Paul Waterson: It has to be clear to everyone. Part of the problem is that everyone has their own interpretations of definitions. How do we define anything concisely and clearly without people having their own interpretation? [*Interruption*.]

The Convener: That noise of bottles clinking will make you feel at home.

Paul Waterson: Yes—I have heard that noise a lot. Somebody is busy.

Chic Brodie: The World Bank defines sustainable economic growth as follows:

> "To be sustainable, economic growth must be constantly nourished by the fruits of human development such as improvements in ... knowledge and skills along with opportunities for their efficient use: more and better jobs, better conditions for new businesses to grow, and greater democracy at all levels of decision making."

Part of what we are struggling with here is that there is probably too much flexibility at local level, which flies in the face of the World Bank's definition.

Have you any ideas how we might—apart from with this bill—secure consistency and allow some flexibility while taking account of the overlay of the code of practice that the minister or any regulatory body can invoke?

David Martin: In terms of how the duty sits with the desire for consistency through national standards, it is useful to consider the example of knife licensing. The committee will be aware that when that legislation came in there was ambiguity around the definition of domestic and non-domestic knives. The SRC co-operated with the Government, the Crown Office and Procurator Fiscal Service, the police and trading standards officials, and guidance was developed that provided that definition. The Cabinet Secretary for Justice recommended the guidance to local authorities and to trading standards officers to follow, in terms of the definition. We have just had a report from the regulatory reform group saying that very few organisations have followed the guidance.

Guidance is just that: it is a suggestion, or advice. That emphasises why we need such guidance to be enshrined in legislation, so that we have something more robust. Legislation is important if we want to achieve consistency. I understand that that is why the proposed duty is in the bill.

Our experience, by and large, is that regulators consider sustainable economic growth and the impact of their decisions on the economy. I say "by and large" because it does not happen all the time; just as in the knife-guidance case, they can take it or leave it. If, however, a duty is in statute, they cannot take it or leave it. A duty in legislation concentrates minds and focuses attention on something that has to be done.

Chic Brodie: Perhaps you can all answer my next question.

You mentioned the RRG. How effective do you think that group has been in terms of providing meaningful guidance that will be followed?

David Martin: I should declare that the SRC sits on the RRG, so I will have a slightly biased opinion. I think that the RRG's work is very good. We have joined it only recently, but historically—with cases it has dealt with concerning knives and alcohol, for instance—it has been pretty effective in analysing the legislative landscape and how effective legislation is. We do not have a better regulation delivery office such as exists in England and Wales; the RRG is the closest thing in Scotland. In terms of cascading down guidance, the only example that I can think of where we have required that is knife licensing. The SRC took up the mantle in that case.

Belinda Oldfield: From the perspective of Scottish Water, the RRG has been reasonably effective. We are quite intensely regulated on all fronts. We welcome consistency of approach to the principles of better regulation being cascaded down at every opportunity. We like to see developments in regulation coming through from the regulatory reform group.

Chic Brodie: In the preamble to this discussion, however, each you mentioned lack of consistency, although to varying degrees. I am not suggesting that the RRG is a talking shop, but if it was effective we might have a bit more consistency and might have to look at what we are trying to do with the bill.

David Martin: On the RRG driving consistency, the best that it can do is offer guidance and, as I discussed with the knife example, guidance does not achieve much in our experience. We need legislation or a new structure that is underpinned by statute, such as primary authority, but it is not within the RRG's gift to establish that. It does as much as it possibly can as far as it has powers.

Paul Waterson: I will go back to the original question and consider varying degrees of inconsistency.

For example, take the argument on overprovision and that on hours. There is a never-ending debate about the hours that licensed premises should be open. The best bodies to determine that are local licensing boards. Overprovision considers whether there are too many licences in an area. That power was simply handed to local licensing boards and, really, they do not know what it means, so it would be far more helpful for that to be considered nationally.

Licensing boards get into all sorts of trouble when they try to define overprovision. What does it mean? If there are two good pubs in a village and a third one is added, will there be three bad ones or three good ones? We could end up with three bad pubs and all the problems of alcohol abuse, overcompetition and prices being lowered.

It depends on the issue. Overprovision should not have been handed back under the guise of local democracy and decision making.

The Convener: The bill covers a couple of fairly technical matters. Sections 5 and 6 deal with a code of practice on regulatory functions, the procedure to be followed in issuing that code and, for example, the level of consultation on it.

Section 7 gives ministers the power to modify the list of regulators who are attached to the bill. Those that are currently excluded are Historic Scotland, Transport Scotland and Marine Scotland.

Do any of the witnesses have concerns about the code of practice or the ministerial powers to modify the list of regulators affected?

David Martin: I do not have any concerns about the code of practice. It is going in the same direction of travel as we see elsewhere in the UK and the EU, so it seems to be quite a sensible approach.

Belinda Oldfield: We feel the same as David Martin.

The Convener: We move on to discuss planning fees—in particular, the proposal that, when planning departments perform unsatisfactorily, planning fees might be reduced.

Margaret McDougall: What are the witnesses' views on the proposal to reduce fees for a planning authority that underperforms? What is underperforming and what would be a well-performing planning authority?

Belinda Oldfield: Since 2010, Scottish Water has made 291 full planning applications across the various planning authorities in Scotland. We do not see a difference in performance across the planning authorities when it comes to full planning applications. We see slight variation when we make applications for a permitted development, but nothing to which we would want to draw attention.

Therefore, we are not best placed to comment on a penalty regime in which there would be a reduction in fees for poor performance. That is not our experience of the planning authorities since 2010.

David Martin: At the time of the consultation, because retail was one of the sectors that was being singled out as a special case and was going to have the cap on fees increased dramatically—off the top of my head, I think that it was an increase of 18 or 20 times the original fee—my members who operate larger retail buildings and infrastructure felt that there had to be some assurance of quality in the system, because they were being asked to stump up so much extra for a planning application. Certainly my larger members were seeking something of a quid pro quo; they were saying, "If you are going to ask us to pay so much more for the planning process, we will need to see something in return." Unfortunately, I can offer only anecdotal evidence but, from our perspective, performance in processing times for applications and so on has been patchy.

11:30

Margaret McDougall: Obviously you are looking at this from the point of view of having to pay more fees, but would it help if the planning authority itself were penalised for underperforming?

David Martin: To be honest, we can see both sides of the argument, although I appreciate that that response might not provide the degree of clarity that you would like. I can see that withdrawing funding from an already underperforming authority might seem slightly counterintuitive, but on the other side my larger members and some property developers with whom we are in contact tell us that many of the problems are not by and large about money. The issues are structural, and money will not necessarily solve them.

Going back to our discussion about duties and sustainable economic growth, I believe that there is an economic imperative for the planning system to be swift, prompt and clear; if it is not, business and developers are penalised and the wider economy suffers. Perhaps there needs to be some incentive, but I can also appreciate the stick approach.

Margaret McDougall: Do you consider a well-performing planning authority to be one that processes applications quickly, or is the quality of the finished article more important?

David Martin: Quality is important, but quality that is provided with a degree of efficiency is ideal. We do not want planning authorities just to speed up their processes and rush through decisions, but there are examples of best practice and authorities that balance quality and speed.

Dennis Robertson: My question, which is probably directed at Paul Waterson, is perhaps not contentious; it certainly did not seem contentious when I raised it with the previous panel. With regard to mobile food trading licences, the bill proposes to issue a single certificate to enable traders to move from authority to authority instead of their having to apply to individual authorities. Do you agree with that principle, or do you have any concerns about such a move?

The Convener: Is that issue of interest to licensed premises?

Paul Waterson: If we are talking about having one application to one level, such a move is to be welcomed. We certainly do not have any problem with it.

David Martin: The principle is eminently sensible. We keep hearing about the primary authority principle at the margins, but this proposal effectively embodies that principle and reflects how the primary authority system itself works. We fully support what we think is a pretty sensible principle, which I believe operates incredibly well throughout the UK.

Dennis Robertson: Good. Thank you very much.

The Convener: On that very point, I note that the Scottish Government has indicated that it is minded to lodge an amendment at stage 2 to introduce the primary authority principle. In evidence last week, the trade unions expressed concern about such a move and suggested that it would lead to people shopping around to find the most lenient local authority, hooking on to it and ensuring that it was regarded as the primary authority with a subsequent race to the bottom in standards across the country. How do you respond to that? Do you have any evidence of how things have worked in practice south of the border?

David Martin: I completely disagree with that view, for three reasons. First of all, the primary authority system is policed and governed by the better regulation delivery office, which is part of the Department for Business, Innovation and Skills. The office has oversight of what happens and has a group that brings everyone together.

Secondly, there is no evidence that what has been suggested is happening. The majority of my large members are in a primary authority partnership; indeed, 700-plus businesses and 109 UK local authorities are involved in those partnerships and if you speak to businesses they will give you several reasons for picking a primary authority.

For example, Home Retail Group, which includes Argos, Habitat and Homebase, told me that it picked Hampshire County Council for fire safety because it is known to be the most robust and the most difficult to get assured guidance through. The company knows that if it is compliant in Hampshire it will be compliant everywhere else. It is not in the business's interest to do what has been suggested; indeed, the whole principle of the process is about showing a willingness and due diligence to comply, not about cheating the system.

Finally, an independent report on the issue that was undertaken by Rand Europe in 2010 found no evidence of abuse or of a rush to the lowest common denominator; instead, it highlighted the efficiency savings that were made as a result of the approach.

The Convener: We have received follow-up evidence from Unison, which gave evidence last week. It says that it has had feedback from some members about a potential conflict of interest. If, for example, a company decided to withdraw from an agreement with the local authority that was the primary authority, there would be a loss of funding; as a result, there might be a conflict of interest with regard to the financial inducement to the local authority. Do you have a view on that?

David Martin: No such conflict of interest should arise, because local authorities should not be funding services from the fees that are derived from the primary authority system. As the statute makes clear, primary authority should be run on a cost recovery principle, which means that authorities should charge only for the cost of that service. Moreover, the European services directive also mandates that such services be undertaken on the principle of cost recovery; indeed, the R (Hemming and Others) v Westminster City Council case has crystallised views about local authorities delivering services on a cost recovery principle. All of that is incredibly pertinent for us in Scotland, given the situation with alcohol fees.

The Convener: As members have no more questions, I thank the witnesses for their evidence.

As we are a bit ahead of the clock, I suggest that we continue in private for our discussion on agenda items 6 and 8. Are we agreed?

Members *indicated agreement.*

The Convener: Thank you very much.

11:37

Meeting continued in private.

SUBMISSION FROM SCOTTISH AND SOUTHERN ENERGY

SSE is a UK owned and based energy company. It is involved in the generation, transmission, distribution and supply of electricity and the production, storage, distribution and supply of gas.

SSE is currently investing the equivalent of £4m every day in low carbon sources of energy and the infrastructure to support it. Its investment plans to 2015 will see it invest more than it makes in annual profit.

SSE welcomes the opportunity to provide evidence to the Economy, Energy and Tourism Committee on parts 1, 3 and 4 of the Regulatory Reform (Scotland) Bill.

In principle, SSE welcomes the Scottish Governments efforts to improve the consistency in the exercise of regulatory functions in Scotland and strongly supports efforts to promote sustainable economic growth.

As many aspects of the Regulatory Reform (Scotland) Bill which will impact on SSE's operations are contained within part 2 of the draft Bill, we have submitted evidence to the RACCE committee in this regard. To that end, please consider this response in relation to sections 1, 3 and 4 of the draft bill.

In particular, the main aspect of which SSE would like to comment on is in regard to Marine licensing decisions.

Part 3, Marine licensing decisions

Our view on the proposed statutory appeal procedure is that the projects to which this would apply are of national importance. As such the Electricity and planning acts make specific provision (through ss36 and 37 of the Electricity Act 1989 (as amended)) for the Scottish Ministers to make the ultimate decision on the relevant applications.

During the lengthy development process (pre-scoping through to consent decision and beyond), significant effort is put into consulting with statutory stakeholders, the general public, NGOs and other consultees. These consultations shape the development design and key issues are recorded in Environmental Statements, Consultation Statements, Gap analysis reports etc. This provides ample opportunity for interested parties to comment on developments and shape their design. Scottish Ministers, Marine Scotland and statutory consultees are provided with information and updated on progress regularly, and consider all comments received by interested parties in their final consent decision. We feel that their decision should therefore be final.

Whilst SSE recognise that the Scottish Government's intention is to reduce the time taken for appeals to be determined regarding Marine Licensing decisions, regardless of the outcome of the new proposal to extend statutory appeal mechanisms to the Inner House of the Court of Session appeals could still be brought forward via Judicial Review. Therefore, extending the appeal process has a real danger of prolonging the decision making even further.

With the Scottish offshore wind industry still in its infancy, SSE believes it is crucial that no unnecessary barriers are introduced which may delay or even prevent future development.

Part 1, Regulatory Functions

The draft bill provides Ministers powers to make *'any provision which they consider will encourage or improve consistency in the exercise by regulators of regulatory functions'*.

Whilst SSE understand and support the Government's intention here, we believe it is crucial that any changes to regulations are fully consulted on, not just with those parties Scottish Ministers consider appropriate. Any changes to regulation should only be introduced following an open consultation period, in which any interested party can comment on the proposed changes.

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Society's Planning and Environment Law Sub-Committees submitted a response to the Scottish Parliament's Rural Affairs, Climate Change and Environment Committee's call for evidence on Parts 1 and 2 of the Bill on 20 May 2013[1].

The Society's Planning, Environment and Licensing Law Sub Committee's should like to respond to the Scottish Parliament's Economy, Energy and Tourism Committee, as lead Committee on this Bill, as follows.

General Comments

The Bill was considered collectively by two specialist sub committees of the Society's Law Reform Committee, with the remits of planning and environmental law respectively. 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. Some further allusions to this are made below.

The Society certainly welcomes the Scottish Government's drive towards the simplification of complex regulation, and supports the move towards the adoption of measures aimed to reduce inconsistency. The objectives of improving the understanding and experience of regulation by users are particularly strongly supported. The Society considers that this should result not only in the support of enterprise at a time of pressure; but also through improved understanding and greater consistency in the dissemination of good practice among regulators, with the concomitant prospect of higher environmental standards that everyone can work to.

The Society understands that this is an enabling measure, and regrets that more information is not yet available about Government's intentions as to the content of the regulations, which would be enacted. The Society is of course aware that Government would fully consult on the draft regulations to come in due course, but urges the Scottish Parliament to clarify the approach that Scottish Government intends to take even only in general terms. The Society is aware that some of the complexities and inconsistencies encountered to date can come from the differing interpretation of government guidance on various aspects of regulation, as much as from local views. Simplification of legislation and also guidance is itself a challenging task in that it requires rigour, scholarship, and a degree of self-restraint by those drafting the revisions. The Society does not underestimate the task of drafting the simplifying legislation, whether in the context of any administrative system of permitting or licensing, or in the specific context of environmental permitting on land or sea.

[1] http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Law_Society_of_Scotland(2).pdf

The Society would like to make the general point that an important element of the problems encountered by both business and regulators derives from the considerable complexity and diversity which has built up over the years, and which is particularly clearly seen in throughout Scotland's environmental protection regimes. This situation has been well described by SEPA in its preparatory papers on regulatory reform which have led to part 2 of the Bill, which is to be more closely examined elsewhere. These complexities have often resulted from the carry over, with minimal adaptation or intervention, of EC environmental legislation. The benefits gained from this stream of legislation must be fully recognised, and this Government has followed previous administrations in committing Scotland to the highest environmental standards, which the Society welcomes wholeheartedly.

However, in considering what this Bill aims to achieve, the Society first questions whether more could not be done by committing and investing in further wholesale codification and consolidation of all our environmental protection codes, into an integrated system of regulation, which would include clear principles about the direction of appeals whether to the Sherriff court, the Scottish Ministers or indeed their Directorate of Planning and Environmental Appeals, or ultimately to the Court of Session. Such clear principles do not at present exist, and the underlying problem, which prompted Clause 40 of this Bill, is only one example of the problems, which can be encountered.

The issue of undue complexity is applicable, for example, to the respective systems for water regulation[2], waste[3], or pollution prevention and control[4], (all of which have recently been codified from several pre-existing sets of regulations without any notable progress towards reducing complexity) or indeed the relatively new system for permitting development at sea under the Marine (Scotland) Act 2010. However, there are in fact patterns of similar mechanisms and structures which appear throughout our environmental regulation regimes, for example proforma permit conditions or 'binding rules', very similar frameworks for applications and permits; similar, but not identical, tests for the assessment of an applicant's fitness for an environmental permit; and provision here and there for informal dispute resolution mechanisms. The problem is that in each set of environmental protection regulations, the various mechanisms have been written into a self-standing code in each set of regulations slightly differently, and also that each code (i.e. waste, water, pollution prevention and control) also has significant differences each from the other. This can lead to problems of interpretation, or inadvertent gaps in provision, and makes the environmental codes harder to operate, as they will have been harder to draft without error or anomaly. Indeed, in clause 40 of this Bill the committee is considering an important amendment which arose from an anomaly between the marine Scotland Act 2010, and the Electricity Act 1989. Examples of such issues exist here and there throughout the systems, and one of the most confusing and unclear aspects is often found in the respective appeal mechanisms, as described in some further detail below. The whole edifice is lacks clarity, structure, and predictability. There are very strong arguments for a comprehensive review towards synchronising all permit and dispute resolution systems so that they are all much more straightforward and logical, and follow similar patterns in each system.

[2] The Water Environment (Controlled Activities) (Scotland) Regulations 2011
[3] The Waste (Scotland) Regulations 2012
[4] The Pollution Prevention and Control (Scotland) Regulations 2012

The Society does not underestimate the size of the task of codification. Investment in intellectual resources would be required. It may be that the drafting process could not be accommodated within a near timescale within the resources of the civil service. Consideration could be given by Government towards externalising the process of drafting such consolidation legislation. Such a project would have the potential both to enhance Scotland's business-friendly credentials, but also to enhance the effectiveness of our environmental protection culture. Environmental regulation is generically administrative legislation designed to facilitate the process of state control. All governments and all consumers of regulation would prefer a light touch where that can be achieved together with effectiveness. Clear, straightforward legislation supports this ideal. Our current environmental legislation is not at present light touch, because of its complexity.

The Scottish Government is at present consulting on the Courts Reform (Scotland) Bill, who proposes major structural reforms to the civil courts; and reform is also proposed to the tribunals system in terms of the Tribunals (Scotland) Bill introduced on 8 May. To link this with the environmental appeals issue, in environmental regulation there is a proliferation of appeal or dispute resolution mechanisms, all originally designated for good reasons to do with the traditional approach to appeals. Environmental permitting legislation is strewn with appeal opportunities, on points which are highly diverse such as the refusal of a permit, permit conditions, enforcement mechanisms, modifications to licenses, requests for commercial confidentiality, to name but a few. In some cases an appeal will go to the local Sheriff Court (infrequently in practice- see below in the comments on clause 40) and in others appeals are referred to the Directorate of Planning and Environmental Appeals. These appeals (in environmental legislation this usually, if not always, includes appeals which lie to the sheriff court) are basically administrative appeals, which deal with the merits of the matter, and these forums are empowered to substitute their decision for that of the original decision maker.

In contrast, there are also rights of statutory appeal to the Court of Session, which are invariably on a point of law only, and where the remedy is not that the court will revisit the merits and substitute their own outcome, but will always remit the matter to the original decision maker for reconsideration. Such appeals each have their own statutory basis, and can be understood as special categories of judicial review. The Society suggests that the Scottish Parliament considers giving guidance to the Scottish Government as to the inclusion of environmental permitting and appeals into the reforms to administrative law currently under consideration.

The Society would also like to draw to the committee's attention another possible area for consideration. The Society's Licensing Law Sub Committee also contributed to the Society's response to the Scottish Government Consultation entitled 'Better Regulation; Consultation on proposals for a better Regulation Bill[5]" in October 2012. That consultation response[6], highlighted to Scottish Government a number of important issues relating to problems with the civic and liquor licensing systems, which should be considered as part of the 'better regulation' drive.

[5] http://www.scotland.gov.uk/Resource/0039/00398287.pdf
[6] http://www.lawscot.org.uk/media/555692/plan-proposals_for_a_better_regulation_bill_final_oct_2012.pdf

The Licensing Law Sub Committee of the Society also went on to make separate representation to the Scottish Government Consultation Paper entitled 'Further Options for Alcohol Licensing' in March 2013 and, in particular, with a view to better regulation made the following comments. These concerns are brought forward now for the committees consideration as follows: -

The Sub Committee believes that notice periods for premises licence reviews are too short as there is only one week's notice required to be given to the licence holder. The implications of these reviews are such that licence holders have to take independent legal advice for such hearings and submits that a minimum of 28 days' notice should be given and notices should include guidance that licence holders should be encouraged to take appropriate advice given the seriousness of a review hearing.

(1) Boards, their Clerks and Deputes should be trained in a manner similar to the training given to Justices of the Peace. In particular they must be trained to assess evidence and to act in the interests of natural justice.

(2) Surrender of licences should be able to be cured by transfer which would take effect immediately to prevent businesses being lost. The procedure should be similar to that relating to temporary transfer under the Licensing (Scotland) Act 1976 and subject to review within three months only if required in terms of the 5 objectives, otherwise the transfer would become permanent.

(3) The Sub Committee suggests that a sixth statutory licensing objective which would benefit the concerns of the licence trade and also benefit the economy namely 'to secure the interests of tourism and/or business and/or to benefit the economy whether locally or nationwide."

The Society notes that in terms of Section 1 of the Bill, Scottish Ministers may by regulations make any provision which they consider will encourage or improve consistency in the exercise by regulators of regulatory functions. The above concerns are specifically submitted for inclusion in the next phase of this legislation.

PART 1 – REGULATORY FUNCTIONS

The regulation making power in this part is very broad and so the Society cannot comment fully on the provisions in the bill itself, as the detail will be contained in regulations. Consequently, the Society welcomes the fact that it is subject to the affirmative procedure in Parliament.

That said, the Society broadly welcomes the provisions contained in Part 1 of the bill subject to specific comments below.

Section 3

Section 3(1) appears potentially to cause more problems than it would resolve. It requires a regulating authority to comply with the forthcoming subordinate legislation except where: -

"…*The regulations impose on the regulator a requirement that conflicts with any other obligation imposed on the regulator by or under an enactment*".

Given the many broadly-phrased statutory duties imposed on public authorities including for example the duty to foster climate change, or well being, or to survey for contaminated land, and not least those proposed in section 4 of this bill, it is

inevitable that these will on some interpretations fall into apparent conflict with the duty imposed by section 3(1). Reconciling these various duties is becoming increasingly complicated and this could be used to justify non-compliance with the more precise provisions in the regulations. The Society questions whether this is really helpful to crisp interpretation.

Section 4

Section 4 imposes on regulators a very broad duty that:

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

There are those who would argue that this is policy written into black letter law and who would question the extent to which that is worth doing. Purists would argue that the proper function of the law should be restricted to providing a framework for the delivery of policy, policy itself being formulated by government. The Society would not comment on a purely political policy in any event. However, regardless of the general political merits of this provision, there are two problems with the imposition of a general duty to contribute to 'sustainable economic growth'. The first is the uncertainty of what this phrase means. This exists both at the large scale (is it economically sustainable growth, or economic growth within the limits of ecological and social sustainability?); and then in ascertaining exactly what is meant once that issue is resolved. For example it is striking that the draft Scottish Planning Policy, currently also under consultation, does not provide a clear definition but offers two far-ranging paragraphs on the topic. 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.

Secondly, it is unclear what yet another duty on public bodies will achieve and how it is to fit with their other statutory duties. This raises questions of legal enforceability and where that is in doubt, what it adds that clearly authorised policy guidance cannot.

The underlying question in relation to the avoidance of burdens on commerce must be whether the imposition of this new duty actually contributes to better regulation or merely adds a further complication to process. If the duty is imposed, the failure to write it into decisions, difficult, as it is to apply, may only result in generating a further ground for appeal of the decision.

Section 5

The presence of a Code of Practice is not by itself enough to save the inherent uncertainty of the duty proposed as described above. However, the Society welcomes the fact that the making of the Code is subject to such open and inclusive procedural requirements.

PART 3 - MISCELLANEOUS

Section 40 – Marine licence applications, etc.: proceedings to question validity of decisions

The Society has some difficulty in providing the Economy, Energy and Tourism Committee with practice based observations of the proposed reform to the Marine (Scotland) Act 2010 Appeal Provisions mainly because the system of marine

planning and marine consents introduced by the 2010 Act remains relatively untested, at least in the courts.

The Society has had the benefit of sight of the remarks by the Lord President in respect of this amending measure, and would respectfully agree with his observations. It is clearly desirable for any major energy infrastructure development proposal that there should not be two different destinations for important challenges to the same proposal. We are a very long way away indeed from the one stop shop concept for our marine energy developments, but the existing situation must be addressed, and section 40 appears to do this.

On the face of Section 40 the measure seeks to synchronise the position with regard to an application where Scottish Ministers are considering, for example, an application for an offshore energy generation facility under the Electricity Act 1989 in tandem with an application under the Marine Scotland Act 2010. The Society notes that there have been a number of such applications already, which may have revealed the current anomaly. The proposal seeks to introduce a defined statutory appeal to be determined by the inner house of the Court of Session only. As the Lord President has explained, the court will then be able to deal with the two appeals together. The Society welcomes such synchronisation if it successfully leads to increased simplification of systems. If the Society might add the solicitor's perspective, the reform may change the nature of the appeal and remove an opportunity for subordinate factual matters to be reviewed. The committee may wish to further consider the implications of this

As previously stated above, the Society's overall position is that the economic and environmental prosperity of Scotland would be best served by widespread simplification and synchronisation of all our environmental permits systems. This may require some investment by government in the expertise necessary to achieve what would be an important intellectual project ultimately in the interests both of efficient and effective environmental regulation and business friendly permitting regimes.

The committee is respectfully reminded that a statutory appeal as will be introduced here will deal with challenges only on the question as to whether there is a legal defect in the process, and will not inquire in to the merits of the decision and will not revisit the factual underlay in the sense of determining the application. If a defect is found the court will remit the application back to the original decision maker.

The Electricity Act 1989 deals largely with matters reserved, and there are protocols, which permit the ministers to take decisions under the Act. The competence of the Scottish parliament is restricted in any amendments it may make to the processes under the Electricity Act in any event. It is obviously expeditious to amend the Marine Scotland Act to suit.

Marine licensing is dealt with for Scottish Ministers by Marine Scotland, a large and experienced civil service department, which deal with fisheries and other issues, most of which will be highly technical and scientific in nature. Marine Scotland is a core department of the civil service and deals with inter alia Marine Scotland Act 2010 consents, which include those for offshore energy consents. The Act provides for a Marine 'planning' process which is obviously just getting under way, so the marine licensing is not yet comparably 'spatial' in quite the sense in which planning

decisions for onshore windfarms are made, or at least, influenced. In contrast, Scottish Ministers' functions in respect of purely land based energy applications are dealt with by the Ministers' energy consents unit based in Glasgow. Both departments therefore have an extremely complex network of interwoven administrative tasks and environmental consent obligations, including tests under the respective legislation, environmental impact assessment, the Habitats Regulations, and many other detailed considerations, to observe consistently, co-ordinate and/or synchronise, to ensure mutual consistency of approach. The point is that in such situations it would be easy to make a mistake, which may have serious consequences for the validity of a complex technical application.

It may be helpful to bear in mind that the 'family' of administrative law decisions to which Marine ct consents belong is probably best categorised under 'environmental', rather than 'spatial planning'. This implies that marine consent issues will be dominated by technical, scientific, and engineering considerations rather than those of policy or judgement, such as one finds dominate spatial planning. Those familiar with the environmental regulation category are also familiar with a culture of compliance in the majority of applications, which SEPA very much values, and has previously alluded to in other places.

This technical environmental quality and culture will correlate more with the regulatory work of SEPA on land, rather than with the work of our planning authorities, Scottish Natural Heritage, or Historic Scotland for example. The culture of compliance and solution based thinking which this type of system engenders is notable in that, despite the myriad of appeal mechanisms in the legislation, there tends not to be much in the way of appeal activity of any kind, whether appeals to the Scottish Government Department of Planning and Environmental Appeals (DPEA- is administered by non-legal Reporters on behalf of ministers who do deal with the merits of appeals referred to them) or appeals to the Sheriff courts, of which there are many examples throughout all environmental legislation.

Because there are so few examples of appeals it is difficult to draw any firm conclusions about how effective the appeal system for environmental appeals actually is.

One aspect of all environmental appeals which should be considered, further perhaps in another place, including in the context of the Marine Scotland Act 2010 or more widely is the question of the capacity of Scotland's Sheriff courts to deal effectively with the underlying specialist or technical questions which would fall to them to determine where an environmental appeal question of any kind to be referred to them. In this context, it should be understood many of the environmental permitting questions directed to the Sheriff courts are <u>not</u> in fact appeals purely on points of law as would be the case in the Court of Session but are actually examples of the many administrative decisions which, in theory, a Scottish Sheriff can make on behalf of government. Sheriffs by long tradition are given a variety of administrative decisions to make in their area, from authorising graveyards, providing for child protection, or permitting public processions, That is to say, in such situations, the law provides power to the Sheriff to apply himself or herself to the merits of the question and become the decision maker himself or herself. This is in strong contrast to the purely judicial review function of the Court of Session sitting on a judicial review or

statutory appeal, which is always restricted to a point of law only and never upon the merits of the case.

It is actually unclear whether the power of the sheriff prior to this proposed reform currently extends to questions under Section 29 of the Marine (Scotland) Act 2010. The Environmental Protection Licensing (Scotland) Regulations 2011, made under Section 29 provide that a Sheriff determining a marine licensing appeal may direct that Scottish Ministers grant a marine licence, and include the Sheriffs ability to specify upon which terms the licence should be granted. The regulations do not provide precisely for the situation whereby Ministers may disagree with a Sheriff's decision. However, the conventional analysis would be that this is another administrative decision where the Sheriff may actually determine the merits of an application. The Society would point out that if the locally based decision-making power of the sheriff is seen as an advantage, then this amendment to the 2010 Act appears to remove that possibility, which does not, in any event, appear in the Electricity Act 1989.

Regrettably it is simply not possible to say whether the sheriff court is in fact an effective or efficient decision maker under the Marine Scotland Act 2010 because there have been no cases. However, if the marine licensing system is going to be technical in nature and dominated by a culture of compliance, it may be worth further consideration about retaining some elements of the power of the sheriff to determine some aspects of the appeal close to the ground in question restricting that power to technical details only, for example.

Section 41 – Planning authorities', functions: charges and fees

The Society refers to its comments in response to the Scottish Government Consultation entitled "Better Regulation: Consultation on proposals for the Better Regulation Bill" and in particular to its answer at question 25 of that Consultation Paper.

The Society does not believe that there should be a direct and draconian link of financial penalty between application fees and the performance of the Planning Authority. As regards the proposition that there should be power to remove or restrict funding available to underperforming planning authorities, the Society aligns itself with others who consider that this will be counterproductive.

It has to be considered that in some cases the reason for a planning service not achieving performance or processing targets may well be that there are simply not enough resources in place or that other pressing priorities have come into play

The Society therefore respectfully suggests that consideration is given to the development prior remedies perhaps in liaison with COSLA, such as, for a task force of planners who could be deployed in support of a local authority with problems in order that backlogs are reduced and targets accordingly met.

It is suggested that simply removing the authorities' resources and collapsing the application service would not help the development industry in the area, nor the wider community and that a more constructive approach, is required.

SUBMISSION FROM THE FOOD STANDARDS AGENCY IN SCOTLAND

Thank you for your invitation to provide a written submission of evidence to the Committee, as part of its scrutiny of Part 3 of the Regulatory Reform (Scotland) Bill, in advance of the oral evidence I will be presenting at the meeting on Wednesday 26th June.

The Food Standards Agency (FSA) is a non-ministerial UK government department operating at arms length from Ministers and governed by a Board appointed to act in the public interest. The FSA's food safety & standards policy remit is one which is wholly devolved in the context of the provisions of the Scotland Act, and it is equally accountable to the Westminster and Scottish Parliament and also to the devolved administrations in Wales and Northern Ireland. As a consequence the FSA is responsible for delivering, the necessary statutory regulatory provisions with respect to its policy area in Scotland. In addition the FSA has, in its central competent authority role, the function of overseeing the delivery of food regulatory enforcement by local food authorities.

You have invited that I provide evidence with respect to the proposed amendment to Section 39 of the Civic Government (Scotland) Act 1982 contained in Part 3 Section 42 of the Bill and I hope the Committee will find the following information useful in this respect.

I understand that the purpose of the amendment is to identify a single food authority as being responsible for issuing the certificate of compliance with any relevant regulations, made under the Food Safety Act 1990. This is a prerequisite before a street trader's license may be granted. The current provisions provide that certificates of compliance can be issued by each of the licensing authorities within which the street trader operates. The proposal of the amendment is to identify a single authority, namely the one where the business is registered for the purposes of auditing compliance with EU Community food hygiene legislation, as the issuing authority for these certificates.

It is anticipated that the new arrangements would work on a mutual recognition basis with respect to the certificate issued by the registering food authority, being recognised by those other authorities in whose area the street trader operates, thereby minimising the potential burden and costs on businesses associated with obtaining individual certificates from each food authority.

As mentioned in paragraph 2 the FSA is the central competent authority for application of Food Safety, Standards and Hygiene Regulations in Scotland. However, in most areas, the FSA has delegated the function of enforcing and executing relevant food safety and hygiene law to the local food authorities and this includes enforcement of food safety and hygiene legislation applicable to local street traders.

There is a Food Law Code of Practice for Scotland issued by Ministers under Section 40 of the Food Safety Act 1990 and Regulation 24 of the Food Hygiene (Scotland) Regulations 2006, which guides food authorities on the exercising of their functions. Every food authority has an obligation to have regard to any relevant

provisions of any such code and to comply with any direction requiring them to comply with Code.

Chapter 1.1 of the Food Law Code deals with inter-authority matters including the coordination of advice and enforcement to ensure uniformity of treatment and consistency in dealing with food businesses, particularly those that have more than one branch or unit situated in different Food Authority areas. In this respect, the Chapter describes the concept of the 'Home Authority Principle' which is designed to nominate one authority for businesses trading in a number of authority areas as the lead authority, which other authorities should contact if they have issues such as concerns over central policies and standards applied by that business.

The Chapter also deals with the need for the establishment of liaison groups at a regional and national level, as a vehicle by which matters of legal interpretation and consistency should be discussed including matters linked to 'home authority' matters. Four regional liaison groups have been established in Scotland which feed into a national coordinating body the Scottish Food Enforcement Liaison Committee (SFELC). SFELC is an independent body from the FSA, but provides us with advice on matters of enforcement.

SFELC is comprised of representatives of the 4 local liaison groups, the FSA, other organisations with an interest in food law enforcement such as Health Protection Scotland, representatives of the main Food industry bodies such as NFUS and Scottish Retail Consortium. Key objectives of the organisation are improving effectiveness and consistency of food law enforcement and coordination of local authority activity and promotion of best practice.

SFELC have been asked by the Scottish Government to assist in developing agreed standards whereby each authority where a street trader operates will be able to rely on the certificate of compliance issued by the food authority of registration, thus facilitating the transferrable certificate of compliance envisaged by the proposed amendment to the Civic Government Act.

As mentioned above, the concept of a single authority identified to lead on matters associated with businesses with interests in more than one authority area has been established within the enforcement code. The new arrangements being proposed for street traders appear to be aligned with this concept.

Food Standards Agency in Scotland
6 June 2013

SUBMISSION FROM THE ROYAL ENVIRONMENTAL HEALTH INSTITUTE OF SCOTLAND

Part 1

Exercise of regulatory functions: economic duty and code of practice

Section 4 Regulators' duty in respect of sustainable economic growth

This section needs to be carefully thought through in respect of what is expected of regulators and what the desired outcomes are. The present drafting does not make this clear. The heading 'Exercise of regulatory functions: economic duty and code of practice' gives the impression that this is about economic growth, whereas section 4 is entitled 'Regulators' duty in respect of sustainable economic growth' which is something very different. There is not a definition or interpretation of sustainable economic growth and as such it is difficult to know what is expected of regulators and what the desired outcomes are.

Economic growth could be described as 'an increase in the capacity of an economy to produce goods and services, compared from one period of time to another'. In other words it is purely an economic indicator. Sustainable economic growth could be described as 'economic growth that is both socially equitable and environmentally sustainable'. As you can see economic growth and sustainable economic growth are different and the present drafting does not make it clear what is intended. Sustainable economic growth would make it a much more balanced provision.

The statement, 'each regulator must contribute to achieving sustainable economic growth' does not convey what is expected of regulators and the current wording is sufficiently vague that it could be interpreted in a variety of ways. I think it is fair for regulators to consider, assess and take into account factors in relation to sustainable economic growth whilst deciding on actions which they can take, however, where public health is at risk action to mitigate or manage such risk must not be compromised by other factors.

It is also a widely held view within business that robust regulation is of benefit when dealing with foreign markets demonstrating the provenance of Scottish products. This can have a positive impact on sustainable economic growth for Scotland and as such, regulation should be viewed as a benefit which assists sustainable economic growth.

This section needs to be much clearer on what is being required to be understood by both regulators and those being regulated and fundamentally the rationale behind such a provision which is so loosely worded requires to be articulated. REHIS believes the principles of sustainable economic growth are laudable and something that society should strive towards, however, to make it an absolute statutory duty would be unwise. It would be best that the principles be subject to guidance which could be amended accordingly as economic, societal and environmental factors change.

Chapter 5

General Purpose of SEPA

Section 38 General Purpose of SEPA

It is noted in this section that SEPA must contribute to –

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

(b) achieving sustainable economic growth.

The link between environment and health has been recognised for some time. One only needs to look at both the World Health Organisation and REHIS definitions of 'environmental health' to recognise the importance of the environment in relation to good health and well being. (See Appendix 1). There are a number of organisations, agencies and professions who contribute to the objective of improving health and well being through positive action on the environment. It is therefore welcome that this link is being more overtly recognised by government.

It does, however, beg the question as to why improving the health and well being of people in Scotland has not been made a duty of regulators to contribute towards in much the same way as the proposal to impose a duty on regulators to contribute towards achieving sustainable economic growth. I would have thought that both aspirations are complementary and it would be difficult to have one without the other. REHIS would therefore advocate that contributing to improving the health and wellbeing of people in Scotland should be a duty of regulators as it is every bit as important and relevant as achieving sustainable economic growth. It could be argued that without improving health and well being you cannot achieve sustainable economic growth. EHOs are educated, trained, qualified and competent to assess and intervene on any impacts of the environment on human health. The local authority named Environmental Health service employs EHOs to protect the health of the public.

Chapter 6

Section 42

Application for street trader's licence: food businesses

REHIS supports the proposal that only one food authority should grant a certificate in relation to food safety. This must not, however, prevent another food authority, within which the vehicle, kiosk or moveable stall is trading, from inspecting the vehicle kiosk or moveable stall and taking appropriate action if necessary. The certificate should validate the physical characteristics of the vehicle, kiosk or moveable stall as meeting the requirements of relevant legislation, however, food handling and hygiene practices can vary and must be monitored in areas where trading is taking place. The proposed amended wording to the Civic Government (Scotland) Act 1982 does not make this clear.

Whilst EHOs are employed within SEPA most of their staff will not have the underpinning public health knowledge required to adequately and competently

perform this specific purpose. It is therefore essential that SEPA employ staff with underpinning public health knowledge in key positions of influence and control.

The Institute welcomes the opportunity to make a written submission in respect of the Bill and trusts that the submission is constructive and helpful in progressing the Bill.

The Royal Environmental Health Institute of Scotland
3 June 2013

SUBMISSION FROM THE ROYAL SOCIETY OF PROTECTION OF BIRDS (RSPB) SCOTLAND

RSPB Scotland welcomes the opportunity to respond to the Economy, Energy and Tourism Committee's call for views on the Regulatory Reform (Scotland) Bill Parts 1, 3 and 4. We provide comments on each of these sections below.

General comments

RSPB Scotland supports regulatory reform for the purpose of integrating and streamlining regulatory requirements but only when this maintains a sufficient level of environmental protection. Well-enforced regulations play a central role in protecting the environment and the natural capital upon which our long-term prosperity and wellbeing ultimately depend. The 2011 UK National Ecosystems Assessment clearly highlighted the wide variety of significant benefits provided by the natural environment in terms of economic prosperity, human health and wellbeing; the risks posed to these benefits through inadequate protection and management of the natural environment; and, in particular, the importance of regulation in safeguarding and enhancing the delivery of key services.

We view regulation as an essential policy tool for achieving effective protection of the natural environment and as a means of the UK meeting its legal obligations under EU Directives such as the Water Framework Directive and the Birds and Habitats Directives. The unfolding situation within the coal mining industry in Scotland is a stark reminder of the need for industry to be closely and effectively regulated. The opencast coal operators that went into administration have significant liabilities in relation to the restoration of their sites, with restoration costs rising into many millions of pounds at some sites. Failure to manage and restore these sites could cause immediate and serious pollution threats from contaminated mine water and put Scotland in breach of European legal requirements under the Birds and Habitats Directives. Scotland's regulatory framework must be made sufficiently effective and robust to avoid such situations in future.

In summary:

- We fully support effective and transparent regulation that safeguards the natural resources upon which a successful economy wholly depends.
- We oppose the introduction of a duty for regulators to contribute to the achievement of sustainable economic growth.
- We are disappointed by the ad hoc nature of the provisions on marine licensing.
- We do not support a system that links fees to planning authority performance.
- We believe the sanctions in the Bill should be refined to give regulators greater scope and flexibility to deal with non-compliance.

Part 1: Regulatory functions

Section 2 – Regulations under section 1: further provision

Provisions in the Bill would allow regulations to be made to amend or revoke existing regulatory requirements. Although the Bill proposes that such changes would only

be permitted when equivalent regulatory requirements exist, we question how this judgement would be made. Robust and sufficient safeguards would be needed to ensure that the provisions do not reduce levels of environmental protection. All secondary legislation arising from the final Act should be made subject to the affirmative procedure.

Section 4 - Regulators' duty in respect of sustainable economic growth

RSPB Scotland questions the use of 'sustainable economic growth' over 'sustainable development' and believes that a duty for the latter is far more appropriate. Sustainable economic growth is not defined in legislation, either in this Bill or in existing legislation, nor is there any clarity about what sustainable economic growth actually is; it means different things to different people. Indeed, we would draw the Committee's attention to written evidence from lawyers and legal bodies including the Law Society of Scotland who guard against forming a legal duty from an imprecise term such as sustainable economic growth. On the other hand, 'sustainable development' is already embodied in international, European, UK and Scottish law and is defined and underpinned by clear principles. The Scottish Government is already signed up to the UK's shared framework for sustainable development and there is strong precedent for sustainable development duties in Scottish legislation, for example the Planning etc. (Scotland) Act 2006, Climate Change (Scotland) Act 2009 and Marine (Scotland) Act 2010.

We are concerned that a sustainable economic growth duty on regulators would introduce a bias towards economic aspects over the other two pillars of sustainable development: environmental and social. If it is not the Government's intention to propose a duty that puts economic issues ahead of environmental or social considerations then a new duty is not technically necessary for regulators that already have a sustainable development duty e.g. SEPA and SNH. Furthermore, SEPA and SNH already have legal obligations to have regard to social and economic factors when exercising their functions. This means that economic growth can already be taken into account. It would be more sensible to extend a sustainable development duty to all of the regulators listed in Schedule 1.

Part 2: Environmental regulation

We are aware that the EET Committee has not invited views on Part 2 but our written submission to the RACCE committee contains our comments on that part. In short, we suggest that a number of the provisions would benefit from further clarification. In particular, we do not believe that financial penalties should be capped because there must be scope to have fines that act as sufficient deterrent and adequately penalise those who have caused significant environmental harm. For example, the Greenhouse Gas Emissions Trading Scheme Regulations[1] enable penalties of 100 Euros per tonne of CO_2 emitted to be applied, and there are clear benefits of a system where the magnitude of fine can be linked to the environmental harm of an activity.

[1] http://www.legislation.gov.uk/uksi/2005/925/made/data.pdf

Part 3: Miscellaneous

Section 40 - Marine licensing decisions

We are disappointed by the ad hoc nature of the marine licensing provisions in the Bill. A range of appeal systems, with varying timescales and procedures, already exists within environmental legislation and the provisions in this Bill merely add to that complexity. There is a real need for a joined-up approach to judicial reform and, in this regard, we wholeheartedly agree with the points made by Professor Colin Reid in his evidence submission. It remains very difficult for parties to challenge Government in the courts. We note that, prior to forming the current Government, the SNP made a manifesto commitment to explore the option of an environmental tribunal or court. To continue making ad hoc changes before that option has been explored is an unfortunate continuation of a disparate approach.

Section 41 - Planning authorities' functions

RSPB Scotland is opposed to a system that would financially penalise planning authorities that failed to meet targets. As a non-statutory consultee and a frequent applicant for planning consent, we are acutely aware of the need to have timely, efficient and consistent processing of applications. However, planning authorities must have the necessary resources and expertise to do this. We disagree that taking money from underperforming planning authorities will help to improve the service and there is a real danger that this would lead to an increased divergence in the quality of service between planning authorities. Such a move is likely to increase the pressure on authorities to grant permission before an application has been fully assessed, potentially resulting in significant detrimental environmental impacts and possible breaches in legislation, such as the Habitat Regulations.

Should Ministers be minded to introduce a link between fees and performance despite the clear risks involved, it would be essential for some mechanism to be introduced that would ensure minimum standards are met. Planning authorities would need to continue to be resourced adequately to ensure that local authorities and Scottish Ministers meet their legal obligations in a variety of areas.

RSPB Scotland
4 June 2013

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.

SUPPLEMENTARY EVIDENCE FROM THE LAW SOCIETY OF SCOTLAND

The Law Society of Scotland's Planning Law Sub-Committee refers to the Scottish Parliament's Economy, Energy and Tourism Committee's call for supplementary evidence on how the duty to promote sustainable economic growth as referred to in Section 4 of the Bill might impact, (positively and/or negatively), on a regulator or regulated activity compared with applying a duty to promote sustainable development when exercising regulatory functions.

The Law Society of Scotland's Planning Law Sub-Committee Convenor, Frances McChlery forwarded this request to the Planning Law Sub-Committee for consideration following upon her appearance before the Economy, Energy and Tourism Committee on 26 June 2013.

The Sub-Committee has had sight of additional written evidence prepared by Professor Andrea Ross, School of Law, University of Dundee who is also a Sub-Committee member, and is broadly in agreement with the terms of Professor Ross's paper and in particular, the examples she refers to.

The Sub-Committee considers that both planning decision makers, and developers and promoters already understand the concept of 'sustainable development' as an internationally well established, balanced and self contained phrase. The phrase, is already embedded in Scots law and policy relating to development planning and environmental permitting. 'Contributing to sustainable development' the existing legal duty, already reflects the need to support development, but also the obligation, shared internationally, to evaluate development proposals against any adverse environmental or social impact, and not to support development which is environmentally unsustainable, in that permitting it would prejudice or undermine the duty of stewardship of the world's resources. In common with several witnesses before the Committee, the Sub-Committee does not consider that an additional duty to promote 'sustainable economic growth' would add anything positive to the existing principle, and considers that the proposed new duty introduces some confusion about what should and should not be considered in any decision making process. Accordingly, the Sub-Committee questions the requirement for an additional duty in respect of 'sustainable economic growth'.

In terms of examples of ill effects of the duty, were it to be imposed on the existing planning or environmental permitting systems, the Sub-Committee would highlight that it is likely to lead to a perception in the application process that developers and / or decision makers should have detailed regard to the economic aspects and prospects of the proposals during the planning or environmental permitting process. The planning system does not handle such financial evidence well, and it has long been the established view that assessing the benefits, or indeed prospects of success, of an investment is not a proper concern for the planning or environmental system. The environmental permitting system has slightly wider financial assessment duties to enable them to evaluate the cost of environmental protection measures, but these are still not sufficiently wide to include the business prospects of any application. Both the planning system and the environmental permitting systems are designed to have regard to geography, including human geography, and for the management of space. These systems are not currently equipped to extend their considerations to the economic benefits or prospects of success of development proposals, in any but the most general sense, such as the prospects for

employment, and the adequacy of the supply of land in the right location. It is submitted that investment issues should remain a matter for the investor, and if public intervention is involved, that should continue to be policed by the enterprise function of government.

To revert to the question of whether there would be benefits in principle, the Sub-Committee further notes that, on the basis that there is to be a duty based on economic growth, then the wording appears to raise the implication that scales are permanently tilted in favour of the economic arguments to the detriment of all others. Although individually this difference in each decision may be at the margins, the cumulative effect is that if every marginal decision prioritises economic over other considerations, then this may mean that the environmental balancing process will be skewed away from protecting the environment. As some of our legal commentators have observed, this could well mean despite any perceived increase in economic prosperity that we would be poorer in other respects and, adopting the Scottish Government's own language, Scotland may be wealthier, but not fairer, safer or greener. This contrasts with existing government policy about the environment of Scotland which recognises the immense value of high environmental standards to the Scottish economy in their own right.

On this point and by way of further practical examples of anticipated problems, there are a significant number of examples throughout Scotland's economic history where economically based decisions have later come to be regretted, in particular, unregulated heavy industry and mineral extraction or exploitation in Scotland which was permitted to operate in ways that left a legacy of contaminated land and river pollution for future generations to address. The modern approach, which the Sub-Committee would regard as well established as fit for purpose, is intended to avoid such bad decisions, and ensure appropriate management. Because of enhanced scrutiny, we would hopefully now be able to identify and avoid sustainability disasters like the Highland Clearances, which appeared to be the economic answer at that time, or leaving to future generations the legacy of dereliction and pollution from an earlier age where the environment was ignored, or regarded as inexhaustible. Portavadie village, never used for its purpose, and now derelict for 20 years, was another example of poor decision making in the past where undue emphasis on the hope of economic development led to a wasteful exercise in planning terms.

Recent experience with the liquidation of coal operators, or indeed with the delays in delivering the benefits promised with the Trump golf resort proposals, demonstrate that it cannot all be left to bonds or conditions to ensure either clean up or delivery of the promised benefits. Some things have to be carefully examined from first principles at the time of decision.

In all development permission decisions the issues are finely balanced, and that balance is already well reflected in the phrase 'sustainable development'. In all cases regulators in taking individual decisions would be putting into their considerations a host of different considerations - economic, social and environmental – and the concern is that if there is a duty based on economic growth, then the scales are permanently tilted in favour of the economic arguments to the detriment of all others, notwithstanding their importance.

The Law Society of Scotland
July 2013

RSPB – SUPPLEMENTARY INFORMATION

In a theoretical example where a regulator has to apply a legal duty to promote sustainable economic growth, this might impact on the regulator or regulated activity by causing some considerable difficulty in identifying what is required in order to meet the duty, with the knock on effect of decisions being made that are challengeable in law. There are no well established definitions of sustainable economic growth. It could be interpreted in many ways. Any decision made by the regulator could be open to criticism and challenge. We do not believe this is conducive to good decision making or to good regulation.

In a theoretical example where a regulator has to apply a legal duty to promote sustainable development, the regulator could refer to a range of guidance and information that has been produced by the Scottish Government and others including:

- That provided in Scottish Planning Policy (SPP) to help Scottish Ministers and local planning authorities fulfil the sustainable development duties they have under the Planning etc (Scotland) Act 2006.
- Choosing Our Future, Scotland's Sustainable Development Strategy
- The UK's shared framework for sustainable development
- The EU Sustainable Development Strategy

While there are subtle differences between these documents, it is well established that sustainable development is about balancing economic, social and environmental factors in decision making such that the decisions made here and now do not compromise the quality of life of people elsewhere in the world, or of future generations. While there are sometimes challenges in interpreting sustainable development in decision making, most regulators are already very familiar with the concept and many already have existing statutory duties to consider it in decision making. For example, the Planning etc (Scotland) Act 1996, the Water Environment and Water Services (Scotland) Act 2003, the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010 all refer. In these circumstances, a regulator would be unlikely to have difficulty in applying the duty to their regulatory activity.

I would also ask you to note that while our slight preference would be for the duty to be amended to a sustainable development duty, we would also be content with the reference to any duty to be simply removed from the Bill as proposed. We also remain curious as to why the proposed duty to promote sustainable economic growth would only apply to a select few regulators, and not, for example, to Scottish Ministers.

Aedán Smith MRTPI
RSPB
July 2013

SUBMISSION FROM THE SCOTTISH GOVERNMENT

It was considered appropriate to base the appeal provision in the Bill on the existing models, such as sections 238 and 239 of the Town and Country Planning (Scotland) Act 1997 and Schedule 2 to the Roads (Scotland) Act 1984, which provide for a statutory appeal with a six-week time limit. The six-week period was adopted in these Acts because, as well as giving adequate time for a legitimate appeal, it allows developments to start without excessive delay and also gives developers certainty that once the appeal period is up they can confidently expend money and start building. The Scottish Government considers that the provision in these Acts has been operating satisfactorily for some time.

We were made aware of the concerns of the Scottish Environment Link and Friends of the Earth Scotland in respect of this timescale after the Bill was drafted, and the Scottish Government will continue to engage with them and other environmental NGOs on this issue as the Bill passes through its Parliamentary stages.

The Government believes the timescale is appropriate; it is in the interests of developers, challengers, and the Scottish Government to avoid unnecessary delays. The Scottish Government also considers that an appeal can be submitted within this timescale; if appropriate, the court can decide to allow more time to prepare a case after appeal has been lodged.

It may be of interest to note the proposals for judicial review contained in the Ministry of Justice report *Reform of Judicial Review*. In this report, the Government at Westminster is proposing a six-week time limit on planning cases (see https://consult.justice.gov.uk/digital-communications/judicial-review-reform/results/judicial-review-response.pdf).

Scottish Government
April 2013

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 11 September 2013

[The Convener *opened the meeting at 09:32*]

Regulatory Reform (Scotland) Bill: Stage 1

The Convener (Murdo Fraser): Good morning, ladies and gentlemen, and welcome to the 23rd meeting in 2013 of the Economy, Energy and Tourism Committee. I remind everyone to turn off—or at least turn to silent—all mobile phones and other electronic devices.

Before we start, I hope that members will indulge me in a little advertising on behalf of the committee. We now have a Twitter feed, whatever that might mean. Our address is @SP_Economy—which I am sure will be spelled correctly in the *Official Report*—so you can follow the excitement, thrills and spills of the committee every day, if you wish.

We have received apologies this morning from Dennis Robertson, for whom Joan McAlpine is attending as a substitute. However, Joan is running a little late; she has sent her apologies and will be here very shortly.

The first item on the agenda is continuation of our evidence taking for our stage 1 report on the Regulatory Reform (Scotland) Bill. I am pleased to say that we are joined this morning by Fergus Ewing, Minister for Energy, Enterprise and Tourism; and Derek Mackay, Minister for Local Government and Planning. They are joined by Scottish Government officials Stuart Foubister, divisional solicitor; John McNairney, chief planner; Sandra Reid, better regulation policy adviser; and David Palmer, head of marine planning. I welcome everyone and thank them for coming along.

Before we get into questions, ministers, do you wish to make any introductory remarks?

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): Thank you very much, convener. Good morning and happy Twittering. I welcome this opportunity to speak on the bill, as it will allow us to build on the letter that we sent last week.

By streamlining and making regulation more effective, the bill will protect our people and environment and make a modest contribution towards helping our businesses flourish and create jobs. Consistent, proportionate and effective regulation is essential to the Government's purpose of increasing sustainable economic growth. That reflects what I am told when I visit businesses throughout the country and indeed the business community's response to last year's consultation on the options for better regulation. This Government has a record of delivering better regulation and I know from personal experience that that can make a significant difference to businesses throughout the country.

As Minister for Community Safety, I oversaw a review of fire safety regulations in the bed-and-breakfast sector of our tourism industry. The sector was unhappy about what it saw as over-the-top fire safety measures, and a working party that I chaired over a long period simplified requirements and reduced the average cost of compliance by more than 90 per cent while ensuring that high safety standards were maintained. That approach was welcomed and, as a result, I strongly believe that although regulation is necessary to protect the environment, consumers and people in business, our approach must also ensure that we apply the principles of better regulation: namely, regulation that is transparent, proportionate, consistent, accountable and appropriately targeted only when needed. The Regulatory Reform (Scotland) Bill aims to improve the application of regulations in practice across Scotland to support business and economic activity and deliver benefits to society.

My colleague Paul Wheelhouse has already given evidence on the bill's environmental aspects to the Rural Affairs, Climate Change and Environment Committee. I am also aware that you and your colleagues have been taking evidence from a variety of organisations and regulators on the bill's enterprise elements, on which I lead, including the enabling power to encourage or improve consistency in the exercise of regulatory functions; the duty to contribute to sustainable economic growth in regulatory activity and the related code of practice and amendments to requirements for certificates of compliance for mobile food business street trader licence applications. As you know, I have already signed a memorandum of understanding with Councillor Stephen Hagan of the Convention of Scottish Local Authorities on working together to develop future national standards.

We also recently consulted on the merits of primary authority partnerships, and we are now analysing the 42 largely supportive responses to that consultation. A code of practice working group has been set up to develop a draft Scottish regulators' code of practice for consultation later in the year.

You may also be interested to know that, in July, the United Kingdom Government issued an updated regulators' code and published a Deregulation Bill, which includes a duty to

"have regard to the desirability of promoting economic growth."

Although that is relevant to businesses that operate across the UK, we in Scotland remain firmly focused on better regulation rather than deregulation. We are committed to a high level of stakeholder engagement and to responding to stakeholders' views.

I will end by acknowledging the interest from MSPs and stakeholders in the duty to contribute to sustainable economic growth and, in concluding these short opening remarks, I make it clear that this duty does not state that sustainable economic growth must be foremost over other regulatory objectives or statutory duties and does not prioritise sustainable economic growth over other regulatory objectives or statutory duties. Regulators need to determine an appropriate balance and be accountable for that. In their responses to consultations and to the Parliament's committees, regulators have signalled that they already act in that way and I welcome that. The bill supports that existing good practice and will extend it across Scotland as a whole.

Before we take questions, I am sure that my colleague Derek Mackay will wish to add a few opening remarks.

The Convener: We are very fortunate in having a brace of ministers this morning. Mr Mackay, would you like to say something?

The Minister for Local Government and Planning (Derek Mackay): Yes, please, convener.

I, too, thank the committee for the opportunity to discuss the Regulatory Reform (Scotland) Bill. The planning reform next steps programme is making progress by encouraging improvements to the planning service to ensure that it fully supports economic recovery through promoting the plan-led system, driving improved performance, focusing on delivery and simplifying and streamlining the system. We have also consulted on a revised Scottish planning policy that provides high-level messages on ministers' planning expectations, including a high-performing, high-standard function that focuses on achieving outcomes that make a difference to people rather than process alone in playing a key role in facilitating economic recovery and sustainable economic growth.

Our key aim is to make the SPP much clearer on how planning can support the delivery of jobs and growth. We propose, first, that significant weight be attached to the economic benefits as a material consideration in the planning process, particularly the creation of jobs and, secondly, that development plans must be deliverable and informed by sound economic evidence, particularly local economic strategies.

As you are aware, I am committed to improving the performance of the planning service in Scotland. I have discussed with staff in every authority in Scotland my aspirations for a high-performing service. I understand that there has been a significant stakeholder interest in section 41 of the bill, which relates to charges and fees for planning authorities' functions. With approval from the Scottish Parliament, planning fees were increased by approximately 20 per cent on 6 April 2013, and I consider that that increase will strengthen planning authorities' resources and capacity to deliver a high-performing service while maintaining a supportive business environment that supports economic growth. Scottish ministers maintain that any fee increases must be inextricably linked to performance if we move towards full cost recovery and I am dependent on local authorities to improve their performance and for them to provide the justification to do so. I will not make any knee-jerk reaction to reduce any authority's fees based on one period of poor performance, and the process will include an opportunity for authorities to improve on areas identified through assessment before I seek to use any new provisions.

A high-level group on planning performance has been formed. The group, which I co-chair with Councillor Stephen Hagan, COSLA's spokesperson for development, economy and sustainability, and which includes key representatives from the Society of Local Authority Chief Executives and Senior Managers, Heads of Planning Scotland and other key agencies, has identified and agreed a set of performance markers that reflect key areas of essential good performance and service quality across the planning system. Those key markers are in the main not new but are drawn from the existing planning performance framework that we developed with local government and other stakeholder groups when it was introduced and form the basis of the assessment that will be used to consider whether to vary any individual planning authority's fees. The high-level group is taking forward detailed practical arrangements for use of section 41 provisions. I am not indicating that COSLA supports the section, but I will continue to work in partnership on that and all other matters relating to the bill.

The Convener: Thank you, minister. As we need to cover quite a lot of territory in the next little while, I ask members to keep their questions short and to the point, and it would be very helpful if we had responses along the same lines. It will

probably be self-evident which minister the questions are directed at, but it will help if members indicate to whom they are asking their question to ensure that there is no confusion.

I will start with section 4, because the evidence that we took suggested that the duty on sustainable economic growth is potentially the most difficult and controversial part of the bill. In your introductory remarks, Mr Ewing, you talked about the Government's priority of promoting sustainable economic growth, but can you tell us what sustainable economic growth is?

Fergus Ewing: I know that there has been a particular interest in the definition of sustainable economic growth and in my most recent letter to you, dated 5 September, I provided it. Given that I am not a parliamentary draftsman and given that anything a minister says is his bond, I will just read from that letter rather than indulge in extemporary contributions.

The Scottish Government defines sustainable economic growth as:

"building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too."

Indeed, that definition can be viewed on the Scottish Government's website in the answer that John Swinney gave to a parliamentary question on 20 November 2012. That indicates that, although there is always interest in this area, the Scottish Government's response has been stated clearly, frequently and with absolute consistency. I hope that we have provided absolute clarity in that regard.

09:45

The Convener: Thank you for that. We have been told in evidence—and we have confirmed this ourselves—that the term "sustainable economic growth" has not been previously defined in legislation. Will you be putting the definition that you have just provided in the bill?

Fergus Ewing: The question whether definitions should be put in bills is one on which we have to take legal advice, so that is a matter for legal advice. We have provided a clear definition of sustainable economic growth. If any of the officials wants to provide additional information, I would be happy for them to do so, but it seems to us that, given that we have provided a very clear—albeit general—definition, that should suffice. To some extent, we are all anxious to get on with delivering economic growth rather than talking about defining economic growth.

The Convener: I think that the point is—we have heard this in evidence—that if there is no definition in the bill, inevitably it will come down to the courts to define the term, and we will end up in litigation. We have heard quite a lot of evidence that says that, because of the impact that the bill will have on a number of regulators, and given that, as you will be aware, when it comes to development and planning, there might be very large sums at stake, it is very likely that stakeholders—either developers or objectors—will end up in the courts to challenge particular decisions based on this provision being put in the bill. Therefore, the courts will decide. Surely it is preferable for Parliament to decide on a definition and to put that in the bill, rather than have the courts decide at a later date.

Fergus Ewing: There is always the risk of court action on all sorts of things. It is not really possible to prevent that, no matter how a bill is drafted. It would be nice, particularly for ministers, if there were a way in which we could avoid some of the litigation in which we are involved but, sadly, that is beyond our ken. Equally, it is important that people have the right to take matters to court. That is an element of civilised society.

The Convener: I am sorry, but you are not seriously telling me that you think that it is preferable for the court rather than Parliament to decide these matters.

Fergus Ewing: I am just coming on to answer your question. We do not think that there is a compelling case for including a definition in the bill. Of course, we are always happy to consider such matters further, and we can have a little bit of legal advice and contribution, if you want, in a moment. It would be imprudent for me to say anything other than that these are matters on which we need to reflect very carefully, for the reasons that you have described.

However, our current view is that there is no compelling case for including a definition in the bill. I should point out that the duty will be underpinned by the code of practice. To address stakeholder concerns about the matter, a definition will be included in the code. The definition will be the one that we have provided very clearly, and over a long period, in response to a series of questions that have been put in writing and verbally.

Of course, we will be happy to consider the matter carefully once again if the committee feels extremely strongly about it and come back to you, but we have reached the view that there is no compelling case for including a definition in the bill. That is our current view and the advice that we have had, after quite a lot of consideration of the issue over a long period, and other bills as well. I do not know whether there is any litigation that you can point to over the matter. Sustainable economic growth has been our primary purpose since the previous Administration was formed.

The Convener: Yes, but the term "sustainable economic growth" has not appeared in a bill that has been passed by this Parliament so, clearly, there would be no litigation around that, because it has not been in the law.

Fergus Ewing: We will tak tent on that and look at it carefully again because, if that is the case, that would be a reasonable point to make. Our current advice is that there is no compelling case to include the definition in the bill, but we have provided a definition. Indeed, that definition, having been stated very clearly in these committee proceedings, will be available for any court to look at in relation to the interpretation of bills. As I understand it, courts are allowed to do that, although I am now trespassing into the area of legal advice, which officials may want to urge me not to do further.

Stuart Foubister (Scottish Government): If it helps, I think it highly unlikely that any legal disputes over section 4 would descend to a definition of sustainable economic growth. I can see the scope for dispute as to what the duty requires a particular regulator to do in a particular circumstance, but I do not think that that is the same as saying that there is a dispute as to what "sustainable economic growth" means. As the minister has pointed out, we have provided a definition in the letter that is likely to feed through into the code of practice or the guidance. If you look at the language that is used, you will see that it is not of the nature that one would normally see in a statute. It is not that kind of legal definition.

Alison Johnstone (Lothian) (Green): I welcome the fact that the minister is thinking about excluding planning functions from the duty to contribute to sustainable economic growth.

We are being asked by the Government to pass what appears to me and to others to be a convoluted and caveated economic duty—namely, a duty for regulators to promote sustainable economic growth, except in cases where that affects their regulatory functions. We have taken a lot of evidence from bodies such as Scottish Natural Heritage, which claims that it will make no difference whatever to the way in which it works, but we have also heard from 12 local authorities that are against the proposal. The unions are opposed to it, and the regulatory review group itself did not suggest or fully endorse it.

Given that we have heard a lot of conflicting evidence and a lot of evidence that does not support the inclusion of the duty, would it not be better to drop the section entirely and allow the successful, non-legislative approaches to continue to deliver consistency?

Fergus Ewing: No. I do not think that that is a suggestion that is well founded, and I am afraid that I respectfully disagree with the characterisation of the position as set out by Alison Johnstone. In all Scottish regulators, we are determined to promote a broad and deep alignment with the Government's primary purpose of delivering sustainable economic growth. We accept that regulators are making progress and that they balance existing duties, but the statutory economic duty, alongside the code of practice, will—we believe—deliver greater transparency towards the Government's purpose of achieving sustainable economic growth.

The duty, as I have already made clear, does not prioritise sustainable economic growth over other regulatory objectives. Some statutes prioritise specific duties. For example, the Sandford principle sets out that the first duty set out in relation to national parks should be given preference, in certain respects, over the other duties. That is a possible course of action, but we have not done that, because we take the view that we should not prioritise economic growth as the consideration to which most weight must be attached. On the contrary, we have said that it must be something to which regulators must have regard, and I think that that is the correct approach.

It would be perverse were that not the correct approach, given that delivering sustainable economic growth is the primary purpose of this Government. I could invert the proposition to Alison Johnstone and say that it would surely be perverse if there were no duty whatever to have regard to what is the primary purpose of this Government. Of course regulators should have regard to it. Therefore, the duty is sensible and necessary. I do not think that how Alison Johnstone has characterised the responses to the bill—she has suggested that this does not receive substantial and reasonable support from wide quarters—is correct.

I want to stress that the approach that I have taken—and I hope that this will not be disputed—has been to have lengthy, detailed and constructive discussions with Stephen Hagan and his staff in COSLA over a long period. We have been very keen to make sure that, in relation to the economic duty, we work extremely closely with COSLA and seek to deliver the bill in a way that is broadly supported by COSLA. I believe that we have achieved a great deal thus far, working with COSLA in that regard. I am proud of the fact that we have had that engagement, and I think that the proposed duty will make a positive contribution to the achievement of sustainable economic growth in this country.

Alison Johnstone mentioned the exclusion of planning from the economic growth duty. The reason why we have taken that approach is that

we think that the application of the bill to planning authorities is not the appropriate way to deal with matters, because sustainable economic growth is already a consideration that is enshrined in planning law. I am sure that Mr Mackay will be willing, if he is permitted so to do, to set out our thinking on how the sustainable economic growth imperative will be taken forward in relation to planning law. It will be taken forward in planning law in practice in another way, and not in the bill. We are not dropping anything; we are just doing it in a different way.

I do not know whether Mr Mackay might want to answer that part of Alison Johnstone's question.

Derek Mackay: I fully expected questions on this subject. As Mr Ewing has indicated, it would be inappropriate for the duty to apply to our planning functions, but the pursuit of sustainable economic growth will continue in planning policy and national planning framework 3. Indeed, it is reinforced in the emerging policies that I continue to actively consult on.

Within those policies, we propose that economic impact and economic benefits should have greater weighting as a consideration in the planning system. That is an appropriate policy place to have that discussion; we should not necessarily have it in the context of a duty that might convolute the appeals process as it relates to planning. That said, sustainable economic growth or economic impact does not necessarily override all other considerations in the planning system. The planning system is about having a balance and an understanding of a range of factors that lead to a conclusion on whether to consent. It is certainly a policy approach as opposed to the legal approach that the bill might have led to. That is why we have been enthusiastic to clarify the point.

Alison Johnstone: Thank you. That is helpful. Unfortunately, I think that it is fair to say that the committee spent a fair amount of time discussing examples that might have arisen were the duty to apply to planning. The clarification is welcome now.

When Councillor Cook from COSLA gave evidence, he said:

"the duty to promote economic growth cuts across local democratic accountability."

He also said, in relation to the question that he was asked about whether COSLA regarded the national duty as ideal:

"our response ... is simply no."—[*Official Report, Economy, Energy and Tourism Committee*, 5 June 2013; c 2953-4.]

Although we are being advised that the economic duty will not be prioritised above others, it is very subjective. Deciding which level of importance to give to an economic duty is a very subjective decision. We were given an example of a shop that is selling bootleg alcohol and, because of that, is making money and growing its business. Could that be a defence against regulatory action?

10:00

Fergus Ewing: I am not going to start to talk about bootleg alcohol, especially so early in the morning.

To take your question seriously, we have had very positive discussions with COSLA. We have had very good working and several meetings with COSLA over a long period. A lot of work has been carried out. A code of practice will be developed by regulators and stakeholders. That will be consulted on prior to introduction. I think that that will provide a lot of practical assistance to regulators and stakeholders, and I hope that it will address some of the concerns that members have expressed in this committee and previously. A short-life working group comprising business representatives and regulators including the Scottish Environment Protection Agency, SNH and COSLA has been established to develop the code of practice.

In practice, we spend a lot of time—and rightly so—engaging with local authorities. I engage with Moray Council on the Buckie shipyard which, sadly, went into administration a week ago yesterday. I engage with Stirling Council in relation to homecoming issues. I engage with Aberdeen City Council and Aberdeenshire Council about the oil and gas industries. Such engagement is very important to me. I could give you many other examples—I engage with the island councils in relation to renewable energy. That is very important. We want to work in partnership with local government, and we do. That is extremely important to us. I think that the bill, working together with the benefits of the code of practice and all the engagement that there has been, will make a significant contribution to creating more jobs and businesses. I hope that that is something that the Green Party would welcome in Scotland.

Alison Johnstone: We had a meeting with a senior environmental trading standards officer who said that, in working with the owner of a burger van or a baker with a mouse infestation, those people's livelihoods are at the front of officers' minds and they constantly help them to get back to work as quickly as possible. Local authorities fully understood the need to contribute to the working world and the economy. He was resolute in his belief that there is no need for national legislation.

On sustainable economic growth, you recognise that sustainable development is a well-understood

and established concept. The Law Society of Scotland could not have been clearer about its concern that the bill is a lawyers' charter. I do not understand why we are going down the road of foisting legal uncertainty about the concept of sustainable economic growth on regulators.

Fergus Ewing: I respectfully disagree with almost all Alison Johnstone's assertions. The bill is not "foisting legal uncertainty" on anyone; I refer to comments by my officials earlier, in that regard. The new duty is about providing clarity on the Government's purpose and demonstrating the obvious—namely, that the Scottish Government and regulators in Scotland value economic growth and protection of the environment. Those need not be mutually exclusive; we can, and should, aspire to deliver mutually supportive outcomes wherever possible.

We have sought to cover all those issues today, and in extensive correspondence. We will look specifically at the issue that the convener raised about the need for a definition. I can see that we have not satisfied all the committee's members, so I undertake to return before stage 2 with a further letter setting out our views so that we can, I hope, close this argument.

Hanzala Malik (Glasgow) (Lab): Good morning, minister. On the one hand, you said that you will look at sustainable economic growth and sustainable development. I am pleased about that and I thank you for saying that. However, some of your other responses almost disagree with that. I want to reassure myself that you are really saying that you will look at the matter again.

Fergus Ewing: What I said in response to the first line of questioning from the convener is that I will come back to the committee with a letter prior to stage 2 on the specific question whether there should be incorporated in the bill a definition of sustainable economic growth. That is fairly clear.

Hanzala Malik: Foot-and-mouth disease and horsemeat pollution in our meat affect our economy, tourism and a host of things, including licensing. How will the bill protect the community from that type of activity?

Fergus Ewing: I must admit that I have not specifically considered foot-and-mouth disease in relation to the bill. My recollection is that those matters are considered primarily by appropriate veterinarian and health experts upon whose advice we tend to rely.

Hanzala Malik: My point is that those issues affect our economy and tourism. The bill is looking at sustainable economic growth and sustainable development. Surely the bill must have a role in protecting industry from that type of activity.

Fergus Ewing: What sort of activity?

Hanzala Malik: I mean, for example, horsemeat contamination of meat.

Fergus Ewing: I am happy to look at that issue and come back to Hanzala Malik on whether the matter has implications for the bill. However, my initial view is that that is unlikely.

Chic Brodie (South Scotland) (SNP): Good morning, ministers and teams. I have never been sure why we went up this blind alley. I have read several local economic development plans and I have yet to see bias one way or t'other.

You and your advisers will have read many more plans than I have. Will you advise me where the economy has superseded sustainable development in any of the plans? In fact, are they not indivisible and do they not work alongside each other?

Derek Mackay: Mr Brodie's point is correct; it is not a choice between sustainable economic growth and sustainable development. They are actually compatible, in keeping with each other and in harmony. Sustainable development has a very well-established definition, simply because of its duration and its timing, and it is a bit more lengthy than the definition that is provided on sustainable economic growth. The parliamentary process is assisting, and I am sure that we can all regurgitate words to mean the same thing. However, there is no conflict.

The debate around whether we are, for example, diluting our sustainability agenda is false. That is at the heart of Government policy and our definition. We can say as many words as we like to mean the same thing but, essentially, the definition is provided by the cabinet secretary, for the Government. Sustainable development as embodied, for example, in planning documents has been established for longer. Therefore, you could describe it as being more widely understood. However, there has never been any serious challenge to the Government's understanding of sustainable economic growth as an overarching purpose or as something to achieve.

On Alison Johnstone's point, for any planning consideration we have to consider a range of factors and then come to a conclusion. Not least in our minds is the economic impact, what happens to a community and what the benefit of any application is. I think that the debate about definition is something of a distraction from the emphasis.

Chic Brodie: Thank you.

The Convener: I will take a very brief follow-up from Alison Johnstone.

Alison Johnstone: Do you consider, for example, the development of Donald Trump's golf course at Menie, on a site of special scientific

interest, to be a clear case of economic considerations outweighing environmental considerations?

Derek Mackay: It would be completely inappropriate for me to comment on that.

Alison Johnstone: Will the bill stop such situations occurring in the future? Will it ensure that such consideration is given full weight?

Derek Mackay: Let me give an assurance in another way. Even in the emerging planning policy as proposed in SPP, sustainable development remains at the heart of planning policy. However, again, the clarification that we have given to the committee is that the duty will not cover the planning function. In all such decisions, there is a balance to be struck, and sustainability remains an important consideration.

The Convener: Thank you. We entirely understand that you cannot comment on a particular planning application—current or historical—and that it would be inappropriate to do so.

Before we move on from this topic, I ask for clarity on one other point. Will the new duty also apply to licensing boards?

Fergus Ewing: No, it will not. Licensing boards are not among the bodies that are referred to in the relevant schedule.

The Convener: Okay. Thank you for clarifying that. We need to move on. I bring in Margaret McDougall on planning fees.

Margaret McDougall (West Scotland) (Lab): Thank you. Good morning, ministers and officials.

In response to the Rural Affairs, Climate Change and Environment Committee report, the minister stated that the costs of processing planning applications are not known. Given that, will the minister provide an explanation of the decision to review the planning system without first establishing the base for the applications?

Derek Mackay: Margaret McDougall's question is a good one. We have used various evidence sources over the piece, including information from Audit Scotland that suggests that there is a gap of some £20 million between the cost of delivering the planning service and income from fees. We were working with that estimate when we considered the planning fee increase that Parliament then considered.

Margaret McDougall will be well aware that the Scottish Government does not provide the planning service at local level and that local authorities establish the figures and costs. That is why we are working with Heads of Planning Scotland to get a fuller understanding of the cost of a planning application and a decision. Of course, costs vary from application to application and authority to authority. The situation is very complex, but we rely on Heads of Planning Scotland to lead that work and to assist us in moving towards full cost recovery. I can go further if Margaret McDougall wants me to do so. That is the evidence and information that we are asking for; previous assumptions were based on information that was provided by Audit Scotland.

Margaret McDougall: So, we do not yet know what the costs of planning applications are and what the cost to councils for processing those will be.

Derek Mackay: I think that what I said was that the cost depends on what the application is and where it is made. Different costs are levied across Scotland, because the planning system is largely, in the first instance, delivered by local authorities. They have not established the full cost of each application in order for us to be able to consider that. Of course there are different levels in the value of applications and, therefore, in fees.

A bit more work needs to be done on the specifics in order to move to full cost recovery. That has to be done in a way that is justifiable. I cannot, for example, ask the private sector to pay over and above the genuine cost of the application. We need to understand that, to probe into it and—to use that terrible term—to drill into the figures and the cases to get a fuller understanding of what every application might cost, in order that we can establish that principle.

We know the global cost of the planning service and the global fees-income figure. That took Audit Scotland to the conclusion that there is a gap of some £20 million. We have plugged some of that gap with the 20 per cent increase to the planning fee this financial year, which we estimate will generate between £4 million and £5 million. That is based on current levels of applications, which, of course, may vary in the light of economic recovery.

Margaret McDougall: Will that go back to local authorities—

Derek Mackay: Yes. The local authorities are working with us in the high-level group. We are working in partnership with Heads of Planning Scotland to establish the cost of planning applications and to take that work forward as best we can.

Margaret McDougall: We have heard lots of evidence on the views of planners, how the bill will affect local authorities and how we can measure the performance of planning authorities. What is being done to ensure that we are measuring planning authorities as best we can? It seems that there is no clear evidence of what is a well-performing planning authority and what is not such

a good one. We heard that the likes of the City of Edinburgh Council can be very different from rural planning authorities, in respect of the complexities of the planning applications that they receive. How do you assess the performance of a planning authority?

Derek Mackay: That is a very good question. I hope that some such information has been provided to the committee. If not, I will make sure that you receive it.

There are markers of good performance that are based on the planning performance framework. Those pose a number of questions on timescales, offering of processing agreements, pre-application consultation for major applications and whether a plan is less than five years old, which is a statutory requirement. There is a range of indicators. The situation is not black and white; it is not that there are good authorities and bad authorities. There is a range of factors, some of which, of course, would be outwith the planning authorities' control.

You can probe particular questions. Some of them will be yes or no questions on whether the authorities do something or not. Some of the questions are about indicators and average timescales for how long it takes for a planning application to go through the system. To be frank I think, as many members do, that it takes too long in many areas, and that that is unacceptable and must be challenged.

We can assess the general performance of a planning authority across a range of indicators. We have been doing so through the performance framework, which was designed in partnership with Heads of Planning Scotland. We are now formalising that through the high-level group, which works in partnership with Heads of Planning Scotland, COSLA, SOLACE and others to make sure that we get it right.

Performance can be considered in a number of different ways. The sanction will give us time to probe that and to assist planning authorities to improve. It is not good enough just to give an improvement agenda and nice reports from the minister, and then to cross my fingers, hope for the best and hope that things will get better. That will not be acceptable if we are making a commitment to link performance inextricably with fees. A 20 per cent fee increase was a big ask. It will get more resources into the system, but we have to be serious about performance and I believe that that mechanism will be a driver to improvement. COSLA does not support that. If I were a council leader—which I was—I would probably not like the mechanism, but I know that I would also ensure that I was driving up performance in the planning system. Every other part of the corporate council would take the same approach to such potential lost revenue, so it is a very powerful incentive.

10:15

Margaret McDougall rightly asked me about views. I would not expect local authorities to support the measure, and COSLA is clear that it does not support it, but we continue to work in partnership on how to establish good performance. By definition, we can then establish areas in which development and improvement need to take place. I know that the committee has heard a great deal of evidence. I do not leave it to officials to tell me what is happening in the planning system, so I have visited every planning authority in the country, some by grouping them together and some by visiting the individual planning authority. Every planner in this country who accepted the invitation has had the opportunity to hear the Scottish Government's views on planning and to question me personally. I am well sighted on the views of planners throughout the country.

I have also had a great deal of engagement on that with stakeholders and COSLA, including visiting—which was a pleasure, of course—the leaders meeting, in front of 32 council leaders and their chief executives, to discuss planning. That meeting has a high level of political importance. If we are to establish the link between fees and performance, which a good number of respondents and witnesses have said is a good thing, we need a mechanism to do it. I suggest that what we propose should be the mechanism.

Margaret McDougall: Will there be a definition of satisfactory performance in the bill?

Derek Mackay: No. That would not be appropriate—it would be uncommon to have such detailed information in the text of a bill. It might be more appropriate to include a definition in guidance or in another vehicle—perhaps a statutory instrument—but one would not necessarily legislate for performance. In the same way, the Accounts Commission or Audit Scotland are created by statute, but the legislation does not include all the indicators that they would use; those would be designed and constructed differently.

I propose the same in this context, but I will not work up a definition in isolation, which is why I have engaged with experts, planners, local authorities and other stakeholders to ensure that we get it right. There will be a proper collaborative process. It would not be appropriate to put a definition in the bill.

Margaret McDougall: You mentioned sanctions. All our witnesses apart from one have said that they do not think that the application of

sanctions on planning authorities would be helpful, because it would reduce the funds coming into their departments and place added pressures on them. Will you continue with the plan to place sanctions on local authorities that are deemed to be underperforming?

Derek Mackay: The thrust of the work by the Government—and by me, as the minister—has been positive and has focused on encouragement, incentivisation, new investment, support and picking up best practice from across these islands. However, that is not good enough if it does not achieve the right performance outcomes. I am, therefore, serious about the mechanism, and about increasing planning fees. In order to be able to justify any future increase, I must have evidence of improved performance. We have to be serious about that in the planning system, so we propose to continue with the mechanism, which I believe will be an incentive.

A council leader, a director of finance or a chief executive with an underperforming planning system might not take as much interest as they should. That might be an unfair comment, but if there was a potential loss of income generation for their authority, it would suddenly become a financial matter as well as a performance matter. That type of corporate approach is one of the things that we need to improve in order to achieve a better planning system.

All too often, I hear from the planning system that a problem was not the fault of the planner or the planning service—it might have been legal obligations, the roads department or a response from the education department. I want all parts of the local authority to take planning and its functions seriously, and the mechanism will be an incentive to move in that direction.

The mechanism will improve behaviour and outcomes, and there will be no loss of income because planning authorities will step up to the plate. I fundamentally believe that—as do many of the stakeholders with whom I have engaged. However, if I was a witness coming to this committee with a planning application in the system, I am not so sure that I would be heralding my support for such a penalty mechanism against the very planners who might make the decision on my application. I am therefore not surprised that some people have been quite quiet in their support for the mechanism, although I detect much support for it throughout the country.

Margaret McDougall: Given the legal implications, as planning authorities sit outside and are separate from local authorities, how would the mechanism apply?

Derek Mackay: That is correct. Planning decisions are quasi-judicial in terms of the merits of the case and the functions therein. Much of planning policy relates to the policy corporate, which is perfectly relevant. When we go beyond assessments and the other policy impacts that have sometimes held planning back, we can see that it is not just about the planning service. You are absolutely correct regarding individual planning decisions and consideration of them, but planning is very much part of the local authority, not least because of the importance of economic development to a council's functions. It would not affect in any negative way the legal imperative.

Some people have asked, "What if authorities simply rush planning decisions so that they do not hit the trigger on timescales?" As I have said this morning, there is more to planning than the timescale—although it is important—and I have already produced markers of good performance in a planning authority. A lot of applicants want certainty, engagement and a good understanding of the process. The mechanism will not contaminate the purity of the planning system in any way; rather, it will act as an incentive to achieve better performance across the board.

Margaret McDougall: Given that you expect that the increased fees will increase the income of local authorities, will that mean that grant-aided funding to local authorities will be reduced?

Derek Mackay: There is no correlation between increased planning fees and the general grant settlement to local authorities.

The Convener: Before I bring in other members, I want to clarify something that you said earlier in relation to COSLA. You will have seen the letter—which was sent to me and copied to you—from your good friend Councillor Stephen Hagan, in which he, on COSLA's behalf, states:

> "Our view continues to be that it is fundamentally too much Ministerial interference in the operations of a specific council service".

I presume that you would agree that local authorities that are democratically elected by their local population are therefore accountable through the ballot box.

Derek Mackay: Absolutely.

The Convener: So why do you not just leave the matter to local authorities and their local electorates to determine? If a local council administration is performing badly on planning or something else, it is surely up to the local population to vote them out of office.

Derek Mackay: Surely that is not a serious proposition from a Conservative: that if a council is performing badly, I should leave it to it—especially in an area in which the Scottish Government has clear responsibility, and given that every planning

application in the country could be determined by the minister.

I have taken a different approach from that which has been taken south of the border. Just for information, if a planning authority south of the border is deemed to be performing poorly, the minister has the power to assume direct control over it. That is a far more centralising agenda than the one that I am trying to deploy in Scotland, which seeks to encourage localism, decentralisation and local decision making and—absolutely—to improve performance.

If the Scottish Government is ultimately responsible for the fee, I have, in connecting fees to performance, to be serious about performance. I know that COSLA objects in principle to that section of the bill. It would, wouldn't it? I fully anticipated that, but there is a great deal of on-going positive partnership work with COSLA on that agenda, and the objections will not stymie that progress.

The Convener: I was trying to understand whether or not you believe in local accountability. I do not think that COSLA would see the change as a decentralising move in any shape or form.

Derek Mackay: The comparison that I was making is that it beats the option south of the border, where the planning minister or his agents could take control over every planning decision in an authority's area, thereby removing all control and decisions from local elected members. I am not proposing to do that; I am proposing an incentive to improve performance in a way that I, as a former council leader, know will work.

Chic Brodie: I welcome the fact that COSLA is working with the Government. Perhaps the robust evidence that we received from the COSLA representative did not reflect what was intended.

On that point, as the convener will know, the evidence from COSLA states:

"Whilst we are not against national standards per se, we are against the presumption that such national standards can be specified by a national government without clear mechanisms for consultation".

However, that is apparently what is happening. Given the diversity of the 32 local authorities, will you, before applying the fees—which some people seem to view as negative—advise, in working with COSLA, on other approaches that will be used to improve performance, such as transferring best practice between local authorities?

Derek Mackay: Of course, we would rather not have to impose fees. We would rather have the 34 planning authorities—32 councils and the two national park authorities—performing so well that we never even have to consider doing so.

Before we come anywhere close to bringing to Parliament a statutory instrument, which would be required to enable us to use the power, there will, of course, be a period of probing to understand the range of factors—some of which might be outwith the planning authorities' control—and to allow an opportunity for improvement. Such an approach would be natural justice as well as good practice, and I would heartily support it. We will work up that mechanism in partnership with the high-level group, while acknowledging COSLA's opposition.

The markers of a well-performing planning authority exist, and the mechanism can be delivered in partnership. However, we would naturally want to give planning authorities the opportunity to improve so that we do not need to use the proposed mechanism. That is the type of incentivised outcome that we all want to achieve.

The outcomes can be focused on a specific thing that the planning authority has not done. For example, this Parliament has said that, by law—I believe that it is by law, as it would have been in the Planning etc (Scotland) Act 2006—development plans should be less than five years old, but in fact only 59 per cent of plans are less than five years old. We need delivery, and to get that, we need to get serious. The mechanism is a driver for improvement, and will focus minds when we are discussing the need for improvement. That removes the need for the Government to centralise an entire planning service.

Chic Brodie: Do you intend, once you have determined the anticipated outcomes and performance markers, to publish those so that they are open and transparent, and so that we can discern the performance of each local authority?

Derek Mackay: Members should have the draft version of those in their hands right now. If you do not, you will soon. If the high-level working group makes any amendments, I am happy to share those, because we should have a transparent planning system.

Hanzala Malik: I have always believed that planning has a lot of implications for and impact on our environment.

Cost is a factor, time is a factor, and delivering to industry is a major factor, because when industry is waiting for planning, it is burning money. I have seen companies walk away simply because they have not been able to get planning in time; that is a very serious issue in a lot of places. To encourage development, and to encourage construction in particular, planning needs to be on the ball in terms of delivery.

Quality of service and delivery on time are essential. I am not terribly convinced about costings and how we relate those to planning applications. I believe that smaller planning

applications sometimes merit a smaller fee than larger ones. That said, delivery on time is very important; it is absolutely crucial, regardless of what type of planning is involved. I see councils up and down Scotland putting the smaller applications on the back burner, saying that they are not terribly important right now and that they will deal with them when they get the chance. That is the wrong attitude. Applications should be online, and when they are submitted they should be activated immediately. There should then be a time bar—a period within which it should be dealt with, whether for or against. That is important, irrespective of all the other elements that are part and parcel of the whole process.

People need to be confident that, if they put in an application, they will get a response within a certain period. I know that there are limits of 21 days—for activating the planning process and in relation to receiving applications—but I have known people who have waited for six months or more, and that is just unacceptable. The point that I am trying to make is that the bill needs to address that.

10:30

The Convener: That is a little bit wide of the provisions of the bill, but I will let the minister answer.

Hanzala Malik: I understand that ministers are consulting COSLA and that they are trying to work this through. The important point is that the bill really needs to address everybody's aspirations. Everyone should be treated equally when it comes to planning applications.

Derek Mackay: Mr Malik's point about performance is at the heart of what the Government is trying to achieve, and it is certainly relevant in a number of ways. The frustration is that, just as Government needs to do certain things to ensure that we get a proper planning system—as Mr Malik said—so do all members of the Parliament. The last time that I was asked about planning timescales in Parliament, it happened to be Mr Johnstone from the Conservatives who asked why it takes 77 weeks for certain applications to go through the system.

It is about people, leadership and culture, but it is about process as well. Where Government has got in the way of process or has created a bureaucracy, we are trying to take that out through streamlining and simplification. All the goodwill and partnership working in the world might not realise the kind of high-quality, well-performing planning system that Mr Malik wants. That is exactly why I think that that mechanism must be there as a driver to achieve the things that he spoke about.

On fees, I do not propose that smaller applications should subsidise larger ones. Of course, fees have to be proportionate, and there is a scaled fee system at the moment. I do not propose one standard fee for everything. A good system of permitted development, pre-application consultation and elected member engagement, as well as confidence in the system at the outset and a bit of certainty, are all key ingredients of a high-quality well-performing planning system. They are in the Government's planning action plan, and that is why section 41 is so important for achieving that plan and giving it real impetus.

We will do the rest of the work anyway. I cannot guarantee success, but we will try. However, I can say that if there is failure, we will be more empowered to tackle it than we are right now, when all we can do is simply hold back planning fee increases. That does not feel particularly healthy, does it? It does not feel fair that the planning fee across the whole country is held back because it is perceived that some planning authorities are not performing or that the system is too variable. The issues go hand in hand: improved performance with increased fees, moving towards full cost recovery.

Some would argue, as I would, that planning is a public service, but there is an aspiration to move towards full cost recovery so that we can genuinely say that people are getting what they pay for and so that the private sector in particular is happy with what it gets when it pays for it. There might not always be consent—the answer might not always be yes—but people must have confidence in the system and the process. I do not think that that is unreasonable at all.

Margaret McDougall: You mentioned sanctions. You said that, once you have tried everything with an underperforming planning authority, including giving it support, you will then put sanctions on the local authority. In effect, you will fine them. As you said in an earlier answer, the local authority would then have to try to sort out its planning department, basically by putting in more resources and support. Therefore, that hard-pressed local authority would have to find the resources—resources that it does not have—which means that it would have to take resources away from some other service to put them into planning to get it right.

Derek Mackay: You have completely misunderstood the concept, the mechanism and the fee. This is a quid pro quo for increasing planning fees by some 20 per cent in this financial year—the highest amount since the Parliament was created. We need to bear in mind the cost to all applicants.

The quid pro quo has to be improved performance. It is not fair that a planning authority

should enjoy the increase in planning fees but do nothing to improve its performance. That has held back full cost recovery in terms of planning fees. We are not talking about a fine; we are making the link between fees and performance. The crucial question at the heart of your point is that of the planning authority being given a chance to explain and improve. I am convinced that, with that incentive, a planning authority that has not delivered a development plan, improved timescales or engaged in pre-application consultation would improve. These are not necessarily massively costly investments. It is about having the political will to get those things done and it might not require the investment that you suggest.

I also pointed out that timescales are not the only game in town when it comes to performance, but that it takes too long to get too many planning applications through the system. We moved from the arbitrary timescales for minor and major applications of two months and four months to monitoring average timescales partly so that we could get a fuller picture of what is happening in each planning authority.

Holding back fees will not be seen as a fine; it will be seen as an incentive and a driver for improvement. That is the context in which we have been able to increase planning fees, but if we are to increase them further there must be improved performance. Authorities that are performing well should no longer be held back by those that are not. My aspiration is to get 34 out of 34 planning authorities at that level, with greater consistency in delivery, so that we have the kind of planning system across the country to which we all surely aspire.

Fergus Ewing: I absolutely support what my ministerial colleague has said. We must always bear in mind the huge significance that an efficient and effective planning system has for economic development and growth. If we have an effective, swift, fair and efficient planning system that deals with applications in a way that is seen as appropriate and fair by objectors and applicants, after the decision has been taken that developments should go ahead, we will create jobs and business and we will see people getting jobs and opportunities throughout the country.

We must bear it in mind that the link between planning and economic development and growth is umbilical. We cannot consider arcane issues in isolation from our overriding objective of helping people to get jobs, helping business to grow and securing investment for this country—most especially for the young people who wake up in the morning thinking that nobody values them and their contribution. That is important in itself, but it is hugely important for the economy of Scotland. That is why I am delighted that Derek Mackay has given such leadership in this area.

Mike MacKenzie (Highlands and Islands) (SNP): I will continue on that theme. Do you feel that, in the present climate when we are seeing a tentative economic recovery, a move towards full cost recovery, even if that was a worthy aspiration, that was too quick would risk jobs, the delivery of affordable homes and the prosperity that we are beginning to see emerge and come back into the economy?

Derek Mackay: Mr MacKenzie almost threw me there when he asked whether the planning system was moving too quickly, and then I realised that his question was about full cost recovery. I suppose that civil servants would describe the decision to increase the fee by 20 per cent as bold and brave, considering when it was taken, but it was engineered to try to get that partnership arrangement with local government around delivery on the ground and improved performance. Resourcing is an issue in all that, but the context is quite challenging.

When stakeholders raise planning issues with me, they do not often raise the planning fee. In fact, the costs of appraisals and assessments sometimes dwarf the planning fee. Such costs can run into tens and hundreds of thousands of pounds, so there is an issue there about people being more reasonable and proportionate when it comes to the assessments that are required. Sometimes good practice means having the relevant information to take all factors into account.

The cost of the planning fee itself is not usually what causes a problem for applications—not for the larger applications of the kind that generate an economic impact of scale. There have been previous consultations on the matter. The first consultation, some years ago, was on trying to link the fee to the individual application. It was suggested that if applicants were unhappy they could get 50 per cent of the fee back, but that suggestion did not find support and was dismissed. Then there was a consultation about going to full cost recovery. That would have meant a substantial increase beyond a level that I could have defended in times of recession and financial pressure, and I could not justify it because of the lack of improved performance.

However, with the arrangement and action plan that we have, 20 per cent is justifiable. Future increases are justifiable if we get improved performance, because the private sector and other applicants have said that they are content with increased planning fees so long as they get improved performance. I do not think that that is unreasonable.

The increase will be set in the context of the planning fee as a bigger sum with regard to development viability, because I am mindful of the small application, or the applicant with a minor matter. With permitted development, we have taken much that was not relevant to minor applications out of the planning system, so those people do not have to go through the whole planning process. Permitted development is a satisfactory measure, but I am mindful of the fact that £300 or £400 is a significant sum for a smaller application by a householder or even a small business.

Fergus Ewing: There is another general point. Another benefit of what Mr Mackay has described as a bold move in increasing planning fees is that it makes a contribution to our overall capacity to focus the expenditure of taxpayers' money where we all really want it to go—on ensuring that our schools and hospitals are well funded and able to operate efficiently. The point that I am making, of course, is that if services are provided at less than the full cost, at a heavily subsidised rate—for example, planning fees, bankruptcy fees or court fees, on all of which we have taken action—that subsidy has to come from somewhere. Money has to go to subsidising certain activities, potentially at the expense of core activities. We have to get our priorities right and adopt a sensible approach about moving to full cost recovery in certain areas. However, there are benefits, because everything is related. It means that we can focus taxpayers' money on the real purposes that the people who elected us want us to focus on. I hope that that is an emerging principle that is gaining increasing acceptance across the political spectrum.

Mark McDonald (Aberdeen Donside): I was not a member of the committee during the initial evidence sessions, so I want to focus on sections 5, 6 and 7. One of the concerns that I noted from previous evidence was about whether there would be consumer-led input to the code of practice, or whether that would come as part of the consultation process. Does the minister have a view on whether the view from the consumer angle is feeding into that process or whether that would be dealt with during the consultation on the code of practice?

Fergus Ewing: What particular consumers do you have in mind?

Mark McDonald: Trisha McAuley of Consumer Futures said that the groups that were inputting into the process were linked more to business growth than consumers. I wondered whether the view was that the wider community angle might come through consultation rather than the initial drafting of the code of practice.

Fergus Ewing: We have worked closely with Trisha McAuley in a number of areas, so of course we want to ensure that we take an inclusive approach to the compilation and drafting of the code. I undertake that I will most certainly consult her and her colleagues prior to the finalisation of the code and get her views on that extremely important matter. Of course, the views of the business community will be important as well. I am happy to give that undertaking in response to Mark McDonald's question.

Mark McDonald: What is the Government's view on how the code of practice will enhance the legislation and the work that is being done through regulatory reform?

Fergus Ewing: I think that it will allow us to work together with all the regulators, which is something that we already do. We spend an enormous amount of time and effort working together as team Scotland, whether it is with SNH, SEPA, Historic Scotland, the planning authorities or a variety of other authorities. That accounts for a huge amount of our time—and rightly so.

10:45

The code of practice will be the offspring of the team Scotland effort. That is the approach that we want to take. We do not want to impose on local government, and we do not want to dictate to local government. Accusations that we do are made daily in the columns of the printed press, but I do not recognise that approach. What I recognise is that day in and day out, week in and week out, we are having serious conversations about serious matters with local government but, often, there is no easy solution.

For example, this week, I co-chaired the fourth or fifth meeting of the opencast coal task force. I pay tribute to the co-operation that we have had from colleagues in Dumfries and Galloway Council, South Lanarkshire Council, Fife Council and East Ayrshire Council. John McNairney has been heavily involved in that work, and Derek Mackay and I have visited several of the opencast mines. The idea that this is other than a team Scotland partnership approach is one that gains a lot of currency in the printed press, but it is the opposite of the truth and of the reality of what happens every day.

Of course, difficult situations arise, such as the problems that we have in relation to opencast mines. However, the correct approach is to have a good, positive, collaborative working relationship with all those who are involved in local government and to talk and work through together what are, very often, extremely difficult issues that face us in public life. I am delighted to have had the opportunity to underscore that point.

Mark McDonald: I thank the minister for his response. He has sort of dealt with the question

that I was going to ask about section 7 but I will ask it anyway. Concern was expressed by Councillor Cook about the enabling power for ministers to amend the list of regulators. Presumably, any decision to amend that list—either to add or remove a regulator—would involve some consultation in advance with partners, such as COSLA or local authorities, to ensure that their input is taken on board before any decision is taken either to widen or to narrow the list of regulators under the power in section 7?

Fergus Ewing: Yes. I am happy to give the committee that assurance. The question is very sensible. The process that the ministers would follow when using the power to amend the list of regulators or the regulatory functions, and whether that process would include partnership discussion with the regulators, are important issues. We would certainly consult COSLA and all other relevant bodies were we minded to consider using that power. That would be the absolutely correct and appropriate thing for us to do.

The Convener: Before another member comes in I just want to ask one question—it might be the final question. My question is for Fergus Ewing. I think that you indicated that you are minded to bring forward stage 2 amendments to introduce primary authority partnerships. Can you tell us what evidence you have gathered about the benefits of primary authority partnerships and what assistance they might provide in relation to economic growth?

Fergus Ewing: I can perhaps give the committee a bit more detail after our analysis of the responses that we have received has been completed. I will do my best to provide more detail, if I can, prior to stage 2. It has been estimated that the UK primary authority scheme delivers net benefits of £19.9 million annually to business and local authorities and generates £3.60 for every £1 of cost incurred. That is one specific answer—there is evidence south of the border that that measure has delivered certain benefits. It is only correct that we should be mindful of that and willing to learn from our good friends south of the border where appropriate—as, sometimes, you urge us to do, convener, in relation to other matters.

To answer the question in a more general way, however, the proposal for primary authority arrangements emerged from business in Scotland. At present, businesses operating in different local authority areas throughout Scotland need to work with each individual local authority. In some instances, that can be time consuming and add to the burden of running a business. It is therefore sensible to explore with businesses and with local authorities through COSLA the operation of such a system in order to avoid duplicating activity time and time again—32 times, potentially.

If I may say so, my impression—this may change following my study of the full analysis of the responses—is that, where a business operates in a particularly specialised way in a specialised area, it is unreasonable to expect 32 local authorities to be equipped with the full range of specialist advice. If, therefore, a particular local authority has that expertise, it seems sensible to take a pragmatic approach. That would perhaps have the effect of removing the burden on other local authorities and enabling them to get on with some of the other functions that we have discussed this morning.

From a pragmatic, commonsense point of view, it seems that there is merit in proceeding to introduce primary authority partnerships. I alluded to the financial benefits earlier. The results of the analysis of the responses will be published at the earliest opportunity. I initially raised the issue in a letter to the committee back in March, so I am hopeful that we can proceed to introduce the primary authority amendments at stage 2. I will do my best to provide as much information as I possibly can to the committee in advance of that.

Chic Brodie: This may not endear me to the convener or to the minister but I have a question about primary authorities and transferability of best practice. The Minister for Local Government and Planning indicated that we want to make the system more efficient and more timely. Notwithstanding the comments that have been made about potential litigation, has any thought been given to the creation of mediation task forces to try to address any planning or regulatory issues so that we can speed up the whole process without people having to go through the rather lengthy exercise of going to court? I do not expect an immediate answer to that, but I ask you to consider whether that might be a vehicle for speeding up the process.

Derek Mackay: As planning minister, I am happy to offer the services of Scotland's chief planner, John McNairney, in a brokerage role if there are issues where that level of intervention is required. I am sure that he would not object. However, there is an important point about mediation and brokerage sometimes being needed in the planning system. Such an approach is possible already and no legislative change is required for it to come into play in terms of the wider regulatory framework.

I will hand over to my colleague Mr Ewing.

Fergus Ewing: I never took the view, when I was sitting where Mr Brodie is, that it was my job to endear myself to ministers, so I would not worry about that—

Chic Brodie: I included the convener.

Fergus Ewing: Well, I would not worry. However, I did not quite understand the scope of Mr Brodie's question in relation to the matters that I cover. Could he possibly restate it?

Chic Brodie: I do not want to go back down the road of discussing the definition of economic growth and the impact that it might have on regulation or on planning. I am asking whether, rather than people going down the legal route, which can be very costly and lengthy, there is some other mechanism that we might consider through some form of mediation—perhaps a mediation group or task force, and perhaps including Mr McNairney. Such a mechanism might address some of the contentious issues much more quickly than if someone had gone down the legal route. As I said, I do not expect a full answer today.

Fergus Ewing: Do you mean issues arising in the planning system or other ones?

Chic Brodie: It may apply elsewhere, although the planning system is an obvious area.

Derek Mackay: I will come back to the planning system specifically if that is what Mr Brodie is driving at; I am happy to pick that up. If the system is performing well, best practice in a major application, for example, will involve a good pre-application consultation, a good pre-application discussion and early engagement with elected members to see what issues they might be concerned about. That means that people find out about those issues at the start of the process rather than at the end, as some sort of surprise, after time and money have been spent. Good engagement and best practice will, we hope, lead to the right outcomes.

Where there is a difficulty in the system, there is always legal recourse, of course. There is also the appeals system, which is there for a good reason—to have that second look if people think that policy has not been complied with. However, there can be engagement at any point in the planning system. There is no difficulty with a degree of mediation or brokerage to try to move things on, as long as it is in keeping with the rules and due process is carried out, and as long as all parties—applicants and objectors—are dealt with fairly and openly. Best practice for the most significant applications should almost automatically have good pre-application consultation and on-going engagement.

What might be in Mr Brodie's mind are the very worst planning applications that have perhaps been in the system for not just months but years. There are some such cases—in fact, they skew the overall statistics. Frankly, the planning system is not there to test an idea and to keep it warm; it is there to get a decision about land use—an appropriate decision about the right development in the right place. There are some legacy cases that should be determined or withdrawn; they should not clog up the system.

Brokerage might happen in an attempt to arrive at a decision as to whether such cases should be determined or withdrawn, but they should not stay in the system causing even further difficulties for the applicant, the planning authority and, potentially, objectors. Various processes are under way to support that approach to take some of those legacy cases out of the system, which will also involve a bit of responsibility from the private sector as a partner. However, there are already tools in the box to assist with that. We do not require new legislation around mediation in the planning service—the function exists.

The Convener: With impeccable timing, that brings us to the end of our evidence session. I thank both the ministers for coming along and their officials for attending. If there are areas that we want to follow up on after the meeting, we will write to you to seek written clarification, if you are happy for us to do so.

10:57

Meeting suspended.

OTHER WRITTEN EVIDENCE TO THE ECONOMY, ENERGY AND TOURISM COMMITTEE

Written evidence

- Association of Salmon Fishery Boards
- Carnegie UK Trust
- Centre for Water Law, Policy and Science, University of Dundee
- East Renfrewshire Council
- Healthcare Improvement Scotland
- North Lanarkshire Council
- Oxfam
- Professor Andrea Ross
- Professor Colin Reid
- Royal Incorporation of Architects in Scotland
- Scottish Environment Protection Agency
- Scottish Land and Estates
- Scottish Property Federation
- The Right Honourable Lord Gill – Lord President of the Court of Session

Other correspondence

- Letter from Minister for Energy, Enterprise and Tourism 28 March 2013
- Memorandum of understanding between CoSLA and the Scottish Government in respect to the Regulatory Reform (Scotland) Bill
- Letter from the Minister for Energy, Enterprise and Tourism 5 September 2013
- Letter from COSLA on planning provisions 6 September 2013

SUBMISSION FROM ASSOCIATION OF SALMON FISHERY BOARDS

The Association of Salmon Fishery Boards is the representative body for Scotland's 41 District Salmon Fishery Boards (DSFBs) including the River Tweed Commission (RTC), which have a statutory responsibility to protect and improve salmon and sea trout fisheries.

We welcome the opportunity to comment on the relevant sections of the Regulatory Reform (Scotland) Bill.

Overarching Comments

We support the policy intention behind part 1, as set out in the policy memorandum, but we are concerned that the Bill as drafted may be more wide-ranging than the policy memorandum suggests.

We welcome the policy intention behind part 2 of the Bill, but we believe that these powers should be further clarified.

We do not believe that the general purpose of SEPA should be sustainable economic growth. This term has not been defined in law and we believe that the achievement of sustainable development is a far more appropriate purpose for an environmental regulator.

Part 1

Part 1 places a duty on stakeholders in respect of sustainable economic growth. There is no definition on the face of the Bill or in the accompanying documents as to the definition of sustainable economic growth. The Scottish Government has a specific webpage dedicated to sustainable development which states the following:

> *The goal of sustainable development is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations.*
>
> *Sustainable development is integral to the Scottish Government's overall purpose - to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.*

This might lead to the conclusion that sustainable development and sustainable economic growth are interchangeable terms. If this is the case, there would appear to be no necessity to include a specific duty on regulators (in part 1) and more specifically SEPA (in part 2) to contribute to achieving sustainable economic growth. A number of regulators are already under a specific duty to contribute to the achievement of sustainable development. For example: section 2 of the Water Environment and Water Services (Scotland) Act 2003 states that Scottish Ministers, SEPA and the responsible authorities must '*act in the way best calculated to contribute to the achievement of sustainable development*'; section 3 of the Marine (Scotland) Act requires Scottish Ministers and public authorities to '*act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, enhancement of the health of that area, so far as*

is consistent with the proper exercise of that function'; section 51 of the Water Industry (Scotland) Act 2002 states: *'Scottish Water must, in exercising its functions, act in the way best calculated to contribute to sustainable development.'* However, we are concerned that i) there is scope for the term to be misinterpreted – for example as economically sustainable growth (i.e. not environmentally sustainable) and ii) it is not clear how such a duty would interact with the current duty that SEPA, and other bodies, have to achieve sustainable development.

It is notable that the duty set out in section 4 is qualified (*except to the extent that it would be inconsistent with the exercise of those functions to do so*). We believe that, given the uncertainty surrounding the specific meaning of sustainable economic growth, and for consistency with other legislation, the duty should be changed to one of ***contributing to achieving sustainable development***. Such a duty would not need to be qualified, in the manner set out above.

We would also draw the Committee's attention to section 2 (2), which would allow, by regulation, a regulatory requirement to cease to have effect through repealing or revoking primary legislation. This power is qualified by subsection (3), but we would seek clarity on the scope of this power and how it might be used in future, in order to ensure that environmental protection is not compromised.

Part 2

Proposals for regulatory powers

We are generally supportive of the proposals for regulatory powers for Scottish Ministers, but would make the following points:

The general purpose of protecting and improving the environment is welcome, but we believe that specific mention should also be made to national obligations relating to protecting and improving the environment.

We believe that the terminology included in section 9 which defines 'environmental activities' as being 'activities that are capable of causing, or are liable to cause, environmental harm' is confusing and potentially misleading. The use of the term 'environmental activities' implies that such activities would be to the benefit of the environment. We believe that alternative terminology should be considered.

We believe that the definition of 'protecting and improving the environment' should be expanded beyond 'ecosystems', to ensure that biodiversity, habitats and species are specifically included.

Proposed powers of enforcement for SEPA

We agree that SEPA should have the power to use fixed and variable monetary penalties but we are not convinced that these penalties are set at the right level. There must be scope to apply a fine that would both act as a deterrent and adequately penalise those who have caused significant environmental harm. In some cases, this may include extremely large multi-national companies, and we would question whether a £40,000 fine would be an adequate deterrent in such cases. Ultimately we believe that fines should be commensurate with environmental impacts.

We welcome the provisions relating to enforcement undertakings assuming that these are used in the manner set out in the original consultation : '*to enable legitimate operators to make amends where an offence has not led to significant environmental harm and has involved little or no blameworthy contact*'. However, we would be very concerned if this approach was seen as a default option as an alternative to SEPA pursuing enforcement through the courts. In many instances, we believe that the latter is the only appropriate response.

We support the publication of enforcement action under section 24. We would seek further information as to the circumstances under which orders would include this provision. On the basis that such publicity can often prove a greater deterrent than a financial penalty due to fears over reputational risk, we believe that publication of enforcement action should be the norm, rather than the exception.

Proposed powers to be given to courts

We support the provisions on compensation orders. However, as we stated above, we believe that fines should be commensurate with environmental impacts, and therefore the cap of £50,000 may not be appropriate.

As stated above, we welcome publicity orders on the basis that such publicity can often prove a greater deterrent than a financial penalty due to fears over reputational risk.

Chapter 4

Section 31 sets out an offence relating to significant environmental harm. We would seek clarity as to the threshold or definition of *significant* in this context. Who will make the determination as to what constitutes *significant*, for the purposes of this section.

Chapter 5

Section 38: Please see our previous comments relating to sustainable economic growth.

SUBMISSION FROM CARNEGIE UK TRUST

The Carnegie UK Trust welcomes the opportunity to provide written evidence to the Economy, Energy and Tourism Committee on the Regulatory Reform (Scotland) Bill. The CUKT was set up in 1913 to improve the wellbeing of the people of the UK and Ireland.

We will restrict our comments to the proposed duty on listed regulators to exercise functions in a way that contributes to achieving sustainable economic growth. We believe the Bill would benefit from broadening this requirement into a duty to have regard to the National Performance Framework, as a measure of Scotland's wellbeing.

The Trust has been working with stakeholders in Scotland, the UK and internationally on wellbeing measurement for a number of years. Inspired by the Stiglitz-Sen-Fitoussi report on Measuring Economic Performance and Social Progress, we convened a roundtable (in collaboration with the Sustainable Development Commission for Scotland) which reported in 2011.

Like many others in recent years, the Roundtable report (More than GDP: Measuring What Matters) identified a number of difficulties with GDP as the dominant measure of social progress. For example, it fails to:

- Account for non-market services such as caring for family and friends.
- Correct for defensive expenditures (costs of crime, car accidents and so on).
- Incorporate the real welfare losses from having an unequal distribution of income.
- Account for changes in the asset base (depreciation of capital stocks and levels of indebtedness for example).
- Adjust for the costs associated with the degradation and depletion of natural capital generated through economic activities.

The Carnegie Roundtable on Measuring Economic Performance and Social Progress concluded:

> because of the complexity of our modern world – including our advanced and diverse economy – we need to break our focus on economic growth and instead focus our effort on delivering well-being, now and into the future.

Our view, stated in the Carnegie Roundtable report and the forthcoming report Shifting the Dial in Scotland is that the National Performance Framework is a wellbeing dashboard of the kind recommended by the Stiglitz-Sen-Fitoussi Commission.

The NPF focuses all government activity on the core purpose of creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. The central place of economic growth within this statement has been queried but the argument has been made by John Swinney, MSP and Cabinet Secretary for Finance, Employment and Sustainable Growth that 'we are not talking about growth at any price but growth within the

context of a range of other balancing factors' (Meeting of the Parliament 05 September 2012).

In the current wording of the Regulatory Reform Bill however, this argument fails, as the wording only states that 'each regulator must contribute to achieving sustainable economic growth'.

The Carnegie UK Trust believes that as currently drafted the Bill is a missed opportunity to reflect the multi-dimensional nature of social progress and as such, acts against the ethos of the National Performance Framework in providing a whole-systems approach to government activity.

We strongly recommend that the Committee amend the Bill to replace the duty on economic growth with a duty to have regard to the National Performance Framework. As economic growth is part of the NPF this would retain the original intention of the draft legislation, while broadening it out to include a range of other factors critical to social progress. It would also be the first time that the NPF has been referred to in legislation, and as such it would represent a critical step forward in ensuring that the framework is embedded across government.

Carnegie UK Trust
4 June 2013

SUBMISSION FROM THE CENTRE FOR WATER LAW, POLICY AND SCIENCE, UNIVERSITY OF DUNDEE

We are pleased to have the opportunity to give evidence on this Bill and we are in general supportive of moves to rationalise and streamline regulation, especially environmental regulation, in Scotland.

We have a number of concerns, especially around the new duty for regulators with respect to "sustainable economic growth" (sections 4 and 38). We consider this an unclear concept, which will be difficult to define and enforce, and is not an appropriate focus for all regulators, especially SEPA and SNH. Their focus should be on protecting the environment, framed by sustainable development.

We are also concerned that the debate around this duty is distracting attention from other parts of the Bill, especially Part 2 which is making significant changes to environmental law in Scotland.

We have some concerns around the structure of the Bill, especially within Part 2.

In Part 2, we think there could be greater clarity about the relationship between the Bill, subsequent regulations and subsequent guidance. Partly because the regulations and guidance are not yet available, it is difficult to fully understand some provisions. Especially, we are concerned about:

- The different tiers of offences: the "significant harm" offence, the relevant offences and any other offences that may remain on the statute books but not within the penalty scheme;
- The appeals process and its relationship to the penalty scheme.

Part 1

We appreciate that RACCE is primarily concerned with Part 2 of the Bill. However we would note the extensive powers in Part 1, especially s.2, to rewrite existing legislation. Whilst we agree that it is often appropriate to use secondary legislation, for all the reasons given in the Delegated Powers memorandum, and whilst we agree that the negative resolution procedure may be appropriate, nonetheless many legislative acts that were once in primary law are now in secondary rules, and enabling powers to Ministers are often extensive. Along with the unicameral structure of the Scottish Parliament we would be concerned about the possible lack of scrutiny, for example, in deciding if regulations would have "equivalent effect" to a previous mandatory enactment.

We would agree that regulations made under ss. 1 and 2 should be made under the affirmative procedure.

We suggest that the regulatory principles in s.6(3)(a) should be stated more generally as applying to regulators, in Part 1 and Part 2, and not only as underpinning to the Code of Practice.

Especially as that is not the case, we would not agree that "sustainable economic growth" should be repeated here as a regulatory principle (s.6(3)(b)). We comment further on this duty under Part 2.

We would like to see (as in all cases where consultation is required by statute) a general requirement to consult the public.

Part 2

We are generally supportive of ss.8 and 9. We would agree with the suggestions made by RSPB and by Prof Colin Reid to include “biodiversity”, or “habitats and species”, after “ecosystems” in s.9(2)(b)(iii).

Section 10 and schedule 2 contain very broad enabling powers to secure the repeal and re-enactment of the four main consenting regimes in Scotland. Each of these is technically and legally complex and their restructuring is likely to require extensive work by the Government and SEPA, involvement of key stakeholders and public consultation. We would strongly suggest that these are appropriate subjects for affirmative procedure, to ensure proper scrutiny.

We would suggest that s.10 could be clearer as to the extensive reforms of the regulatory system that we understand are intended under this provision.

There are four tiers of control in schedule 2. Whilst permits and general binding rules are well-understood, it is not wholly clear what the difference is between notification and registration. We think a three-tiered system would be simpler and could still provide for all necessary forms of control.

We note s.11(2) and we are unclear as to its purpose. We recognise that Government obtains significant data and input from consultations at different times and on different subjects, but where the legislation imposes a specific duty to consult specific parties, we consider that should always merit a specific consultation at that time. Otherwise there is a risk that earlier responses, made to a different question, will be taken out of context in ways that the respondents did not fully intend, or overlooked. Given the importance of these reforms, it will be most important that Government allows time for full consultation as the detail emerges.

We would suggest that s.38, chapter 5 (general purpose of SEPA) would be better placed near the start of Part 2. We would also suggest that the “significant harm” offence in s.31 should be placed higher up in Part 2, before the penalty scheme. This might make it easier to understand the context of the scheme.

Chapter 2 – we are generally supportive of these new powers for SEPA, and we think they will significantly improve effective enforcement. We would like to see more focused reporting by SEPA on outputs and outcomes.

We are unclear about the desirability of the provisions in s.13(3). We note that the explanatory notes state that such an early payment is common in penalty schemes. However, we would be concerned to be sure that this is not a mechanism for liable parties to avoid not just criminal proceedings but any record of their non-compliance. Otherwise they could incur a series of such early payments without recognition of a pattern of behaviour.

We would agree with Prof Reid’s comments about how the scheme will apply to ongoing breaches.

The whole question of the balance between higher penalties and lower levels of regulation is crucial to the potential success or otherwise of a 'light touch' regulatory regime.

We would support the maximum fixed penalty being set at £5000, level 5 on the standard scale, rather than £2500, level 4.The maximum will not always be used.

More generally, whilst we fully support that submission to the penalty scheme should mean that no criminal proceedings could be brought, it is not clear whether "relevant offences" will also be subject to criminal proceedings as an alternative, or whether criminal proceedings will only apply to these offences where the operator has not complied with an element of the penalty scheme. See also our comments below on relevant offences in relation to s.31.

We would support Prof Colin Reid's concerns around the need for clarity on appeals, and especially, the relationship between appeals and further proceedings; and that this should be addressed in the Bill.

Under s.15, we are concerned that the penalties may not be high enough. Whilst we appreciate that the £40,000 maximum has precedent behind it, we would like to see the possibility of penalties high enough to deter even large organisations. We appreciate that this money should not be directed to SEPA, and that it the penalty is not for remediation, compensation or cost recovery, but we would also prefer that these sums be hypothecated to environmental protection or improvement in some way.

We support the non-compliance penalties under s. 18, the general provision for enforcement undertakings under s.19, and cost recovery provisions in s.22.

Section 24(2) is unclear. If the purpose is to allow SEPA to publicise information about the wrongful activity as well as the level of penalty, which we would support, this could be more clearly expressed. Visibility of the penalties will be a major factor in effective deterrence.

Chapter 3 – Clause 26 – as the purpose is to remedy environmental harm, we do not agree that there should be a limitation on the sums payable. They should be limited by the nature of the harm in combination with the culpability of the offender; ability to pay may be relevant, but where there is ability to pay then full recovery of the costs of reparation should be possible.

We strongly support clause 27, and also clause 28.

Chapter 4 – Section 31 – we support this provision and that it should have strict liability. As noted, we think it should be located higher up in this Part, before the penalty scheme.

We have two concerns:

The definition of "significant" environmental harm: it will be important to have clarity about the meaning of "serious adverse effects". Similar language is used in other

related legal regimes, and is often restricted.[1] In particular this must not imply that the offence is only applied where there is damage to a EU designated conservation site can be proven, whilst damage to national sites (such as SSSIs) and non-designated sites is treated less seriously.

The relationship between this offence and the definition of "relevant offences" (section 39): as so much is left to future regulation and guidance, it is not wholly clear in the Bill what will be the status of, for example, the "procedural" offences; or, the permitting or causing of environmental harm that is not "significant". Will these only be subject to penalties and undertakings; or will they also be subject to potential prosecution, and if so, will that only be where a penalty has not been paid or an enforcement undertaking not complied with, or will they also be "stand alone" offences?

Linked to that, will there be a "middle tier" of offences which are not "significant harm", but not open to the penalty scheme either?

We would prefer to have some clarity around this in the Bill. We would also suggest that all orders relating to the offences be made under the affirmative procedure, and consulted on widely.

Section 32 – we would like to see the provision for compensation, and for publicity, extended to this offence. It is not clear to us that this will be the case; we read this provision separately to that on "relevant offences" in chapter 3.

Section 35 – we would agree with Prof Reid that the decision to remove special sites should be made by (or with) SEPA.

Chapter 5: General purpose of SEPA:

We agree that it is helpful for SEPA to have a statutory purpose. We would suggest that this be placed higher up in this Part.

We do not support the inclusion of the duty to contribute to sustainable economic growth for SEPA under s.38, or for Scottish Natural Heritage in particular under s.4.

We consider that "sustainable economic growth" as a concept is not well defined or understood and contains inherent and fundamental contradictions. The economy is wholly dependent on the environment, not the other way round.

We would also support the arguments made by Prof Reid and by the RSPB in regard to this provision, and the evidence submitted by Professor Andrea Ross.

We consider that the appropriate focus for environmental regulators is the environment, and sustainable development is the appropriate over-arching concept. Sustainable development takes a tri-partite approach and SEPA does therefore consider economic and social dimensions in aspects of its decision-making. "Sustainable economic growth" shifts the emphasis away from the environment and towards the economy and this is not appropriate for SEPA or SNH. Sustainable

[1] The Habitats Directive, 92/43/EEC, considers "significant effects". The Environmental Liability Directive, 2004/35/EC, and the Water Environment (Controlled Activities) (Scotland) Regulations 2011/209 use "significant adverse effects". These provisions are all restricted.

development is a well-established concept and we would support its further emphasis and refinement. Especially, we would support strong procedural duties to show progress towards sustainable development, including the use of indicators.

Schedule 3 Part 3: Environment Act 1995.

We support the amendments to s.33 and the repeal of s.36. We do not see the reasoning behind the repeal of s.32 (heritage and access) or s.34 (protection and conservation of water) though we accept the latter may be covered by s.2 of the Water Environment and Water Services (Scotland) Act 2003.

We are unclear as to the import of the amendment to s.34. If this means that the general cost benefit provisions will no longer apply to SEPA, we would not support that. We would consider that a general analysis of the costs and benefits of any regulatory action is an essential part of ensuring that such actions are proportionate, consistent and targeted, as in s.6 of the Bill.

Centre for Water Law, Policy and Science – University of Dundee
6 June 2013

SUBMISSION FROM EAST RENFREWSHIRE COUNCIL

I refer to the Economy, Energy and Tourism Committee's call for views on the Regulatory Reform (Scotland) Bill and the associated Financial Memorandum. I would like to present the following views from East Renfrewshire Council.

The Regulatory Reform (Scotland) Act 2013 introduces the principle that planning fees may vary between authorities i.e. be reduced for authorities that are considered to be not performing. The Financial Memorandum as contained in the Explanatory Notes looks at the implications of this change.

Our concerns/objections are both to the principle of this proposed change and to the assessment of its implications in the Financial Memorandum.

The principle

We have concerns in the following regards:

- We think that the principle that reduced income will lead to increased performance is flawed. The threat of reduced income and the threat of loss of reputation by being classed as a poorly performing authority may well be an impetus for authorities to increase their perceived performance; however the actual implementation of these measures could be counter-productive, see points below.

- There is a flawed assumption in the documents that an actual reduction in income by an authority will lead to improved performance. There is no explanation given as to how this will happen. How can an authority realistically be assumed to improve its performance with reduced budgets and possible reduced staffing levels? It is contended instead that a reduction in income, very possibly resulting in reduced staffing levels, will actually lead to further reductions in performance levels, and thus into a spiral of failure.

Assessment of implications

We have concerns in the following regards:

- There is no indication given as to how "not performing" will be judged, although that will presumably come in regulations, it is slightly worrying that the Act is silent in this regard.

- The most obvious objective measure in terms of performance is in terms of speed of decision-making. The Memorandum indicates this to be the case in discussing the implications of *"the impact of delays"* and in encouraging *"poor performing planning authorities to improve their response times"* (paragraph 47). Authorities could therefore prioritise speed of decisions, to the detriment of the quality of decisions and the quality of customer service … and this is a serious implication that should not be omitted.

- Following from the above, the perceived performance of an authority i.e. speed of decisions, could be tackled by authorities making quick refusals of permission rather than taking a little extra time to negotiate a satisfactory

development, thus actually increasing the time it takes for an applicant to get permission at the end of the day (applicants would have to resubmit a revised application or progress to appeal/review, both of which are likely to be slower options). This course of action would reduce public service and good will and overall be counter-productive.

- The Scottish Government are estimating (paragraph 44) that the introduction of this provision will cost them £50-55,000; but somehow (and unexplained) will lead to overall reduction in costs (but have not said to whom) of more efficient processing of applications. They have accepted that any authority affected would see a drop in income which may impact on other budgets. It is therefore a flaw that these statements alleging reduced costs and increased efficiencies are not explained or substantiated.

SUBMISSION FROM HEALTHCARE IMPROVEMENT SCOTLAND

Healthcare Improvement Scotland welcomes the opportunity to submit evidence on the proposals for regulatory reform as set out in the Regulatory Reform Bill.

As the aim of the Bill is to "improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment", it would appear that the substance and main focus of the Bill is on activities that lie very largely outwith the remit of Healthcare Improvement Scotland.

However Schedule 1 of the Bill identifies Healthcare Improvement Scotland as a regulator for the purposes of Part 1 of the Bill and so we wish to respond to the call for evidence in so far as we can envisage the Bill's application in practice to Healthcare Improvement Scotland. Our main comment would be that, in the event that any proposals do impact on our regulatory activity, it is extremely important that relevant stakeholders, including ourselves, are consulted.

We have not commented on Parts 2 and 3 of the Bill as these are not relevant to this organisation.

Part 1 – Regulatory Functions

Part 1 of the Bill relates to Regulatory Functions and has three main elements:

- encouraging and improving consistency in the exercise of regulatory functions
- a duty on listed regulators to exercise functions in a way that contributes to achieving sustainable growth
- provision for a code of practice in relation to the exercise of regulatory functions.

The Bill therefore extends to Ministers powers which could be enacted in relation to Healthcare Improvement Scotland. There are two areas of Healthcare Improvement Scotland's activity which relate to commercial interests: the regulation of independent healthcare services, including independent hospitals, voluntary hospices and private psychiatric hospitals; and guidance on the use of health technologies and medicines, through the Scottish Health Technologies Group and Scottish Medicines Consortium. Whilst the process of licensing of medicines is a matter reserved to the UK Parliament, the development of guidance to the NHS on their use or otherwise is a devolved matter.

The Bill gives Scottish Ministers the power to make regulations in order to encourage or improve consistency in the exercise of regulatory functions by one or more regulators and also to require regulators to co-operate or co-ordinate with other regulators, or to impose or set new regulatory requirements or secure compliance with them. We therefore wholly support the provision that "before making these regulations, Scottish Ministers must consult with regulators, representatives of those substantially affected and any others as appropriate". It is assumed that the main other regulator with which we may be required to co-operate or co-ordinate with is Social Care and Social Work Improvement Scotland (the Care Inspectorate). Healthcare Improvement Scotland already works closely with the Care Inspectorate

on integrated inspection activity and both organisations are already subject to the Duty of Co-operation set out in the Public Services Reform (Scotland) Act 2010.

It is also important to note that, as a national body regulating the independent healthcare sector across Scotland, we are already working to address potential inconsistencies and variation in regulation. We do believe, however, that our role could be strengthened with the introduction of mandatory national standards and would welcome the streamlining of national standards for health and social care, and support the need for a review of the National Care Standards. Similarly, all NHS Boards are required to consider the advice of the Scottish Medicines Consortium in relation to accessing new medicines, and the recent New Medicines Reviews and work of the Health and Sport Committee on access to medicines are considering further steps to increase consistency in how NHS Boards are responding to this advice.

Section 4 places a duty on listed regulators to exercise regulatory functions in a way that contributes to sustainable economic growth, "except to the extent that it would be inconsistent with the exercise of those functions to do so". We welcome the provision that contribution to economic growth is balanced with the key purpose of regulatory function, in Healthcare Improvement Scotland's case to ensure that healthcare providers comply with advice, standards and regulations to protect and enhance the safety and wellbeing of patients and the public.

We note that sections 5 and 6 of the Bill provide for Scottish Ministers to issue a code of practice in relation to the exercise of regulatory functions by specified regulators, one of which is Healthcare Improvement Scotland. Again we welcome the statement that Ministers must consult on the code.

Healthcare Improvement Scotland
3 June 2013

SUBMISSION FROM NORTH LANARKSHIRE COUNCIL

Part 1

Any additional measure which clarifies existing legislation to allow consistency of enforcement is welcomed.

Part 3

The provision to enable Scottish Ministers to reduce the fees paid to Planning Authorities which are not performing satisfactorily is considered inappropriate and counter-productive. Reduction in performance is likely to be linked closely with decreasing resources and so a reduction in fees will only increase the problem rather than act to address it.

The proposed amendment to S 39 (4) of the Civic Government (Scotland) Act 1982 is likely to reduce costs to traders of obtaining a food certificate to allow them to trade in each local authority area, and provide consistency and transparency across local authorities.

North Lanarkshire Council
20 January 2013

SUBMISSION FROM OXFAM

Oxfam welcomes the opportunity to respond to the Economy, Energy and Tourism Committee call for evidence into the Regulatory Reform (Scotland) Bill. Our response is restricted to the proposed duty on regulators in Part 1 of the Bill which states: 'In exercising its regulatory functions, each regulator must contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so'.

Oxfam works to overcome poverty all over the world, and believes that in a rich country such as the UK the existence of poverty is completely unacceptable. In the UK, we work to overcome poverty in three ways: we develop projects with people living in poverty to improve their lives and show how things can change; we raise public awareness of poverty to create pressure for change; and we work with policy makers to tackle the causes of poverty. Our UK poverty programme has been operating since 1996, with specific country programmes in Scotland, England and Wales.

The problem with focussing on economic growth

Decades of economic growth have failed to change the lives of too many Scots who still face premature mortality, economic inactivity, mental and physical ill-health, and poor educational attainment. In the communities where Oxfam works the economic and social policies pursued in recent years have largely been ineffective in reducing deprivation, while unquestioningly prioritising economic growth has produced social and environmental damage.

Failings of the current economic model manifest themselves profoundly in Scotland's growing health inequalities, most evident in Glasgow. Up until 1981 the gradient of poor health in Glasgow mirrored that of similarly-sized UK and European regions. Since then health inequalities have deepened - premature male mortality which is 30% higher than in these comparable cities; suicide is 70% higher; there are 32% more violent deaths and 225% more alcohol-related deaths.[1] These excesses emerged at a time when the Scottish economy grew by almost 2% each year[2]. This example shows that a focus on economic growth is wholly insufficient as a public policy goal of Government.

In the same way we do not believe 'sustainable economic growth' should be a primary purpose of the Scottish Government's National Performance Framework[3], we do not believe it is appropriate for the Government to require regulators to contribute to achieving sustainable economic growth. The aim of regulators should be to pursue their primary purpose. As the STUC have pointed out in their submission[4] – the banking crash stemmed, at least in part, from confused regulation. Adding a duty to contribute to economic growth (albeit with the caveat of not interfering with its other functions) is not only focussing on the wrong goal but risking confusion. This is particularly relevant to a duty to contribute to achieving economic

[1] Walsh, David 2010 Investigating a 'Glasgow Effect': Why Do Equally Deprived UK Cities Experience Different Health Outcomes? Glasgow Centre for Population Health, Briefing Paper 25, September 2010

[2] From 1977 to 2007 Scotland's Gross Domestic Product increased by an average of 1.9% each year

[3] Civil society briefing on the National Performance Framework: http://www.foe-scotland.org.uk/npfbriefing

[4] http://www.scottish.parliament.uk/S4_EconomyEnergyandTourismCommittee/Bills/RRB_-_STUC.pdf

growth given that, in certain circumstances, this may represent the very opposite remit of certain regulatory bodies.

Better Alternatives: the National Performance Framework and the Humankind Index

If the Government is intent on pursuing an additional duty on regulators, we believe there are better alternatives. The Scottish Government's National Performance Framework, while not perfect, is a positive attempt to measure Scotland's performance on a range of measures. As such we believe regulators would be better suited to contribute to the *National Performance Framework* than to *sustainable economic growth*. Given the wide range of factors within the NPF, this would also allow regulators to work within a framework of factors which are more closely aligned with their core functions. In short, it wouldn't risk placing directly opposing demands on regulators.

If the Government is intent on picking one element from the National Performance Framework (as it is doing with economic growth) then, given the evidence that inequality is a major determinant of social progress[5], Oxfam believe it would be more appropriate to pick the solidarity target and require regulators to contribute to increasing 'the overall income and the proportion of income earned by the lowest income deciles as a group'.

In a similar vein, Oxfam's Humankind Index sets out 18 priorities that demonstrate what really matters to the people in order to live well in their communities. Created through a large scale consultation with 3,000 people across Scotland, good mental and physical health tops the list alongside access to a decent, safe and affordable home. The economic factors within the Index are not orientated around economic growth and GDP but rather, people want satisfying work, secure and suitable work, having enough money to pay the bills, and a secure source of money when things go wrong. While this shows that economic growth is not what most people think it is important, it also provides for a much more holistic framework in which to plan and assess policies and resource allocation. In the coming weeks Oxfam will launch a Humankind Index policy assessment tool.[6] We believe this would be a far more appropriate mechanism to ensure regulators contribute to wider factors of prosperity beyond their specific remit.

Conclusion

We hope the Committee calls on the Scottish Government to drop its proposed duty on regulators to contribute to economic growth. We also hope the Government will seek to move beyond a focus on economic growth and utilise more holistic mechanisms such as the Humankind Index and its own National Performance Framework when considering new plans and policies.

Oxfam
12 June 2013

[5] See for example the Christie Commission as well Pickett and Wilkinson 'The Spirit Level'
[6] Available at: http://oxfam-hki.herokuapp.com/

SUBMISSION FROM PROFESSOR ANDREA ROSS

Introduction to the Submitter

Andrea Ross is Professor of Environmental Law at the University of Dundee. She is the author of *Sustainable Development Law in the UK – from Rhetoric to Reality* (Earthscan / Routledge) and has written widely on the role of legislation (the UK, Scottish, Welsh and Canadian) in implementing sustainable development.

Scope of this response to consultation

I have the benefit of following the responses produced by the Law Society for Scotland and my colleague Professor Reid and strongly agree with the content of both. I would however, like to more specifically respond to the proposals to introduce a duty on selected public bodies to contribute to sustainable economic growth in section 4 and section 38 of the Bill.

(a) The use of the phrase sustainable economic growth

The Scottish Government, very usefully in my opinion, has set out a central purpose which is to 'create a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth'. This has been shortened by the Government to be a central purpose of 'sustainable economic growth'. I believe this shortened version puts the emphasis on the wrong part of the full purpose. Indeed, Scots want to be successful, they want to flourish, how that happens is most likely to be of secondary concern to them. Sustainable economic growth (or see below, the broader term of sustainable economy), like good governance and sound science are key ingredients to that success and flourishing; they are enablers but they should not be the true purpose of Government.

It is possible that the Scottish Government could achieve sustainable economic growth without Scotland being successful. Conversely, Scotland could be very successful and most Scots flourishing without growth. As such, the term sustainable economic growth is too narrow and restrictive an economic goal and detracts from the real objective of 'a successful Scotland with opportunities for all to flourish'. The message to the public sector is skewed by the inclusion of growth and marginalizes success or failure of Government to meet the real purpose of a successful Scotland. A broader economic goal of sustainable economy is preferred and this would allow growth (so long as it is sustainable), plateauing (only if sustainable) or even a shrinking of the economy (so long as it is sustainable) and, of course, all lead to a successful Scotland with opportunities for all to flourish. This is true regardless of the interpretation given to 'sustainable' (see below) and this broad approach is consistent with the phrasing used for the other enablers - 'good' governance and 'sound' science.

As noted by both Prof Reid and the Law Society, sustainable economic growth is capable of at least two very different interpretations. Is it simply the pursuit of growth avoiding large booms and busts (thus sustainable) or is it the pursuit of economic growth within the limits of ecological and social sustainability. As discussed above, to be successful and flourish, Scotland needs an economy that operates within the ecological and social limits of the Earth for the benefit of its inhabitants now and in

the future. Regardless of how this government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability. History has shown that where key decisions need to be made the need to address immediate pressures (including war, economic recession, disaster, or an upcoming election) will very often outweigh concerns about long term effect.

This is a good reason to consider legal duties which require public bodies to consider the long term effects of their actions.

(b) The role of sustainable development and the value of general duties

The evidence shows that a policy approach supported by only minimal legislation has not led to long term sustainability, nor has it acted to protect innovative and crucial procedures, institutions and goals from electoral short-termism. The more we erode the Earth's carrying capacity, the more the ability of leaders to provide just answers to economic and social crises diminishes.

Sustainable development, for all its definitional failings, has proven its resilience as a widely accepted, and now expected and measured, policy objective: internationally, in the EU, in Scotland and elsewhere in the UK. Most versions of sustainable development make decision makers at least consider the long term effects of their actions on the ecological limits of the Earth and its inhabitants, now and in the future.

Properly drafted duties on public bodies can create a meaningful framework for decision making based on sustainable development, while ensuring that this framework is iterative and flexible. They can serve to promote cultural change within government and beyond and unlike, procedures on their own, duties can be very symbolic. A significant amount of legislation already requires some authorities in Scotland to contribute to the achievement of "sustainable development", however, it is hindered by a lack of clarity in the definition of sustainable development.

It is recommended that the Scottish Government re-focus its efforts to properly define sustainable development for Scotland in line with its central purpose of 'a successful Scotland with opportunities for all to flourish' with the health and wellbeing of Scotland's people and environment, now and in the future, at the forefront of the definition. Scotland's current approach to governance using Economic Strategy is ideally suited to this approach, as is the central purpose of 'a successful Scotland with opportunities for all to flourish'. The inclusion of a clear, forward looking definition of sustainable development into such a clear approach to governance would, I believe, be world leading.

If this occurred, then a general duty on public bodies 'to contribute to the achievement of sustainable development' would be very valuable. Past experience in Scotland with specific duties and in Northern Ireland and Canada with general duties shows that in order to have any impact these duties need to be supported by legal procedures such as obligations to report, produce strategies or assessments, consult and review which are easier to enforce and monitor than the duties themselves.

Further reading

Ross. (2012) *Sustainable Development Law in the UK – from Rhetoric to Reality?* Earthscan / Routledge Publications, London Chapter 10 and Chapter 7

Ross A. (2000) "Greening Government -Tales from the new Sustainability Watchdog *Journal of Environmental Law* 12(2) 175-196.

Professor Andrea Ross – University of Dundee
4 June 2013

SUBMISSION FROM PROFESSOR COLIN REID

This evidence is presented in a wholly personal capacity and does not represent the views of any institution or organisation.

Part 1

A general observation is that actual or perceived inconsistency can be the result of having to operate with unduly complicated and fragmented regulations. When both regulator and regulated are faced with a complex patchwork of much amended regulations, with slightly different procedural provisions in slightly different contexts, it is inevitable that the regulatory burden will seem heavier than it need be. Where there is a well-organised and consolidated set of regulations, using a consistent set of procedural models, it is easier for everybody to understand what is required and what the consequences of non-compliance are, concentrating on the real purpose of the law rather than having to spend all the available energy simply picking through the legislative maze. A simple, coherent, consistent and clear regulatory framework can be understood and operated by all concerned. The energy and effort being expended on the process leading to Part 2 of this Bill and the regulation-making that will follow should be repeated in other areas. There are resource costs in such exercises, but there is also a large pay-back for all concerned in terms of better regulation.

Section 1: The regulation making power is very broad and it is welcome that it is subject to the affirmative procedure in Parliament.

Section 3: Given the many broadly-phrased statutory duties imposed on public authorities (not least that proposed in section 4 of this Bill), it is inevitable that these will on some interpretations conflict with the duty imposed by section 3(1). There will often be plenty of room for argument over the "proper" interpretation of these duties and therefore whether there is an existing obligation to justify non-compliance with the more precise provisions in the proposed regulations. Having to juggle competing obligations is hardly adding to the simplification of the regulatory process.

Section 4: Regardless of the political merits of this provision, there are two problems with the imposition of a duty to contribute to sustainable economic growth. The first is the uncertainty of what this phrase means. This exists both at the large scale - is it economically sustainable growth, or economic growth within the limits of (ecological and social) sustainability? - and then in ascertaining exactly what is meant once that issue is resolved. For example it is striking that the draft Scottish Planning Policy, currently also under consultation, does not provide a clear definition of sustainable economic growth but offers two far-ranging paragraphs on the topic, and draws a clear distinction between pursuing sustainable economic growth and pursuing sustainable development. 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.

Secondly, it is unclear what yet another duty on public bodies will achieve. How is this duty to fit with their other statutory duties such as to secure best value, to further the conservation of biodiversity, to act in the way best calculated to meet the greenhouse gas emission targets and in the way considered most sustainable?

Which is to take priority when there is a conflict? Is it conceivable that this duty will ever be legally enforced? If not, is there clear evidence that the creation of such legal duties really changes the ways decisions are taken to an extent greater than can be achieved through policy, guidance and training? Moreover, authorities already have to cope with so many duties imposed on them, that the benefit gained by singling out one or two duties as deserving special legal status has been lost by the number of duties imposed, duties which inevitably conflict in some situations.

Section 5: The presence of a Code of Practice is not by itself enough to save the inherent uncertainty of the duty proposed.

It is welcome that the making of the Code is subject to such open and inclusive procedural requirements.

Section 6(4): There should be an express requirement for consultation with the public.

Part 2

Chapter 1

Section 8: Given the broad powers conferred, a statement of purpose is welcome.

Section 9: The definition of "protecting and improving the environment" refers to "the status of ecosystems" but there should also be reference to biodiversity, since looking after our priceless natural heritage involves caring for it both at the ecosystem and the species (and even local population) levels, as noted in the Convention on Biological Diversity (1992) to which Ministers must have regard under s.1 of the Nature Conservation (Scotland) Act 2004.

Sections 10 and 11: Again, very far-reaching regulation making powers are introduced, but this does not represent a major change since this is already the legislative position in most areas covered by the proposed powers.

Given the significance and extent of the intended overhaul of several major regulatory regimes, there is an argument for at least the first set of comprehensive regulations being subject to the affirmative procedure in Parliament (as was the case in the Pollution Prevention and Control Act 1999, s.2(8),(9)).

It would also be preferable to have an express requirement for consultation with the public, not just those the Ministers think fit.

Chapter 2

One general observation is that it is unsatisfactory for there to be a piecemeal introduction of new enforcement powers in different areas. Although having the one system across the major environmental areas is a very welcome step forward, there should be a standard model (or limited set of models) which can be adopted in any regulatory context, rather than being confined to environmental matters. The same

model(s) should be available for use where appropriate for health and safety, consumer protection, food hygiene, etc. Is it intended to replace all of the existing environmental enforcement powers with this model (e.g. those introduced under the Marine (Scotland) Act 2010, ss.46-50 and the Wildlife and Natural Environment (Scotland) Act 2012, s.40)? Similarly, why is it only SEPA and not any other regulatory body (or the police) that is being empowered to recover enforcement costs?

A second general observation is that it is difficult to comment fully on the proposals in this section when some specific issues are dealt with in the Bill and others will be included in the regulations. In particular the absence of detail on appeal mechanisms makes it impossible to comment on the acceptability or ECHR-compliance of these provisions. Whilst I can appreciate the desire to have certain major provisions fixed in the statute, the result is that it is not possible to see the overall picture.

The issue of appeals is significant, not just to ensure ECHR-compliance, but also because the initial procedure and the appeal process must be viewed together to see if there is an appropriate balance between efficiency and due process. Moreover, we are currently undergoing major restructuring of the courts and tribunal system, and detailed consideration of appeal procedures at this stage might offer opportunities for a reallocation of functions between different judicial and administrative/ministerial appeal bodies (in this area and other regulatory regimes), affecting structures and workloads and ensuring the proportionate handling of cases by bodies with the appropriate expertise. (See also comment on s.40)

Sections 12-17: The standard of proof required here, the balance of probabilities, is lower than one might expect for the imposition of penal sanctions by the state, but the acceptability of this depends largely on the appeal mechanisms that will be available, a feature on which the Bill does not provide details.

Many of the offences likely to be relevant here arise not from one-off incidents but are continuing offences. It should be made clear how the enforcement procedure works in relation to such continuing offences.

Sections 13 and 16: It should be made clear in the Bill, or at least in the regulations, what the effect of an appeal is on any notice that has been served pending determination of the appeal and also the effect of a successful appeal on the potential to take further proceedings, whether by a second notice or by prosecution. Does a successful appeal against a notice preclude further action or mean that all options are again open to SEPA and the Crown Office? It is understood that the provisions in ss.13(6)(b) and 16(6)(b) are intended to prevent a successful appeal on one ground, namely that SEPA should not have issued a notice but instead have chosen another course of action, acting as a barrier to taking that further action, but this is just one example of the wider question of the effect of appeals on the ability to seek sanctions. There is a balancing act necessary between exposing operators to double jeopardy and risking technical flaws precluding necessary enforcement action.

Section 24: Publicity for the enforcement action taken is an essential element for securing public confidence in the use of the new mechanisms.

Chapter 3

Section 27: This provision is welcome, but it does not appear that equivalent provisions in other areas of law make a striking difference to the fines imposed.

Section 28: Again this provision is welcome and matches the provision for publicity in the event of the new sanctions being imposed by SEPA.

Chapter 4

Sections 29 and 30: The extension of vicarious liability is welcome and should avoid difficulties caused by the diverse management structures of companies and partnerships.

Section 31: The relationship should be considered between this offence and the offence of keeping etc. waste in a manner causing pollution or harm – Environmental Protection Act 1990, s.31(1)(c). There may be merits in having both offences available, noting the different thresholds of harm ("significant" harm here as opposed to any harm in the 1990 Act), but if so this position should be the result of conscious consideration.

Section 32: The introduction of a wide remedial power is welcome.

Section 33: These powers are welcome.

Section 34: The power to remove a special site from the register should not be given to the local authority acting merely in consultation with SEPA (proposed s.78TA(3)). Since the whole point of special sites is that they raise issues of a nature inappropriate for a local authority to deal with, SEPA's approval should be required, or the power should lie with SEPA.

Chapter 5

Section 38: The inclusion of a duty in relation to achieving sustainable economic growth is objectionable for the reasons pointed out above.

Part 3

Section 40: There has been a missed opportunity for joined-up thinking across government in relation to reform of the civil justice system, both courts and tribunals, and our compliance with the Aarhus Convention. The matter dealt with here is a symptom of a broader issue affecting the appropriate scrutiny of decision-making, the cost and speed of judicial review and the way in which appellate responsibilities are allocated between Ministers, planning reporters, courts and tribunals. This specific change should not preclude a more thorough consideration of how best to ensure genuine access to justice across a wide range of regulatory matters.

Section 41: Although the threat of adverse financial consequences for the authority may help to concentrate the minds of those responsible for poor performance, reducing the resources available is unlikely to assist improvements. The exercise of this power should be a last resort after more positive engagement between Ministers and the authority, and this might be reflected in the statutory provision.

Professor Colin T. Reid
Professor of Environmental Law
University of Dundee
May 2013

SUBMISSION FROM THE ROYAL INCORPORATION OF ARCHITECTS IN SCOTLAND

The Royal Incorporation of Architects in Scotland (RIAS) is the professional body for Scotland's 3000 chartered architects. They work in 1000 businesses, mainly very small, as well as in areas of industry from housebuilding to local and central government.

The RIAS has charitable status and offers a wide range of services and products for architects, students of architecture, construction industry professionals and all those with an interest in the built environment and the design process.

The RIAS welcome the opportunity to comment on the Regulatory Reform (Scotland) Bill. However we can only comment on aspects which have some relevance to the practice of architecture.

Purpose of the Bill

A Bill to enable provision to be made for the purpose of promoting regulatory consistency; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

Comments

SEPA

The RIAS welcomes a more streamlined approach to regulation and the introduction of tougher enforcement tools in order to tackle poor environmental performance, non-compliance and environmental crime more effectively.

We would welcome in particular:

- Any simplification of regulations consistent with the maintenance of fair and practical governance
- An improvement in consistency
- Fair penalties
- Any measure which would reduce the average cost of compliance

Planning

The RIAS welcomes the need to improve the performance of planning authorities by establishing a legislative link between planning fees and performance.

Royal Incorporation of Architects in Scotland
13 June 2013

SUBMISSION FROM THE SCOTTISH ENVIRONMENT PROTECTION AGENCY

SEPA welcomes the opportunity to submit written evidence to the Committee on the Regulatory Reform (Scotland) Bill.

We note the Committee's call for evidence on Parts 1, 3 and 4 of the Bill and our written evidence below refers to Parts 1 and 3. We have also provided written evidence to the Rural Affairs, Climate Change and Environment Committee on Part 2 of the Bill.

SEPA is a non-departmental public body, accountable through Scottish Ministers to the Scottish Parliament. We are Scotland's principal environmental regulator. We have a strong track record in supporting, understanding, shaping and delivering a better regulation agenda in Scotland. As the Committee is aware, Part 2 of the Bill contains proposed legislation aimed at improving environmental regulation. This has been developed jointly by Scottish Government and SEPA and via engagement with our stakeholders.

In general, we consider that the proposals contained in Part 1 will deliver real benefits as long as the new powers and policies are implemented in an effective way i.e. using a proportionate and evidence based approach and targeting those areas where the most improvements can be achieved. We would also hope that, overall, implementation of the proposals will help promote a better understanding of the role, purpose and value of regulation.

Part 1 – Duty on Regulators to Contribute to Sustainable Economic Growth

We support and are already aligned to the Scottish Government's overarching purpose of sustainable economic growth. Many of the mainstays of Scotland's economy, such as established industries like tourism, agriculture and the food and drink trade, depend on our high quality air, land and water. Effective regulation can stimulate business innovation and achieving compliance or going beyond it can be a powerful marketing tool for business. We recognise that the way we work can help to create the right conditions for new investment and business, whether this is how we organise ourselves to support emerging sectors down to how quickly we process applications for new permits.

Part 1 contains a duty on regulators to contribute to sustainable economic growth. This would not apply where a regulator is already subject to a duty to the same effect and it is our understanding that this specific duty would not apply to SEPA as a result of proposals in Part 2 of the Bill. As the Committee will be aware, Part 2 of the Bill contains a proposed new statutory purpose for SEPA. This provides a primary purpose of protecting and improving the environment, including managing natural resources in a sustainable way, and that in doing so SEPA must, except to the extent that it would be inconsistent with the primary purpose, contribute to improving the health and wellbeing of people in Scotland and achieving sustainable economic growth. We support this principle.

The Public Services Reform Act 2010 already places a duty on us to provide information on the exercise of our functions as they relate to promoting and increasing sustainable growth. We are required to publish statements on this alongside our Annual Report. This is a relatively new duty and we plan to develop our approach to this reporting further over the coming years.

Part 1 - Code of Practice in Relation to the Exercise of Regulatory Functions.
Part 1 provides for a Code of Practice in relation to the exercise of regulatory functions. We believe that a Code could contribute to the delivery of the better regulation agenda in Scotland. We have welcomed the Scottish Government's focus on better and more effective regulation in contrast to the UK Government's stated focus on deregulation. We know that the UK Government is currently revising its own Regulators' Compliance Code and issues of alignment will need to be considered in relation to a Scottish Code given that many Scottish regulators also deal with non-devolved duties e.g. SEPA's role under the European Union Emissions Trading System. We believe that there is an opportunity with the development of a Scottish Code to draw on good evidence-based regulatory practice both in the UK and more broadly. We would also hope that the process of developing the Code would help to raise a shared understanding amongst regulators of good regulatory practice.

Part 1 – Power Aimed at Improving Consistency
Part 1 contains a regulation making power aimed at improving consistency in the exercise of regulatory functions. We believe that there may be areas where an enabling power of this type could be useful. We would be keen for an evidence-based approach to be taken to this i.e. targeting the use of this power where there is clear evidence of an inconsistent, disproportionate and/or inefficient approach. In relation to SEPA, Scottish Ministers are already enabled under the Public Services Reform (Scotland) Act 2010.

We believe that there could be circumstances where it is not appropriate for a regulator to adopt a mandatory approach or standard. This could be where a regulator has already demonstrably implemented good practice in the area in question and hence meets the broad objective that is being sought from the introduction of the mandatory approach or where intervention would be disproportionate to the outcome/benefits to be achieved. In view of this we support the proposals in Part 1 for Scottish Ministers to direct that provisions may not apply to a regulator or apply subject to modifications and conditions.

Part 3 – Varying Planning Application Fees
Part 3 provides for varying planning application fees based on the performance of a planning authority. We are a statutory consultee in land use planning and have delivered significant reform to our role and service on planning in recent years. This has included improving both our response times and the quality and helpfulness of our advice.

Whether or not the proposal in the Bill achieves desired outcomes would depend in large part on how planning authority performance is measured and judged. There could be a risk that local authorities prioritise the speed of turning around the consultation over the quality of the output. This could lead to us e.g. being asked to respond to poorer quality consultations with inadequate supporting information which in turn could lead to delay and additional cost.

We hope that the Committee finds this written evidence useful and would be happy to provide any further clarification.

SUBMISSION FROM SCOTTISH LAND AND ESTATES

Executive Summary

- Scottish Land & Estates is supportive of the Scottish Government's Better Regulation agenda and supports the aim of the Regulatory Reform (Scotland) Bill to ensure that regulatory functions are exercised in a consistent manner in such a way as to contribute to sustainable economic growth.

- Scottish Land & Estates wishes to see that regulation is proportionate and streamlined in such a way that it does not place an undue burden on rural business interests.

- Scottish Land & Estates is supportive in principle of the provision to introduce a Code of Practice in relation to the exercise of regulatory functions, however we have concerns over monitoring and accountability of those who do not comply.

- We are supportive of a duty which requires regulators to contribute towards sustainable economic growth.

- Scottish Land & Estates broadly supports the provision to link planning fees and performance however it is not without reservation.

Scottish Land & Estates is a member organisation that uniquely represents the interests of both land managers and land-based businesses in rural Scotland. Scottish Land & Estates has over 2,500 members with interests in a great variety of land uses from farming and forestry to moorland management and tourism. As such, this Bill will impact upon our members' businesses so we welcome the opportunity to submit our views on the Regulatory Reform (Scotland) Bill. We have already submitted our evidence to the Rural Affairs, Climate Change and Environment on Part 2 of the Bill.

Response to key issues and general comments:

Part 1 – Regulatory Function

<u>The provision of a regulation making-power for Scottish Ministers to encourage or improve consistency in the exercise by regulators of regulatory functions:–</u>

Scottish Land & Estates is supportive of the aim to improve consistency in the exercise of regulatory functions and mechanisms which enable or promote regulators to co-operate and co-ordinate their approach. As much of the detail of this provision is not yet known, for example the criteria to be used to assess requests to opt out, Scottish Land & Estates would seek assurance that there will be full consultation with regulatory bodies and stakeholders when the detailed regulations are developed.

<u>The provision to exercise regulatory functions in a way that contributes to achieving sustainable economic growth:–</u>

Scottish Land & Estates is supportive of a duty which requires regulators to contribute to sustainable economic growth in exercising functions but recognise difficulty in defining the term. Sustainable economic development has been suggested as an alternative but we believe that sustainable growth is actually an even more ambitious objective which incorporates but is not limited to development. Business interests are often unfairly criticised for focussing on the economic without reference to sustainability but we see this duty as a useful signal that regulators can and should support and promote growth but only insofar as it is sustainable. There may be difficulty in balancing this against the other various duties imposed on public bodies and it should be clear that the duties will not conflict or place a statutory straightjacket on regulators in functioning day-to-day.

Proposed Code of Practice in relation to the exercise of regulatory function:–

Scottish Land & Estates welcomes a Code of Practice in the interests of consistency of regulatory approach but we are concerned about lack of sanction if a regulator fails to comply. Some mechanism to hold regulatory bodies to account where it fails to adhere to the standards expected in the Code may be worth the Committee's consideration.

List of Regulators:–

Scottish Land & Estates notes that Historic Scotland has been removed from the list of regulators between the consultation stage and the introduction of the Bill. We understand the reason for this is that Historic Scotland does not have a legal identity which is separate from Scottish Ministers but would be interested to know what proposals there are to ensure that the same objectives can be achieved by other means for such regulatory bodies within the Scottish administration which are not separate legal identities.

Primary Authority Partnerships:–

Subject to examining the details, Scottish Land & Estates supports in principle the notion of Primary Authority Partnerships and welcomes intention to introduce this at Stage 2.

Reviews and sunsetting:–

Scottish Land & Estates is disappointed that the proposal to introduce periodic reviews and a sunsetting policy in Scotland has been removed between the consultation stage and the introduction of the Bill. We believe that is important that regulatory authorities continue to review regulation to ensure that it is fit for purpose and contributes towards the Scottish Government's overarching aim of achieving sustainable economic growth. We feel that introduction of this provision would further improve regulatory consistency that the Bill aims to achieve but also links to the Scottish Parliament's Standards, Procedures and Public Appointments Committee's Inquiry into post legislative scrutiny which is currently ongoing. We would encourage the Committee to consider this as part of its Stage 2 amendments.

Part 3 – Miscellaneous

The proposals for Scottish Ministers to make provision for the charge or fee payable to different planning authorities to be of different amounts dependent on performance:–

Scottish Land & Estates is broadly supportive of this provision and agrees that that it is important that there is a clear connection between quality of service/ performance of the Planning Authority and the level of fee paid by the applicant. However we are concerned that inconsistency will ultimately arise due to this provision and this goes against several of the strategic objectives of the Bill. We would refer the Committee to our submission in response to the Scottish Government's consultation on fees for planning applications 20121 in which we raise concern that punishing 'poorly' performing authorities by reducing the fee paid would undoubtedly lead to that Authority to continue to deteriorate. We continue to have doubts over the practical and financial implications, both to Planning Authorities and rural businesses as well as the policing of this approach. Often rural businesses do not have a choice in where they chose to develop and will therefore be directly affected by the performance of their local Planning Authority and any subsequent change to planning fees. Scottish Land & Estates would encourage the Scottish Government to work in partnership with Planning Authorities to ensure that every opportunity to support improved performance had been taken before a change to the level of planning fee was introduced. As part of its deliberations, Scottish Land & Estates would encourage the Committee to look at the effectiveness of the Planning Performance Framework and to liaise with the high-level group established by the Minister for Local Government and Planning, Derek Mackay, to review planning performance.

Part 4 – General

Scottish Land & Estates has no comments on this part of the Bill.

Further information

Scottish Land & Estates hopes this evidence is useful to the Committee in its deliberations on the Bill and we would be happy to provide further information on any of the points made above.

Scottish Land and Estates
6 June 2013

SUBMISSION FROM THE SCOTTISH PROPERTY FEDERATION

Introduction to SPF

The Scottish Property Federation (SPF) is a voice for the property industry in Scotland. We include among our members; property investors including major institutional investors, developers, landlords of commercial and residential property, and professional property consultants and advisers.

General Comments

In general the SPF hopes that the Better Regulation Bill will address a tendency in government to view costs in a segmented sense and not to realise or understand the full cumulative costs of the suite of regulatory burdens faced by developers and investors. A holistic approach by Government should ensure that no sector is overburdened by regulation and there will be greater consistency, confidence and clarity with clearly identifiable benefits from regulation.

It is vital that Government regulates with an eye not just on the issue at stake but also on the competitiveness of Scotland vis-a-vis other parts of the UK as well as internationally. Sometimes there will be clear reasons for prioritising safety or environmental concerns above business competitiveness, for example in relation to the new requirement for protective barriers in commercial buildings which the SPF supported. However, there are also initiatives where Scotland is moving ahead of the field in terms of regulatory demand, sometimes with little costed evidence base. For example in the field of commercial property retrofit under regulations to apply from January (over four years in advance of the rest of the UK and covering both sales and let properties) it will become a requirement for EPC related action plans to be implemented by the property owner at point of sale or lease, if cost-effective. Although the Scottish Government has at this stage enabled a number of provisions within the Regulations to enable smaller properties, or green deal related properties to be exempt, there will remain some considerable scope for misunderstanding on liabilities as well as a major issue of awareness among businesses in particular.

Similarly for new build energy efficiency regulations Scottish Ministers are currently raising energy efficiency related building standards every three years despite the relative lack of new build development that is actually taking place and in the light of increasing evidence that further standards are difficult to make cost-effective. Already Homes for Scotland confirm that new houses are some 70% improved in terms of energy efficiency as a result of modern building standards compared to the 1990 benchmark, as are modern Scottish offices. We believe it is time for a moratorium on further energy efficiency standards in the light of the on-going restrictions and market weakness for the development industry as well as the progress made to date in terms of modern new build houses and offices.

The main focus of our comments below will relate to the planning performance issues identified under Part 3. SPF has long argued that increases in planning fees should be related to a tangible improvement in the performance of the planning system. Our understanding of the provisions of the Bill is that the Minister believes this will come about as a result of the financial penalty provisions that might be

applied to local authorities. We discuss below some of our views on this proposal specifically but we would make the following points at this stage.

First, we know that local authorities believe that there is a revenue gap between what is required to provide the planning service and what is achieved in terms of fees. However, in relation to the planning service we have never been fully convinced about the explanations of various reports as to what exactly is the service that is being paid for? Developers are required to pay substantial sums far in excess of the planning fee for a range of reports including among others Environmental Impact Assessments, Habitats studies, transport impact assessments, retail impact assessments, and water capacity studies. For a major development these costs may easily run into hundreds of thousands of pounds. If the developer is already forced to pay for all of this advice and in some cases statutory regulation then this needs to be recognised in relation to the debate on planning fees.

We would also recognise that there are instances whereby applicants make mistakes and do not submit adequate planning applications, or delays can of course occur with applicants themselves. While no planning authority has brought to our attention any such application inadequacy specifically on the part of a member of SPF it is a fact that applications are made from a wide variety of applicants. However, we urge that it would be in the interests of all parties to ensure that minor mistakes are simply amended by the applicant quickly and that more major concerns are addressed as quickly as possible.

In relation to delays on the part of the applicant this can occur for a number of genuine reasons and that is why SPF believes that strong communication and processing agreements must be an essential part of any planning process. This is really about good project and development management and suggests a need for a qualitative and fair assessment of applications and for major planning applications on a case by case basis; particularly if financial penalties or any related extension of planning fees themselves are to be considered. The SPF is part of the Scottish Forum for Planning run by RTPI Scotland and we would welcome the identification of ‘best practice’ exemplars for development management of major planning applications across both residential and commercial/mixed developments.

Regulations should be proportionate, timely and suited to the current economic climate. We do not believe that at present we are achieving this balance. Our members have some detailed concerns which we refer to below in line with the Committee’s call for comments.

Part 1 Regulatory Functions

A key concern of our membership is that the regulatory process should be made to work better in order to stimulate sustainable economic growth. Members consider that, on the face of it, the policy guidance and direction goes a long way to help avoid continued inappropriate delay and demands made during the planning process. However, while general guidance is encouraging it is not mandatory and experience dictates that planning authorities will continue with a culture of 'shopping list' demands of the development sector in interpreting regulations, which leads to a lack of confidence, certainty and consistency across the various local authorities. Members are firmly of the view that standards should be fit for purpose and should

be appropriate to the economic environment of the time and should be broadly consistent throughout Scotland. Members would support a statutory presumption in favour of sustainable development as one of the most objective ways to stimulate sustainable economic growth.

In addition to a specific presumption in favour of sustainable development, our members would strongly support a new generic statutory duty on Scottish regulatory authorities to consider (and report on) the economic impact of their regulatory activity. The SPF has argued for some time that there is a tendency in government to view costs in a segmented sense and not realise or understand the full cumulative costs faced by developers and investors. Planning fees are not the only cost but planning obligations, the costs of up-front reports and appraisals demanded by the public sector and other non-planning impacts such as Rates and the Health Levy etc. also arise and these also factor into the ability to deliver development. The Government should approach regulation as a holistic exercise to ensure that no sector is overburdened by regulation.

Part 3 Planning Authorities' Functions: Charges and Fees

The SPF has strong concerns that the Scottish Government has noted in the Financial Memorandum that accompanied the Bill that it has not been able to quantify the costs and benefits of implementing this provision with any precision. Instead the Government can only anticipate that the benefits from improved performance are likely to exceed significantly the costs of implementation, without so far as we can see any sound evidence base. We would observe that our members are acutely aware that the impact of delay upon planning decisions can be significant in terms of lost opportunity as well as additional costs. Therefore even without a firm basis of evidence we support the intentions of the government in this part of the legislation. We believe that a fundamental tenet of regulatory reform must be that the implementation of any legislative change and the cost of any performance framework should not outweigh the benefits and that both investors and the general public should be able to identify tangible benefits.

The penalty for poor performance is also a concern, particularly if fees will be reduced in poorly performing authorities, which may only serve to exacerbate a difficult situation. For example it could be that an authority has genuinely struggled because of a lack of resources – if so, a financial penalty could add to its difficulties rather than detract from it. There is considerable uncertainty around how the sanctions on fees will operate in practice - and it is unlikely that an aggrieved applicant will take much personal satisfaction where an expensive application is rejected by what subsequently is deemed to be a poorly performing authority. There is also a risk that too much time spent on measuring performance might actually be detrimental to the planning system. An alternative proposal and possibly a first response before the imposition of any penalty might be to appoint a peer review group as an intervention team drawn from high performing local authorities or a central government resource that could assist a poorly performing authority to improve its processes. The additional costs involved could effectively amount to a penalty on the authority but improvements should result and this would not therefore be just simply a fiscal "punishment".

Our members also have strong concerns that a reduced planning application fee in poor performing authorities does not mean that applicants will pay less for their planning applications. This clearly means that the costs of delay to developers and investors will still not be covered in any regulatory assessment sense, but there will still be a real loss of any potential development contribution to sustainable economic growth in that particular authority.

Our members are also concerned that perverse timescales could be introduced that would have an adverse effect on the decision making process from the perspective of applicants. For example, an authority could decide to readily meet timescale requirements through bringing forward applications in order to ensure additional fees, where there may have been little realistic prospect of planning progress by the applicant in order to ensure additional fees. This might not necessarily guarantee that the right quality of decision had been made. Therefore there needs to be a qualitative assessment of planning performance, which we recognise as the intention of the emerging HoPS, COSLA and the Scottish Government agreement as part of the wider performance framework.

The SPF would be pleased to explain its comments in further detail at the Committee's request.

Scottish Property Federation
6 June 2013

SUBMISSION FROM THE RIGHT HONOURABLE LORD GILL, LORD PRESIDENT OF THE COURT OF SESSION

Introduction

I restrict my comments to the Scottish Government's proposals outlined at paragraphs 63-70, questions 26-30, on the question of extending statutory review mechanisms to challenges to Scottish Ministers' decisions on infrastructure projects. These proposals affect the jurisdiction and practice of the Court of Session.

In summary, the Ministers are concerned that the agglomeration of judicial remedies available against decisions concerning infrastructure projects presents a "confusing and complex picture" (para 65). The Ministers propose the extension of statutory appeals and rights of appeal as a substitute to resort to judicial review and transfer of marine licence appeals from the sheriff court to the Court of Session. I support these proposals.

The current problem

Proposals to build power generating infrastructure or overhead cables require planning permission under the Town and Country Planning (Scotland) Act 1997 and the appropriate authorisation under the Electricity Act 1989, Part I. Refusal of planning permission is subject to a right of appeal in terms of the former Act (s 239), but refusal of the relevant authorisation under the latter Act can be challenged only by judicial review. Therefore even in respect of the same project and the same decision maker, with many considerations relevant under both Acts, the routes of challenge differ. Although both challenges take place in the Court of Session, with the extent of the court's supervisory role virtually identical to its statutory appellate role under the 1997 Act, two processes will have to be initiated. In these processes different tests applied in relation to *locus standii* and the timeousness of the challenge.

An appeal under the 1997 Act will be presented to the Inner House and typically will be determined there (Rules of the Court of Session, Rules 41.1, 41.19(1), *cf* Rule 41.44); whereas the converse applies in petitions for judicial review (Rule 14.2(e), *cf* Rule 34.1). In my view, these differences serve no practical purpose. The potential for duplication of procedure, where decisions are made under both Acts in tandem, or for multiplicity of challenges where decisions are taken sequentially, is also undesirable.

Similar anomalies arise in relation to off-shore wind farms, which require authorisation under the Electricity Act 1989 and the Marine (Scotland) Act 2010. A disappointed developer would have to petition for judicial review in the Court of Session against a decision under the 1989 Act; but would have to appeal to the sheriff against a decision under the 2010 Act (s 38). An environmental non-governmental organisation would have to resort to judicial review to challenge the decision under the 2010 Act. In my view, no purpose is served by these differences.

Recently in *Walton v Scottish Ministers* ([2012] UKSC 44), the Supreme Court noted a similar anomaly where a decision on a roads project with implications for the environment might give rise separately to an appeal under the Roads (Scotland) Act

1984, Sch 2 and a judicial review arising from the Environmental Assessment (Scotland) Act 2005 (*cf* Lord Reed, para [79]). The Supreme Court also commented on the undesirable variations in remedies between statutory regimes (*cf* Lord Carnwath, paras [142]-[145]).

In my view, this is an opportune time to consider the creation of a flexible, uniform set of powers on disposal of infrastructure appeals.

The solution

A major theme of the Report of the Scottish Civil Courts Review was that there should be a move away from technicality and formality wherever possible, and towards uniformity of procedure, in order to promote the efficiency of the civil courts.

In my view, it is desirable that there should be one, uniform type of remedy available from the Court of Session against decisions on infrastructure projects. The remedy should not depend on the type of project. The relevant procedure and available remedies should differ only so far as is strictly necessary. A judge or practitioner who is acquainted with a statutory appeal against one type of decision can easily apply that experience to another type of infrastructure appeal.

Features of a new appeal mechanism

In my view, in order to promote uniformity between judicial review and statutory appeals in this field, the test of title to invoke the appellate procedure should be sufficiency of interest (*Axa General Insurance Ltd, Petitioner* 2011 SLT 1061).

As appeals under enactments such as the Town and Country Planning (Scotland) Act 1997 (ss 238, 239), the Roads (Scotland) Act 1984 (Sch 2) and the Land Compensation (Scotland) Act 1963 (s 29) refer simply to there being an appeal to the Court of Session, the question of whether the appeal is heard by the Inner or Outer House is determined by the Rules of Court, subject to the court's discretion in any particular case (Rules 41.1 41.9(1), 41.44). In my view any new appeal mechanism should likewise leave the forum of appeal open. This would allow the Court of Session to manage its caseload either generally through Rules of Court or on a case-by-case basis. For marine license appeals, in my view, consideration should be given to providing that appeals regarding licences for matters other than infrastructure projects should remain in the sheriff court; or, alternatively, to providing that the Court of Session should have power to remit marine licence appeals to the sheriff court in appropriate cases.

There is always the potential, no matter how the right of appeal is defined, for there to be disputes as to whether a particular decision is amenable to a statutory appeal (*eg Scottish Borders Council* v *Scottish Ministers* [2012] CSIH 79). Such disputes are arid because if there is no right of appeal there will almost inevitably be a right to petition for judicial review. As the law stands, a failure to elect correctly between judicial review and statutory appeal is likely to lead to an incurable fundamental irregularity (see, by analogy, *Sidey* v *Clackmannanshire Council* 2010 SLT 607). In my view, there would be some advantage in having a slip rule, conferring upon the court a discretion to allow a purported statutory appeal to proceed as a judicial review and *vice versa.* We are making such provision for actions raised by

summons and for petitions for judicial reviews (Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2012, para 4 inserting new Rule 58.12, coming in to force on 19 November 2012). A similar provision for statutory appeals may require amendment of the relevant statutes.

In the Civil Courts Review, we recommended that a permission stage should be introduced for petitions for judicial review (Rec. No. 152). We also recommended the introduction of a filter for reclaiming motions and statutory appeals (Rec. No. 19). The aim of both recommendations was to have weak cases sifted out expeditiously. In my view, the creation of a new appeal mechanism for infrastructure projects, replacing in some instances judicial review, provides an opportunity to introduce some form of a permission stage or filter.

The questions

I answer the consultation questions as follows:

Q26. Yes

Q27. At least for decisions under the Electricity Act 1989 and Environmental Assessment (Scotland) Act 2005

Q28. Not applicable

Q29. Yes

Q30. Yes

The Right Honourable Lord Gill
Lord President of the Court of Session
May 2013

Minister for Energy, Enterprise and Tourism
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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Murdo Fraser MSP
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Scottish Parliament
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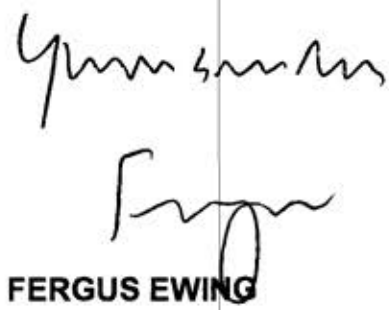
28 March 2013

Dear Murdo,

As you know the Regulatory Reform (Scotland) Bill is to be introduced to the Parliament today. The Bill was announced in the Programme for Government in September 2012 and takes forward the 2011 commitment to improve further the way regulation is developed and applied in practice across Scotland. It aims to improve the regulatory landscape, and in particular deliver consistency, efficiency and effectiveness while actively supporting local democracy and circumstance, and indeed the quality and professionalism of Scotland's regulators. The Bill will deliver benefits for the environment, protect our people and environment, help businesses to flourish and create jobs.

I am pleased to inform you that the Scottish Government has now also published an independent analysis of the responses to the Proposals for a Better Regulation Bill consultation. This can be found on the Better Regulation pages of the Scottish Government website. The analysis showed that respondents felt that the impact of the Bill would or could be broadly positive. There was a good response to the consultation from both business and trade organisations and local authorities. Together they accounted for 59% of all submissions. However the independent analysis differs from internal Scottish Government analysis in one key area, in terms of the level of support for a proposed economic duty. As such, Scottish Government officials invited stakeholders classed as "undecided" by the consultant to a multi-lateral discussion. Subsequently 7 of those 18 stakeholders signalled support for the economic duty now proposed. In addition, COSLA have formally revised their position opposing clauses on the economic duty on regulators and on regulatory consistency, following the development of a Scottish Government/COSLA Memorandum of Understanding.

Finally, I should alert you to a potential Stage 2 Amendment. The Bill as introduced does not feature a specific and additional proposal which emerged from the consultation in 2012: that some equivalent of Primary Authority Partnerships should be adopted in Scotland. A further consultation will be initiated shortly, focused on establishing whether there is broad support for a Scottish equivalent of the current UK Government scheme, and what that would involve. Subject of course to stakeholder responses, I am keen to have the option of adopting Primary Authority Partnerships at the earliest opportunity, by introducing Stage 2 amendments to the Regulatory Reform (Scotland) Bill.



FERGUS EWING

MEMORANDUM OF UNDERSTANDING ON CONSISTENCY IN THE EXERCISE OF REGULATORY FUNCTIONS AND FUTURE NATIONAL STANDARDS

The 2013 Bill to support and deliver Better Regulation will contain a regulation-making power to encourage or improve **consistency in the exercise of regulatory functions**. Where a regulator has discretion as to how to apply a regulatory requirement and there is scope for the requirement to be applied inconsistently, the power may be used to encourage or improve consistency. For example, future regulations may provide for, or require the adoption of, consistent requirements and procedures. However, if a regulator makes a compelling case that local circumstances merit a variation, the regulations can take account of this. Business consultation responses have indicated that local authority licensing could potentially provide an opportunity to consider and implement nationally-consistent regulatory requirements and procedures using the powers proposed for the Bill.

This paper recognises the wide range of important regulatory functions delivered by local authorities across Scotland. It aims to build on the existing Scottish Government/Concordat by defining a high-level yet practical framework for co-operation focused on consistency in the exercise of regulatory functions and consideration of the merits of future proposals relating to national standards. Core principles include:

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

When either national or local government believe there is a relevant regulatory function which could be improved through a consistent national system then this will be discussed by the relevant Minister and COSLA Spokesperson, to agree a collaborative research and consultation process. COSLA Leaders and local authorities will highlight any criteria which might be used to assess the general case or specific cases for local variation.

Any future national system will be developed in partnership, ensuring practitioners are involved at all stages to develop a system which achieves the intended outcomes for regulating without placing unnecessary burdens on either the regulators or the regulated. This will include, as appropriate, any consideration of nationally set fees or charging regimes which would be discussed by the Minister and COSLA Spokesperson in the first instance.

The Scottish Government will, as required, fund a Policy Manager post in COSLA so that adequate time and resources can be spent on developing and delivering any such national system. This could also allow COSLA to assist any local authority preparing a business and regulatory impact assessment to support a case for local variation of any future national standards.

In considering any individual local authority case for local variation of any future national standards the Minister will consult the COSLA Spokesperson.

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September 2013

I am due to appear before the Committee on 11 September to discuss the Regulatory Reform (Scotland) Bill and thought you might welcome a letter setting out recent relevant developments and also my thinking on themes which emerged from evidence received by EET committee, in the Stage 1 Report from the RACCE Committee and the letter from the Finance Committee.

Regulations to encourage and improve regulatory consistency

Sections 1 and 2 of the Bill are intended to expand the Better Regulation toolkit and allow a consistent national approach to be taken, where justified. As you know, there has been a great deal of collaborative work with COSLA on this policy concept as I recognise the validity and value of local decisions in most contexts. We have, in principle, agreed a Memorandum of Understanding with COSLA setting out how we would work together to use these new powers, and the response from local authorities has been very positive.

Economic duty and code of practice

I note that the RACCE Committee report on the Bill recommended that a definition of sustainable economic growth should be brought forward as a stage 2 amendment, and also highlighted some stakeholder concerns about the interaction between the proposed economic duty and other statutory responsibilities. In terms of the former I recognise of course that the term sustainable development has been in play in environmental contexts for some considerable time, with the result that it is a concept which many feel better able to define and understand. Sustainable development is integral to the Scottish Government's overall Purpose: to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. This Government remains committed to sustainable development as defined in the 2005 UK shared framework, 'One future, different paths.' The fundamental principle of sustainable development is that it integrates economic, social and environmental

objectives. This principle is reflected in both the Scottish Government's definition of sustainable economic growth and in the five guiding principles set out in the UK shared framework for sustainable development.

Sustainable economic growth is at the core of the Government's Purpose and means "building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too".

I should stress that the rationale for the economic duty element of Part 1 of the Bill is to promote greater regulatory consistency by imposing a statutory duty in relation to sustainable economic growth, empowering regulators to align their activities and approach with the Government's Purpose. That proposed duty will sit alongside, and certainly not override, their existing duties. This is a key point. The difference is that there will be an imperative to include economic factors *appropriately* in future decisions. Of course we are aware that local government does take its role in relation to local economic development seriously, and that the provison of this Bill should further clarify the importance of giving due consideration to these matters. I believe strongly that we must build on that existing good practice to drive further performance improvements and promote consistency. Section 5 of the Bill therefore gives Scottish Ministers the powers to issue a code of practice, linking the proposed economic duty to statutory guidance which provides clarification on the practicalities of determining an appropriate balance between economic and other regulator-specific objectives. We believe that any such Code of Practice must be developed by regulators and stakeholders and a short-life group is progressing the development of a draft Code for consultation later this year.

The proposed Code will apply to all regulators listed in schedule 1 – and will <u>not</u> be specific to any particular regulator. It is <u>not</u> intended to circumvent or replace other codes of practice, or the powers to do so. Indeed, by developing this Code in an open and collaborative way, involving regulators and other stakeholders, the intention is for it to complement detailed and subject-specific codes which already exist.

With my colleague Derek Mackay, Minister for Local Government and Planning, I have considered the evidence provided by stakeholders, and also in response to the view of the Committee, that it is not clear-cut whether section 4 as currently drafted would apply to planning functions. We share a clear understanding that sustainable economic growth is already an established element of planning policy and practice. We are taking forward the important role our planning system has to play in contributing to sustainable economic growth through a revision to Scottish Planning Policy (SPP). The SPP will be implemented through updated development plans and decisions on individual planning applications being made in accordance with those plans unless material considerations indicate otherwise. The forthcoming NPF3 also reflects the revised SPP. This established framework ensures balanced decision making by planning authorities with sustainable economic growth properly taken account of alongside other policy objectives.

As you may be aware the Planning Reform: Next Steps programme is also making improvements to the planning service so that it fully supports economic recovery. It is doing this through promoting the plan-led system, driving improved performance, simplifying and streamlining the system and a stronger focus on delivery.

As such, we are minded to bring forward a Stage 2 amendment that will make it clear that the planning functions of a local authority are not subject to the proposed duty to contribute to sustainable economic growth.

Primary Authority

The Consultation on Primary Authority Arrangements relating to the Devolved Regulatory Responsibilities of Local Authorities in Scotland closed on 23 August. We are currently working on a detailed analysis of the 42 responses received and I shall provide a separate written update on that in due course.

Planning Authorities' Functions: Charges and Fees

The Finance Committee's letter to you of 19 June highlighted a number of concerns raised by COSLA in relation to the proposals for charges and fees. The Annex to this letter responds to those specific points.

I trust this is helpful, and look forward to providing additional detail on 11 September.

I am copying this letter to the Convener of the Finance Committee, and the Minister for Local Government and Planning.

FERGUS EWING

Planning authorities' functions; charges and fees

Response to concerns regarding S41 of the Regulatory Reform (Scotland) Bill

There is no definition of good or bad performance

The High Level Group on Planning Performance, which the Minister for Local Government and Planning chairs jointly with Councillor Stephen Hagan, COSLA spokesperson on Development, Economy and Sustainability, has identified a set of Performance Markers which are attached. These Performance Markers derive from key features of the Planning Performance Framework, which was developed by local government and the Scottish Government and introduced last year.

As the Performance Markers paper indicates, a wide assessment of performance will be undertaken, looking at service standards across the range of planning functions and reflecting aspects of service quality valued in a high-performing planning authority. Speed of decision-making will always be an important measure of planning performance – but it is certainly not the only measure, as clearly identified through the Planning Performance Framework. For example, development plans are at the heart of our planning system and I want to make sure these are always up-to-date and relevant; while planning processes and the costs that can be associated with them must be proportionate. These and other aspects of a quality planning service are recognised in the identified Performance Markers.

A penalty clause focuses on inputs and outputs, not outcomes

The Scottish Government fully recognises and supports planning's essential role in quality placemaking, in supporting economic investment and in delivering facilities and essential services; along with the benefits this brings to our communities and society. The Planning Performance Framework reflects the actions, culture and behaviours undertaken by planning that contribute to quality outcomes.

A key element of planning reform has been the shift towards better front-loading of the planning system, to support early cross-sector engagement so as to reduce disputes over planning matters and to work together to support better outcomes. This early engagement is a key feature of the Planning Performance Framework and is reflected in the Performance Markers. Good quality engagement and open processes support quality outcomes.

It does not enable a move towards cost recovery

At the debate on the fee regulations in Parliament 6 March 2013, the Minister for Local Government and Planning considered that if we move to full cost recovery – which is an aspiration shared with our local government partners – it must be robust and fair for people who pay for applications. As reflected in COSLA's submission to the Committee, The Audit Scotland report 'Modernising the Planning System' (September 2011) noted a fall in the extent of cost recovery to 50% in 2009/10. Since that period though, the Scottish Government has increased planning application fees twice; by 10% in April 2010 and by 20% earlier this year, requiring applicants to pay more during some difficult times for our economy. Developers deserve to be charged a planning fee that is consistent with the quality of the service they receive we are completely dependent on local authorities to improve their performance to give justification for increasing fees further.

Audit Scotland also recognised however that local government had only limited information about the costs of processing planning applications, limiting their ability to understand and reduce their costs. Getting a better handle on planning authority costs is essential for us to move towards full cost recovery. This has not yet been resolved, but I am pleased that Heads of Planning Scotland and the Improvement Service are now working with 16 planning authorities to collect monitor and report data on the cost of development management.

Planning Authorities don't control the whole planning system and delays are often from things outwith their control, such as section 75 agreements.

Planning authorities have a central role in project managing the development proposals they handle. We recognise though that sometimes delays can occur which are outwith their control.

Where a planning obligation is being sought, the process of concluding the obligation is integral to the decision-making process on the grant of planning permission and should be given high priority by all parties. There should be effective cross-service management within the local authority to minimise delay and unnecessary costs to all parties involved. Lengthy delays in concluding obligations are not acceptable given the adverse impact this has on the delivery of sustainable economic growth.

Where a developer has not provided sufficient information to conclude a section 75 agreement, this can be taken into account through the Planning Performance Framework and official statistics, whilst one of the Performance Markers deals specifically with section 75 agreements, in that they should either be concluded or resolved within 6 months.

Key agencies have responded to the challenge of delivering planning reform. Each has sought to improve performance and culture. They will continue to support the Government's agenda to modernise planning and improve the performance of the system.

There is no indication of the scale of penalty nor the length of time it would apply.

The details of these arrangements are currently being considered through the High Level Group on Planning Performance. It is highly unlikely however that Ministers would seek to prevent a planning authority charging any fees at all. It is more likely that an authority's fee would be lowered to the fee before the most recent increase.

HIGH LEVEL GROUP ON PLANNING PERFORMANCE - PERFORMANCE MARKERS

DRIVING IMPROVED PERFORMANCE

Performance Marker	Measure	Source/Evidence	Policy Support	PPF
Decision making: authorities demonstrating continuous evidence of reducing average timescales for all development types	Evidence of continuous improvement.	Statistics and National Headline Indicators	Official Statistics and PPF reports	NHIs
Project management: offer of processing agreements (or other agreed project plan) made to prospective applicants in advance of all major applications and availability publicised on planning authority website	Y/N	PA to provide	Modernising the Planning System (Audit Scotland); SG website / template	NHIs; Certainty
Early collaboration with applicants and consultees on planning applications: - availability and promotion of pre-application discussions for all prospective applications - clear and proportionate requests for supporting information	Y/N Examples	PA to provide	White Paper; Delivering Planning Reform; Planning Reform Next Steps	NHIs; Open for Business; Certainty
Legal agreements: conclude (or reconsider) applications within 6 months of 'resolving to grant' * * *this will require production of supporting guidance, following wider stakeholder input*	Reducing number of live applications more than 6 months after resolution to grant (from same time last year)	PA to provide	Official statistics; PPF reports; evidence of delays to major developments	Certainty; Efficient and Effective Decision-Making
Enforcement charter updated / re-published	Within 2 years	PPF report	Planning Act (s158A)	NHIs
Continuous improvement: - show progress/improvement in relation to PPF National Headline Indicators - progress ambitious and relevant service improvement commitments identified through PPF report	Progress on all commitments	PPF report	Delivering Planning Reform; PPF Report	Culture of Continuous Improvement; Service Improvement Plan

PROMOTING THE PLAN-LED SYSTEM

Performance Marker	Measure	Source/Evidence	Policy Support	PPF
LDP (or LP) less than 5 years since adoption	Y/N	PPF report	Planning Act (s16); Scottish Planning Policy	NHIs; Certainty; High Quality Development on the Ground
Development plan scheme demonstrates next LDP: - on course for adoption within 5-year cycle - project planned and expected to be delivered to planned timescale	 Y/N Y/N	PPF report	Planning Act (s16); Scottish Planning Policy	NHIs; Certainty; High Quality Development on the Ground
Elected members engaged early (pre-MIR) in development plan preparation	Evidence of activity	PA to provide		Certainty; Efficient and Effective Decision-Making
Cross-sector stakeholders, including industry, agencies and Scottish Government, engaged early (pre-MIR) in development plan preparation	Evidence of activity	PA to provide		Certainty; Efficient and Effective Decision-Making
Production of regular and proportionate policy advice, for example through SPGs, on (i) information required to support applications and (ii) expected developer contributions	Evidence of activity	PA to provide		Open for Business; Certainty

SIMPLIFYING AND STREAMLINING

Performance Marker	Measure	Source/Evidence	Policy Support	PPF
Corporate working across services to improve outputs and services for customer benefit (e.g. protocols; joined-up services; single contact; joint pre-application advice)	Examples from the year	PA to provide		
Sharing good practice, skills and knowledge between authorities	Evidence of activity to pass on and adopt good practice	PPF report	Delivering Planning Reform; Planning Reform Next Steps	

DELIVERING DEVELOPMENT

Performance Marker	Measure	Source/Evidence	Policy Support	PPF
Stalled sites/legacy cases: conclusion/withdrawal of planning applications more than one year old	Reducing number of applications more than one year old (from same time last year)	Statistics from SG Analytical Services		
Developer contributions: clear and proportionate expectations - set out in development plan (and/or emerging plan,) and - in pre-application discussions	Y/N Examples	LDP PA to provide		

Murdo Fraser MSP
Convener
Economy, Energy and Tourism Committee
Scottish Parliament

6 September 2013

Dear Mr Fraser,

Regulatory Reform (Scotland) Bill

At the Development, Economy and Sustainability Executive Group on 5 September, following discussion on the above item, Members requested that we send a letter to the Economy, Energy and Tourism Committee to ensure clarity with regards to our position on the planning penalty clause contained in the Bill.

The Committee will be aware from our previous evidence that COSLA proposed and is working with the Minister for Local Government and Planning on the High Level Group looking at performance markers in planning to improve planning performance. Such a commitment to service improvement in no way implies any agreement with the proposed penalty clause.

Whilst we have worked together to agree key markers of performance to include in the Planning Performance Framework (PPF) developed by Heads of Planning (HOPS), these markers are not agreed to give indications of any weighting to be applied in any ministerial assessment nor do they indicate any triggers whereby an authority would be deemed to be placed in 'penalty clause measures'. The PPF has been in operation for one year and the performance measures are in the process of being incorporated into PPF2 reports being completed by planning authorities.

Our view continues to be that it is fundamentally too much Ministerial interference in the operations of a specific council service and that it would be counter-productive to penalise so-called poor performance by reducing resources. COSLA wish to continue to work in partnership with Scottish Government, as we are with regards to the national standards within the Bill, to deliver improved outcomes for communities. The planning penalty clause runs counter to this and could damage the ability of councils to provide locally adapted, accountable and effective services.

COSLA's view is that local government is showing positive commitment to planning performance improvement. If the penalty clause is enacted we need to have agreed what counts as good performance but that does not mean support for this clause nor agreement on

how such a clause would be implemented given the level of financial uncertainty it will create in a local authority's funding arrangements. Regularly changing fees within local authorities if they become 'poor performers' will not help local authorities improve and will make it difficult for them to plan future spending, nor will it benefit businesses who may face varying fee levels. This will create inconsistencies across Scotland, and is at odds with as one of the principles of better regulation, to promote consistency.

In short we are dedicating significant resources (officer and political) to continued performance improvement in planning and to ensuring that the system can be appropriately resourced via an appropriate fee income regime. The penalty clause does not fit comfortably with the positive work on performance improvement.

I hope that these comments ensure clarity on COSLA's position for Committee's consideration of this aspect of the Bill, particularly for your upcoming evidence session with the Minister on 11 September.

Yours sincerely,

Cllr Stephen Hagan
COSLA Spokesperson
Development, Economy and Sustainability

CC
Derek Mackay MSP – Minister for Local Government and Planning
Fergus Ewing MSP – Minister for Energy, Enterprise and Tourism

Regulatory Reform (Scotland) Bill

Fact-finding meeting with Environmental Health Officer

21 May 2013

Members: Dennis Robertson MSP and Alison Johnstone MSP

Summary

- Met with an officer who has experience of environmental health and trading standards.
- The inclusion of the economic duty in the Bill creates a conflict with the responsibility of protecting public health/safety.
- National standards can create clear expectations but guidance on the operation of such standards to take account of local circumstances.

Theme 1 – National Standards

Main points—

- Value of national standards in creating expectations and ensuring all involved in regulatory work understand what is expected of them.
- Concern though about the level at which national standards would be set. Larger cities such as Glasgow, Edinburgh and Aberdeen have quite high standards currently and would not want to see them reduced.
- Whether standards will reflect the practical experience of effective regulation in different areas.
- Flexibility would also be needed to respond to the particular needs of geographic areas and the businesses within them.
- Understanding of the practicalities of inspection regimes including matters such as combining food hygiene and health and safety inspections (such as happen in larger urban areas).
- How standards would be developed is important in ensuring all parties involved understand why particular standards are arrived at and applied. Standards could be developed jointly by representatives of REHIS, local authorities and relevant trade bodies.

Example: An environmental health officer in a smaller area is likely to have a more direct relationship with businesses that they inspect and so will be able to build up that relationship and demonstrate the benefits of compliance to support the operation of the business as a commercial enterprise. Where enforcement action is required,

they are also more likely to have a relationship with the Procurator Fiscal through which appropriate measures can be imposed. In a larger area those relationships may be less likely to exist but there is more scope to combine inspections for different parts of the licensing regime and can aid compliance and operation that way.

Theme 2 – The economic duty

Main points—

- Economic duty could be removed from the Bill.
- Unclear of the purpose it serves and creates a conflict.
- Other approaches, such as the enforcement concordat, exist and seem to serve the same purpose.
- Whether there is a shared understanding or clear definition of what is meant by sustainable economic growth.
- Existing professional standards apply and are promoted by the relevant professional bodies.
- Provisions already exist that place the role of a regulator as being a facilitator who creates a level playing field. In this environment effective regulation helps legitimate businesses to prosper.

Example: If a business with a significant share in the leisure sector of a large city was diluting or short measuring alcoholic beverages across all outlets this has an impact in terms of public reassurance about the quality of what they are purchasing and also impacts on other businesses in terms of being able to compete on an equal basis. Given the impact of that business in terms of market share where would the economic duty balance against the public safety considerations?

Theme 3 – Street trader licensing

Main point—

- Quite surprised that the issue is seen of being such importance as it is a relatively small area of regulation.
- Notes that it is the area in which field environmental health officers are most involved.
- Concern that it may lead to ‘shopping around’ to be inspected in areas which are viewed as having less stringent standards than others.

Example: A small local authority has 4/5 environmental health officers but is an area that is geographically convenient as a winter base for people who operate travelling

shows. At present the major urban centres have inspection regimes which have higher standards and more officers dedicated to particular areas for inspection and compliance. With these provisions, one small authority would be potentially responsible for licensing 20% of traders in Scotland.

Other issues

Home authority

Understanding of how home authority agreements can contribute to effective regulation. For example, a home authority agreement can be valuable to companies operating in a number of regions as it allows issues to be dealt with by regulators who are able to see the entire picture of that company's operations and determine the best resolution.

Example: A large motor vehicle retailer which operates nationwide may have a number of queries raised within a single local authority. Compared to other businesses in the same sector this might seem like a large number of issues on which the authority may wish to take enforcement action. However, if referred to a home authority it is easier to see the scale of the issue against the scale of the business and determine whether less draconian enforcement action is more proportionate than if the same number of issues had arisen with a much smaller business.

Resourcing

The appropriate resourcing is needed to deliver regulation. The model of funding is based on a per capita headcount but might need to be rebalanced to look at the burden of work.

Example: Edinburgh has a high proliferation of food outlets and these attract people from outwith Edinburgh. A per capita allocation of resources therefore might not reflect the volume of work that would be involved for officers in that area.

Regulatory Reform (Scotland) Bill

Fact-finding meeting with Planning Officers

21 May 2013

Members: Chic Brodie MSP and Margaret McDougall MSP

Summary

- Members met with two planning officers
- LAs are too diverse to be able to have national standards applied to the planning process. Robust and strong local development plans are the mechanism to give developers and communities certainty in the planning process. All planners are clear that that they have sustainable economic growth or regeneration as a key objective.
- In relation to planning fees, there were many concerns about how satisfactory performance might be measured given it will likely focus on timescales rather than good partnership working and good decision making (or the added value that planners can bring to the process).

Theme 1 – National standards

- Scotland is a diverse country with different issues affecting different communities/local authorities (LA) across the country such as rural and urban, affluent and deprived. The Local development plan for each LA reflects these issues and concern was expressed that imposing national standards would mean local issues would not be tackled as effectively – it would remove the LA planners from the process and effectively deliver planning by the Scottish Government
- Some regulatory functions (such as those carried out by SEPA) would be easier to deliver through national standards as they are based on a scientific approach, planning is more of an art than that and reflects local circumstance and priorities e.g. Edinburgh has different pressures than Glasgow so it is difficult to compare the two and apply a national standard.
- A consequence of having 32 local authorities is that you get different approaches in different local authority areas (to address local issues), although LAs do work together on cross border issues.

Theme 2 – Economic duty

- It was acknowledged that the objective of all planners is sustainable economic regeneration or growth but planners serve their local authority population and those communities have to have a say in the process including when the development is not palatable.
- Partnership working with other regulators is good but their expertise and primary statutory responsibility is in heritage or environment and not economic

growth although that may be a higher priority now given the national planning framework.

- Sustainable economic growth will mean different things to different parts of the country (e.g. urban and rural, deprived communities vs affluent) There was concern about how performance measures would reflect this accurately – will it become a tick box exercise?

- Sustainable economic growth is the overarching theme of the Bill; to achieve this will require planning authorities / local authorities to balance complex set of competing demands and needs of communities and other stakeholders. There is concern that in practice, by increasing central control and monitoring of performance with a threat of financial sanction, this would translate into a measurable / statistical standard of success or failure with LAs targeting their budgets at meeting that measure irrespective of whether that is good planning. That is to say, too much focus on 'outputs' (short term) at the expense of 'outcomes' (medium to long term).

Theme 4 – Planning

- There was a lot of concern expressed about how satisfactory performance might be measured. Reasons for this concern included:

    - The planning system works through partnership working between the community, planners and developers and given this, it is not always within the gift of local authorities to deal with applications within a set timescale (and therefore why were only LAs targets in the Bill with a possible financial sanction).

    - Planning process is a qualitative process so how can changes to the application process be measured effectively (and this will be time consuming). Historically there have been many attempts at measuring the performance of planning authorities which have subsequently failed as they focus on dealing with applications rather than measuring the effectiveness of the process.

    - If planning authority isn't performing and then their fees are reduced, if the fees aren't pooled to that function how will that improve quality?

    - Services provided in-house by LAs are not consistent (large LAs will have ecology and heritage experts in-house whilst smaller LAs may not) which can impact on the application process.

    - The financial sanctions may result in LAs targeting funding and priority on those areas impacting on the agreed planning targets and not on providing a good overall service. Few years ago there was an example of planning departments being organised specifically to meet the 2 month target for householder and small applications (if an application was near to the 2 months limit then the application was rejected but the applicant was given have another free go whilst other authorities chose not to focus on the 2 month target if they thought there was a chance

the applicant could get permission through discussion with the planners.)

- Making good decisions is as important as efficiency but the Bill is too focussed on efficiency.

- Considerable efficiencies have been already achieved in planning departments through reduced staff numbers, use of new technologies, better training of staff and more better understanding of the performance measures, not sure what further efficiencies could be achieved.

- Examples of good practice between local authorities and regulators such as developing best practice/ talking to other LAs/ meeting other LAs staff, in some cases administration support for development functions was being reviewed to speed up application consideration;

- Planning fees are not ring fenced to the department (which has budgetary targets to meet which are set centrally). Planning fees do not influence the planner in doing their job, driven more by providing a good service.

- How does the sanction provision relate to localism? If fees aren't ring fenced and the LA decides that education is its priority rather than planning then resources will be moved to that priority – then the LA could be financially sanctioned if it's planning performance falls. Is the role of the Scottish Government to give that sanction given it is for LAs to decide their priorities?

- Planning fees section – the main focus is taking money away (what about rewarding good performance?)

- How does regulation relate to investment? Not clear that planning is the main reason why investment is not happening and if this is the case then would financial sanctions actually address this?

- Within the LAs different departments have different roles in planning process – and how these departments are organised structurally can impact on the consistency of approach to planning applications e.g. if the roads section are not part of the planning department then maybe the approach may not be as consistent.

- The view was that the planning fees section of the Bill should be removed as it is unlikely that it would be able to be implemented effectively given the diverse economies, climate, and priorities of communities. LAs need the ability to respond to their specific development plans which may be different to the SG view of national consistency or LA performance.

Regulatory Reform (Scotland) Bill

Fact-finding meeting with SMEs

21 May 2013

Members: Murdo Fraser MSP, Mike Mackenzie MSP and Rhoda Grant MSP

Summary

- Businesses were in favour of national standards and the duty for regulators to contribute to sustainable economic growth.
- They would like the Bill to instigate a 'change of culture' amongst regulators, which would result in more partnership working.
- Regulations need to be applied in a timely, consistent and fair way.
- The planning system could improve and would benefit from the collection of more detailed data to effectively monitor performance.
- A reduction in "red tape" would be welcomed by businesses and good for the economy.

Theme 1 – National standards

We heard of inconsistently applied regulations by local authorities and the associated financial and practical costs to businesses. Examples include:

- Interpretation of the Scottish Government guidance that a S.75 order under the Planning Scotland Act for the use of land is not always required. When a reporter says this is not required some local authorities will follow that advice, whereas others will ask for a S.75 order.
- When running a taxi firm some local authorities have guidelines for the age of the car and the requirement for an annual taxi test, whereas others are content with the annual MOT test as proof of the roadworthiness of the vehicle.

We also heard of instances where regulations are applied rigidly to the detriment of businesses, such as:

- Licensing boards application of opening times for licenced premises, which mean that a business has to open during hours when they do not expect any custom.

Theme 2 – Economic duty

To assist regulators in exercising their functions in a way that contributes to sustainable economic growth, we heard that local authority departments could work together in a more cohesive way to help businesses understand, and successfully adhere to, regulations. Examples include:

- Economic development being viewed as a cross-department role, with someone allocated to oversee its consistent application.

- Local authorities viewing themselves as facilitators and taking a proactive approach to assisting businesses. This could be done by providing timely advice to business at the start of the process and consistent advice throughout.

- Reorganising departments so that those with a related function work together, for example planning and building regulations. This could reduce regulations, which may not be compatible, being enforced in an inflexible way across departments.

- Micro, small, medium and large businesses all receiving the same service – for example where the planning process has worked smoothly for one business, duplicate this process for all.

- Demonstrate fairness in dealing with a complainant and the business which is the subject of the complaint. For example, find ways to assist the business by visiting the premises and understanding the concerns of both sides.

Theme 4 – Planning

- Businesses indicated that planning fees are a small part of costs, with the majority of costs being the survey fees etc. to meet requirements prior to a planning consent being granted.

- Up-front fees for applications where consent is not granted represent a large cost to businesses. Planning authorities providing a consent in principles, dependent on conditions being met would provide certainty and save time and money.

- There is a need to monitor performance in dealing with planning applications and this could be done by collecting data on the complexity and size of applications dealt with, and not just the number.

- Duplication effort – building standards / planning department – standards for carbon reduction.

Specific examples of legislation

1. Duplication of legislative requirements

- The Climate Change Act sets out the carbon reductions to be achieved in buildings. Whilst section 72, 3F, of the Town and Country Planning (Scotland) Act 1997 requires a planning authority's local development plan to "be designed so as to ensure that all new buildings avoid a specified and rising proportion of the projected greenhouse gas emissions from their use".

- The local authority development plans can include building standards carbon reduction policies which are 10 – 15% above the high standards set in the Climate Change Act. One reason this higher standard is being applied is

because planning officers do not have the necessary expertise to deal with assessing the appropriateness of an application when measured against carbon reduction standards and are therefore erring on the side of caution. This approach creates unnecessary additional work and expense for the building industry.

- Section 73(2) of the Climate Change (Scotland) Act 2009 requires the local authority reports to assess the continuing need for section 3F of the Town and Country Planning (Scotland) Act 1997. This section has not been implemented to date.

2. Lack of legislation / guidance from the Scottish Government

- Section 7 of the Sewerage (Scotland) Act 1968 allows roads authorities (including local authorities) and Scottish Water to enter into agreements as to the provision, management, maintenance or use of sewers or drains for the conveyance of water from the surface of a road or surface water from premises.

- The Water Environment and Water Services (Scotland) Act 2003 gave responsibility for the future maintenance and capital replacement of shared public sustainable urban drainage system (SUD) systems to Scottish Water. With the Water Environment (Controlled Activities) (Scotland) Regulations 2011 indicating that the SUD system should “collect and drain water run-off from one or more premises and transport it to, and discharge it into, the water environment”.

- The issue is that whilst Scottish Water treats the surface water from properties and maintains the SUD system, there is no clear indication in law on who has responsibility for treating road surface water and maintaining the required SUD system. When neither the local authority nor Scottish Water takes responsibility it passes to the householder (although most would be unaware of this) which can cause issues when selling properties.

- The lack of responsibility can also have wider implications, for example a local authority being unwilling to grit a particular road, as the sewer has not been adopted because the SUD system has not been adopted. This is an example where the legislation should be clear on where the responsibility lies.

ECONOMY, ENERGY AND TOURISM COMMITTEE

EXTRACT FROM THE MINUTES

16th Meeting, 2013 (Session 4)

Wednesday 22 May 2013

Present:

Marco Biagi	Chic Brodie
Murdo Fraser (Convener)	Rhoda Grant
Alison Johnstone	Mike MacKenzie
Margaret McDougall	Dennis Robertson (Deputy Convener)
David Torrance	

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

11:34

On resuming—

Regulatory Reform (Scotland) Bill

The Convener: Agenda item 3 concerns the Regulatory Reform (Scotland) Bill, on which the committee undertook a number of fact-finding meetings yesterday. We broke into three groups and it would be useful to get reports from those groups on the key points that they discussed. I remind members to bear it in mind that the meetings were held in private and that people participated in them on the basis that their contributions would be kept private, so names will not be revealed.

I ask Alison Johnstone to report on what the first group found.

Alison Johnstone: Dennis Robertson and I met an officer with a great deal of experience of environmental health and trading standards, who was absolutely fascinating. We could have talked to him for twice as long.

Among the main points that came up was the inclusion of the economic duty in the bill. He did not believe that there was any point in that. He believed that it would create a conflict with the responsibility to protect public health and safety. He agreed that the national standards could create clear expectations but said that guidance on the operation of such standards would have to take account of local circumstances.

I will briefly go through the main points. The officer believed that the economic duty should be removed from the bill, because its purpose was unclear and it would create a conflict. He believed that other approaches, such as the existing enforcement concordat, seemed to serve the same purpose. He also questioned whether there is a shared understanding or a clear definition of what is meant by "sustainable economic growth". He believed that existing professional standards apply and are promoted well by relevant professional bodies, that provisions already exist that make it the regulator's role to be a facilitator who creates a level playing field and that effective regulation helps legitimate business to prosper.

The officer gave examples. He said that a restaurant would rarely be closed for any longer than was absolutely necessary and that officers understand that people's livelihoods are at stake. They try to improve matters and sort things out as quickly as possible, so they contribute to economic growth.

He gave the example of a business with a significant share in a large city's leisure sector diluting or short-measuring alcoholic beverages across all outlets, which would have an impact on public assurance of the quality of what they purchase and on other businesses' ability to compete on an equal basis. Given the impact of that business's market share, how would the economic duty balance against public safety considerations?

He thought that there would be value in having a national standard and that it was important that all who are involved across the country in regulatory work understand what is expected of them. There was concern about the level at which standards would be set. Large cities such as Glasgow, Edinburgh and Aberdeen have high standards, which he would not want to be reduced.

He had concerns about whether standards would reflect practical experience of effective regulation in different areas. He said that an inspector in Glasgow might see four or five burger vans in an afternoon, whereas the number could be one or two a year in Clackmannanshire. Some people would have great experience and be able to operate more efficiently, which might have an impact on the standard. He was concerned that what might be appropriate in Glasgow would not be appropriate in the Highlands.

He commented quite strongly on the need for a holistic approach that combines food hygiene and health and safety inspections, as in larger urban areas. He gave an example of where that does not happen. He told us of a quite harrowing incident in which someone had ended up with their foot in a frying pan.

Mike MacKenzie: Do you mean a deep-fat fryer?

Alison Johnstone: Yes—a deep-fat fryer. Someone who was attempting to clean a kitchen oven had found himself standing on top of an oven and had had a dreadful accident.

Rhoda Grant: Oh no!

Alison Johnstone: That person had been trying to comply with one set of regulations and had failed to comply with another.

The officer believed that environmental health officers would naturally be able to have a more direct relationship with the businesses that they inspect and to demonstrate more clearly the benefits of compliance to those whom they deal with. When enforcement action is required, those officers are more likely to have a good relationship with their local procurator fiscal, through which appropriate measures can be imposed. In a larger area, those relationships might be less likely to exist, but there is more scope to combine inspections for different parts of the licensing regime, which could aid compliance and operation.

Finally, the officer was surprised that street-trader licensing, which is a relatively small area of

regulation, is seen as being of such importance. However, he noted that it is the area in which environmental health officers are most involved. He has a concern, which I think has been mentioned to the committee previously, that the proposals might lead to street traders shopping around so that they are inspected by authorities that are viewed as having less stringent standards. For example, a small local authority that employs four or five environmental health officers might cover an area that is geographically convenient as a winter base for people who operate travelling shows. At present, the major urban centres have inspection regimes that have higher standards and more officers who are dedicated to particular areas for inspection and compliance. Under the bill, one small authority could be responsible for licensing 20 per cent of such traders in Scotland.

The officer felt that appropriate resourcing is needed to deliver effective regulation. The current funding model works on a per capita or head-count basis, but that might need to be rebalanced to take into account the burden of work—he pointed to the fact that Edinburgh has a phenomenally high number of fast-food restaurants and so on.

Dennis Robertson might want to make other points. We had an interesting and helpful meeting.

Dennis Robertson: I emphasise only that there was some concern about the potential for dilution of standards, which the officer did not want. We should aim to bring other authorities up to the level of, for example, the City of Edinburgh Council, Glasgow City Council or Aberdeen City Council on good practice.

The Convener: I ask Margaret McDougall to report back on her group.

Margaret McDougall: We met two planning officers, who were very knowledgeable about what they do. In summary, they felt that local authorities are too diverse for national standards to be applied to them. For example, Edinburgh has lots of listed buildings, whereas Glasgow has more industrial issues and dispersed problems. The planning officers were very clear that they have sustainable economic growth as a key objective.

On planning fees, there were many concerns about how satisfactory performance might be measured, given that the focus will likely be on timescales rather than on good partnership working and decision making. How will we measure the quality of planning decisions? It seems that there is no clear way of measuring that.

A concern was expressed that, whereas a local development plan can reflect the diversity of a local authority area, imposing national standards could mean that local issues were not tackled as effectively. In effect, local authority planners would be removed from the process and planning would be delivered by the Scottish Government.

On the economic duty, planners recognise that their job is to encourage economic regeneration and growth, as I said. However, planners serve the local authority population, and communities need to have a say in the process, including times when a development is not palatable. In addition, when there are time constraints, planners might still need to consult and rely on information from other organisations, such as Scottish Natural Heritage, but other organisations might not always conform to the timescales.

Partnership working with other regulators is good, but planners have expertise in heritage or the environment rather than in economic growth, although that may be a higher priority now within the context of the national planning framework. Basically, that is what the planning officers felt.

On sustainable economic growth, the planning officers mentioned several times how performance will be measured and how it will be reflected accurately. Will that be a tick-box exercise? The priority could be meeting timescales rather than the quality of the planning application and how a decision comes about, particularly in relation to larger developments.

11:45

On planning fees and the sanctions that have been mentioned, there was concern about what will happen if a planning authority is not performing and its fees are reduced. If the fees do not go into the larger pool of the local authority, how will the planning authority improve the service that it provides, given that its funds will be reduced?

We heard that the in-house services that local authorities provide are not consistent. Large local authorities have ecology and heritage experts in house, but smaller ones have to get consultants in to do that work, which takes time.

The planning officers were not at all keen on the financial sanctions. They believe that the sanctions might result in local authorities prioritising and targeting funding in areas that will impact on the agreed planning targets rather than focusing on providing a good overall service. We heard that making good decisions is as important as efficiency and that the bill is too focused on efficiency.

I presume that all committee members will get a copy of the notes from the meeting, so I will not go through them all. The view was that the section of the bill on planning fees should be removed as it is unlikely that it will be possible to implement it

effectively, given the diverse economies, climates and priorities of communities. Local authorities need to be able to respond to their development plans, which might differ from the Scottish Government's view of national consistency or local authority performance.

I will leave it at that. Chic Brodie might well want to add something.

The Convener: Does Chic Brodie want to add anything?

Chic Brodie: No. Planning fees and localism were the two main concerns.

The Convener: I will report back briefly from the group that I was in. Mike MacKenzie, Rhoda Grant and I met a cross-section of the business community, ranging from quite substantial house builders down to very small microbusinesses. We had a broad-ranging discussion that inevitably went on to subjects that were not really relevant to the bill, but nevertheless it was interesting and it was good that they engaged.

The themes that came out of the discussion were pretty consistent. On national standards, there was concern about local authorities inconsistently applying national policies and regulations. The businesses would prefer more consistency. An example was given of somebody running a taxi firm. It seems that different local authorities apply different standards, and people who operate in different areas have to comply with the different standards, which adds to costs.

Perhaps unsurprisingly, there was general support for the economic duty, which the businesses feel would be helpful. Crucially, they want regulators, including local authorities, to be seen as facilitators and enablers who are there to assist people in business rather than just to put obstacles in their way, which is how they are perceived at present. Probably the strongest message that came out from the businesses was that they want a change of culture among regulators and local authorities, which should be much more business friendly and should try to help them through regulation rather than stand in their way.

The point was made that planning fees are a small part of the total cost of a planning application. We heard that the changes might not make a huge difference to other planning issues.

We were given quite a few specific examples of legislation in which the businesses believe that there is duplication. One concerns building standards and the interplay with the requirement on local authorities to require carbon reductions under the Climate Change (Scotland) Act 2009. Some local authorities are using that to enhance building standards, in effect, which is making it more difficult for house builders to get on and do what they want.

I do not think that the messages from businesses surprised any of us who were there. They were focused on making it easier to do business and on the need for regulators to be more helpful, rather than just to strictly apply the rules.

Do Mike MacKenzie and Rhoda Grant want to add anything?

Mike MacKenzie: A couple of people in the group were from very small businesses. There is a difference between bigger businesses, which can engage more effectively with regulators and whose primary concerns tend to focus on technical issues that relate to the efficiency of regulation, and smaller businesses, which are bewildered by the complexity and cannot negotiate their way through what can be a complex minefield.

Rhoda Grant: I echo that. Another thing that came across clearly was that legislation and regulation really matter. The businesses said that there is no legislation on things such as surface water and who is responsible for it, but carbon reduction is overlegislated, with different pieces of legislation doing the same thing or even fighting against each other.

There are also problems with organisations making legislation come to life. Some departments have no view of what other departments are doing, so people get different messages from a single organisation. As Mike MacKenzie said, there is confusion because people are not speaking to each other and there is no understanding of what is going on.

The Convener: We will circulate the notes from the various meetings to all members so that they can see what the people at the other meetings said. We will bear all the issues in mind in the formal witness sessions as we scrutinise the bill.

Chic Brodie: Last week, I went to the David Hume Institute presentation on competition, at which regulation came up. I know that we will address competition after September 2014, but it is clear that in the bill there is an overtone of competition regulation and how that applies.

The Convener: Okay. Thank you. We now move into private session.

11:52

Meeting continued in private until 12:13.

The Scottish Parliament
Pàrlamaid na h-Alba

Rural Affairs, Climate Change and Environment Committee

6th Report, 2013 (Session 4)

Report on the Regulatory Reform (Scotland) Bill

Published by the Scottish Parliament on 28 June 2013

The Scottish Parliament
Pàrlamaid na h-Alba

Rural Affairs, Climate Change and Environment Committee

Remit and membership

Remit:

To consider and report on agriculture, fisheries, rural development, climate change, the environment and other matters falling within the responsibility of the Cabinet Secretary for Rural Affairs & the Environment.

Membership:

Jayne Baxter
Claudia Beamish
Graeme Dey (Deputy Convener)
Nigel Don
Alex Fergusson
Rob Gibson (Convener)
Jim Hume
Richard Lyle
Angus MacDonald

Committee Clerking Team:

Clerk to the Committee
Lynn Tullis

Senior Assistant Clerk
Nick Hawthorne

Assistant Clerk
Alison Wilson

Committee Assistant
Ross Fairbairn

The Scottish Parliament
Pàrlamaid na h-Alba

Rural Affairs, Climate Change and Environment Committee

6th Report, 2013 (Session 4)

Report on the Regulatory Reform (Scotland) Bill

1. The Committee reports to the Economy, Energy and Tourism Committee as follows—

EXECUTIVE SUMMARY

2. **The Rural Affairs, Climate Change and Environment (RACCE) Committee considered the potential impact of section 4 of Part 1 of the Regulatory Reform (Scotland) Bill, which states that certain regulators must contribute to achieving sustainable economic growth, except where it would be inconsistent with their regulatory functions to do so. It also gave consideration to the provisions contained in sections 5 and 6 in so far as the proposed code of practice and consultation procedure affected the Scottish Environment Protection Agency (SEPA), Scottish Natural Heritage (SNH) and the Food Standards Agency Scotland (FSA).**

3. **The Committee also considered Part 2 of the Bill – environmental regulation, including regulations for protecting and improving the environment, SEPA's powers of enforcement, court powers, miscellaneous offences, appeals and vicarious liability and the general purpose of SEPA. The Committee welcomes the policy intention behind the Bill and in particular recognises the value of the new powers proposed for SEPA in protecting and improving our environment by enabling SEPA to target its resources effectively.**

4. **The Committee has concerns in relation to the proposed duty on regulators of sustainable economic growth as set out in Part 1 of the Bill. The Committee is concerned that there is no statutory definition of sustainable economic growth and it is unclear how the duty and the code of practice in respect of that duty will impact on the day to day activities of regulators within its remit. The Committee agrees with stakeholders that if such a duty is to be included in the Bill then, to ensure clarity and to safeguard against any reinterpretation of its meaning at a later date, a definition of the term should be included on the face of the Bill.**

5. **The Committee remains unclear as to why the term sustainable economic growth has been used in the Bill rather than sustainable**

development on the grounds that while neither has a statutory definition sustainable development has international recognition and is understood legally across a number of regimes and jurisdictions. The Committee recommends that the Scottish Government bring forward amendments to the Bill at Stage 2 to include a definition of sustainable development in section 38 of the Bill.

6. **The Committee welcomes the Scottish Government's explanation that the policy intention of the new general purpose for SEPA, as provided for by section 38, is to acknowledge the three elements of sustainable development and give primacy to the environmental element. The Committee agrees with the Scottish Government that this is right and proper for a body whose primary function is to protect the environment and recommends that this, or a very similar provision, should be applied to SNH, who also have a primary role in protecting Scotland's environment.**

7. **The Committee is disappointed at the lack of available information in relation to both section 4 and the proposed code of practice provided for by section 5. It believes the lack of information available in the Bill and its accompanying documents makes it difficult for the Committee, regulators and stakeholders to understand the impact of the Bill at this stage.**

8. **The Committee is also concerned about how a code of practice set at a high level in order to be applicable to a wide range of regulators can be meaningful and effective, and would welcome additional information from the Scottish Government on what it sees sitting below the high level code of practice. The Committee believes it is important that the code of practice includes clear guidance to regulators on how to resolve any conflict between compliance with primary functions and achieving sustainable economic growth.**

9. **The Committee welcomes SEPA's approach of working in partnership and providing advice to those organisations that are willing to work with it to protect and improve the environment. The Committee fully supports the Scottish Government's intention to bring forward amendments to strengthen SEPA's powers to take enforcement action against those engaging in criminal activity and in some instances making serious threats of violence and intimidation towards SEPA's officers. The Committee agrees this behaviour cannot be tolerated.**

10. **The Committee welcomes confirmation from the Scottish Government that regulations made under the Bill will now enable SEPA to consider issues on a company-wide basis in addition to an individual site basis.**

11. **The Committee considered proposals for fines set out in Part 2 of the Bill. A concern was raised by stakeholders as to whether or not SEPA would be able to use the 'balance of probability' approach to decide to impose fines in cases where there was insufficient evidence to refer the matter to the Procurator Fiscal. The Committee heard from SEPA and the Minister for Environment and Climate Change that the guidelines which are to be issued to by the Lord Advocate on how SEPA should use the powers given to it**

under the Bill will provide a safeguard against this. The Committee welcomes confirmation that work is already underway with the Lord Advocate, the Scottish Government, SEPA and stakeholders to discuss the detail of the proposed guidelines.

12. **Issues in relation to a lack of clarity arose in relation to the processes for consultation set out on Parts 1 and 2 of the Bill. Whilst the Minister confirmed that any consultation would be open to the public, the drafting of the Bill does not readily lend itself to that view. The Committee welcomes the Minister's undertaking to review the consultation processes in the Bill.**

13. **Subject to the fact that much of the detail of the Bill remains to be developed over time – through codes of practice, guidance and subordinate legislation – the Committee welcomes the Bill, as enabling legislation, and is generally supportive of its aims. The Committee believes that scrutiny of the Bill at Stage 1 could have been improved if the Policy Memorandum had contained more detailed explanations of the policy intent behind the provisions in the Bill.**

14. **The Committee highlights this report and recommendations to the lead committee, to inform its consideration of the Bill at Stage 1.**

INTRODUCTION

Parliamentary scrutiny

15. The Regulatory Reform (Scotland) Bill[1] was introduced in the Scottish Parliament on 27 March 2013. The Bill was accompanied by Explanatory Notes,[2] which include a Financial Memorandum, and by a Policy Memorandum,[3] as required by the Parliament's Standing Orders.[4]

16. Under Rule 9.6 of Standing Orders, on 16 April 2013 the Parliamentary Bureau referred the Bill to the Economy, Energy and Tourism (EET) Committee as lead committee, and to the Rural Affairs, Climate Change and Environment (RACCE) Committee[5] as secondary committee, to consider and report on the general principles.

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[1] Regulatory Reform (Scotland) Bill, as introduced (SP Bill 26, Session 4 (2013)). Available at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61582.aspx

[2] Regulatory Reform (Scotland) Bill. Explanatory Notes (SP Bill 26-EM, Session 4 (2013)) Available at: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-en.pdf

[3] Regulatory Reform (Scotland) Bill. Policy Memorandum (SP Bill 26-PM, Session 4 (2013)) Available at: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-pm.pdf

[4] Scottish Parliament (2012). Standing Orders, 4th Edition (4th Revision). Available at: http://www.scottish.parliament.uk/Parliamentaryprocedureandguidance/SO4_Revisions_Complete.pdf.

[5] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. Details available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29876.aspx.

17. Secondary committees appointed by the Bureau are required to report their views to the lead committee rather than to the Parliament (Rule 9.6.1 of Standing Orders). The lead committee is required to take into account any views submitted by any secondary committee in preparing its Stage 1 report.

18. The RACCE Committee understands that the Finance Committee and the Delegated Powers and Law Reform Committee will consider the Financial Memorandum and Delegated Powers Memorandum[6] respectively and will report to the EET Committee, as lead committee.

19. **The Scottish Parliament Information Centre (SPICe) published a briefing[7] on the Bill which proved very helpful to the Committee throughout its scrutiny.**

RACCE Committee approach and call for views

20. The Committee agreed its approach to consideration of the Bill at Stage 1 at its meeting on 24 April 2013. The Committee agreed to focus its scrutiny, as secondary committee, on the element of Part 1, as it relates to the RACCE Committee's remit, which places a duty on its stakeholders who are regulators in respect of sustainable economic growth and on Part 2 of the Bill on environmental regulation. The remainder of Part 1, along with Parts 3 and 4, will be scrutinised by the EET Committee, as lead committee.

21. A call for views[8] on those aspects of the general principles of the Bill relevant to the Committee's agreed areas of focus was subsequently issued and closed on Monday 20 May 2013. The Committee received 20 submissions to its call for views. The Committee also received three written submissions from the Minister for Environment and Climate Change, Paul Wheelhouse MSP ("the Minister").

Witnesses

22. The Committee took oral evidence from the Scottish Government's Bill team, and from SEPA, on 22 May 2013, and then took evidence from stakeholders in a roundtable discussion on 29 May 2013.

23. The Committee's oral evidence-taking concluded with a session with the Minister on 5 June 2013.

24. Extracts from the minutes of the meetings at which the Bill was considered are attached at Annexe A. Where written submissions were made in support of evidence given at meetings, these are linked, together with links to the *Official Report* of the relevant meetings, at Annexe B. A link to all other written

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[6] Regulatory Reform (Scotland) Bill. Delegated Powers Memorandum (SP Bill 26-DPM, Session 4 (2013)) Available at: http://www.scottish.parliament.uk/S4_Bills/Delegated_Powers_Memorandum_260313.pdf [Accessed 18 June 2013].

[7] Scottish Parliament Information Centre. (2013) Regulatory Reform (Scotland) Bill. SPICe Briefing 12/68. Available at: http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_13-26.pdf [Accessed 18 June 2013].

[8] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. Call for views. Available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/62687.aspx.

submissions, including supplementary written evidence, can be found in Annexe C.

25. **The Committee extends its thanks to all those who gave evidence on the Bill.**

BACKGROUND TO AND PURPOSE OF THE BILL

General

26. The Policy Memorandum (PM) states that—

> "The primary purpose of the Bill is to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment. It will protect our people and environment, help businesses to flourish and create jobs."[9]

27. The Bill covers a diverse range of policy areas under the broad headings of Better Regulation and Better Environmental Regulation.

Contents of the Bill

28. The Bill is presented in four parts and three schedules—

- Part 1 – Regulatory Functions (regulations, compliance and enforcement, exercise of regulatory functions, list of regulators);
- Part 2 – Environmental Regulation (regulations for protecting and improving the environment, SEPA's powers of enforcement, court powers, miscellaneous – offences, appeals and vicarious liability, general purpose of SEPA and interpretation of Part 2);
- Part 3 – Miscellaneous (marine licensing decisions, planning authorities functions: charges and fees and street traders licenses);
- Part 4 – General (consequential modifications and repeals, sub leg, ancillary provision, crown application, commencement, short title);
- Schedule 1 – Regulators for the purposes of Part 1;
- Schedule 2 – Particular purposes for which provision may be made under Section 10; and
- Schedule 3 – Minor and consequential modifications.

29. Part 1 of the Bill places a duty on the regulators specified in Schedule 1 to exercise their regulatory functions in a way that contributes to sustainable

[9] Regulatory Reform (Scotland) Bill. Policy Memorandum (SP Bill 26-DPM, Session 4 (2013)) Available at: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-pm.pdf

economic growth. The RACCE Committee has an interest in Part 1 of the Bill in so far as it impacts on the regulators which fall within its remit.

30. Part 2 of the Bill, which the RACCE Committee is primarily concerned with, is described in the PM which accompanies the Bill as having three main environmental regulation elements—

- simplifying and updating current legislation which sets out objectives and general duties for SEPA to create a new statutory purpose to "reflect the sort of environmental regulator Scotland needs for the future.";
- providing that all SEPA's functions are exercisable for the general purpose of protecting and improving the environment; and
- providing for SEPA to contribute to improving health and wellbeing of people in Scotland and achieving sustainable economic growth.

31. Within this, the PM states that the Bill will—

> "provide and enable a simpler legislative framework, and by doing so will enable SEPA to be more transparent, accountable, proportionate, consistent and targeted in carrying out its regulatory functions."

32. The PM also states that there will be a shift in the focus of the regulatory framework from pollution control to the potential to cause environmental harm.

33. Part 2 also enables Scottish Ministers to provide SEPA with new enforcement tools, such as fixed and variable monetary penalties, and enforcement undertakings, and provides for employers to have vicarious criminal liability for certain environmental offences committed by employees or agents. The Bill creates a new offence of causing or allowing significant environmental harm, and gives the courts a wider range of sentencing options.

Scottish Government consultation

34. Environmental Regulation was consulted on jointly by the Scottish Government and SEPA from May to August 2012 in the Consultation on Proposals for an Integrated Framework of Environmental Regulation[10]. An analysis of responses[11] was published in December 2012; however, the 89 individual responses were not initially published online. This process is now underway.

35. Additionally, one of the key parts of the Bill, namely Chapter 5: General Purpose of SEPA, was included in a further Scottish Government and SEPA joint consultation on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency[12]. This was held between October 2012 and

[10] Scottish Government / SEPA *Consultation on Proposals for an Integrated Framework of Environmental Regulation.* Available at: http://www.scotland.gov.uk/Resource/0039/00392549.pdf [Accessed 21 June 2013].

[11] Scottish Government / SEPA *Consultation on Proposals for an Integrated Framework of Environmental Regulation, Analysis of Responses.* Available at: http://www.scotland.gov.uk/Resource/0041/00411494.pdf [Accessed 21 June 2013].

[12] Scottish Government / SEPA, *Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency*. Available at [Accessed 21 June 2013].

January 2013. However, while the individual responses have not yet been published an analysis of these has been published online[13]

36. Regulatory functions, marine licensing decisions and planning authorities' functions: charges and fees were consulted on from August to October 2012 in the Proposals for a Better Regulation Bill: Consultation[14]. An independent analysis[15] and summary analysis[16] of the 80 responses[17] was also carried out. The Scottish Government has also recently published an analysis of responses[18].

37. **The Committee notes that the policy in the Bill has been informed by separate consultations on specific issues. The Committee also notes that not all individual responses to the consultations had been published online when the Committee began its scrutiny of the Bill. The Committee is concerned that all consultation responses were not available online at the earliest opportunity. This is vital to improve transparency and accessibility. The Committee welcomes the Scottish Government's undertaking to make these available as soon as possible.**

38. The Committee notes that some provisions in the Bill, for example, vicarious liability, were not directly consulted on but this and additional issues emerged through the consultation process. These are discussed later in the report in the consideration of Chapter 4.

39. In his letter of 19 May 2013 the Minister confirmed that a further consultation in relation to the National Litter Strategy which currently being developed may lead to amendments being brought forward at Stage 2, possibly in connection with extending the powers of other public bodies to issue fixed penalty notices.

40. **The Committee welcomes the information from the Minister on the forthcoming consultation on the National Litter Strategy which, the Committee understands, may result in amendments in relation to extending the powers to issue fixed penalty notices being brought forward at Stage 2.**

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http://www.scotland.gov.uk/Publications/2012/10/1984

[13] Scottish Government / SEPA, *Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency, Analysis of Responses*. Available at: http://www.sepa.org.uk/about_us/consultations/idoc.ashx?docid=abde1502-1892-43e5-9fc7-720d44e3f68c&version=-1 [Accessed 21 June 2013].

[14] Scottish Government, *Proposals for a Better Regulation Bill: Consultation,* Available at: http://www.scotland.gov.uk/Publications/2012/08/8403 [Accessed 21 June 2013].

[15] Scottish Government, *Independent Analysis of the Better Regulation Bill Consultation Responses.* Available at http://www.scotland.gov.uk/Publications/2013/03/6019 [Accessed 21 June 2013].

[16] Scottish Government *Independent Analysis of the Better Regulation Bill Consultation Responses - Executive Summary*, Available at: http://www.scotland.gov.uk/Publications/2013/03/1930

[17] Scottish Government, *Consultation on Proposals for a Better Regulation Bill – Responses*, http://www.scotland.gov.uk/Publications/2012/12/4140/0 [Accessed 21 June 2013].

[18] Scottish Government, *Scottish Government Response to Consultation Analysis.* Available at: http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/BetterRegulationBillConsultation/RRBConsultation/SGResponse, [Accessed 21 June 2013].

Sustainable development

41. The Committee has previously discussed issues relating to sustainable development, and has been informed about the work within the Parliament to explore the possibility of mainstreaming the scrutiny of sustainable development issues across committees, with a view to improving scrutiny. This Bill has a clear sustainable development aspect to it as it seeks to improve regulation to create more favourable business conditions in Scotland while at the same time delivering benefits for the environment, improving environmental regulation and leading to positive societal effects. The Bill places a requirement on SEPA to carry out its functions in relation to improving and protecting the environment whilst being consistent with improving the health and well-being of the people of Scotland and achieving sustainable economic growth.

42. **The Policy Memorandum states the Bill will have no negative impact on sustainable development and that the provisions in the Bill are expected to lead to largely positive environmental, economic and social effects. However, the Committee echoes the comments it made in its Stage 1 Report on the Aquaculture and Fisheries (Scotland) Bill[19] where it was of the view that this section of the Policy Memorandum would have been strengthened by the inclusion of such information and recommended to the Scottish Government that it gives consideration to this when preparing sustainable development sections of future policy memoranda. The Committee would have expected the Policy Memorandum for this Bill to include more detail and specific examples of the ways in which the Bill will lead to positive environmental, economic and social benefits. The Committee discusses the issue of sustainable development later in the report under its consideration of Part 1 of the Bill. It also gives further consideration to the contents of the Policy Memorandum later in the report.**

PART ONE – REGULATORY FUNCTIONS

43. Part 1 makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and encourages regulators to adopt practices that are consistent with regulatory principles. The Committee agreed to explore the implications of part 1 on its stakeholders in relation to what, if any, impact it will have on their current obligations and duties. In this respect issues of concern were raised in respect of sections 4, 5 and 6.

Section 4: Regulators' duty in respect of economic growth

44. The Committee examined section 4 of Part 1: regulators' duty in respect of economic growth, and took evidence on this issue from SNH and the FSA, two of its stakeholder organisations affected, within the remit of the Committee. It also gave consideration to the provisions contained in sections 5 and 6 in so far as the

[19] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. 1st Report 2013 (Session 4). *Stage 1 Report on the Aquaculture and Fisheries (Scotland) Bill* (SP Paper 260) http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-pm.pdf.

proposed code of practice and consultation procedure affected these stakeholders.

Conflict with regulators existing primary purpose

45. The Committee heard in both written and oral evidence of a general concern from stakeholders over the duty being placed on regulators to contribute to achieving sustainable economic growth. One of the main concerns was that this duty may conflict with a regulators' primary purpose, for example SEPA's primary purpose of protecting the environment could be impacted on by the duty under this Bill to contribute to sustainable economic growth. Bridget Marshall, from SEPA and on secondment to the Bill team, explained[20] that section 4 contains an exemption from this duty in the circumstances where a regulator already has a similar duty placed on them under other legislation. She stated that as a similar duty is being placed on SEPA in section 38 of the Bill then it will be exempt from the provisions in section 4. The Committee heard the Bill has been drafted in such a way to ensure that all regulators, irrespective of whether or not they are exempt under section 4, are bound by the code of practice set out in section 5.

46. The Committee heard from Gordon McCreath of the UK Environmental Law Association[21] that more clarity was required in relation to section 4 because, as currently drafted, there are a number of interpretations that could be put on section 4 as the duty applies only when it would not be inconsistent with other functions of regulators. Gordon McCreath said—

> "As a lawyer, I think that there are a number of interpretations that could be put on section 4, because of the point about the duty applying only when it would not be inconsistent with other functions. In addition, there is the concept of functions as opposed to duties. Are functions different from duties? I do not know. We could talk about that for a while."[22]

47. The Committee sought the views of SNH and the FSA on whether they were comfortable with what the Bill says in section 5 and what it and section 4 will mean to them in the context of their role as regulators and while both welcomed the Bill in general terms, SNH went on to say—

> "It is a broad enabling Bill, there is a lot of detail that is not in it and we do not yet know precisely what form that detail will take, but we do not have any difficulties with the principles behind the Bill, the general thrust behind it and the structure it provides."[23]

48. However neither was clear on whether they would be exempt from the duty under section 4(4). In its written evidence SNH stated it is not fully clear how far its existing balancing duties under section 3 of the Natural Heritage (Scotland) Act

[20] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2031,* Col 2224.
[21] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2293.
[22] Ref needed
[23] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2281.

meet this requirement, and the FSA suggests it would be useful to have clarity on the matter with regards to its own situation relation to exemption from the duty.

49. The Committee asked a similar question of SEPA during its oral evidence session as to whether or not it was clear as to its priorities and purpose going forward. Calum MacDonald of SEPA stated there was a clear understanding of its role and that its new general purpose, as drafted in section 38 of the Bill accurately reflects the way in which it currently operates.

50. In his oral evidence session the Minister told the Committee—

> "to be absolutely clear, we would not want and do not intend the public duty on sustainable economic growth to subvert in any way SEPA and SNH's existing regulatory duties which must be at the top of the hierarchy…only when there is no conflict will regulators be able to take economic impact into account"[24]

51. The Committee then considered whether or not the hierarchal approach used to set out a new general purpose for SEPA in section 38 may be a good model to adopt for establishing clarity for all other regulators as to how their contribution to sustainable economic growth should be prioritised against their primary functions. The Committee sought the views of the Minister on this point when he gave evidence and he agreed to raise the matter with the Minister for Energy, Enterprise and Tourism who is the lead Minister for the Bill to see if there is an approach that could alleviate the concern raised by the stakeholders and the Committee. [25]

52. The response the Committee received from the Minister in his letter of 11 June 2013 states that while the twinned definition of the general purpose of SEPA works well in that context it would be less effective in a more general section such as section 4 which applies to a range of regulators.

53. **The Committee is aware of SNH's statutory[26] general purpose and aim which gives it responsibility for securing the conservation and enhancement; understanding and enjoyment; and sustainable use and management of the natural heritage. This is also set out by SNH in its written evidence[27] and it appears to the Committee that a very similar provision to that being placed on SEPA should also be applied to SNH to recognise its role in protecting the environment.**

54. **The Committee acknowledges confirmation of the policy intention of section 4 by the Minister but remains concerned that the manner in which this section of the Bill has been drafted results in a lack of clarity on how the duty to achieve sustainable economic growth will sit alongside the primary purpose of regulators. The Committee is also concerned about the lack of**

[24]Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2342.

[25] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2329.

[26] Natural Heritage (Scotland) Act 1992 c.28. section 1.

[27] Scottish Natural Heritage. Written Submission, paragraph 4.

clarity around which regulators will be exempt under section 4(4) and how and by whom this will be determined and agreed.

55. **The Committee recommends the Scottish Government gives full consideration to its concerns regarding the lack of clarity around section 4 and the impact it will have on the day to day operations of all regulators listed in Schedule 1. The Committee encourages the Scottish Government to reflect on this and give further consideration to the use of the hierarchical model set out in section 38 as a means to aid clarity for regulators other than SEPA. In particular the Committee agrees that as the statutory general purposes and aims of SNH are clearly linked to the environment then section 38 or a similarly drafted provision should be applied to it also.**

56. **The Committee also explored the possible impact of the duty to achieve sustainable economic growth on regulators in relation to both the regulatory functions and in relation to their statutory duties.**

57. **The Committee is reassured by the evidence provided by the Minister that the duty of giving consideration to achieving sustainable economic growth will only apply to the regulatory functions of SEPA and SNH and will not apply in their role as statutory consultees in, for example, the planning process but regrets that this was not made clearer in the Bill and its accompanying documents.**

Definition of sustainable economic growth

58. A further concern raised by stakeholders was that there is no legal definition of sustainable economic growth. In his written evidence to the Committee Professor Colin Reid of Dundee University states—

> "It is unsatisfactory for legislation to impose a legal duty where there is so little clarity to its meaning".[28]

59. This point was echoed in the written submission from the Law Society of Scotland who state—

> "Effective legislation is best made with precise terms".[29]

60. When asked by the Committee where the term "sustainable economic growth" originated and what it meant, the Minister referred to a definition of the term provided by the Cabinet Secretary for Finance, Employment and Sustainable Growth in response to a written Parliamentary Question[30]. In response to the call from stakeholders that a definition of sustainable economic growth be inserted in Part 1 of the Bill he stated that he did not believe there was a compelling case for that.

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[28] Professor Colin T Reid. Written Submission, paragraph 5.
[29] Law Society of Scotland. Written Submission, paragraph 15.
[30] SW4-10994 Claire Baker: Available at http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S4W-10994&ResultsPerPage=10.

61. **The Committee agrees with stakeholders that if a duty to contribute to achieving sustainable economic growth is to be included in the Bill then, to ensure clarity and to safeguard against any reinterpretation of its intended meaning at a later date, a definition of the term should be included on the face of the Bill. The Committee recommends that the Scottish Government bring forward amendments to the Bill at Stage 2 to include such a definition. The Committee is further concerned that any lack of clarity with regard to the definition will make it difficult to implement, measure and enforce.**

Sustainable economic growth or sustainable development?

62. The Committee heard concerns from stakeholders on why a duty had been placed on regulators in relation to contributing to sustainable economic growth over one which contributed to sustainable development. Lloyd Austin of The Royal Society for the Protection of Birds (RSPB) stated—

> "Sustainable development is well developed as a concept in international, Scottish and European policy making and guidance, but sustainable economic growth is a new concept. Sustainable development is already a duty in a lot of Scottish legislation, such as the Planning etc (Scotland) Act 2006, the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010."[31]

63. The Law Society of Scotland highlights in written evidence to the Committee that the current framework for legislation already requires some authorities to have regard to sustainable development and statutory guidance on this is issued as an element of the Scottish Government's main planning policy statement. In relation to the term "sustainable economic growth" used in the Bill the Law Society questions whether the use of two closely similar phrases is helpful given the possibility for disagreement as to their respective meanings.

64. The Committee also heard that public bodies already have statutory duties, such as those contained in Climate Change (Scotland) Act 2009, to contribute to sustainable development, and that therefore regulators are already under legal obligations to have regard to social and economic factors alongside their primary purpose of protecting the environment. The RSPB and Scottish Environment Link (SE Link) both believe that the duty in the Bill will give a bias towards economic aspects over the other two pillars of sustainable development, environmental and social.

65. The Committee explored the view put to them by some stakeholders that the duty placed on regulators should be one of contributing to achieve sustainable development and not one of sustainable economic growth. The Committee sought the views of SNH and the FSA, in their role as regulators, on this point and both indicated that the preference would be to retain the current wording and that using sustainable development would change the scope of the Bill and may make it broader than it currently is. The FSA in particular expressed the view that the

[31] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2296.

current wording aligns with its remit and sustainable development appears slightly wider and the FSA was less clear on how it could be delivered.

66. The Committee sought the view of the Minister on whether or not the purpose and effect of the Bill would change significantly if the Bill was changed to include sustainable development rather than sustainable economic growth. While the Minister acknowledged the Committee's point regarding the Bill being made more explicit around sustainable development principles and made a commitment to reflect on this point he also confirmed that he did not want to lose the link to sustainable economic growth as this provides a direct link to the Scottish Government's economic strategy.

67. This point was made further by the Minister in his letter of 11 June 2013 where he goes on to say—

> "While I recognise that sustainable development is well understood in the context of environmental legislation and regulatory activity the Scottish Government is convinced that retention of the term "sustainable economic growth" is essential. The Scottish Government's central Purpose is "to focus the Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. By sustainable economic growth we mean building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too." The rationale for Part 1 of the Bill is to promote greater regulatory consistency by imposing a statutory duty in relation to sustainable economic growth, empowering regulators to further align their activities and approach with the Scottish Government's Purpose."[32]

68. It was further explained by George Burgess of the Bill team that in response to the wish of stakeholders that the words "sustainable development" did not disappear, the requirement for Ministers to provide guidance on the contribution expected will remain in legislation. It is envisaged that there will be a single set of guidance on the new purpose and on the contribution to sustainable development to articulate how the terms interrelate. The Committee sought clarification on why, if sustainable development will be defined in guidance, it is not included in the Bill and the Minister acknowledged that perhaps an explicit link is lacking but expressed the view that it was felt some aspects of the Bill collectively deliver sustainable development outcomes.

69. Similarly in his oral evidence George Burgess explained to the Committee that in relation to SEPA—

> "That is why section 38 is written in the way that it is, with a clear hierarchy in place. As I have said, it acknowledges the three elements of sustainable development – the economic, the environmental and the social – and gives primacy to the environmental leg. We consider that to be right and

[32] Minister for Environment and Climate Change. Written Submission, 11 June 2013.

appropriate for a body such as SEPA, which is an environmental protection agency, after all."[33]

70. **The Committee is unclear why, if the three parts of section 38 constitute the three elements of sustainable development, the term sustainable development cannot itself be used on the face of the Bill.**

71. **The Committee seeks clarity from the Scottish Government on why the term sustainable economic growth has been used in the Bill rather than sustainable development on the grounds that while neither has a statutory definition; sustainable development has international recognition and is legally understood across a number of regimes and jurisdictions.**

72. **The Committee recommends that the Scottish Government bring forward amendments to the Bill at Stage 2 to include a definition of sustainable development in section 38 of the Bill.**

Reporting on the duty

73. Concerns were raised in written and oral evidence that the introduction of an additional reporting requirement could result in increased costs for regulators. The Committee understands that the Bill does not contain any reporting requirements and noted the evidence from the Bill team that SEPA is already subject to duties to provide annual reports on its functions and the expectation is that future annual reports will address the outcome of the new duties under the Bill. The Committee heard that SNH and FSA have similar reporting duties that could be adapted.

74. The Minister agreed that it is expected that future annual reports will include the outcomes of the new duties placed on them by the Bill. He recognised the importance of providing the regulators with appropriate guidance and confirmed the Scottish Government would do this in consultation with stakeholders. In his letter of 11 June 2013 the Minister sets out the intention to establish a short life working group to develop a draft Scottish Regulators code of practice; the remit of the group sets out that the code should include the issue of accountability.

75. **The Committee is content with the explanation from the Minister that regulators will be able to report on the outcomes of their new duties in future annual reports, however the Committee remains concerned as regulators appear unclear on what the duty will mean for them in practical terms which will make it difficult understand how they should then report on it. The Committee therefore welcomes the commitment by the Scottish Government to consult with stakeholders to produce appropriate guidance for regulators which will cover this matter.**

76. **The Committee highlights to the Scottish Government that it would have been beneficial for the issue of reporting on the duty to have been addressed in the PM accompanying the Bill as the lack of clarity has led to the issue being raised by stakeholders and the Committee as a concern.**

[33] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2013,* Col 2225.

Enforcement of the duty

77. The Committee raised the issue with the Minister of how the Scottish Government intends to ensure that regulators carry out this duty and how it might be enforced. In response, the Minister confirmed that regulators, such as SEPA and SNH, are already accountable to Ministers on the delivery of their functions. If the circumstance arises where they have failed to deliver in any particular area then they are expected to write to the Minister explaining the reason for that failure and outlining the steps they are taking to address the issue. The letter from the Minister of 11 June 2013 sets out that the draft code of practice will contain guidance to regulators in relation to their duties. The Committee agrees this is important so as to ensure clarity for regulators and properly define what is expected of them in respect of the duty placed on them by section 4.

78. **The Committee is content that Scottish Ministers have identified a suitable mechanism to ensure the duty placed on regulators by section 4 is reported on. However, the Committee remains concerned that if the duty is not properly defined and understood it will be difficult to enforce. The Committee welcomes confirmation from the Minister that the code of practice will be comprehensive and will clearly define what is expected of regulators in relation to their duties under section 4.**

79. **The Committee highlights to the Scottish Government that it would have been beneficial for the issue of enforcing the duty to have been addressed in the PM accompanying the Bill as the lack of clarity has led to the issue being raised by stakeholders and the Committee as a concern.**

Section 5: Code of practice

Code of practice: contents

80. Concerns were raised in evidence in relation to how the code of practice would work and at what level it would be set. SNH suggested that the code would have to function at a high level to ensure it could be applicable to and take into account the divergent roles and responsibilities of the various regulators in Schedule 1. This view was shared by the FSA and, Lloyd Austin of the RSPB. SNH visualise the code as being about how regulators conduct themselves with policy guiding the detail of how they will work in practice.

81. In response to the question of whether one code of practice could adequately cover the remits of all the regulators Dr Sarah Hendry from Dundee University commented that—

> "that will be ambitious, unless it is done at a high level. It is hard to say how it could be done at a more detailed level without an extremely extensive piece of documentation."[34]

82. The Minister confirmed that the code will apply to all the regulators listed in Schedule 1 and will not be specific to any particular regulator but will support all

[34] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2281.

regulators as they deliver on their economic duty. Neil Watt of the Bill team confirmed that the code is being developed with regulators and would be designed to ensure it clarified the practicalities around how the regulators roles will be delivered.

83. **The Committee recognises that this is an enabling Bill and much of the detail in terms of delivery will be incorporated in secondary legislation, however the Committee considers that the potential impact of section 4 and section 5, as it relates to the code of practice, is considerable. The Committee is disappointed in the lack of available information in relation to both section 4 and the proposed code of practice provided for by section 5. It believes the lack of information available in the Bill and its accompanying documents makes it difficult for the Committee, regulators and stakeholders to understand the impact of the Bill at this stage.**

84. **The Committee believes it is important that the code of practice includes clear guidance to regulators on how to resolve any conflict between compliance with primary functions and achieving sustainable economic growth.**

85. **The Committee is also concerned about how a code of practice set at a high level in order to be applicable to a wide range of regulators can be meaningful and effective. On this basis the Committee would welcome additional information from the Scottish Government on what it sees sitting below the high level code of practice.**

Possible conflict with other codes

86. The FSA raised a specific concern in relation to the current codes of practice they operate under, for example the Food Safety Act 1990 provides codes of practice for the enforcement of food law which Ministers have implemented. The FSA sought assurances that the new code would be without prejudice to any statutory provisions that exist elsewhere. Dr Sarah Hendry agreed that—

> "…some things might depend on how 'sustainable economic growth" is to be construed and developed in policy and guidance. Until we know that it will be difficult to tell whether there will be any conflict with other functions or codes of practice"[35]

87. In regard to this specific point the Minister confirmed that the new code is intended to support and encourage consistent regulation and compliance with regulatory principals and this is not in any way intended to circumvent or replace other codes of practice. The Minister further confirmed in his letter of 11 June 2013 that the code is intended to complement the detailed and specific subject codes which already exist.

88. **The Committee welcomes confirmation from the Minister that the new code of practice is not intended to circumvent or replace other codes of practice. However, the Committee retains a concern that this is not clear in**

[35] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2281.

the Bill as currently drafted and recommends that the Scottish Government considers how this could best be made clear and whether amendments are required at Stage 2 to achieve clarity.

Section 6: Code of practice: procedure

89. The Committee heard that stakeholders had concerns over the consultation process for the code of practice, in particular it was felt that any consultation process within the Bill should be open to the public and not restricted to those who appeared to Ministers to be representative of the regulators or to those they consider appropriate as provided for by in section 6(4)(a) and (b).

90. Additionally Dr Mark Williams from Scottish Water expressed the view that—

> "The consultation is critical to the process…the important thing here is that we set out principles and enable those principles to be widely scrutinised and understood. The full range of measures and guidance that will come into the code of practice need to be open to that level of scrutiny".[36]

91. In responding to queries on the consultation process the Minister confirmed that the Scottish Government is committed to an inclusive and open approach in its consultation process in general and George Burgess added that—

> "Practice during the past decade has been that any consultation would be an open public consultation that appears on the Scottish Government website. There would be absolutely no restriction on people feeding into it."[37]

92. The Committee notes the Minister, in his letter of 11 June 2013, confirms that the intention is to be as open and inclusive as possible. However, the Committee questions whether or not the use of the terms 'sees fit' and 'considers appropriate', as included in the Bill, lend themselves to this approach.

93. The Committee notes and welcomes the commitment given by the Minister in his letter of 4 June 2013 to review the differing provisions for consultation in Part 1 and Part 2 of the Bill to ensure consistency whereever possible.

94. **The Committee agrees the current drafting of the Bill may be interpreted as excluding some people or organisations from the consultation process. On this basis the Committee recommends that if this is not the Scottish Government's intention and the consultation process is to be open to the public then the Bill should be clear and say so, perhaps by the removal of the terms 'sees fit' and 'considers appropriate' in reference to who Scottish Ministers will consult with.**

95. **The Committee is pleased to note the Minister has given an undertaking to review the provisions for consultation in Parts 1 and 2 of the**

[36] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2298.
[37] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2332.

Bill to ensure a consistency of approach and will bring forward any amendments necessary at Stage 2 to achieve this.

96. **The Committee shares the concern of stakeholders on the lack of clarity at this stage on what the code of practice will contain which prevents a fuller scrutiny of the Bill and its impact on regulators. Therefore the Committee may wish to take evidence from stakeholders and the Minister with a view to submitting a formal response to the Scottish Government prior to the draft code being finalised and laid before Parliament.**

PART TWO – ENVIRONMENTAL REGULATION

97. Part 2 focuses on environmental regulation and is divided into 6 Chapters.

Chapter 1 – regulations for protecting and improving the environment

98. Chapter 1 deals with Regulations for protecting and improving the environment, it provides that Scottish Ministers may make provision for, or in connection with, protecting and improving the environment including those for regulating environmental activities and implementing relevant EU obligations. It also introduces Schedule 2.

Definition of environmental activities and environmental harm

99. The Committee heard both in written evidence and during the roundtable discussion about the confusion and differing views around the definitions of environmental activities and environmental harm in section 9. SE Link believe the definition of 'environmental activities' is potentially misleading and would prefer a definition making it clear it was about activities which were potentially harmful to the environment.

100. Gordon McCreath expressed the view that the definition of 'environmental harm' was a very wide definition but was one that was familiar to environmental lawyers. He also raised a concern that section 9(2)(e) may actually be too wide.[38]

101. Following the roundtable discussion the Minister wrote to the Committee on 4 June 2013 to provide clarity on the definition of 'environmental harm'. The Minister confirmed that the definition is identical to the one which appears in the Pollution Prevention Control Act 1999 and that a very similar definition also appears in the Water Environment and Water Services (Scotland) Act 2003.

102. The Committee considers the definition of 'significant environmental harm' later in the report.

103. **The Committee welcomes the Ministers confirmation that the definition of 'environmental harm' has a statutory precedent.**

104. The Committee also heard from Gordon McCreath that as the Bill will ultimately lead to a rewriting of environmental law then it would be preferable that

[38] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2302.

the first set of regulations made under section 10, relating to protecting and improving the environment, should be made under affirmative procedure.

105. In response the Minster confirmed in his letter of 4 June 2013 that the Scottish Government is happy to consider an amendment at stage 2 which will require the first set of amendments made under section 10 to be subject to the affirmative procedure. This is consistent with the Pollution Prevention Control Act 1999 (section 2(8)-(9)).

106. **The Committee strongly recommends that the first set of regulations are brought forward under the affirmative procedure and welcomes the Scottish Government's intention to consider bringing forward an amendment at Stage 2 to require the first set of regulations made under section 10 to be made under affirmative procedure The Committee notes the Ministers commitment to ensure the consultation process is reviewed for consistency and similar to the point raised in relation to section 6 the Committee recommends that if the consultation is to be open to all then the Bill should be clear and say so.**

Chapter 2 – SEPA's powers of enforcement

107. Chapter 2 provides for Scottish Ministers to make provisions to enable SEPA to impose fixed and variable monetary penalties. It also provides for Ministers to make provisions enabling SEPA to accept an enforcement undertaking from a person it believes has committed a relevant offence and to provide for penalties where such undertakings are not complied with. This chapter sets out that the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to penalties and undertakings.

Proportionality

108. The Committee heard there was general support for the provisions in Part 2 of the Bill and overall stakeholders welcomed the strengthening of SEPA's powers.

109. The Committee heard from Calum MacDonald from SEPA that—

> "we deal with a wide range of operators, from serious environmental criminals at one end of the spectrum to environmental champions at the other, with many in between."
>
> and…
>
> "Overall Part 2 will give us the right tools and flexibility to target our resources and effort where it is most needed"[39]

110. The Committee explored the concern of stakeholders that SEPA may use its new powers to impose fixed penalty fines in relation to some of its 'weaker cases' rather than pursue them through the court process due to a perceived lack of evidence. The Committee sought clarification from SEPA that it would only have

[39] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2013,* Col 2240.

to satisfied on the balance of probabilities that an offence had been committed before issuing a penalty notice and how that might be perceived by those it regulated as a way of implementing a fine without requiring a huge burden of proof.

111. Bridget Marshall confirmed that SEPA was aware this was a downside to the proposed system. She added that SEPA will still require to complete a thorough investigation into the evidence before it is able to conclude whether criminal intent was present or not and that the guidelines from the Lord Advocate would provide a safeguard against SEPA using this approach where there was a lack of evidence.

112. The Committee welcomes confirmation by the Minister that the quality of the evidence alone will not be the deciding factor in whether or not SEPA will refer the case to the Procurator Fiscal and that the evidence of criminal intentions will also be relevant. This will ultimately be determined by the guidance issued to SEPA by the Lord Advocate which will set out how the new enforcement measures should be used.

113. In practice this will mean the nature of the offence and whether or not criminal intent was involved will be taken into consideration when determining the balance of probabilities. In such cases where it is considered criminal intent was present then it is likely the case will be referred to the Procurator Fiscal and where it is a matter of regulatory non-compliance then it is likely SEPA will take direct enforcement action itself. This is consistent with SEPA's move from an activity-based system to a risk-based system.

114. The Committee heard evidence[40] from SEPA citing an example of where it had put this approach into practice with farmers in a catchment area. SEPA had discovered 5,000 breaches of regulations but did not take enforcement action. Instead it worked with the sector and the farmers concerned and provided advice to improve performance and follow up visits had shown a 75% improvement. Allan Bowie of the National Farmers Union Scotland told the Committee[41] he was pleased SEPA had adopted this catchment policy and was working with farmers, that it had listened to them and had implemented a simplified scheme.

115. **The Committee is content that the guidance issued by the Lord Advocate will provide an appropriate safeguard for it to determine which offences may be subject to SEPA's enforcement and which may be referred to the Procurator Fiscal. The Committee also welcomes confirmation that discussions between the Crown Office and Lord Advocate, the Scottish Government and SEPA are already underway and that jointly arranged stakeholder events are planned to discuss the enforcement measures in greater detail.**

116. The Committee raised a question as to whether it would be possible to require operators who apply for a licence to lodge a bond against failure to comply,

[40] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2013,* Col 2245.
[41] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2304.

for example, operators in the waste management and transfer industry. George Burgess confirmed that this system already exists as part of the regulatory regime.[42] The RSPB, in its written evidence, cited a current example where two of the largest opencast operators have recently gone into administration; both have significant liabilities in relation to the restoration of their sites with possible restoration costs of millions of pounds. The RSPB highlighted that a failure to manage and restore these sites could cause immediate and serious pollution threats that could ultimately put Scotland in breach of European legal requirements under the Birds and Habitats Directives.

117. **The Committee welcomes confirmation that a system requiring operators to lodge bonds against a failure to comply with regulations already exists, however it also notes the concerns of the RSPB over the level of the bond in relation to the impact of potential liabilities and asks the Scottish Government to ensure that the existing system that is in place is adequate and fit for purpose.**

Enforcement on multiple sites

118. The Committee also questioned SEPA on how, in practice, it would enforce relatively minor offences that take place on a number of sites owned by a single company. The Committee was interested to hear if the enforcement powers in the Bill would enable SEPA to move from the approach of treating companies on an individual site basis to one where a cumulative view of the company's action can be taken.

119. Bridget Marshall confirmed that while these issues would not necessarily be addressed through the Bill it is a measure that SEPA is aware of and one which can be implemented on a national level.[43] She explained that SEPA is now beginning to look at corporate entities as well as sectors and that the regulations made under the Bill will allow SEPA to consider corporate permits to enable them to consider issues on a company wide basis instead of looking at individual sites. The Minister wholly endorsed[44] this approach and agreed that companies may turn a blind eye to a series of fairly low-grade environmental breaches, such as littering, on individual sites but this can then add up to a serious problem over their entire estate and it important that SEPA works with companies on this to ensure compliance before taking any enforcement action.

120. **The Committee welcomes confirmation from the Scottish Government that regulations made under the Bill will enable SEPA to consider issues on a company wide basis in addition to an individual site basis. The Committee notes much of the detail of what the Bill seeks to achieve will come in secondary legislation and again welcomes the Scottish Government's confirmation amendments will be brought forward at Stage 2 to ensure regulations made under section 10 will now be considered under the**

[42] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2013,* Col 2230.
[43] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2013,* Col 2233.
[44] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2351.

affirmative procedure. This will allow the Committee to engage further with the issue.

Serious environmental crime

121. The Minister explained that as part of the Scottish Government's commitment to tackling environmental crime, the Environmental Crime Taskforce, established by the Cabinet Secretary for Rural Affairs and the Environment, is due to come forward with proposals which will better equip SEPA to deal with environmental crime. The Minister's letter of 19 May 2013 indicated this may include bringing forward amendments at Stage 2 in relation to search and entry powers in section 108 of the Environment Act 1995.

122. **The Committee was deeply concerned to hear of cases relating to serious organised environmental crime where SEPA officials had been subject to serious threats of violence and intimidation. The Committee condemns such behaviour and therefore welcomes the Scottish Government's intention to bring forward amendments at Stage 2 which will strengthen SEPA's powers, based on the outcomes of the work of the Environmental Crime Taskforce.**

Capping fixed monetary penalties

123. The Committee heard of concerns from stakeholders that a cap of £40,000 was to be applied in relation to fixed monetary penalties. Susan Love from the Federation of Small Businesses (FSB) stated[45] that while £40,000 may be an insignificant amount to a large multinational company it could effectively be a huge penalty for a smaller individual company. Some stakeholders considered that the penalty should be linked to the environmental impact and potential financial benefit gained by failing to meet the regulation.

124. In his oral evidence[46] the Minister explained that the £40,000 cap is the maximum amount that can be imposed by a criminal court in summary proceedings for most environmental offences and the intention is not to create an imbalance between the new powers and the criminal courts. The Minister further explained that this is a cap on the amount SEPA can impose directly. Should a case be referred to the Procurator Fiscal where it was then determined that due to the seriousness of the crime and the existence of serious criminal intent the case should not be heard through summary procedure but instead should be heard in full in the criminal courts then the court could impose a more severe penalty.

125. **As the Criminal Court has the authority to impose a higher level of fine if serious criminal intent is proven the Committee is content that the level of fine that can be directly imposed by SEPA be capped at £40,000.**

[45] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2308.
[46] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2347.

No opportunity to refuse a penalty notice from SEPA and opt for court proceedings.

126. The Committee heard oral evidence[47] from Gordon McCreath that more information was required in relation to the interaction between SEPA's jurisdiction and that of the court. In particular he stated that there was no information on what happens when SEPA imposes a penalty on someone on whether that person then has the option to say they are not willing to accept SEPA's decision made on the balance of probabilities and that they wish to take the matter to the courts.

127. The Committee sought clarification from the Minister on whether or not that choice was available for those believed by SEPA to have committed an offence. The Minister confirmed that whilst that option had been considered initially it had been decided that the principle of proportionality was important and that to follow that approach would mean that some less significant cases could still end up in the court system. In taking this approach in the Bill the Minister confirmed recognition was given to the importance of ensuring compliance with article 6 of the European Convention on Human Rights (ECHR) and that anyone who was unhappy with the penalty would be able to appeal to the Scottish Land Court, with this being a temporary measure until the Tribunals (Scotland) Bill had completed its parliamentary scrutiny and an appropriate tribunal could be identified for this purpose.

128. **The Committee welcomes confirmation that when SEPA imposes a penalty on someone there is no option, under the provisions in this Bill, for that person or organisation to take the matter to court as an alternative approach but an alternative means of appeal to the fixed penalty notices issued by SEPA is available.**

Action by SEPA following a successful appeal of a penalty notice

129. Gordon McCreath sought clarity on whether once SEPA has imposed a penalty on someone criminal proceedings can then be raised against them for the same matter. The Committee heard oral evidence[48] from Dr Hendry of Dundee University on the importance of a clear process for appeals and how continuing breaches will be dealt with.

130. The Committee questioned the Minister on this and he confirmed[49] that if a fixed penalty is withdrawn by the tribunal then SEPA is unable to impose any further sanctions for that breach or refer the matter to the Procurator Fiscal for prosecution. In cases where further breaches relating to the first notice arise again then SEPA may then impose another penalty and will also have the opportunity to refer the case to the Procurator Fiscal on the grounds that the course of offending is continuing.

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[47] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2306.

[48] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2298.

[49] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2351.

131. **The Committee notes the explanation provided by the Minister on the available safeguards that will prevent SEPA attempting to pursue the same case twice but which will allow further on-going breaches to be enforced appropriately.**

Chapter 3 – court powers

132. Chapter 3 provides that the courts may make compensation orders in relation to persons convicted of a relevant offence and that in doing so they must have regard to any financial benefit accrued to the offender when determining the amount of the fine to be imposed. The courts are also given powers to determine whether or not the offender should be required to publicise that they have been convicted of the offence and details of the offence.

Capping fixed compensation orders

133. It was unclear to stakeholders and the Committee as to why there was a cap of £50,000 on compensation orders made by the courts. Stakeholders such as SE Link and the RSPB believe that the compensation should be proportionate to the environmental harm caused and that on this basis and some stakeholders considered that a cap of £50,000 was too low.

134. The Minister addressed this in his letter of 4 June 2013 stating that section 26(4) of the Bill requires to be read in conjunction with section 249(8) of the Criminal Procedure (Scotland) Act 1995 and refers only to summary proceedings. In the circumstances where an offence is subject to solemn proceedings then there is no limit to the amount of compensation that may be awarded under a compensation order. In future the amount of compensation that may be awarded will be a relevant consideration by the Procurator Fiscal in deciding whether to take proceedings by summary or solemn procedure.

135. **The Committee welcomes the confirmation around the procedure for compensation orders by the Minister and regrets that this was not made clearer in the Bill and its accompanying documents.**

Publicity orders

136. The Bill provides an additional sentencing power in respect of publicity orders which the criminal courts may use where appropriate. Publicity orders may be used alongside or in place of other sentences that have been imposed for a relevant offence. A publicity order requires a person who has been convicted of a relevant offence to publicise, in a specified manner, details of the offence and any other sentence imposed by the court.

137. In their written and oral evidence[50] both the FSB and Scotch Whisky Association raised concerns over what criteria the courts would use in deciding whether it was appropriate to issue a publicity order given the potential reputational impact of such an order. The Committee sought the views of the Minister on whether the policy intention behind publicity orders was to allow recognition of the difference between situations where a normally compliant

[50] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 29 May 2013,* Col 2310.

business had committed an offence accidentally and one where the perpetrator had deliberately played "fast and loose"[51] with the environment.

138. The Minister confirmed that the aim of the provision is to deter damage to the environment and activities which undermine legitimate businesses. He confirmed that while ultimately the decision will be at the courts discretion he imagined that clear guidelines on the intent will be produced.

139. **The Committee welcomes the introduction of publicity orders and recommends that in relation to the issuing of publicity orders the Scottish Government should produce clear guidelines on the intent behind the policy to assist the courts.**

Chapter 4 – miscellaneous

140. Chapter 4 deals with miscellaneous provisions including vicarious liability for certain offences committed by employees and agents. It also creates an offence of causing or permitting significant environmental harm and provides the courts with powers to order persons convicted of an offence to remedy or mitigate the harm and gives rights to the prosecutor to appeal a decision by the courts not to make publicity or remedy orders. This chapter also makes provisions in relation to contaminated land, special sites and air quality assessments.

Section 31 significant environmental harm: offence

141. Section 31 of the Bill creates an offence of 'significant environmental harm' and stakeholders such as the FSB and the Scotch Whisky Association felt the definition of the offence was very wide and could be open to misinterpretation. FSB in particular felt they would struggle to explain what the offence was to their members as it was so vague.

142. The Committee raised the issue with the Minister and sought clarity[52] on whether the term 'significant environmental harm' was understood in law. In response the Minister stated—

> "In addition, there will be the new significant environmental harm offence, which will apply when the harm caused is outside that contemplated by the regulatory system, whether or not the offender has a permit. The examples that have been given relate to the health and wellbeing of the Scottish population and protecting and improving the environment. Although they are not specified in regulation, it is possible to define instances in which harm has been caused to the public's health and wellbeing – which is obviously a major concern for the Government and, indeed, the whole Parliament – or to the protection and improvement of the environment."[53]

[51] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2355.
[52] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2358.
[53] Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2358.

143. This was supplemented by George Burgess who indicated that environmental harm may be isolated locally but can very significant due to the impact in that place.

144. **The Committee welcomes the clarification from the Minister on the definition of significant environmental harm, however, it regrets that this was not made clearer in the accompanying documents. The Committee recommends that guidance on significant environmental harm is made available.**

Section 34 Land no longer considered to be contaminated or to be a special site

145. The Committee heard from Andy Rooney of South Lanarkshire Council that this provision was generally welcomed as it enables a site previously declared as being contaminated to be removed from the contaminated land register and brought back into productive use once the contamination has been removed. It was also suggested by Andy Rooney that to safeguard the interests of all parties, some degree of monitoring of the land should continue.

146. **The Committee welcomes the inclusion of the provision on contaminated land and recognises the importance of putting land back into productive use.**

Vicarious liability

147. In its written evidence Scottish Land and Estates raised a concern around vicarious liability. The specific concern focused on this being a provision in the Bill which reverses the principle of Scots criminal law in requiring intent to convict a person of a criminal offence.

148. The Committee raised this matter with the Bill team during its evidence session[54] and asked why this provision was included in the Bill without any consultation taking place. Neil Watt confirmed that although a specific question on vicarious liability did not appear in the consultation document the proposals in the Bill reflected the feedback that came from stakeholders on the issue.

149. In relation to who this provision would apply to and if it would also be applicable to Trusts, George Burgess confirmed that—

> "the provisions apply to anything that the law recognises as a legal personality…the key point is that only a legal person can hold a licence or permit from SEPA. In short if the thing exists as a legal entity then the vicarious liability provisions will apply."[55]

150. **The Committee recognises that the provision in the Bill in relation to vicarious liability is a significant change in the law and regrets that the issue had not been formally consulted on prior to introduction of the Bill.**

[54]Scottish Parliament. Rural Affairs, Climate Change and Environment Committee. *Official Report 22 May 2013,* Col 2238.
[55] Scottish Parliament Rural Affairs, Climate Change and Environment Committee. *Official Report 5 June 2013,* Col 2357.

151. **The Committee welcomes the clarification from the Scottish Government on the inclusion of provisions in connection with vicarious liability however regrets that the reasons for its inclusion in the Bill was not made clearer in the accompanying documents.**

Chapter 5 – general purpose of SEPA

152. The Committee also give consideration to the general purpose of SEPA earlier in the report as part of its consideration of Part 1 of the Bill.

153. Chapter 5 places a requirement on SEPA to carry out the functions conferred on it by the Bill, or any other legislation, for the purposes of protecting and improving the environment. It also requires that in exercising these functions SEPA must contribute to (a) improving the health and wellbeing of the people of Scotland and (b) sustainable economic growth.

154. The general purpose of SEPA has been considered earlier in the report in relation to the duties that are to be imposed on regulators by section 4.

155. The Committee heard from stakeholders and from SEPA that they are happy with the new general purpose for SEPA as set out in the provisions in section 38. However Dr Sarah Hendry questioned the inclusion of the term 'sustainable economic growth' with reference to the point made earlier in relation to section 4 as to what this means.

156. **The Committee welcomes the new general purpose for SEPA and has recommended earlier in its report that consideration be given to replicating the hierarchical formula to set out the duties to be placed on other regulators and, in particular, SNH.**

Subordinate legislation

157. The Committee notes that this Bill is an enabling Bill and that much of the detail of what remains to be developed will be carried out by subordinate legislation. Much of the written and oral evidence commented on the extent to which the implementation of the provisions of the Bill will be through subordinate legislation, codes of practice or guidance.

158. The Committee further notes the concern of the Scotch Whisky Association which stated —

> "the Bill is so wide in scope that there exists opportunity for secondary legislation to capture activities not yet subject to regulation and potentially capture activities not intended to be covered by the scope of this Bill"[56]

159. **The Committee acknowledges the concern of stakeholders on how the perceived wide scope of the Bill may allow secondary legislation to specify activities not yet subject to regulation and which are not intended to be covered by the Bill. The Committee is confident that if this were to happen it**

[56] Scotch Whisky Association Change. Written Submission, June 2013

would be identified by the Delegated Powers and Law Reform Committee during its consideration of subordinate legislation arising from the Bill.

Financial issues

160. The Committee notes that the difficulties which arise in scrutinising the financial implications of the Bill on the grounds that much of the detail will follow in codes of practice or subordinate legislation. This is highlighted by the Minister in his letter of 4 June 2013 where he states—

> "the financial impacts will be heavily dependent on the secondary legislation and will vary across sectors and companies according to the activities they undertake and the associated risks".[57]

161. **The Committee encourages the relevant committees to give careful consideration to financial issues when scrutinising subordinate legislation.**

162. The Committee further notes that in the same letter the Minister confirms that in respect of the Business Regulatory Impact Assessment which accompanied the Better Environmental Regulation Programme "Proposals for a New Integrated Framework of Environmental Regulation" and "Future Funding Arrangements for the Scottish Environment Protection Agency" there were no comments as a consequence of the public consultation.

Policy Memorandum

163. The Committee notes throughout its consideration of the Bill that many of the concerns and issues raised by the stakeholders could have been mitigated by fuller explanation of the policy intentions in the PM. For example in relation to Part 1 of the Bill it would have been helpful to have clarity that the consultation on the code of practice would be public and accessible to all and confirmation that existing regulatory functions would take priority over the duty imposed by section 4 of the Bill.

164. Similarly in Part 2 of the Bill explanations in the PM on the policy intent behind the financial caps on the level of penalties that can be imposed, the statutory precedent for the definition of environmental harm, the inclusion of a provision on vicarious liability, and publicity orders would have greatly assisted stakeholders and the Committee in their scrutiny of the Bill.

165. **The Committee recommends that the Scottish Government gives consideration to strengthening future Policy Memoranda by adequately reflecting the outcomes of consultations, giving greater consideration to the impact of legislation on sustainable development and taking the opportunity to provide detailed information on the policy intent behind provisions in Bills.**

[57] Minister for Environment and Climate Change. Written Submission, 4 June 2013.

ANNEXE A: EXTRACT FROM THE MINUTES OF THE RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

MINUTES

14th Meeting, 2013 (Session 4)

Wednesday 24 April 2013

Regulatory Reform (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

MINUTES

18th Meeting, 2013 (Session 4)

Wednesday 22 May 2013

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

Neil Watt, Bill Manager and Better Environmental Regulation Policy, Environmental Quality Division;
Bridget Marshall, Better Environmental Regulation policy, Environmental Quality Division;
George Burgess, Deputy Director for Environmental Quality, Scottish Government; and
Calum MacDonald, Executive Director;
Jo Green, Corporate Support Manager;
Bridget Marshall, Head of Legal for Operations, Scottish Environment Protection Agency.

RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

MINUTES

19th Meeting, 2013 (Session 4)

Wednesday 29 May 2013

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

Bill Adamson, Head of Food Standards, Hygiene and Regulatory Policy, Food Standards Agency Scotland;
Roger Burton, Programme Manager for Wildlife Management and Social and Economic Development Programmes, Scottish Natural Heritage;
Dr Sarah Hendry, University of Dundee;

Lloyd Austin, Head of Conservation Policy, Royal Society for the Protection of Birds Scotland;
Andy Myles, Parliamentary Officer, Scottish Environment LINK;
Graham Hutcheon, Chair of the Scotch Whisky Association's Environment Committee and Group Operations Director, Edrington, Scotch Whisky Association;
Dr Mark Williams, Environmental, Regulation and Climate Change Manager, Scottish Water;
Gordon McCreath, Partner for Pinsent Masons, UK Environmental Law Association;
Susan Love, Policy Manager, Federation of Small Business;
Andy Rooney, Divisional Environmental Services Officer, South Lanarkshire Council;
Allan Bowie, Vice Chair, National Farmers Union Scotland.

MINUTES

20th Meeting, 2013 (Session 4)

Wednesday 5 June 2013

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

Paul Wheelhouse, Minister for Environment and Climate Change;
Neil Watt, Bill Manager and Better Environmental Regulation Policy, Environmental Quality Division;
Bridget Marshall, Better Environmental Regulation Policy, Environmental Quality Division; and
George Burgess, Deputy Director for Environmental Quality, Scottish Government.

Regulatory Reform (Scotland) Bill (in private): The Committee considered the evidence heard earlier in the meeting.

MINUTES

22nd Meeting, 2013 (Session 4)

Wednesday 19 June 2013

Regulatory Reform (Scotland) Bill (in private): The Committee agreed a draft report to the Economy, Energy and Tourism Committee

ANNEXE B: ORAL EVIDENCE

18th Meeting, 2013 (Session 4) Wednesday 22 May 2013

ORAL EVIDENCE.....

Neil Watt, Bill Manager and Better Environmental Regulation Policy, Environmental Quality Division, Scottish Government;
Bridget Marshall, Better Environmental Regulation policy, Environmental Quality Division, Scottish Government;
George Burgess, Deputy Director for Environmental Quality, Scottish Government;
Calum MacDonald, Executive Director, Scottish Environment Protection Agency;
Jo Green, Corporate Support Manager, Scottish Environment Protection Agency;
Bridget Marshall, Head of Legal for Operations, Scottish Environment Protection Agency.

19th Meeting, 2013 (Session 4) Wednesday 29 May 2013

Bill Adamson, Head of Food Standards, Hygiene and Regulatory Policy, Food Standards Agency Scotland;
Roger Burton, Programme Manager for Wildlife Management and Social and Economic Development Programmes, Scottish Natural Heritage;
Dr Sarah Hendry, University of Dundee;
Lloyd Austin, Head of Conservation Policy, Royal Society for the Protection of Birds Scotland;
Andy Myles, Parliamentary Officer, Scottish Environment LINK;
Graham Hutcheon, Chair of the Scotch Whisky Association's Environment Committee and Group Operations Director, Edrington, Scotch Whisky Association;
Dr Mark Williams, Environmental, Regulation and Climate Change Manager, Scottish Water;
Gordon McCreath, Partner for Pinsent Masons, UK Environmental Law Association;
Susan Love, Policy Manager, Federation of Small Business;
Andy Rooney, Divisional Environmental Services Officer, South Lanarkshire Council;
Allan Bowie, Vice Chair, National Farmers Union Scotland.

20th Meeting, 2013 (Session 4) Wednesday 5 June 2013

Paul Wheelhouse, Minister for Environment and Climate Change;
Neil Watt, Bill Manager and Better Environmental Regulation Policy, Environmental Quality Division;
Bridget Marshall, Better Environmental Regulation Policy, Environmental Quality Division; and
George Burgess, Deputy Director for Environmental Quality, Scottish Government.

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 22 May 2013

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

Regulatory Reform (Scotland) Bill: Stage 1

The Convener (Rob Gibson): Welcome to the 18th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off their mobile devices because leaving them in flight mode or on silent can affect the broadcasting system.

We have two witness panels on the Regulatory Reform (Scotland) Bill. We will hear first from the Scottish Government's bill team and then from the Scottish Environment Protection Agency. I welcome the bill team. Neil Watt is the bill manager and is from the better environmental regulation policy, environmental quality division—I hope that you can remember that—Bridget Marshall is from the better environmental regulation policy, environmental quality division; and George Burgess is deputy director for environmental quality in the Scottish Government. Neil Watt will give a brief introduction.

Neil Watt (Scottish Government): Thank you for inviting us here. I will briefly set out why the Government has introduced the bill, what it will do and the benefits that it will bring.

Delivery of the bill is a cross-Government effort. We are here primarily to discuss the parts of the bill that the committee is looking at—the economic duty provision in part 1 and the environmental regulation provisions in part 2. Before I go into that, I will set the scene a little and tell you about the joint working approach that the Government is taking with SEPA to deliver the bill and the wider programme that it supports.

The team here includes Bridget Marshall, who was seconded to our division from SEPA to ensure that operational needs have been incorporated from the start. George Burgess, Bridget and I all work in the environmental quality division. There is a collective effort both in policy development and in operational delivery; we have been collaborating on the programme for a number of years to maximise the skills and experience in both organisations and to deliver more effective outcomes.

The bill is only one part of the better environmental regulation programme, which also includes changes to SEPA's future funding model and other elements of its transformational change agenda. The better environmental regulation programme is about delivering environmental outcomes more effectively and helping SEPA to become the sort of regulator that Scotland needs for the future.

The programme is not about less regulation or loosening of environmental regulation; rather, it is about effective regulation in protecting the environment. We are working towards a more flexible and responsive culture, where regulation is based on risk and performance rather than on anticipated routine activity. By applying the principles of better regulation to environmental protection, the programme will streamline the legislative framework and SEPA's regulatory activity.

Put simply, the environmental regulation part of the bill does four things. First, it introduces a new statutory purpose that recognises the broader role that SEPA now has. That will set SEPA's environmental protection role within a wider context of sustainable economic growth, including health and wellbeing.

Secondly, it enables a new simplified and integrated framework for environmental regulation that will bring together the arrangements for regulation of water, waste, pollution prevention and control, and radioactive waste in a single permissioning structure under a single standardised procedure.

Thirdly, it creates a new enforcement framework. The bill will enable the introduction of a wider range of penalties and enforcement measures that SEPA can use directly—such as financial penalties and enforcement undertakings—to tackle poor performance and non-compliance.

Fourthly, the bill will provide the criminal courts with a broader range of sentencing options, including publicity orders for the worst cases of environmental offending.

A wide range of interests have been consulted on the bill's provisions and we continue to engage directly with stakeholders to identify and address issues and concerns and to try to build consensus on the way forward. The legislation will not lead to significant additional costs to the Government and will be associated with delivery of efficiencies for SEPA and for operators.

In conclusion, the bill and the wider programme that it supports will help to deliver multiple benefits, including benefits for the environment, as SEPA will be able to draw on a broader range of enforcement tools and the courts will have a wider range of sentencing options for those who blatantly disregard their environmental obligations.

There will be benefits for business, particularly those that adopt good environmental business practices through simpler permissions and guidance, and more targeted support and advice. There will be benefits for communities, as SEPA will be able to focus more resources on the greatest environmental harms or risks, and there will be benefits for SEPA, as the bill will help it to take a more proportionate and outcome-focused approach to regulation. The bill will lead to fairer and more effective and efficient protection of the environment.

Thank you. We are happy to answer questions.

The Convener: Thank you. We all have to dip into what is a fairly new area to the committee. I will kick off the questions. What was the rationale for undertaking a number of separate consultations?

Neil Watt: We undertook the first consultation in May last year. That quite detailed consultation was on the environmental permissioning framework and the enforcement measures. We wanted to give sufficient time for stakeholders to consider the proposals fully.

The May consultation outlined the background to SEPA's purpose and how we thought that that could be simplified and made more in line with SEPA's current role in environmental protection. In the May consultation, there were quite a lot of comments on that issue. We decided to include it in a further consultation, which was on SEPA's future funding arrangements. That issue is outwith the scope of the bill, but because of the level of interest, we wanted to reflect the views that we had received in the earlier consultation and give sufficient time for that to be developed.

The Convener: Some provisions in the bill have not been consulted on. What are they and what informal feedback has been sought or received on them?

Neil Watt: The main parts of the bill were included in the two consultations—the May consultation and the October consultation. Minor parts of the bill were not formally consulted on, but we informally consulted relevant stakeholders on them. The minor parts include vicarious liability, contaminated land, and air quality. If those are the parts of the bill to which you are referring, I can answer more questions on them. However, the vast majority of the bill was included in the formal consultation exercises.

The Convener: We will have further questions on the minor parts of the bill.

Individual responses were not made easily available. Is that consistent with the Scottish Government's principles of better regulation—transparent, accountable, proportionate, consistent and targeted?

Neil Watt: Do you mean the responses to the consultations?

The Convener: Yes.

Neil Watt: I understand that they have, as is practice, been made available via the Scottish Government library. This week, we are in the process of putting all the responses to all the consultations on the Scottish Government's website, although we have not—other than from the Scottish Parliament information centre—received any requests for them.

The Convener: I am sure that people are used to going to the electronic medium to get such things.

Neil Watt: As I said, we will have the responses online this week. I am happy to take the committee's feedback on the issue.

Nigel Don (Angus North and Mearns) (SNP): Good morning, colleagues. I want to pick up on an issue to which I think we will refer several times, which is the apparent multiplicity of objectives. As drafted, there appear to be at least two duties on SEPA, one of which is to achieve sustainable economic growth. The other is sustainable use of natural resources. Those two duties could immediately conflict—never mind our worrying about any other principles. Does that concern you as much as it concerns me? How will the hierarchy of principles be sorted?

George Burgess (Scottish Government): I think that you are referring to section 38, which establishes the general purpose of SEPA. The section sets out SEPA's purpose in one place and does so more clearly than it is defined in the current legislation.

SEPA's primary purpose, if you like, is to exercise its functions for the purpose of protecting or improving the environment, including managing natural resources in a sustainable way. It then has, as far as is consistent with that, the purposes of improving the health and wellbeing of the people of Scotland and achieving sustainable economic growth.

We might contrast that with the current statutory provision, in which the only purpose that is given to SEPA is to protect and improve the environment, which relates only to its pollution control functions. It is quite odd. When SEPA was set up and established, it was given a whole batch of functions, but apart from that one provision, little sense was given in statute as to what it was about, or what it was supposed to be exercising its functions for.

Over the years—SEPA colleagues might be better able to comment on this—the way in which SEPA has operated has been, in fact, to take account of sustainable development of the environmental, economic and social elements all together. I see what is written in section 13 as SEPA's general purpose as acknowledging the reality of how it carries out its work.

Nigel Don: Yes. I am sure that that is true, and nothing that I want to say is to be critical of what is necessarily going on at present, although I think that, as constituency MSPs, we all run into some doubtful decisions every now and again.

However, I am still concerned that whatever the first principle is, the second principle will always be subordinate to it. That implies that, if the primary duty is to look after the environment, the moment the environment is damaged, sustainable economic growth goes away. Surely that is not what we want. How are we going to resolve, in a statute that is designed to clarify what is going on, how the principles sit on top of each other so that people can actually make decisions?

George Burgess: What has been set out is that protecting and improving the environment is the primary purpose, and that SEPA must achieve the other purposes in so far as they are consistent with that primary purpose. That is a step ahead of the position that we currently have, where the only statutory purpose is to protect and improve the environment.

We need to remember that the purpose exists at a high level. There will be other regimes—for instance, in relation to the water environment controlled activities regulations—in which individual pieces of legislation will set out in rather more detail exactly how SEPA must undertake that balancing act. That situation is already familiar to SEPA. The bill provides a background to SEPA's operations; bringing together the economic, environmental and social elements in a way that does not apply at present will give SEPA rather more comfort that how it currently exercises its functions is, in fact, in line with statute.

Nigel Don: May I push this, convener?

The Convener: Yes. After that, Claudia Beamish wants to come in with a supplementary question.

Nigel Don: Given that we live in an increasingly litigious environment, and given that it might become easier for groups and individuals to go to court on environmental issues, which increasingly seems to be the legal situation, is not there a risk that a group or an individual could take the position that we currently have, where protection of the environment is the top line, and say in court, "If you are doing anything significant to my environment"—I am not talking about trivial things—"the sustainable economic growth should be struck, because the top level is protection of the environment"?

George Burgess: I suggest that that risk—there probably is such a risk—is greater under current statute, in which the only purpose is to protect and improve the environment—

Nigel Don: Forgive my interrupting you. I would not dispute that but, given that we are rewriting the law, surely we should be doing it so that the hierarchy is organised so that we are quite clear that we can do some of the lower-order things. In other words, it should not be a hierarchy. It needs to be an "and, and, and" or an "or, or, or" rather than a "this, then perhaps that".

George Burgess: It would probably be more difficult for SEPA to operate if the three elements—the economic, the social and the environmental—were simply left as equal parts.

SEPA is the Scottish Environment Protection Agency, and protection and improvement of the environment is its top priority. We feel that the hierarchy that we have set out is the right one for SEPA, because it acknowledges the three legs of sustainable development and puts them in what we believe is the correct order.

09:45

Claudia Beamish (South Scotland) (Lab): Good morning to you all. I will take you back to the remarks that were made about not having formally consulted on some areas. Can any of you explain why it was decided not to consult formally on air quality and contaminated land? Frankly, I find that quite surprising, from the perspective of communities, if nothing else.

Neil Watt: On air quality, the provision in the bill relates to our reporting requirement with regard to the local air quality mapping system for local authorities. We have consulted informally with local authorities, scientists and the Scottish pollution control co-ordinating committee, and the requirement is generally deemed to be a less useful one that gets in the way of the more meaningful reporting requirements. The intention is to consult on that formally, but in practical terms we have a good opportunity to include it in the bill. We intend to consult those groups fully in the coming summer.

George Burgess: On contaminated land, the bill seeks to address an issue that has emerged from consideration of communities' concerns. The committee will be aware of the situation at Dalgety Bay, where there is radioactive contamination of the foreshore. SEPA has powers to declare that land to be contaminated land. One of the concerns that the community expressed to us and to SEPA

was about the blight of having a declaration of contamination with no real mechanism for that to be closed off at the end of the period. The provisions in the bill therefore come directly from the concerns of communities. They attempt to address the concern that if SEPA—in that area of land or another area—has to go down the route of formal designation, the area will be forever labelled in that way. The bill attempts to provide a mechanism so that, once the contamination has been dealt with and there is no longer a problem, there is a way to say, "Okay. That's finished and dealt with, so we can close that off."

There has been no consultation on that measure, except some informal consultation of professionals who are involved in that work. The provision very much comes from hearing and seeking to respond to the concerns of communities.

The Convener: I remind members and the panel that the minister wrote to us at the beginning of this week to say that contaminated land will be the subject of a set of amendments at stage 2, as will an environmental crime task force and, potentially, a national litter strategy. I guess, from the evidence that has been received informally, that those two things have emerged in the way that you have just explained.

George Burgess: Yes.

Nigel Don: I return to the practicalities with regard to the duties. How will SEPA and Scottish Natural Heritage implement the duties? Would that be done through pre-planning advice and looking at planning applications? How will those duties play out?

Neil Watt: I know that the committee is taking evidence from SEPA separately today and from SNH later. I think that they would argue that, in a general sense, they already contribute to the Government's purpose. I do not want to pre-empt what they say, but I have looked at their written evidence. I think that you are referring to the duty in part 1 that will be placed on regulators to contribute to sustainable economic growth. I understand that that will be underpinned by a code of practice, which will deal with exactly that kind of issue and which will be developed with input from the regulators. I can really only give you that general answer. You also mentioned planning.

Nigel Don: I was thinking that all kinds of things go on out there. SEPA is involved day to day in things that go on in the real world, but there are also lots of development proposals. Clearly, SEPA and SNH will want to be involved at the planning stage. I suspect that the answer that I am looking for is about a code of practice. As a parliamentarian, that always worries me, because I wonder how much should be in the bill and how much should be in a code of practice. However, that is probably the answer.

Neil Watt: The code will be consulted on and will receive parliamentary scrutiny in the coming year.

Bridget Marshall (Scottish Environment Protection Agency): To clarify, SEPA will not be under the duty in part 1. There is an exemption so that a regulator that is under a similar duty under other legislation is not subject to the general economic duty in part 1. The proposal is to write into SEPA's purpose the requirement to consider sustainable economic growth, so SEPA will be under a similar duty under part 2, and therefore part 1 will not apply to it. I hope that that is clear.

Nigel Don: I am clear about the issue, but I am not clear as to what you said, although I am sure that the *Official Report* will be. Are you implying that SEPA will have the general economic part of its duty throughout its activities?

Bridget Marshall: Yes.

Nigel Don: That will be a result of the changes that are being made, even if SEPA is applying something that was previously set up under a different regime.

George Burgess: Yes. The new purpose that we are providing for SEPA, which is in section 38, applies across the board to all SEPA's functions. That includes its functions of dealing with regulation, such as application for permits and the like, but it will extend to SEPA's involvement in the planning regime, for instance. That is in contrast to the current statutory provision in which, as I said, the only hint of purpose that is given to SEPA relates exclusively to its pollution control functions, which are a much narrower subset. As Bridget Marshall explained, there is a general duty on all regulators in part 1. The interaction between that and other duties, such as the new general purpose that is being set out for SEPA, is resolved in part 1, so that we do not end up with conflicting sets of duties on bodies such as SEPA.

Richard Lyle (Central Scotland) (SNP): I want to double-check the purpose of the provisions in part 3 on planning authorities' functions relating to charges and fees and street trader licences. Do those provisions relate to fairs or just to street trader licensing? When we talk about the environment in that regard, does that include noise?

George Burgess: I will pick up your questions in reverse order. Noise will certainly be an aspect of the environment that can be regulated; it is an element that can be controlled under the existing pollution prevention and control regime.

On street trader licences, I should confess that, in a previous role I was responsible for civic

government licensing. The provision on that is to deal with the current complexities under which mobile burger vans and the like need to get food hygiene certificates in each local authority area in which they operate. That is not thought to be in line with the practices of better regulation. The bill will allow such vans to be checked out in one area and get their certificate, which will be effective across the country.

The Convener: I point out that our committee is not dealing with part 3—another committee is dealing with that.

Richard Lyle: It was just a simple question while we have the people here. If you will allow me two seconds, convener, I would like to ask whether funfairs come under the part of the bill that this committee is not dealing with.

George Burgess: Funfairs are dealt with under the Civic Government (Scotland) Act 1982, probably under public entertainment licenses rather than street trader licences, which is what is referred to here.

Richard Lyle: It was just for clarification. Thank you.

Graeme Dey (Angus South) (SNP): I want to return to a particular subject, if I may. At the risk of labouring a point that Nigel Don raised, I would like some assurance on this issue. Can the panel conceive of a situation in which an argument is advanced for reordering the hierarchy, or in which pressure might be applied on the basis that economic growth must take precedence in particular circumstances? In such circumstances, can we be assured that such pressure would be resisted and that environmental protection would always be the priority?

George Burgess: That is why section 38 is written in the way that it is, with a clear hierarchy in place. As I have said, it acknowledges the three elements of sustainable development—the economic, the environmental and the social—and gives primacy to the environmental leg. We consider that to be right and appropriate for a body such as SEPA, which is an environmental protection agency, after all.

Neil Watt: We are also alluding to any tension between the three elements. Such tension already exists and SEPA manages it daily. As George Burgess said, the new purpose is set out in statute and it gives primacy to the environmental protection role.

Graeme Dey: That is fine. I just wanted that to be clear and on the record. Thank you.

Alex Fergusson (Galloway and West Dumfries) (Con): I think that Bridget Marshall has answered the first part of my question, which is how we expect the organisations involved to be able to balance the duties that the bill will impose on them with those that other legislation has imposed on them. I think that you answered that by saying that it will be fine—obviously, that is a paraphrase.

To turn that round a bit, do you think that the organisations involved will find it as fine as you think it will be? I am really asking whether there will be unforeseen consequences; obviously, if they are unforeseen, they have not been foreseen. Might there be any difficulties of that nature?

Bridget Marshall: By "organisations", do you mean those that SEPA regulates?

Alex Fergusson: No, sorry. I mean SEPA, SNH and the Food Standards Agency.

Bridget Marshall: To reiterate the point that we have already made, we are used to that balance and we do not foresee anything untoward arising that we do not already manage on a daily basis.

Alex Fergusson: If that is all to be managed, I presume that the outcomes will have to be measured or reported on, but there is no provision in the bill for such reporting.

George Burgess: SEPA is already subject to duties to provide annual reports on its functions, so I think that we can expect future annual reports to address the outcomes to which you refer.

Alex Fergusson: You expect SEPA to report the outcomes of the new duties in its annual report.

George Burgess: Yes.

Alex Fergusson: Okay. Thank you.

The Convener: We move on to part 2. Jim Hume has a question.

Jim Hume (South Scotland) (LD): Good morning, ladies and gentlemen.

I believe that chapter 1, on environmental regulation, would give Scottish ministers the power to bring forward secondary legislation to update SEPA's duties for purposes such as

"protecting and improving the environment"

and "preventing deterioration ... of ecosystems". Those are very broad terms, because we could argue that since man has walked on Scotland's land he has naturally affected ecosystems. We have large industries in whisky, aggregates and farming. How will that package of provisions work in practice, given that those industries have many different permits for different regimes?

10:00

George Burgess: At the moment, we have a series of different regulatory regimes of different

vintages with different provisions, some similarities and some bits that simply do not match up. To be frank, that is confusing for SEPA, the people who are regulated and Government. Part 2 will allow us to bring those regimes together and simplify them for the benefit of everyone concerned, so that farmers and distillers do not have to sit with a fistful of permits all written in different ways that are not necessarily consistent with each other under different regimes, but can have a single permit.

As far as European regulation—which, of course, is important in this area—will allow, it will also give the flexibility to make regulation more proportionate. At the moment, our water environment regulations allow for tiered regulation. Some of the most important things require a permit; lower-level things simply require registration with SEPA; other things can be done simply as long as some general binding rules are followed. There is a great deal of flexibility there, but we do not have that in some of the other regimes, so part 2 will allow us to spread the benefits from one regime to the others. It really should be better for all concerned.

Jim Hume: Okay. That sounds good.

We consider the financial implications—positive or negative—of any legislation. Perhaps you think that costs could be saved. Have estimates been made of whether the bill will be cost positive or cost negative to industries?

Neil Watt: We made it clear from the start that we expect there to be efficiencies for SEPA and for those whom it regulates. At a basic level, fewer permits means less administration. The ability to apply for permits online will save time as well.

Jim Hume: I am thinking not about time but about money. I am thinking about helping industries and cutting their costs, which are many and varied.

George Burgess: SEPA's time translates, of course, into money for the companies. Because the costs of the regulatory regime are met through SEPA's charging scheme, if it costs less overall for SEPA to administer the new arrangements, less cost will be passed on to the regulated entities through the charges.

Jim Hume: I will try to get as much detail as possible out of you. Has any estimation been made of how much industries throughout Scotland would save?

Neil Watt: It is hard to answer your question specifically right now, but I will try to answer it in a different way. The feedback that we had from the consultation was positive on the measure, pending the detail, how it is implemented and how SEPA engages with business on its implementation. We are aware of the need to work closely with the regulated bodies on the detail. Only when we are working on the detail and producing the guidance will we be able to attach cost estimates to it. However, there is an acceptance that it will have a positive impact for SEPA and those whom it regulates.

Jim Hume: Do you foresee doing that work before stage 3?

Neil Watt: That would be challenging. I am less familiar with SEPA's guidance. We can look into it, if that would be useful to the committee.

Jim Hume: It would be.

The Convener: We would like to know whether part 2 will be cost neutral. One assumes that, with a smaller budget, SEPA will have to maintain its income. Will charging for permits be a means of maintaining that income?

George Burgess: Part 2 is certainly not cost positive. It is not a cash-generating measure for SEPA. If it provides for efficiencies, there will be less work for SEPA to do and less resource will have to be expended on it, which should flow through to less expense to the regulated parties. It is certainly not a measure to try to find new ways to extract money from businesses.

Graeme Dey: To develop that theme, if SEPA's budget is reduced, in effect it still has to deal with a potential shortfall in income. Would there not be a temptation for it simply to maintain the charging regime at the current level in order to maintain its income, even though less work might be entailed?

George Burgess: I do not think that that is the way in which SEPA operates. SEPA will be better able to respond later, but the history over the past couple of years, when charges have been frozen, demonstrates that it is looking at ways to ensure that what it does is efficient as well as effective. It is not looking at ways to screw every last pound out of those whom it regulates.

Neil Watt: Going back to principles, we are moving from an activity-based system to a risk-based system. It will be difficult to compare, because SEPA will not be regulating everything that it regulates under the current system. It is accepted that by moving to the new model, SEPA will be able to make savings in how it operates and also in terms of the requirements for those whom it regulates.

Bridget Marshall: Although SEPA's charging schemes are not part of the legislative package, SEPA and the Government have consulted on proposals for reforming those charging schemes. The proposals were on moving to a risk-based, more flexible form of charging. There is a big commitment by SEPA and Government to work on

charging with stakeholders over the next year, as the proposals develop.

The Convener: Let us move to chapter 2.

Angus MacDonald (Falkirk East) (SNP): Good morning, panel. I turn to the additional powers for SEPA and powers of enforcement, such as fixed monetary penalties and non-compliance penalties. In which cases do you envisage that SEPA would use fixed and variable monetary penalties? What process would SEPA use to identify whether to impose a fixed or variable penalty and the appropriate level of penalty?

Bridget Marshall: The new enforcement measures that are being made available to SEPA will be within a framework of guidance from the Lord Advocate, who has a discretion around the disposal of offences in Scotland. He will provide guidance to SEPA about which offences are appropriate for fixed and variable penalties. Anything that I say is within the context of guidelines that will be developed with the Lord Advocate and which will set the framework for the use of the new enforcement measures by SEPA.

The fixed penalty is meant for very low-level, primarily administrative offending. The fines are set at a relatively low level in the bill. The proposal is that the maximum amount is level 4 on the standard scale, which is £2,500. We consulted in the May consultation on levels of around £500 for individuals and £1,000 for companies.

In the context of the Lord Advocate's guidelines, we expect that SEPA will use those fines for genuinely administrative offences relating to failure to supply data as a requirement of a permit, or perhaps for supplying false information. In other words, they will be offences in which no real environmental harm has been caused and which relate to the nuts and bolts of the administrative system.

The variable penalty is different. We have proposed in the bill that the maximum amount of the variable penalty will be £40,000. That will be set by order, so the amount has yet to be determined. It could be less than £40,000. The variable monetary penalty is to be used in cases of low-level—in terms of the offender's attitude and behaviour—offending. It is supposed to be used for companies and individuals that are generally compliant or perhaps confused about their financial obligations, in cases when there is no real criminal intent or deliberate intent not to comply with the environmental regulation, and when a low level of harm has been caused. The variable penalty is not intended to be used when there is either criminal intent or deliberate intent, or when any significant harm is caused. SEPA will continue to refer such cases for prosecution to the procurator fiscal.

Variable penalties are intended to be used in the middle ground. We refer some offences to the procurator fiscal but criminal sanctions are not necessarily proportionate and a gap has been identified. If the regulator is given the ability to serve such a penalty, that provides an extra deterrent for generally compliant businesses. We are talking about offences such as those around failure to comply with conditions. It is hoped that variable penalties will enable such situations to be dealt with in a much more proportionate manner, and much more quickly than if they were referred through the criminal courts.

Angus MacDonald: Is there a proposed ceiling for non-compliance penalties?

Bridget Marshall: As a response to the variable monetary penalty, someone can offer an undertaking to carry out certain activities. For example, instead of paying the fine, they can offer to undertake restoration of the environment from all the harm that they have caused. If they fail to comply with that undertaking, the non-compliance penalty comes into play, so it is of limited application in that sense. However, there is no ceiling in the bill on what the non-compliance penalty could be and we have been in correspondence with the Subordinate Legislation Committee on proposing a stage 2 amendment that would plug that gap.

Angus MacDonald: That is good.

As we know, operators are driven primarily by profit and loss and I note in the bill the regime for the imposition of fines for organisations and individuals. What measures are planned to prevent an offending operator from simply folding their operation, ignoring the fine and leaving local authorities and communities with the bill for cleaning contamination? Is it not worth considering requiring operators who apply for a licence to lodge a bond against failure to comply with a risk assessment?

George Burgess: That sort of system already exists in part of our regulatory regime. The pollution prevention and control regulations provide for SEPA, as part of the fit-and-proper-person test, to require financial provision to be put in place—it can take the form of a bond or a financial guarantee or some other mechanism. That will be available across the spectrum of regulated areas. It will be more appropriate in some areas than others—landfill is an obvious example in which we would want to ensure that sufficient safeguards are in place.

Angus MacDonald: Yes, not just landfill but waste transfer facilities, too.

Nigel Don: My point is not about subordinate legislation, although you might have expected it to be. On the idea of variable monetary penalties, am

I right in thinking that SEPA would only have to be satisfied on the balance of probabilities that an offence had been committed?

Bridget Marshall: You are right; that is the proposal in the bill. We have considered the issue long and hard. Similar sanctions are in place in England and Wales under the Regulatory Enforcement and Sanctions Act 2008—there they have a criminal burden of proof. We looked at that model and we thought about the context in which sanctions are being applied in Scotland, which is a very different legal context from that in England and Wales.

10:15

We felt that, on balance, the civil burden of proof was the right burden of proof in Scotland in relation to the sanctions. One of the major reasons for reaching that conclusion was to make a clear distinction in the bill between the role of the fiscal and the role of SEPA. They have distinct roles when it comes to the prosecution of offences. SEPA refers reports to the procurator fiscal, who considers the sufficiency of evidence in the context of making a public interest decision on whether to prosecute. SEPA does not have that role.

That contrasts with the Environment Agency in England and Wales, which is also the prosecuting authority. The Environment Agency deals with a criminal burden of proof in relation to criminal offences, and it is well used to deciding matters according to the sufficiency of evidence test. We felt that it would be clearer if the bill reflected the distinction in Scotland between the role of SEPA and the role of the fiscals.

We considered the issue in the context of the entire range of enforcement measures that SEPA has. SEPA has an existing ability to serve enforcement notices and revocation and suspension notices, all of which have a burden of proof at the civil level. We felt that the new enforcement measures sat within the package of enforcement measures that SEPA is dealing with. It was right that the burden of proof was a civil one.

We closely considered the human rights implications. For those of you who are familiar with article 6 of the European convention on human rights, it is more about the process around rights of appeal. It is very important to have a strong appeal route in relation to the sanctions. It seemed from our review that the civil burden of proof is sufficient to supply adequate protection with regard to the way in which the measures are to be used and implemented by SEPA.

SEPA already has the ability to serve civil sanctions in relation to emissions trading, and the burden of proof in relation to that is a civil one. We also considered a range of regulators that serve financial penalties, including the Office of Fair Trading, the Financial Services Authority and the Scottish Information Commissioner. It is quite usual in the regulatory context for there to be a discretion to serve financial penalties that have a civil burden of proof. We did not think that that was out of step in relation to other systems.

Nigel Don: Thank you for that wide-ranging response; it is very helpful to have that on the record. I cannot help having a feeling that my local farmers will say that the provisions give SEPA a way of implementing a fine without having to prove very much. Perhaps the net result will be to have a relatively low-level way of enforcing something and extracting a penalty, if I may describe it that way, and then to have a very large jump from that to going through the courts. There could be a huge burden of proof, the fiscal has to be involved and there are significant costs for SEPA and any other organisation involved.

I understand your rationale for having a low-level approach of that sort, which makes a great deal of sense, but we then finish up in a position where the average farmer or operator will think that SEPA will use that approach as often as it can, because it knows that going through the courts takes a huge amount more effort. SEPA will not want to do that, so the farmers think that they will keep being nudged using the other approach. That will be their reaction.

Bridget Marshall: We are entirely aware of that, and that is the downside of the system that we propose. There is also the allegation that we will put our weak cases through the route that involves SEPA imposing a sanction, rather than referring them to the criminal court. The safeguard around that approach lies in the guidelines that the Lord Advocate will give us, as well as in the way in which SEPA will implement it.

We thought long and hard about the matter. The point at which SEPA will make a decision on whether it will impose a penalty or refer a case will be quite late in the day, once the investigation has been carried out. It will be very difficult to make decisions about the extent of the environmental harm or even the culpability of the person involved until quite a late stage. We felt that there might be little practical difference between the evidence that SEPA gathers when it imposes a measure and the evidence that is gathered when it refers cases.

Graeme Dey: I want to return to the issue of administrative-type offences. I understand that, at present, such low-level issues are dealt with on a site-specific basis. That means that a company that operates six sites and fails to provide the appropriate data or to report in the appropriate way is not dealt with as a significant offender,

because no cumulative view is taken of its actions. Is there anything in the new proposals that addresses that, and if there is not, should not there be?

Bridget Marshall: Are you saying that we do not look at the pattern of offending as a whole?

Graeme Dey: SEPA seems to treat companies on a site-by-site basis. Is there anything in the bill that will address that?

Bridget Marshall: That would not necessarily be addressed through the bill; it is more of an implementation issue. SEPA will implement the measures in question on a much more national basis. We currently have regional peer review groups that look at what officers recommend be done on a site. In future, it is proposed that governance will be done nationally, so we will look at the way in which companies operate across Scotland in a much more rigorous way than we do at present. However, I think that that is more of an implementation issue than one that should be dealt with in the bill.

Graeme Dey: But it is an issue that you are aware of.

Bridget Marshall: Yes.

Graeme Dey: Okay. Thank you.

George Burgess: One of the bits of flexibility that the bill's regime provides for is what we have termed "corporate permits", whereby rather than a single body having a series of permits for individual sites, it would be possible to deal with them all together in a single permit. That might be a way of dealing with the sort of issue that you mentioned. There are upsides and downsides to that, as came out in the consultation, but the flexibility is there to adopt such an approach.

The Convener: We move to chapter 3, on which Jayne Baxter will lead off.

Jayne Baxter (Mid Scotland and Fife) (Lab): Good morning. Chapter 3, which relates to court powers, sets out provision for compensation orders, fines and publicity orders. How effective are the existing remediation powers? Under the current system, are there examples of cases in which fines have been imposed that have failed to offset the financial benefits that have been accrued by committing an offence?

Bridget Marshall: As you know, fines—like sentencing—are largely for the criminal courts, so it is hard to comment in any detail or to express particular views on them. Fine levels in the environmental field are generally felt to be low, as I am sure that the committee recognises. Last year, the average fine was just under £6,000, which is higher than it has been in previous years, so we feel that we are moving forward in a positive way, even if progress is not as rapid as some of us would like.

A package of measures is required on fines in Scotland. We have been working on some of those measures for a number of years. In recent years, through the Judicial Studies Committee, SEPA, along with the Crown Office, has trained sheriffs, and the Crown Office has developed specialist fiscals to prosecute environmental crime. Since 2011, there has been a specialised wildlife and environmental crime unit in the fiscal service that can get to grips with environmental law and present it to the criminal courts in an extremely positive way.

A number of measures apart from legislative measures can be taken to improve fine levels for environmental crime. In recent years, we have had the success story of fines of £90,000 and £200,000 being imposed, which we would not have believed possible even five years ago. I think that we are seeing a sea change in the approach to environmental crime.

Jayne Baxter: Thank you for that useful and comprehensive answer.

Claudia Beamish: Could any of you explain the issue further to me, as a layperson? Obviously, the issue of fines is for the procurator fiscal. Do I detect that you are pleased that there are more robust fines for very serious environmental crime? Waste crime, for instance, is extremely serious—I will perhaps leave it at that. I am concerned about whether the level of fines reflects the seriousness of crimes. Is there ever an opportunity to have dialogue with the procurator fiscal, or would that not be appropriate?

Bridget Marshall: To correct that, the issue of fines is for the sheriffs and the criminal courts, rather than the procurator fiscal. As I explained, we have worked with the Judicial Studies Committee and the Crown Office on a package of measures that will improve the specialism of sheriffs and fiscals in relation to environmental crime.

To tackle serious criminality in the environmental field—which is certainly there, particularly in relation to waste—SEPA has developed its own expertise and its relationships with other stakeholders, including the police, to enable us to take an intelligence-led approach to such criminality.

Jayne Baxter: Does the proposed £50,000 cap on compensation orders in respect of costs incurred in

"preventing, reducing, remediating or mitigating the effects of ... harm to the environment"

adequately reflect the potential associated costs?

George Burgess: That deals with only one set of provisions. Compensation orders have existed as part of criminal court powers since 1980. Because of how compensation orders were set up, their use in relation to environmental offending when there is no clearly identifiable victim has been limited.

Section 26 is trying to ensure that the criminal courts can use the compensation order mechanism to get money into the hands of a local authority or other body to help to remedy the damage. The limits that have been set are in line with the existing powers of the courts in relation to compensation orders, but there are other mechanisms for remediation—the offender can be required by the court to remediate the damage or SEPA can do the work and claim back the costs.

Jayne Baxter: Is there scope to use a range of sanctions—for example, a compensation order and the other measures—alongside each other?

George Burgess: There is. The provisions are quite complicated. We need to ensure that there is not an almost double recovery in them. If money has already been extracted from the offender or work has been done, they cannot be made to pay twice for the same offence. It is certainly possible for a combination of sanctions to be used.

Neil Watt: We have had quite a lot of feedback from stakeholders on the package of enforcement measures. We accept that we need to outline more clearly and in basic terms what is involved. We are facilitating an event on 11 June to bring together stakeholders to discuss exactly that issue; we hope that there will be more clarity after that.

Angus MacDonald: I would like more clarification about the terms "sustainable development" and "proportionate". Does the Government expect the bill to have a positive impact on sustainable development?

Neil Watt: Yes. That question could be answered in a number of ways. The requirement for SEPA to have regard to sustainable development exists alongside the new purpose. That requirement remains from the Environment Act 1995.

It is also important to look at what the parts of the bill that the committee is looking at do. In SEPA's purpose, the bill retains the reference to sustainable development. The integrated framework will have a positive impact on how businesses perform and how they comply with environmental regulation, and the enforcement tools will have positive impacts for communities in relation to tackling the most serious environmental risks. It is fair to say that the bill will have a positive impact on sustainable development.

10:30

George Burgess: I am afraid that our accompanying documents rather use the formulaic phrase of having

"no negative impact on sustainable development."

That is probably one area in which we are rather underselling what the bill does. As Neil Watt said, we see it as making a much more positive contribution to sustainable development.

Angus MacDonald: The bill mentions sustainable development and uses the word "proportionate". Sustainable development could mean different things to different people depending on their perspective on economic development and whether they are the Government, the regulator, the developer, the urban resident or the rural resident.

The word "proportionate" could also mean different things to different people. How will it be defined? It could be taken to refer to costs by operators, the employment of the best available techniques by the regulator, the drive for economic growth by the Government and perceived damage to the environment by communities.

George Burgess: I am struggling to remember where in the bill the word "proportionate" appears. I think that we would describe the system as one that is aiming to be more proportionate. Perhaps the member can point me to a particular use of the word.

Angus MacDonald: I am afraid that I do not have the bill with me.

George Burgess: Maybe we can pick up the issue outwith—

The Convener: You can always write to us.

George Burgess: That will be fine. As has been mentioned, in relation to sustainable development and the purpose, ministers are required to provide guidance to SEPA. Rather more can be set out there than is necessarily appropriate for inclusion in the bill.

Claudia Beamish: The policy memorandum that accompanies the bill states:

"The primary purpose of the Bill is to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment. It will protect our people and environment, help businesses to flourish and create jobs."

We discussed that earlier, but I mention it again to clarify my question. What assessment was made of protecting our people and environment and helping businesses to flourish and create jobs in relation to sustainable development, to ensure that we are on the right track?

Neil Watt: I am just trying to organise my thoughts on your question. We are talking about the balance between the Government's purpose—the national focus—and the global commitment to sustainable development. The Government's purpose is clear on the relationship between the two. We are very much focusing the bill and the wider programme on the contribution that regulators including SEPA can make to both elements. That is part of the Government's purpose, as outlined in the performance framework.

Claudia Beamish: Perhaps I was not clear, but I am particularly asking about the assessment in relation to our people as well as the environment. Communities are subjected to, say, noise from opencast mining or air pollution in Glasgow. I mention Perth as well, because it was in the news this week. It is important that we are clear—I would like to be clear, anyway—about what assessment was done in relation to sustainable development.

George Burgess: A number of assessments have been provided along with the bill. The provision on SEPA's purpose, for example, has gone from being something that talked about only the environmental aspects to something that much more clearly brings in the social aspects that we discussed. In cases to do with air quality and noise, the environmental and social aspects often go hand in hand.

There are other areas in which the environmental, social and economic aspects might point in different directions. I am thinking of, for example, conflict over different uses of a water body—between water sports such as canoeing, and hydroelectric facilities, for instance. The new provision about purpose will allow such matters to be taken into account, instead of the focus being on one element, potentially to the exclusion of others.

Neil Watt: Impact assessments were undertaken on the various parts of the bill and were fed into the policy memorandum, from which Claudia Beamish quoted. They are available on our website, and they highlight positive impacts of the proposals in the bill.

Claudia Beamish: Do they relate to Scotland's people and communities?

Neil Watt: Yes—the equality impact assessment is an example of that.

Claudia Beamish: I will check that.

Neil Watt: I can forward the assessments to the committee.

Alex Fergusson: I think that I heard Mr Watt say that one or two minor items in the bill were not consulted on, including vicarious liability. I put it to you that that is not a minor issue for an employer who might find himself or herself vicariously liable.

Neil Watt: I agree. It is certainly not minor. I suppose that I was talking about the length of the bill—

Alex Fergusson: Will you explain why that was not consulted on?

Neil Watt: The position is similar to the position on SEPA's purpose. There are references to vicarious liability on pages 15 and 24 of the larger, May consultation document. It is not that we did not mention the issue in that original consultation; we just did not ask a specific question on it. The proposals in the bill reflect the valuable feedback that we got from stakeholders on that important point. I make it clear that I was not belittling the issue. I suppose that I was thinking about the size of the reference to the subject in the bill in comparison with larger sections.

Alex Fergusson: Did you receive submissions that mentioned vicarious liability?

Neil Watt: Yes. A lot of the submissions in response to the original consultation mentioned the issue. I can forward the references, if that is useful.

Alex Fergusson: I will be able to find them, if I need to do so.

The Convener: I thank the bill team for its evidence. We will have a short break before we hear from SEPA.

10:37

Meeting suspended.

10:42

On resuming—

The Convener: I welcome the witnesses from SEPA: Calum MacDonald is executive director; Jo Green is corporate support manager; and Bridget Marshall is head of legal operations. Bridget Marshall was on the previous panel—you know what questions we will ask; we will see whether you agree with yourself. I invite Calum MacDonald to make opening remarks.

Calum MacDonald (Scottish Environment Protection Agency): Thank you for inviting us to give evidence. I welcome the opportunity to make a short opening statement.

As the committee heard earlier, SEPA has been directly involved in developing the Regulatory Reform (Scotland) Bill and the wider, better environmental regulation programme, jointly with the Scottish Government, as is illustrated by the fact that Bridget Marshall is supporting the

evidence giving by Scottish Government officials as well as by SEPA. Jo Green is SEPA's lead on the joint working with the Scottish Government.

I suspect that the committee is pretty familiar with what SEPA does, so I will not spend too much time on that. However, I want to say a little about our direction of change. I will explain why and how we are changing and, in particular, how part 2 of the bill will support us in that regard.

Key aspects of our change agenda have been and continue to be about: delivering and, where possible, improving our services while living within our means; ensuring that environmental regulation is not unnecessarily burdensome for businesses; focusing our efforts on the issues that matter most; working more in partnership with others; and delivering more by way of measurable results for the environment, communities and the economy.

Engagement with stakeholders has played a vital role in the development of SEPA's change proposals and we are fully committed to continuing that engagement as the proposals develop further. Our stakeholders have told us a number of things, one of which is that they want a simpler, clearer, more joined-up and outcome-based approach to environmental regulation. The bill will facilitate that.

The scope of the activities that we regulate will not increase or decrease significantly as a result of the legislation. It is more about improving how we regulate the existing range of activities.

10:45

An important part of being an effective regulator is to understand the people and organisations that we regulate and why they are—or are not—compliant. We deal with a wide range of operators, from serious environmental criminals at one end of the spectrum to environmental champions at the other, with many in between.

We want to work with those that we regulate to encourage and support compliance, and we will provide information, advice and guidance where appropriate. However, we also need an effective approach to enforcement. The proposed new enforcement tools will enable us to take a more proportionate and effective approach to the lower-level offences in particular.

We recognise the responsibility that is being placed on us by being given the new enforcement tools, and we will work with the Lord Advocate, who will issue us with guidance on how we should apply those enforcement measures. We will also engage our stakeholders on changes to our enforcement policies.

There will still be an important role for the criminal courts. As part of our change agenda, we want to do more to target operators engaging in criminal activities or those whose negligence leads to significant impacts on the environment and communities and whose actions undermine legitimate businesses. We very much welcome the provisions aimed at giving the courts a wider range of sentencing options.

As has already been mentioned this morning, the bill produces a statutory purpose for SEPA. We welcome the broad primary purpose of protecting and improving the environment and the fact that that includes managing natural resources sustainably. We also welcome the fact that the statutory purpose recognises the contribution that we already make and will continue to make to the health and wellbeing of communities and the economy. We very much believe that our work can—and already does—deliver multiple benefits for the environment, communities and the economy.

Many of the mainstays of Scotland's economy, such as the established industries of tourism, agriculture and the food and drinks sector, depend on Scotland's high-quality air, land and water. Effective regulation can stimulate business innovation, and achieving compliance—or going beyond it—can be a powerful marketing tool for business.

We recognise that the way in which we work can help to create the right conditions for new investment in business. Overall, part 2 will give us the right tools and flexibility to target our resource and effort where it is most needed.

I hope that you find that opening statement useful. We are happy to answer your questions, and I am sure that Jo Green and Bridget Marshall will pitch in where appropriate. If there are any questions that we are unable to answer fully today, we will be more than happy to answer them in writing.

The Convener: We have a limited time in which to ask questions so I hope that we can have short questions and succinct answers. Nigel Don can set a good example.

Nigel Don: Good morning to the newcomers and welcome back to Bridget Marshall. I think that it is the first time that the same person has appeared on the agenda under two different titles. It is wonderful.

In anticipation of your new approach to regulation, what will you do within the organisation to align your practices with the principles and processes that you hope to have under the legislation?

Calum MacDonald: We have been undergoing a change agenda at SEPA for a number of years. That continues, and the issues that will come to us

via the bill will help us towards completing the journey. We are training our staff for the new enforcement tools that will become available, and we are taking a hard look at our structure to ensure that it is fit for purpose.

Nigel Don: I can see that, if the legal environment is simpler, it will make life easier for everybody, but do you anticipate that you really will get greater efficiency and output out of the bill?

Calum MacDonald: Yes, we are confident that we will get efficiencies from the bill. The main driver behind the bill is not to achieve cuts; it is to make us better regulators. It will enable us to redistribute and redirect our resources to the things that matter most and to where the biggest environmental risk is. The redistribution, retraining and redirection are the most important things.

Nigel Don: So there is every prospect that, for example, the farmer down the road from me who has to have a visit and who gets charged £600 for a licence just to remove a gravel bank that his father and his grandfather moved might not have to have a visit or pay £600 for something that everybody knows needs to be done.

Calum MacDonald: There are specific questions around gravel banks, which my colleague Jo Green might help to answer. We have engaged seriously and effectively with the National Farmers Union on that particular issue, and we are working towards finding a more proportionate way of dealing with it. We are required to regulate it, and in discussions with the industry we are trying to find a sensible way of doing that that is not unnecessarily burdensome on the businesses and farmers involved.

Would Jo Green like to add anything to that?

Jo Green (Scottish Environment Protection Agency): Specifically on dredging, we have changed our approach, so if you need any clarification—

Nigel Don: Forgive me, but I raised that particular example merely so that you could give me a general answer, which I am sure is what we want to hear. Let us not worry about the specifics today.

Graeme Dey: On a theme that is similar to Nigel Don's theme, I want to take you back to a point that I raised with the first panel and the example of a company that operates a series of sites and is not adhering in reporting and administration to what is required of it across those sites. Currently, the sites are treated individually. In practice, what scope will there be for you to look at the cumulative issue and to address it? As a cumulative issue it is quite important, whereas on individual levels the issue is relatively trivial.

Calum MacDonald: I agree with what is behind your question. In his answer earlier, George Burgess started to touch on the possibility of a single permit for an organisation that covers several sites. That approach would give us more scope, or even more scope, to deal with the sort of issue that you are talking about.

I can comment on how we deal with that situation currently. If we have problems on a particular operator's site, that rings alarm bells on how it operates the other sites, and we will look closely across the sites. However, that is a question of how we organise ourselves rather than what is in the legislation.

The Convener: We will move to questions on chapter 1.

Claudia Beamish: Good morning to those to whom I have not yet said good morning.

What difference will the provisions make to the work of SEPA's enforcement officers? You have already highlighted training. How will SEPA's enforcement officers apply an ecosystem services approach in practice? Is that likely to be easier or harder than under the current regime?

Calum MacDonald: We are considering how we might apply the ecosystem services approach to regulation. There are particular challenges in that, and the thinking is not fully developed at the moment. I am therefore not in a position to describe in detail what that might look like in future.

On the difference that the provisions will make to our officers who are involved in enforcement, for me they will principally give a much wider range of enforcement tools to deal with the wide range of offences that are before us. The enforcement tools that are currently available to us are quite restricted, and there is a significant gap between the use of enforcement notices and a report to the procurator fiscal for a prosecution in court. The bill helps to fill that gap and enables us to deal with some of the lower-level offences in particular in a way that does not require full prosecution in the courts.

Claudia Beamish: I appreciate that work on the relationship between the provisions, SEPA's work and the ecosystem services approach is in development, but could you say something about that for us, please? How is it developing?

Calum MacDonald: I will let Jo Green have the first crack at that, but I might come back in.

Jo Green: That is an area of strong interest for us. We know that the environment provides a lot of natural services that are important to communities and the economy in Scotland. The difficulty for us is that it is an emerging approach, so thinking

about how it might apply to individual regulatory decisions is a bit down the road.

We are considering how we might engage better with development planning in the planning system, and we have started to think about an ecosystem services approach to river basin management planning and some of the measures around it. We are thinking more about the strategic plans that we deal with and how we might embed some of the thinking in them.

Claudia Beamish: Are the changes in the bill likely to be cost neutral? How is the work of SEPA that we have discussed today measured? With the previous panel, we heard about the annual report, but what other measurement is there of specific streams of work?

Jo Green: To add to my previous answer, there is an additional reporting requirement on SEPA under the Public Services Reform (Scotland) Act 2010 to report specifically on how we are contributing to sustainable economic growth. That already exists.

More broadly, we have some baseline information as we shift towards the new approach. We monitor the environment and we have information on the number of complaints that we get. We also have information from our inspections and the compliance results.

We therefore have a body of baseline information. As we proceed, we will keep that under review and see what the impact of the shift is. The whole point is to have the flexibility to go out and get measurable results. In future corporate plans, we should see much clearer targets and the results of our work to go for them.

Claudia Beamish: I should probably know the answer to this next question, but I do not. Is the information that you have just talked about publicly available on your website and, if not, will it be in future?

Jo Green: We report annually on compliance but, from early 2015, our website will have on-going or regularly updated information on inspections. That will set out who we have inspected, the inspection frequencies for certain areas and what the compliance results are on an on-going basis. That will be much more easily accessible.

As part of our change agenda, we are interested in citizen engagement or citizen science. We have a partnership of bodies under Scotland's environment web but, in future, we want to get communities to report to us about issues in their areas much more.

Claudia Beamish: I probably should not have asked two questions at once, but I also asked whether the changes are cost neutral.

Calum MacDonald: They are cost neutral. We are not seeking additional resource to enable us to do the work. We will redistribute the resource that we already have.

I can add briefly to Jo Green's answer about reporting. Our annual report is comprehensive and it covers the corporate targets that we have set ourselves. In addition, we report annually on our enforcement activity, such as the number of prosecutions that we have instigated and the number of enforcement notices. We also report annually on the level of compliance in the full range of activities that have licences or permits from us.

The Convener: It would be fair to say that members receive a nearly weekly update on your activities, including things such as successes in the courts.

Calum MacDonald: Good—I am glad to hear it.

The Convener: That is in addition to the statutory returns and is helpful.

We come to chapter 2 and powers of enforcement. Jim Hume has questions on that.

Jim Hume: Convener, can I ask a supplementary question, before I go on to that?

The Convener: Whyever not?

Jim Hume: I explored charges with the previous witnesses. Mr MacDonald, you say that the bill will be cost neutral, but with the previous witnesses I tried to eke out whether there could be a positive cost implication for industries such as whisky, farming and aggregates—I think that those are the ones that I mentioned. Obviously, simplification possibly means that less manpower will be required. Do you foresee the bill resulting in reduced charges for licences?

11:00

Calum MacDonald: I do not want to pre-empt the results of our consideration of a new charging scheme for SEPA, but I suspect that there will be some winners and some losers. We want our approach to be based on risk, so the level of both our charges and our activity will be based on the risk to the environment. We will put more effort into the processes that present more environmental risk and less effort into the ones that carry less risk.

Overall, I would see the changes to the charges that we make to industry as being broadly neutral. For me, the main gains will come from there being less delay—we will be slicker in processing applications, which will mean the industry is presented with less in the way of delay. The costs of complying should also be lower as a result of the flow-through of the legislation.

Jim Hume: Let us move on to chapter 2. How will SEPA ensure a consistent approach across the organisation to the application and level of penalties?

Calum MacDonald: There is the Lord Advocate's guidance, which Bridget Marshall mentioned earlier. We will also have robust internal governance arrangements. People should not be concerned about officers going out on inspection and imposing fines. That will not happen—it cannot happen. There will be governance arrangements to ensure that decisions are made consistently and at an appropriate level in the organisation.

I suspect that in the early days of the fines, many of the decisions will come to me as executive director. They will not be made by officers in the field. We will make sure that robust arrangements are in place.

Jo Green: I can put the new enforcement tools in context. Our approach is all about achieving the right outcomes. Sometimes that needs enforcement tools; sometimes it does not. It is really important that we are clear on that.

One example, which I think that you are possibly aware of, is the work that we have done on diffuse pollution in priority catchment areas. In those extensive walkovers, we found 5,000 breaches of the regulations, but we did not take enforcement action. Instead, we worked with the sector and farmers through a campaign to provide advice to get their performance back up.

Some of the figures are very encouraging. We are revisiting farmers and, in the 277 repeat visits carried out to date, 75 per cent of farms have remedial measures in place—the improvements have been achieved. We have not had to revert to enforcement tools, but they are a critical backstop for us as a regulator.

Jim Hume: Mr MacDonald, you made the point about decisions on fines coming across your desk. Ultimately, you are responsible for a huge amount. Will a certain level of fine come to your desk, or will it be all of them? I presume that the vast majority of fines are small scale.

Calum MacDonald: The more significant ones will certainly come to me. Below that, there will be robust governance arrangements so that individual officers cannot just make decisions willy-nilly and we drive consistency and proportionality.

Jim Hume: That is fine; we have explored that point.

The Reservoirs (Scotland) Act 2011 also enabled enforcement to be undertaken. What is SEPA's view on whether the application of that act has worked?

Bridget Marshall: The 2011 act contained the ability to put in place enforcement undertakings. No regulations have yet been made under those enabling powers, so there is no experience in Scotland of enforcement undertakings.

There is significant experience in England and Wales of enforcement undertakings. The Environment Agency was given them for a limited range of offences under the Regulatory Enforcement and Sanctions Act 2008 and it has agreed about 99 enforcement undertakings in a two-year period. It has found them a very helpful tool in achieving enforcement outcomes.

Interestingly enough, those powers have been used mainly to enforce the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 for administrative-style offences that involve not environmental harm but obligations to recycle waste. As companies can gain a significant financial benefit from not complying—there is a cost to complying with the packaging regs—the Environment Agency has found those powers very useful. It is easy to calculate the amount of financial benefit that a company has gained from failing to comply, so the agency has been able to accept enforcement undertakings that remove that financial benefit. Such undertakings have been important in levelling the playing field in that area of law.

The Convener: We move on to chapter 3, on court powers.

Graeme Dey: My question is probably directed at Calum MacDonald. Can you provide examples from your experience of where the fines imposed have failed to offset the financial benefits that were accrued by committing the offence? How will the new regime be an improvement?

Beyond fines, will the £50,000 cap on compensation orders that we discussed earlier be sufficient in helping to complete the deterrence regime?

Calum MacDonald: I think that Bridget Marshall comprehensively answered the question about fines earlier. There is a general feeling—not just in Scotland—that environmental offences do not attract the level of fines that we might otherwise wish for. However, the trend is definitely moving in the right direction. As Bridget Marshall explained, we have made efforts in the legal community to raise the profile and awareness of the importance of our environment. The recent fines of £90,000 and £200,000 are prime examples of that.

We are also seeing an increase in the number of cases in which community payback orders are applied. I speculate here, but I suspect that we are getting close to the point of applying a custodial sentence for environmental offences. To the best of my knowledge, there has been only one

custodial sentence for an environmental offence in Scotland, but I suspect that that is close to coming back again.

That is my experience of fine levels. Perhaps Bridget Marshall can say something further about compensation orders.

Bridget Marshall: On the cap for compensation orders, the member is right that, in many cases of remediation, £50,000 will not go very far. However, my understanding is that the cap is in line with rules in the criminal justice system and that it came from the justice side of Government. All that we can say is that compensation orders will be useful in some circumstances and will probably be used most often for the removal of waste that has been fly-tipped. In those circumstances, £50,000 will go some way. The compensation will be able to be paid to SEPA or the landowner, so it will be useful in that context.

Graeme Dey: To sum up, do you feel that the direction of travel is appropriate and is sending out the right message to those who would play fast and loose with the environment?

Calum MacDonald: Yes. That is my one-word answer to that.

The Convener: We move on to chapter 4 and vicarious liability.

Richard Lyle: Good morning again. Vicarious liability was mentioned some time ago. Will the witnesses give us evidence of cases in which SEPA was unable to prosecute an employer under the old regime but will now be able to do so? How many times has that happened? How many convictions have there been in other regimes where employers have been found vicariously liable?

I should give notice that I have another question after that one.

Calum MacDonald: I will ask my lawyer to answer that one.

Richard Lyle: It is a good job we have them with us.

Bridget Marshall: Yes, we are useful for something.

The concept of vicarious liability was introduced recently in two acts, but perhaps the one that members will be most familiar with is the Wildlife and Natural Environment (Scotland) Act 2011, for which I understand the vicarious liability provision was introduced by a stage 2 amendment. I am not aware of any prosecutions in which the provision has been used, but we can certainly find out about that if the committee is interested.

On the context in which SEPA will use vicarious liability, most of our prosecutions are against companies. In circumstances in which an employee has carried out an act such as illegal dumping of waste, SEPA has to track back and collect a significant amount of evidence that demonstrates that the company did not adequately supervise, train or support its staff.

The vicarious liability provision is therefore about shifting the burden of producing the evidence away from SEPA and towards the employer, and ensuring that employers have a strong ethos of environmental responsibility and that they properly train, supervise and support their staff. A due diligence defence is attached to the provision, which means that if the employer can demonstrate to the court that it has taken reasonable steps and that it did not know that the offending was taking place, then it has a defence. What that means is that the employer will have to present that evidence, rather than the burden being on SEPA and its having to track back to find the criminal responsibility being with the employer. We have a number of examples in which employees' acts have meant that SEPA has had to spend a significant amount of energy on an investigation to track back and attach the criminal liability to the employer.

Richard Lyle: Thanks for that. Can we turn to the cause of significant—

The Convener: Before we do so, Alex Fergusson has a question on vicarious liability.

Alex Fergusson: I am grateful, convener. The thorough explanation that Bridget Marshall has just given highlights potentially quite a change of emphasis and a burden for employers in all this. Is that not quite a shift in burden not to be consulted on?

Bridget Marshall: Perhaps that is a question that you should have put to the Government—

Alex Fergusson: I did—or rather, I will.

Bridget Marshall: —rather than to SEPA.

Alex Fergusson: Okay, fair enough.

Richard Lyle: On the issue of significant environmental harm, are there any examples of offences where significant environmental harm has been caused but the courts have been unable to respond appropriately? How many times has that happened?

Bridget Marshall: The significant environmental harm offence arose from consideration of the fact that most of the offences in the environmental field are around regulatory non-compliances, so are about not complying with the regulatory requirements. In that sense, the offences do not focus on harm or damage to the environment. In a discussion with the specialist fiscals, they made the point that it is difficult to lead evidence in

relation to regulatory offences around the environmental harm caused. In many cases, particularly when we are talking about failure to have a permit, they are left presenting evidence about the failure to obtain a permit when in fact those concerned would not have been given a permit in any event for the activity that was being carried out in a particular location. However, that aspect somehow gets lost in the presentation to the court. So it is very much about making environmental harm, and significant environmental harm, the focus of the offence.

A good example of when significant environmental harm is caused is when large-scale illegal landfills are developed in locations in which SEPA would never permit them to be. In such circumstances, the new offence will make it possible to lead on the harm to the environment that has been caused rather than the failure to have a permit. It will enable us to present environmental harm evidence to the courts in a powerful way.

11:15

We perceived that there was a gap, apart from under the Environmental Protection Act 1990, in which there is a harm offence in relation to waste. In all the other regimes, there is no offence that enables us to focus on the environment. I have some examples that bring that home, one of the best of which is an explosion of cement powder at a cement batching plant that was operated under a PPC permit. As a result of the explosion, 5 tonnes of cement were released into the atmosphere, which caused pollution of widespread scale and effect.

The operating company was charged with breaching a condition of the permit that required emissions to be free from visible emissions of particulate matter. The breaching of that condition of the permit was the only thing that came anywhere near being an offence for which we could refer the company to the fiscals. That was entirely inappropriate, given that it was such a significant environmental event that would never have been permitted. However, we were left having to demonstrate that the company breached that particular condition, which was not to do with the significance of the harm that was caused or even the type of event that took place.

I hope that that is a helpful example of why we think that the significant environmental harm offence is necessary and why it will improve our ability to prosecute companies for causing such harm.

Calum MacDonald: I agree with Bridget Marshall that, rather than for cases in which environmental harm has already happened, the new offence will be particularly useful in cases in and around the field of illegal landfill sites, which are a growing problem.

Angus MacDonald: You will not be surprised to learn that I have a couple of questions about waste management offences. The first, which is for Calum MacDonald or Jo Green, is about the proposed inclusion in the bill of partnerships. At present, how many partnerships in which one of the licence holders might not be regarded as "fit and proper" hold licences to transport controlled waste? Has any estimation been made of the number of licences that might be captured by the new provision?

Calum MacDonald: I do not think that we can give you specific figures. I suspect that there will be a considerable number of waste carrier registrations that involve partnerships. I do not think that there is any doubt about that.

Bridget, do you have anything to say about the partnerships issue that might help to address Angus MacDonald's question?

Bridget Marshall: No, other than to clarify that what is proposed is largely a technical, legal amendment to ensure that we can look at a partnership—as well as the individual partners within it—as a legal entity.

Angus MacDonald: Okay.

I would like to broaden out the issue of waste management and pick up on a earlier question by my colleague Graeme Dey. I know that I am not the only constituency member to have issues with some waste management companies, but we need to be aware that we do not protect one section of the environment at the expense of another section of the environment, and that those citizens who live in what might be referred to as a blighted area have a right to seek improvements to their living environment. Development plans and Government policies need to take that into consideration. Areas with an industrial history appear to be targeted for what some might describe as less attractive developments that often give rise to environmental issues.

For example, the national waste strategy encourages development in proximity to similar pre-existing facilities or in established industrial locations. As you will be aware, that can and has caused difficulties in my constituency. Current planning rules allow for changes of use without any public consultation and with only cursory notification to SEPA. The location of waste management facilities—in particular, waste transfer stations—in industrial areas also encourages the transport of waste over long distances, which is contrary to the national waste plan. To get to the point, is there provision in the

bill to help prevent the location of waste transfer stations next to or near residential areas?

Calum MacDonald: I am not sure that the bill will help with decisions about the location of facilities; that is more of a land use planning issue. The bill will, however, give us a better range of tools to deal with sites that are in close proximity to housing. If I were to pick one sector where the bill's provisions will be most helpful, it would be the waste sector. The range of tools available and the flexibility that the changes to the system will give us will allow us to apply more effort to exactly the type of circumstances that you have described.

Angus MacDonald: To follow on from that, should the burden of proof not be moved to the operator for it to prove that it is not responsible for a reported event and its operation suspended until it can provide that proof to SEPA? As I understand the process, at the moment SEPA has to gather evidence of a breach of licence conditions and, until it does so, the operator is free to continue in action.

Calum MacDonald: Bridget Marshall might want to have a stab at that one.

The Convener: A rapid thrust.

Bridget Marshall: Yes. That is true in terms of referring a report to the procurator fiscal. It depends on the significance of what the operator is doing. SEPA might take other action as well; it might issue an enforcement notice or some sort of suspension notice that stops the operator carrying out the activity or parts of the activity while the report is referred and until its non-compliance is brought back into compliance. There is a range of enforcement tools that SEPA uses in different—and proportionate—ways and which have different effects, depending on what needs to be achieved in the circumstances.

The Convener: We move rapidly to chapter 5, which amends the Environment Act 1995.

Graeme Dey: Do you anticipate that SEPA will find itself contending with a conflict between managing natural resources in a sustainable way and achieving sustainable economic growth, or does the hierarchical structure of the bill make that situation clear cut? To put that another way, on a day-to-day basis—working at the coalface, as it were—are you clear in your priorities and purpose going forward?

Calum MacDonald: Yes, we are clear in our purpose. I do not think that a shift in our main focus is being imposed. There is a clear understanding of what we have been established to do, which is to protect the environment. There are other things that we have to take account of in decisions that we make on a daily basis. The purpose as drafted in the bill accurately reflects the way in which we operate currently.

Graeme Dey: You will be aware that certain environmental groups look at examples of bills for better regulation that have been lodged in other countries which, in the view of those groups, shifted the balance inappropriately. What reassurance can you give such groups and the committee that protecting the environment will always be the priority?

Calum MacDonald: That is what I am in the job to do. Perhaps that is not enough to reassure the committee. Changes in the regimes of other countries are much more part of a deregulatory agenda. I firmly believe that that is not what the bill is about. For me, it is about improving the way in which we regulate and making our duties and responsibilities as a regulator more transparent.

Graeme Dey: Thank you. That is useful.

Jayne Baxter: Calum MacDonald, you said that you were confident that interpretation of the provisions in chapter 5 can be balanced against existing duties. Can you give any examples of where those provisions will be used in practice and how they will be prioritised?

Calum MacDonald: I will ask Jo Green to answer that.

Jo Green: Is that in terms of our new general purpose?

Jayne Baxter: Yes.

Jo Green: An example of where we have balance and where we can contribute is what we did on planning services reform back in 2008 and 2009, when our new chairman, David Sigsworth, came in. He knew that we were playing a valuable role with the advice that we were giving, but he was clear that we could improve our role in planning. When we analysed what we were doing and spoke to the development sector and planning authorities, it was clear that a lot of our advice was slow and so broad that it was difficult for people to understand what the important advice was. Often we were coming in quite late in the process.

We changed what we did quite significantly and put much greater effort into development plans. If you get those right, it is much easier to get the development management side right. We put much more focus on pre-application engagement—on engagement early rather than late on in the process. We replaced a lot of the advice that we were giving on the low-risk stuff with standing advice.

Not only were there efficiencies and a better, quicker service, we could track the impact of our advice so we knew the uptake of our advice and that our advice was having a really good impact.

We did all of that without in any way compromising our role on the environment. We were absolutely helping the economy and communities.

Jayne Baxter: There is no reason why that will not continue.

Jo Green: Absolutely. It is just a balancing act that we already do.

Calum MacDonald: Those balancing decisions are literally taken on a day-to-day basis. Another example would be when we have a particular requirement on a permit holder. We can come and go about timescales, rather than being hard and fast. Those things are done in discussion with the operator. We take into account the wider context in which they are operating.

Jo Green: There is a focus on the economy part of this, but there is also the health and wellbeing element.

Jayne Baxter: I am more interested in the health and wellbeing element, if I am allowed to say that.

Jo Green: SEPA already has a role in health and wellbeing. We are Scotland's flood risk warning body. With the Health and Safety Executive, we play a role in the control of major accidents and hazards. We are a category 1 responder to major incidents.

Occasionally, as a regulator, if the issue is about life or a short-term impact on the environment, we sometimes have to make a decision that protects life. As a regulator, we already make those balancing judgments.

Jayne Baxter: How do the proposals in chapter 5 relate to the proposals in section 4, which require regulators to

"contribute to achieving sustainable economic growth".

Is there a duplication of provisions? What are the implications of that?

Calum MacDonald: Bridget Marshall attempted to answer that earlier, but you should hear it from us directly. Bridget and Jo Green want to contribute on this one.

Bridget Marshall: As I explained earlier—I think that George Burgess covered this as well—section 4 exempts those regulators that have a similar duty under any other enactment from that general duty. As SEPA is getting a similar duty in part 2, the general duty under section 4 does not apply to SEPA.

Jo Green: The code of practice linked into that duty would apply to us. We will be on the group that will help the Government to develop a code of practice.

Jayne Baxter: That is helpful.

Angus MacDonald: This may be an operational issue but, as we have you here, I will ask about it anyway. There are communities in which, due to the nature of the economic activity, the risk of environmental incidents is higher. I am thinking in particular of my constituency. Should consideration be given to locating SEPA personnel in those communities to facilitate a faster response to environmental incidents and to ensure clear oversight?

Calum MacDonald: We are very conscious of our environmental footprint and our coverage throughout the country. We have officers located in 23 offices, from Orkney and Shetland right down to the Borders. I am not sure what you are suggesting with regard to the location of officers. I want my guys out in the field as much as possible rather than sitting at desks and keyboards. I am happy to consider the specifics of your constituency case. I would be happy to have that conversation, away from this table, about how we might achieve what you are asking in a better way.

Angus MacDonald: That would be good. Thank you.

The Convener: We have asked all our questions. I thank the panel for their evidence, which will help us along our way. We are dipping our toes into areas that are important for the country. Thank you.

11:30

Meeting suspended.

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 29 May 2013

[The Convener *opened the meeting at 09:37*]

Regulatory Reform (Scotland) Bill: Stage 1

The Convener (Rob Gibson): Welcome to the 19th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. I ask everyone to remember to switch off their mobile phones, BlackBerrys and other electronic devices, as they affect the broadcasting system.

Agenda item 1 is two evidence sessions on the Regulatory Reform (Scotland) Bill. The focus of the first session will be part 1 of the bill, and in particular section 4. In the second session, we will concentrate on part 2.

For the first panel, I welcome Bill Adamson, head of food standards, hygiene and regulatory policy at the Food Standards Agency Scotland; Roger Burton, programme manager for wildlife management and social and economic development programmes at Scottish Natural Heritage; and Dr Sarah Hendry from the University of Dundee.

I kick off with a general question, which I think is quite germane. Are you content with the consultation process? Do you believe that it was consistent with the Government's principles of better regulation?

Dr Sarah Hendry (University of Dundee): I am happy to start on that. I thank the committee for inviting us to give evidence. We generally welcome the ideas behind the bill. There has been a lot of consultation on the bill's principles, and we very much hope that that will continue in the next, critical stage of developing the regulations and the guidance.

The Convener: Okay.

Roger Burton (Scottish Natural Heritage): I second the appreciation for the invitation to be here. SNH is content with the way in which the consultation was carried out. We responded to the Scottish Environment Protection Agency's better environmental regulation consultation and the Government's better regulation consultation. I have also had other discussions with SEPA in particular about the way in which its agenda is shaping up.

The Convener: What about the FSA?

Bill Adamson (Food Standards Agency Scotland): Thanks for inviting me along, convener. Similarly, we have been involved in the consultation. We formally responded to it and we participate in some of the regulatory forums that Russel Griggs has set up, so we have day-to-day dealings with the department.

The Convener: Was the consultation transparent, accountable, proportionate, consistent and targeted? You do not have to address each of those things individually. If there is anything that stands out as not being any of those things, this is the time to tell us. Do you have any comments?

Witnesses: No.

The Convener: Okay. Those are the better regulation principles. We will now see whether they apply to the bill.

Nigel Don (Angus North and Mearns) (SNP): Good morning, colleagues, and welcome to what I hope will be a high-level discussion about sections 4, 5 and 38, which deal with codes of practice, what your priorities should be and the hierarchy—if one is needed—of duties and responsibilities. I start with an open-ended question to you all. Are you comfortable that you know what the bill says and what it will mean in context?

Dr Hendry: A number of aspects of the bill would benefit from greater clarity. They include the questions of what is meant by "sustainable economic growth" and why the regulatory principles appear in section 6 in relation to the code of practice, but are not applied to the regulator. I also have some questions about part 2 concerning things that it might be better to have in the bill, although I appreciate that we are not discussing that part just now.

Nigel Don: Thank you for that. We will discuss part 2 later. There will also be questions on the phrase "sustainable economic growth", which is an issue. I am asking more about the structure and the hierarchy of what is involved in sections 4, 5 and 38. Are you clear about what is in the bill and what it means?

Dr Hendry: Section 38 begins with the purpose of SEPA, which includes "sustainable economic growth". That is clear if one knows what "sustainable economic growth" means. The same applies to section 4.

On the code of practice, section 6 states that the regulatory principles are to be embedded in the code, but they do not appear in section 4 as applying to the regulators. That seems to me to be worthy of discussion.

Nigel Don: Yes, I am with you on that. Can your colleagues say something about where we are on this?

Roger Burton: SNH welcomes the general thrust of the bill and we are comfortable with the sense of section 4. We acknowledge that there are questions about the precise wording, but that does not give us a difficulty in relation to our existing balancing duties. There may be a question about the extent to which the specific powers are met by the way in which our balancing duties are expressed. However, we are comfortable with the broad interpretation of that.

Bill Adamson: Our response is similar, in general terms. Our organisation has a statutory function to protect public health from risks arising from food, and the phrase in section 4(1) is inconsistent with the exercising of those functions in that, although we will do a number of things to ensure that we promote economic growth, we will not do those things in such a way as to endanger public health. However, we take it that that is what the last part of the sentence in section 4(1) indicates.

We have one comment on section 5. We have a good sense of what the regulator's code of practice will be, but I suggest in my written evidence that it would be useful to have a clear caveat about where that code of practice might interact with other codes for which ministers have responsibility. For example, in our area, Scottish ministers already have powers under the Food Safety Act 1990 to provide codes of practice for the enforcement of food law, and they have made those codes of practice, which we oversee. The implication is that the new code would be without prejudice to any statutory provisions that exist elsewhere, but it may be useful to have some sort of caveat in the bill to clarify that that is indeed the case.

09:45

Nigel Don: Might the principle not be that the code in the bill will displace any previous code that is inconsistent with it? That is what I would expect as a general principle of statutory interpretation. I would have thought that an existing code of practice would be displaced by the one in the bill.

Bill Adamson: In so far as the code that we have at present is designed specifically to give authorities direction as to how they carry out their functions, and it has consistency elements, there is a potential overlap with regard to consistency. I guess that the code that is envisaged in the bill will be much broader in its sense of the requirement for regulatory consistency. The elements of the existing code of practice that we oversee are there not implicitly but almost as a consequence of what the code says. That code covers more than I envisage the new code will cover. Given that both codes will have been made under primary legislation, there might be an issue about which will take precedence.

Nigel Don: I am genuinely trying to see whether there is an issue. I am not trying to confuse you; I am trying to explore what the bill will do. Am I right in thinking that section 4(4) will mean that section 4(1) will not apply to any regulator that is already subject to a duty? If you already have something that you regard as a duty, regulation or code of practice, perhaps you are exempt anyway.

Bill Adamson: I read that in the context of the sustainable economic growth part of the bill, but I did not quite see that that reads across to section 5 and the code of practice.

Nigel Don: As I said, I am not here to try to confuse anybody, but am I entitled to suggest to anybody who is listening or anybody who will read the *Official Report* that you are not entirely clear how those things will interact? I am not trying to dig you into a hole; I am looking for your words and, indeed, those of your colleagues.

Bill Adamson: Some clarity would be useful.

Nigel Don: As I understand it, section 4(2), which provides for ministers to give you guidance, will probably not provide for anything that they cannot do anyway. Am I right in thinking that section 4(3), which colours the provision in section 4(2) by saying that you as regulators "must have regard" to that guidance, is perhaps the change? Is forcing you to have regard to that guidance a change to your current position?

Roger Burton: It makes no difference for SNH because we have regard to guidance that ministers give us in any event.

Nigel Don: If your lawyers disagreed with Government lawyers on what something meant, what would happen? Would you automatically do what a minister's guidance said?

Roger Burton: We would advise the Government. It would depend on what form the guidance took, but ministers can direct us under our founding legislation. Ultimately, ministers are at liberty to provide that direction and we need to observe it.

Nigel Don: So guidance that you would have to take notice of under the bill might be the same as direction under other statutes.

Roger Burton: It could be, or it could be more general guidance about the manner in which one approaches certain things, which would be, if you like, less directive and more of a steer on the general principles that we should adopt. Guidance is a broad term.

Nigel Don: Indeed. I ask you again whether you are comfortable that you understand what is in the bill and what it will mean for your organisations.

Roger Burton: It is a broad, enabling bill. There is a lot of detail that is not in it and we do not yet know precisely what form that detail will take, but we do not have any difficulties with the principles of the bill, the general thrust behind it and the structure that it provides.

Dr Hendry: I suppose that some things might depend on how "sustainable economic growth" is to be construed and developed in policy and guidance. Until we know that, it will be difficult to tell whether there will be any conflict with other functions or codes of practice.

The Convener: Graeme Dey has a supplementary question before we move on.

Graeme Dey (Angus South) (SNP): In practical terms, how feasible is it for one code of practice to adequately take account of the divergent roles and responsibilities of the various regulators that are set out in schedule 1?

Dr Hendry: That will be ambitious, unless it is done at a high level. It is hard to say how it could be done at a more detailed level without an extremely extensive piece of documentation.

Roger Burton: I agree. Any such code would have to function at a high level. Much of what the bill intends to achieve concerns culture, and I would be thinking in terms of a high-level code that can cover the desired behaviours.

Graeme Dey: Are we looking at having a sort of pyramid structure whereby there would be a high-level code with something more specific to the regulators underneath that?

Roger Burton: That is conceivable.

Graeme Dey: Would that be preferable?

Roger Burton: Again, we act as a regulator in a number of different ways, so there would be a question about how the various regulatory functions that we have would be dealt with. However, where it was necessary and it added some value, I would not have a difficulty with that suggestion.

Bill Adamson: Similarly, I expect that there will be quite broad principles. My organisation is a Government department and we have a role of directing others in terms of regulatory functions. In fact, the vast majority of functions are carried out on our behalf by local authorities. To a certain extent, the code is likely to affect those who deliver on our behalf as opposed to us. In that sense, our regulatory function has been a relatively limited one. As I said earlier, ministers have already issued a specific code of practice that gives local authorities direction with regard to the detail of those functions. Therefore, if the code involves high-level principles, I do not envisage there being any conflict.

Roger Burton: In the planning system, we provide guidance for others to observe. We can see benefits in the code giving weight to that sort of guidance, which will help to create a degree of consistency of approach to natural heritage issues in the planning system.

Graeme Dey: You are saying that there would be a broad, overarching code for everyone and that, below that, you would continue to do the same things that you do now, where that was appropriate. Is that correct?

Roger Burton: Underneath that, there is policy as well. As I see it, the code is about how regulators conduct themselves. Policy will then guide the detail of how they do that.

Nigel Don: Do SNH and the FSA feel that the duty to contribute to "sustainable economic growth"—we will deal with the precise words in a moment—conflicts with their existing primary purposes?

Roger Burton: We do not see that as a primary purpose under the bill. It is expressed as an additional requirement alongside our other balancing duties which, as our written evidence states, include taking account of the interests of agriculture and forestry—that is, rural businesses—and the needs of social and economic development. We see the duty as complementing that.

We are aligned to the Government's purpose. We sit in the context of the Government's overarching purpose rather than in isolation, and we contribute significantly through the national performance framework, which is, in effect, the expression of sustainable economic growth, which is the Government's purpose. We contribute strongly to national outcome 12, and to others in lesser ways.

Bill Adamson: Similarly, we do not see any conflict in that regard. Indeed, we have strategic outcomes that are better regulation orientated.

We believe strongly that it is important that regulation is proportionate, targeted and smart, and that such regulation has the benefit of sustaining economic growth. In our sector in particular, the worst situation that can arise is that a food incident happens that undermines public confidence and, in turn, the economy.

We do not think of those things as being incompatible. In fact, one of our current corporate priorities is to support growth through better, smarter regulation. That seems to be wholly compatible with the objectives of the bill.

Nigel Don: Thank you.

Claudia Beamish (South Scotland) (Lab): Good morning to you all.

I invite each of the panellists to give their perspectives on whether the purpose and effect of the bill would change significantly if a duty to contribute to achieving sustainable development was included rather than a duty to contribute to achieving sustainable economic growth. There are European Union obligations in law on sustainable development, which come through into some areas of Scottish law and policy. For example, there is a sustainable development obligation in the planning framework, as you will know.

Dr Hendry: In recent years, many national obligations have been established with regard to contributing to sustainable development.

There are different ways of looking at the issue. Given that "sustainable economic growth" is not defined, it might be that it is to be refined and supplemented by policy and guidance. That has also been the case with sustainable development—there has been a reluctance to provide a statutory definition of that. I would prefer the sustainable development concept to be taken a little further and for there to be increased vigour in pursuing and supporting it through the use of indicators and by going back to the policy principles in the 2005 statement, because a great deal of endeavour has been built up around sustainable development in the past 20 years or so.

A lot depends on what is meant by sustainable economic growth. Does it mean growth that is sustainable in economic terms, or does it mean economics that is sustainable in environmental and social terms? If sustainable economic growth was defined as growth that is within the carrying capacity of the planet, that would be an interesting innovation, but I suspect that it is not one that we are likely to see.

My preference would be for the duty to relate to sustainable development and, as much of my focus is on the environmental part of the bill, I believe that that would be more appropriate for SEPA and for SNH, although I take on board that SNH might have a slightly different view.

A lot comes down to how sustainable economic growth will be defined. Sustainable economic growth and sustainable development are not the same concepts. If we look at the current draft planning policy, there are paragraphs on each of them, but it is clear that they are not the same. Neither of them is defined there, either.

I suppose that there is an argument that it is problematic to put such broad and complex concepts into legislation, regardless of whether a definition is provided—there are arguments either way on that. It would be a different bill if the duty related to sustainable development, and I think that the evidence that the committee has received would have been substantially different. The provision has attracted a huge amount of attention, to the extent that it might be diverting attention from other parts of the bill that are extremely important.

Claudia Beamish: I would like to hear from all the witnesses, if that is okay.

Roger Burton: I have a lot of sympathy with a lot of what Sarah Hendry said.

For us, it is clear that the scope of the bill would be different if the duty related to sustainable development rather than sustainable economic growth. We would prefer sustainable economic growth to be expressed in terms of the overall Government purpose to help to guard against any reinterpretation of it at a later stage.

Beyond that, the use of either term would not concern us greatly. Which term is used is a matter for others to consider. In many ways, the term "sustainable development" is even broader than "sustainable economic growth", and its use in the bill would take us into a different area in terms of the regulations that contribute to it.

10:00

Bill Adamson: From our perspective, the term "sustainable economic growth" might be better, in that we envisage that we will minimise burdens on business and protect the marketplace by ensuring that regulation is effective and we do not have the incidents that I described, and through that mechanism we will ensure that the economy will grow. Using the word "development" might be a bit more difficult for our organisation, because it might involve more of a commitment to proactively do things that might be outwith our remit. The current wording aligns with our remit in that it is about having a proportionate regulatory regime, which in itself will protect the marketplace. In that sense, promoting "sustainable development" seems slightly wider and it might be more difficult for us.

Claudia Beamish: Are you saying that having the term "sustainable development" in the bill rather than "sustainable economic growth" would put the Food Standards Agency in some difficulty? I do not quite understand that. Correct me if I am wrong, but my understanding is that, to some extent, you would have to take into account people and the environment in your regulatory obligations.

Bill Adamson: I would not go so far as to say that it would cause us a problem. It comes down to semantics, I suppose, and what the words mean to different individuals. As a personal observation, the current wording sits better with me as I see us performing a function that would support that. It is less clear to me what role we would perform in delivering sustainable development.

Claudia Beamish: I take your point that there are questions about definition.

Bill Adamson: I would not say that we could not live with that wording—let me put it in that way. Our clear idea is that, through protecting the marketplace, we will be engaged in some fashion in helping to sustain economic growth. However, that is not our primary function, which is to protect public health.

Claudia Beamish: The point that I would make to all of you is that we have the wording "sustainable economic growth" but we do not seem to have a clear definition of that, either. Would that cause your organisations difficulty?

Bill Adamson: Section 4(2) is important. I think that we all envisage that some guidance will be provided that will clarify the expectation. I anticipate that, if anything in that guidance is incompatible, we will need to deal with that. At present, it is difficult to get to the nub of the matter. I know what I think the intention of the bill is, and I am content with that, but we need to see the detail in the guidance. The bill states:

"The Scottish Ministers may give guidance".

That will be essential to ensure that we clarify what is intended so that we do not jump to conclusions about what is meant.

The Convener: Graeme Dey has a supplementary question on that point.

Graeme Dey: Essentially, we are talking about environmentally responsible sustainable economic growth. Is that not the definition of what we are looking for?

Dr Hendry: It might be what we are looking for. To me, the term "sustainable economic growth" shifts the meaning further to the economy and away from the environment and society. To me, that would be the point that one is trying to make by selecting that term as opposed to "sustainable development". The term "sustainable development" gives more emphasis to the environment than the term "sustainable economic growth" does.

Roger Burton: Policy is clear that sustainable economic growth includes care for the natural environment, among a range of other interests. In a sense, the issue is how far legislation should rest on current policy for its definitions or whether that can change over time. I do not want to form a hard view about what should happen, but we might need to think about that issue if we are to create clarity on the subject.

Claudia Beamish: Given what you have all said, it might be somewhat challenging to answer my next question at this stage because of the lack of clarity about the detail of the regulation. How do you see a meaningful report coming forward on your performance in applying the duty? I am sorry—I mean the duty as it stands, namely the duty to contribute to achieving sustainable economic growth.

Roger Burton: That raises some questions in that, under the Public Services Reform (Scotland) Act 2010, we already report on sustainable development. I am not quite sure how we would tease apart a requirement to report on sustainable economic growth alongside that report on sustainable development. I would need to spend more time thinking about what such a document would look like and how much more work it would create to separate, somewhat artificially, those two closely intertwined concepts, accepting that there are different shades and breadths. The duty to report on sustainable development alone is not entirely easy, because our whole annual report contributes to sustainable economic growth and sustainable development, so everything that we do has a role to play in that sustainable dynamic.

Bill Adamson: The Food Standards Agency Scotland would not necessarily have a problem with providing auditable evidence. We are a United Kingdom department that is already required to provide evidence to the regulatory scrutiny committees at Westminster on what we are doing to meet the better regulation agenda down there. We also do that informally in Scotland—for example, by providing to Russel Griggs's regulatory review group examples of what we are doing to support that agenda—so it would not cause us a problem.

The only issue from our perspective is that we have more than one function, in that much of what is done on our behalf is done by local authorities. If we were asked to report directly both on what we are doing as a Government department and as a regulator, where we are a regulator, and on what is being done on our behalf by local authorities, there would need to be clarity about the mechanism for reporting that back.

Jim Hume (South Scotland) (LD): Do the witnesses believe that a code of practice is enough to help people understand what sustainable economic growth means in practice?

Roger Burton: I suspect that it can go a long way, but it may not be sufficient on its own. There is a range of other documents and policy statements that help to shed light on that, and I would not look to the code of practice to provide the one and only definition. Statements in the likes of national planning framework 3 and the Scottish planning policy are important in shedding further light on what Government means by sustainable economic growth.

Bill Adamson: It is difficult to answer the question, because we are being asked to comment on something that we have not yet seen, but I hope that the code of practice and the guidance envisaged by the bill will clarify exactly what is meant, so that we can be clear about that in our own minds. The bill provides both for guidance and for codes of practice, so one would hope that those would indeed help to clarify the matter.

Dr Hendry: It is a concept that will undoubtedly lend itself to endless debate and discussion, depending on what the code and/or the guidance says. There is a raft of policy that can help to clarify the issue, but I think that, like sustainable development, it will continue to be much debated, and there may still be differences in the ways in which certain regulators and other interested parties reflect on and carry out the duty.

Jim Hume: It could be argued that the provisions on whom to consult are fairly narrow. Do the witnesses agree with that? Should the consultation be broadened out, even to the general public?

Dr Hendry: It would be highly desirable for any provision in the code of practice, and any regulation under part 1 or part 2 of the bill, to be subject to extensive consultation. In all matters of public law where there is a requirement to consult, I would like to see the public added to the list of consultees. The Government generally does consult the public, and that is right and proper, and in matters environmental it is very important. There is a provision in part 2 of the bill with a list of consultees that does not include the environmental non-governmental organisations, which seems extremely strange. In general, I would like the public to be consulted.

Jim Hume: Do other panel members wish to comment on that point? It is quite important.

Roger Burton: I have not looked closely at those provisions and schedules but, in principle, SNH would prefer an open process that takes account of all views.

Bill Adamson: Similarly, the Food Standards Agency has a role, which is, to a certain extent, putting the consumer first. Therefore, in our consultations, we would always consult consumers. I envisage that the Scottish ministers would intend to consult the public under the "such other persons" provision, but I take the point that it is not explicit.

Graeme Dey: My question is perhaps best directed to Mr Burton. Will you provide us with examples of activities that could be deemed to contribute to sustainable economic growth but could take place on protected sites?

Roger Burton: Yes. The most obvious is the fact that nearly all protected sites are farmed and many have commercial forestry on them. Those activities contribute to economic growth. At a management level, that is really no issue.

How it would work with built development would be more complex. I cannot quote you precise examples in which planning consent has been given for developments that impinge on small parts of designated sites because they have not adversely affected the integrity of the site. I am just trying to think whether I can help further with that—no, I am sorry, I cannot.

Graeme Dey: Perhaps Dr Hendry has some thoughts on that.

Dr Hendry: A huge amount depends on the nature of the activity and the specific features of the site to be protected. We would be keen for adequate protection to be in place and maintained for sites that are protected under European and national law.

I am sure that there are plenty of examples of agricultural activities that are compatible with designations of protected sites and other activities that would not be compatible—it might depend on intensity and scale—but I do not have any specific examples to give.

There would be no need to have an outright ban on any economic activity in any protected area, but it is important that adequate protection continues to be given and it would be a great pity if the duty was to be used in future to encourage activity on protected sites of any sort that would not have been permitted or encouraged at an earlier stage. That would be unfortunate.

Roger Burton: I recognise that this is not about specific examples and that there are differences in the level of protection; for example, there are sites with a national designation, such as sites of special scientific interest, and there are sites with the European Natura 2000 designation. However, the argument starts from a slightly shaky premise in the sense that protected sites contribute to sustainable economic growth in their own right because their protection means that some of the most important areas are safeguarded from harmful development while allowing the development to take place elsewhere where it will cause less harm.

Dr Hendry: Their contribution to the tourism industry is also of major importance in many parts of Scotland.

The Convener: Dr Hendry, you hinted earlier that you may have other comments to make about the bill. I ask you to give us a flavour of them just now.

Dr Hendry: Thank you, I appreciate that, because I have spent quite a lot of time looking at part 2 and my responses to the previous consultations mainly concerned part 2-type issues.

There could be greater clarity in the bill on two issues in particular. One concerns the hierarchy of offences in the context of the new enforcement powers that are being developed for SEPA. I am strongly in favour of those enforcement powers. It is hugely important that we move away from the current system, which is very restrictive in what can be done.

The significant environmental harm offence—the big offence, if you like—comes at the end of part 2. Before that, we have the information on the penalty scheme, a great deal of which depends on the Lord Advocate's guidance for how it will work. By my reading, it is not clear in the bill whether there will be the significant harm offence and then a series of offences that will be covered only by the penalty scheme. Will those offences also be subject to criminal prosecution? Will there be a middle tier of offences that are only subject to prosecution but do not represent significant harm, which requires "serious adverse effects"? There are some questions around that we will not really know the answers to until the regulations are at a much more advanced stage.

It is not wholly clear at the beginning of part 2 what it is all about. We know from policy statements and the consultations that have already taken place that the purpose is to integrate the big four environmental control regimes, but you would not really know that from reading the bill. It is not clear how the layers of offences fit together and it is not clear enough what the appeals processes will be. You have heard evidence from the Law Society of Scotland and Colin Reid about that. What happens with continuing breaches? What is the effect of a successful appeal? What is the effect of a failed appeal?

I understand that there is a balance to be struck between the enabling provisions and the detail, but I would have preferred a bit more detail to be in the bill so that we were a bit clearer about things before proceeding to the next stage.

The Convener: Thank you very much. If the rest of the panel are content not to make any further comments, I thank all the witnesses for their contributions.

We will have a short suspension so that the clerks can reorganise the room.

10:16

Meeting suspended.

10:28

On resuming—

The Convener: I welcome our second panel of witnesses on the bill. We will go around the table for brief introductions before moving to questions—those of you who witnessed the first session will have an idea of what those questions are; the rest of you will just have to guess.

I am Rob Gibson, the convener of the committee.

Jayne Baxter (Mid Scotland and Fife) (Lab): I am a list MSP for Mid Scotland and Fife.

Lloyd Austin (RSPB Scotland): I am the head of conservation policy for RSPB Scotland.

Claudia Beamish: I am an MSP for South Scotland and shadow minister for environment and climate change.

Graham Hutcheon (Scotch Whisky Association): I am the group operations director of Edrington, and I chair the Scotch Whisky Association's environment committee.

Richard Lyle (Central Scotland) (SNP): I am a list MSP for Central Scotland.

Dr Mark Williams (Scottish Water): I am the environmental regulation and climate change manager at Scottish Water.

Andy Myles (Scottish Environment LINK): I am the parliamentary officer at Scottish Environment LINK.

Nigel Don: I am the MSP for Angus North and Mearns.

Gordon McCreath (UK Environmental Law Association): I am the environment and planning partner at Pinsent Masons, and am here on behalf of the UK Environmental Law Association.

10:30

Alex Fergusson (Galloway and West Dumfries) (Con): I am the MSP for Galloway and West Dumfries.

Susan Love (Federation of Small Businesses): I am the policy manager of the Federation of Small Businesses in Scotland.

Jim Hume: I am an MSP for South Scotland.

Andy Rooney (South Lanarkshire Council): I am an environmental health officer in South Lanarkshire Council.

The Convener: Angus MacDonald MSP was occupying the next seat. He will be back in a minute.

Allan Bowie (National Farmers Union Scotland): I am the vice-president of the National Farmers Union Scotland and a farmer from Fife.

Graeme Dey: I am the MSP for Angus South and the deputy convener of the committee.

The Convener: I will kick off with a general question. Have you been content with the consultation process that has led to the bill, and do you think that it is consistent with the Scottish Government's principles of better regulation? I will spell out those principles in a minute, if you want.

Gordon McCreath: It would have been nicer to have been given a bit more information—that applies to the bill, as well. You have already had some discussion about the very general nature of provisions in the bill and how difficult it can be to comment on the code of practice when you do not yet have it.

The consultation has been good—I do not wish to do it down—but it would have been good to get some more detail, as that is where the devil will be in this case. The information that accompanies the bill could also have been a lot more detailed.

Lloyd Austin: I agree that consultation has been good, in so far as it has followed general practice. I agree with Gordon McCreath about the lack of detail and the lack of clarity around some of the issues. You discussed that with the previous panel and we will deal with it again, I am sure.

There is a lack of clarity for stakeholders. That is common to a range of Government consultations, so I do not want to pick on this one in particular. There is a lack of clarity about how the various views have been taken into account at the next stage and why comments have or have not been taken on board. Some of the decision making around the next stage is not clear to stakeholders.

Graham Hutcheon: We feel that the consultation process—not necessarily on the bill itself but on some of the subordinate legislation that will come forward later—was positive. Our industry provided resources to SEPA to help to model some of the simplification of the issuing of permits on sites, which proved to be worth while. SEPA met a wide range of operators across the sector on a number of occasions. The devil will be in the detail. Subordinate legislation is the key for operators, and the bill is very much an enabling one. The stuff that we saw during the consultation process was fairly positive.

Susan Love: I echo what others have said, but I would also point out the importance of understanding impact at this stage in the legislative process. The lack of modelling to feed into a business regulatory impact assessment at this point makes it difficult to make decisions. Our regulatory review group has highlighted that on many occasions as a weakness in our legislative process, and it is not good practice.

The Convener: So, with a piece of legislation for better regulation and the creation of a better process, business has not been able to even make a guess about the financial impact.

Susan Love: A piece of enabling legislation in which there is no detail about who will be affected by certain measures, how many businesses or organisations will be affected, what size those organisations are or what the cost impact will be is not ideal when people are making decisions.

Andy Myles: The consultation process has been conducted according to the standards and has been quite satisfactory, but the bill might have benefited from having stakeholder groups similar to those established to examine the details and broad issues before the Marine (Scotland) Bill was introduced. The many years of discussion between stakeholders across the spectrum was enormously beneficial in that process, with a stakeholder forum first ironing out some of the problems and details that are now giving rise to the discussions on the bill that you are required to host.

The Convener: We head into the meat of the matter now. Nigel Don will kick off.

Nigel Don: I would like to go back to the territory that I explored with the first panel, picking up on the regulators' duty in section 4. I warn witnesses that whether it should be "sustainable economic growth" or "sustainable development" or any other form of words is not my point; that is something that we will come to later. Section 4 gives the regulators a duty in respect of sustainable economic growth—or whatever it may be—and states that Scottish ministers may provide guidance and that regulators must take that guidance into account, but section 4(4) states that that does not apply to a regulator to the extent that it is already subject to a similar duty. My question to the witnesses is whether, in the context of any of the regulated bodies, it is clear or unclear how all that fits together and what duties those organisations will have.

Andy Rooney: My background is in environmental services. South Lanarkshire Council takes guidance from the Food Standards Agency Scotland, as Bill Adamson said earlier, and from the Health and Safety Executive on health and safety enforcement in our premises, so I have to say that I am unclear about where everything sits. It was suggested earlier that it was a pyramid arrangement, and that is probably the best way of explaining it, but if the local authority is to deliver on the day, the component parts have to be bolted together to ensure that we can achieve consistency in our approach.

Nigel Don: Given that a local authority will itself be one of the organisations that has a duty, is there a risk that you could end up trying to fulfil the guidance from the Food Standards Agency Scotland although it might be inconsistent with guidance given directly to you?

Andy Rooney: Potentially. I do not think that it is likely, but it could happen.

Lloyd Austin: I would like to make a couple of points. I understand Nigel Don's perspective on separating the discussion about the use of the terms "sustainable economic growth" and "sustainable development" and dealing with it later, but the answer to his main question depends in part on the conclusion of that discussion. In interpreting section 4(4), what you mean by "sustainable economic growth" or by any other phrase that you might put in its place will depend on whether you think you are already subject to a duty to the same effect.

Let us take SNH as an example of one of the regulators. It already has a duty under the Natural Heritage (Scotland) Act 1991, first to seek to ensure that everything done in Scotland is done

"in a manner which is sustainable",

and, secondly, to take into account social and economic matters, except where European legislation overrides that. Depending on how you interpret "sustainable economic growth", you could argue that SNH already has a duty to the same effect as that in the bill, or you might not.

Essentially, you are setting up an opportunity for a debate—or, in the worst-case scenario, an argument—and for confusion. You also need to ask how the new duty sits alongside the other duties that apply to all public bodies, as well as duties that apply to Scottish ministers. It is interesting to note that the one regulator not listed in schedule 1 is Scottish ministers.

The Convener: Indeed.

Gordon McCreath: I think that this is a good example of another area in which it would be helpful to have some indication of the intention behind the section. As a lawyer, I think that there are a number of interpretations that could be put on section 4, because of the point about the duty applying only when it would not be inconsistent with other functions. In addition, there is the concept of functions as opposed to duties. Are functions different from duties? I do not know. We could talk about that for a while.

There is perhaps more clarity in relation to SEPA's duties and how they fit together in section 38, which is to be welcomed, but, in general, I would say that there is not enough clarity.

The Convener: Does anyone else wish to comment on that point?

Allan Bowie: I reiterate what Gordon McCreath said. From a farming perspective, we are keen that economic growth is considered, but it is the detail of the provision and how it is implemented on the ground that concerns us. I am sure that such detail will be forthcoming.

The Convener: We hope that your surety is realised, but we will try to tease out whether that will be the case.

Andy Myles: First, I thank the convener for arranging for the clerks to circulate the additional paper that I sent in yesterday, which explains Scottish Environment LINK's fear that the discussion that we are having about the compatibility—or lack of it—between sustainable development and sustainable economic growth could easily end up being decided in the courts. As our paper indicates, our suspicion is that the courts would end up deciding that the duty to contribute to achieving sustainable economic growth was properly given by Parliament in the bill but that regulators did not have a duty to support unsustainable economic growth. It seems to me that unsustainable economic growth has been left out of the discussion and of the bill and that, in many respects, that has caused the problem.

If there is sustainable growth, it is inevitable that there will be unsustainable growth. If we leave it in the hands of the courts to decide the Government's policy, the Government will not achieve what it is looking to achieve because of the confusion that exists. That might be the case even if the clearest guidance in the world is issued on the distinctions between the two concepts. I noticed that it was mentioned at last week's meeting that a greater number of such cases are arriving in the courts. The committee has a duty to look down the line at what might happen to this law when it is passed.

Nigel Don: In the light of those comments—particularly those of Gordon McCreath—I wonder whether section 38 might be a better model, because it gives SEPA specifically a duty under subsection (1) of the new section that it inserts in the Environment Act 1995 and what might be described as sub-duties under subsection (2), which apply only in so far as they are not incompatible with the provisions of subsection (1). Would that be a preferred model for introducing a requirement to contribute to achieving economic growth? The relevant provision is in paragraph (b) of subsection (2) of the new section that section 38 seeks to insert in the 1995 act.

Gordon McCreath: From the perspective of clarity of the law, it would be, but I am not sure exactly how that would fit in with other regulators

and their duties. Section 38 certainly provides clarity on where SEPA's duty to contribute to achieving sustainable economic growth sits and whether it is a balancing duty or a primary duty. In that case, it is clearly not a primary duty.

Nigel Don: I am suggesting that the balancing duties might be different for different regulators. Is that approach better from a structural point of view?

Gordon McCreath: Yes.

The Convener: Does anyone else have comments to make on that point? I do not want to pitchfork Andy Rooney into the discussion, but his authority might have a lot of dealings with SEPA. That is fine, because a definition is provided of what SEPA must do, but there are other regulators that South Lanarkshire Council has to deal with. Should as much definition of what they must do be provided as is provided in section 38?

10:45

Andy Rooney: This perhaps comes back to what I said earlier about our engagement with the Food Standards Agency and the Health and Safety Executive. There is perhaps a difficulty there. I accept the point that you are making about greater clarification. At this point, I must step back and say that we will need to revisit the matter and see where we stand overall.

Alex Fergusson: The question that I was going to ask has principally been covered, but I ask Mr Rooney to expand a little bit on what he has said. Given the points that have been made about the lack of detail and clarity that is currently available, can you say how the proposed legislation might impact on your day-to-day business as a local authority?

Andy Rooney: As far as our enforcement role is concerned, we have primary objectives to safeguard public health and to ensure that there is fair trading, so that reputable companies are not disadvantaged by rogue traders.

The provisions in relation to the code of practice sit at a very high level. We seek to work with business and to encourage development, but there is a difficulty in balancing things to ensure that we are not compromising public health for the success of business. That is the difficulty that I see.

Alex Fergusson: I understand that point about the interaction with business. Can you comment on how the eventual legislation might affect your dealings with SEPA, SNH and the FSA?

Andy Rooney: We work together with SEPA, and we have many elements of commonality. SEPA is also a regulator for the local authority in relation to our waste management sector. I see that there will be positives, but until the full detail is there, the issue is a difficult one.

Alex Fergusson: I appreciate that. It is useful to have a local authority's point of view.

Jayne Baxter: We have covered some elements of this question, but I want to bottom it out. Would the purpose and effect of the bill change significantly if a duty to contribute to achieving sustainable development was included, rather than sustainable economic growth?

Lloyd Austin: The bill would become a lot clearer and a lot more consistent with existing government policy and existing statute if that was the case. Sustainable development is well developed as a concept in international, Scottish and European policy making and guidance, but sustainable economic growth is a new concept. Sustainable development is already a duty in a lot of Scottish legislation, such as the Planning etc (Scotland) Act 2006, the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010.

If the use of the phrase "sustainable economic growth" is intended to make regulation more biased towards economic aspects than towards the other two pillars of sustainable development, we would be very concerned, and we would wish for that to be shifted. If that is not the Government's intention, any new duty should follow the consistency of previous legislation, policy and so on. That there is a question about what is the Government's intention is an indication of the lack of clarity that is highlighted in the Law Society's written submission, which states:

"Regardless of the political merits of this provision"—

in other words, whether or not there is an intention to have bias in respect of the pillars of sustainable development—

"there are two problems with the imposition of a duty to contribute to sustainable economic growth. The first is the uncertainty of what this phrase means ... is it economically sustainable growth, or economic growth within the limits of (ecological ... sustainability?"

That question is completely unresolved and unclear. The practical effect of the change will remain unknown until the committee can answer it. If you answer it by seeking a bias towards continuation of sustained economic growth, that would be a very disappointing move after 20 years of developing the concept of sustainable development, which is about ensuring that social and economic matters are taken into account, and about living within the planet's environmental limits.

Andy Myles: If the definition of "sustainable economic growth" is economic growth within

ecological limits and taking into account social considerations, it is already part of sustainable development. It would not make sense, on the ground of consistency in the law, simply to stick in the phrase "sustainable development" instead of "sustainable economic growth".

I have an understanding of how the Government has argued over the past six years that sustainable economic growth is defined not just as economic growth that can be sustained. If it is perceived just as economic growth that can be sustained—as any old economic growth—or if that is the definition that comes out in the guidance, we are on the road to serious conflict.

Alex Fergusson: I will pursue that point a little. I am reminded that at least two of the three witnesses on the previous panel suggested to us that replacing the phrase "sustainable economic growth" with "sustainable development" would provide even less clarity than currently exists. The representatives of SNH and the FSA feel that there is already considerable emphasis on sustainable development in the duties that they have been tasked to undertake. There seems to be a conflict, so I seek a bit of clarity, which I think we would all appreciate. I am not sure that we are all singing from the same hymn sheet.

Andy Myles: I have to say that I was slightly confused by the evidence that was led by the two agencies in the previous panel, for the simple reason that—as Lloyd Austin pointed out—they have duties in respect of sustainable development and reporting on sustainable development. I therefore do not know how the inclusion in the bill of a duty of sustainable development on those agencies, as regulators, would make life any more complicated. I really did not understand at all the points that they made. Scottish Environment LINK has been told by Scottish Natural Heritage that we must promote sustainable development as part of our grant conditions, so it is obviously a concept that the organisation understands fully. I cannot see where the confusion lies.

What is more, SNH stated in its written response to the consultation that

"In addition, there is a risk that by applying ... a duty"

to sustainable economic growth, public bodies would

"when making decisions or providing advice ... be open to legal challenge that the duty has been wrongly applied."

The paragraph continues in that vein. The committee should look closely at that submission from SNH.

For what it is worth, my view—I think that I speak for the 35 NGOs that are members of Scottish Environment LINK—is that sustainable development has been worked on since the Brundtland commission and the Rio de Janeiro conference, and is a part of international, EU, UK and Scots law. As with any concept that is placed in a legal context, it will be the subject of debate and definition, but it has been well worked on and it allows for the idea of sustainable economic growth.

I cannot see why, if sustainable economic growth is a subset of sustainable development, it is necessary to make a change. I have serious fears that that will merely introduce confusion to the law, and conflict in the courts.

The Convener: We will chew over those things, and will discuss the issue with the minister soon.

Jim Hume: Would a code of practice be enough to clarify what sustainable economic growth means or do we need more?

Andy Myles: A code of practice might help to clarify the matter. It would be binding in law, so the suggestion does not undermine any of my comments. I just underline the fact that there is already an agreement between the UK Government and the four devolved Administrations on a definition of sustainable development. The agencies have been working with it already, so I am not sure that a code of practice would, in fact, add anything to the situation. Further, it could confuse matters if the definition of sustainable economic growth proved to be less compatible with sustainable development than I think is intended by the Government.

A code of practice could make matters better and could be a better route to getting things into law, but it could also cause a lot of trouble.

Gordon McCreath: It would depend on what the code of practice said. We need clear detail on whether we need sustainable development or something else.

The Convener: Consulting widely enough is important, too.

Jim Hume: I was just going to make that point. Some witnesses have felt that the consultation was wide enough, but do the panel think that consultation should include the general public or be otherwise wider?

Dr Williams: The consultation is critical to the process. The lead-up to the bill and the consultations that were carried out by SEPA and the Scottish Government in relation to their elements of the process provided us with a huge opportunity to learn more about the direction of travel. The important thing here is that we set out principles and enable those principles to be widely scrutinised and understood. The full range of measures and guidance that will come into the

code of practice need to be open to that level of scrutiny.

Lloyd Austin: It would be good if there were as wide a consultation as possible on the code of practice. Section 6 should specify that it should be as wide as possible and that it should include NGOs and the public.

It would be helpful if Government were to indicate how it took into account responses to the consultation. Another piece of legislation contains a provision that says that, when ministers consult on something and lay a final version before Parliament, they must also produce a report on the consultation process that says how the responses to the consultation have been taken into account. That ensures that Parliament is informed about the consultation process when it considers a bill.

I cannot recall whether that concerns the access code or something similar—I will research that and get back to you—but it is a procedure that I fully support.

Allan Bowie: It is important to get the principles right. It is great to have wide consultation—our members have no issue with that. However, if the principles are not right, we are just going to confuse things even more. That will make things hard to implement from a practical point of view. I do not doubt that the principles will be right, we simply need to think of the consequences if they are not. No pressure, convener.

The Convener: Thank you for that—as ever. We are here to tease those things out.

11:00

Graeme Dey: Is a single code of practice likely adequately to take account of the divergent roles and responsibilities of the regulators, as set out in schedule 1? Would we, in reality, need a pyramid system with an overarching broad code, and supplementary regulator-specific codes—perhaps taking in existing practices—sitting below that?

Andy Rooney: I have already commented on that from a local authority perspective.

Lloyd Austin: I would agree with one of the witnesses on the previous panel; to cover everybody, the code would have to apply at a high level. I agree with Allan Bowie with regard to the code being at a high-principles level. Would more detailed codes be needed underneath that for individual regulators? That would depend on the outcome of the previous discussion about the impact on other regulators in relation to section 4(4) and the definitions of sustainable economic growth and sustainable development. The second part of the question cannot be answered until you have resolved the debate that you were having earlier.

The Convener: We move on to part 2, chapter 1, which is on environmental regulations.

Richard Lyle: Do the witnesses consider that the new focus on

"protecting and improving the environment"

will serve the needs of both business and the environment? Are the definitions in the bill adequate and clear?

The Convener: That question refers to section 9.

Gordon McCreath: Will the focus help with the balance between business and protection of the environment? That question brings us back to what we have been talking about for the past half an hour or so: how will the provisions interact with whatever we mean by sustainable economic growth? Is the purpose clear? I understand that some of the drafting has been based on existing legislation, which is welcome. In particular, the definition of "environmental harm" eventually tracks through into SEPA's duties and is familiar stuff to environmental lawyers.

There is one exception: the final paragraph of section 9(2) refers to

"impairment of, or interference with, amenities or other legitimate uses of the environment."

That strikes me as being an incredibly wide provision. Guidance and further detail on what it is intended will be covered by that would be very welcome.

Andy Myles: It is a pleasure to move on to bits of the bill in respect of which, in our consultation response, we definitely support the general approach.

We have an issue with the use of the term "environmental activities" in section 9, however. We suspect that it means:

"activities which reduce or eliminate pressures on the environment and which aim at making more efficient use of natural resources."

In our written evidence, we go on to suggest that

"A more appropriate term should be substituted—such as 'activities potentially harmful to the environment'."

The rather bland phrase "environmental activities" is open to interpretations that could include going for a walk in the park or digging the garden. In fact, it is fairly clear from a reading of the context of section 9 that it means activities that are potentially harmful to the environment.

On the general point about business and the environment being compatible, I have no doubt whatever that, in the context of sustainable development, business and the environment can get on very well—as long as the principles of sustainable development are considered.

Graham Hutcheon: I read the briefings on the bill and I think that compatibility between the environment and business is essential. Business is part of the society that we live in, so it is not in business's interests to destroy the environment. That is particularly the case in my sector. The environment is a key factor in the global marketing that drives our exports.

The important point about part 1 of the bill, in relation to SEPA's management of our regulated industry, is that there is an attempt to move the focus away from compliant organisations—using a lighter touch in the administration of regulation, as opposed to regulation itself—and to direct it towards the unregulated and illegal activities that go on, which seems to be perfectly sensible. A compliant organisation or sector probably does not need many visits and assessments, so simplification of the system will reduce costs for SEPA and for regulated businesses. The general principles of the bill are about simplifying the system for businesses that generally try to comply with regulations, and directing resource at organised crime and non-compliant organisations.

Allan Bowie: It is also about getting businesses to change practice—and recognise that they must change—if there is an issue or they are not doing the right thing. I would hate to think that we must go through the courts to rectify everything. It is about getting the right mindset. We are conscious of what the Scotch Whisky Association is doing and we are part of that; the last thing we want is to have our business interests affect that.

Lloyd Austin: We support effective and transparent regulation. In the Government and SEPA's previous consultations, we have supported in principle the move towards what the Government described as better regulation, in so far as that means simplifying administration and processes for industries and activities that are compliant, and concentrating effort on those that are not compliant or which are in breach of regulations.

The key issue is to ensure that the objective—the environmental outcome that regulation is seeking to achieve—is achieved. That means that although a lighter touch might be taken to administration in relation to businesses, individuals and activities that are achieving the outcome, a harder approach must be taken to those that are not doing so. That caveat is important.

Claudia Beamish: Are the definitions in section 9 clear and adequate? Section 9(2) defines "environmental harm" as harm to humans and a great many other things—I will not read them all out. Evidence was provided in a written submission—I am sorry, I cannot remember which one—that biodiversity is not in the list. We cannot have a massively long list, but do the witnesses think that the definition of harm covers enough, in a broad sense?

Gordon McCreath: I think that it does. Colin Reid and others have mentioned biodiversity, which links to ecosystems. Ecosystems are mentioned in the definition. I cannot quite spot the reference, at the moment.

Claudia Beamish: It is in section 9(2)(b)(iii).

Gordon McCreath: I have no objection to the definition; it is familiar stuff to environmental lawyers, who see such wording not just in legislation but in contractual provisions. I assure you that the lawyers who draft the contractual provisions intend them to be as wide as possible. The definition is very wide—indeed, I have some concern that paragraph (e) of section 9(2) is too wide.

Jayne Baxter: Should the provisions to consult on relevant regulations apply to the general public rather than solely to regulators and other persons whom Scottish ministers "think fit"?

Gordon McCreath: Yes.

The Convener: That is simple.

Lloyd Austin: My answer is the same as my answer to the consultation question that Jim Hume asked.

The Convener: Okay. Does Susan Love have any points to make?

Susan Love: No—I have no objection to the definition.

The Convener: In that case, we move on to the next question.

Angus MacDonald (Falkirk East) (SNP): I apologise for not being here for the start of this evidence session. There was an issue that had to be dealt with.

My question follows Jayne Baxter's question about consultation on relevant regulations on environmental activities. Does the panel consider that regulations should be produced subject to the affirmative procedure, in order to allow detailed scrutiny of them?

Gordon McCreath: Yes—there is no question about that. The bill will lead to a rewriting of the entire corpus of environmental law. In his written evidence, Colin Reid makes the compromise point that, although scrutiny of all the regulations might not be a good use of parliamentary time, there is no doubt that the very first set of regulations should be scrutinised at a technical level of detail. The regulations will set out how this is all going to work for the entire country, and the idea that they should be simply laid before Parliament subject to negative procedure is a difficult one to go with.

Andy Myles: I agree completely with Gordon McCreath that this very important set of guidance should be subject to affirmative procedure.

The Convener: It would be a good idea to have more MSPs involved and more time for that.

Andy Myles: I said that last week, convener.

Graham Hutcheon: If I could leave the committee with one message, it would be my total agreement with what Gordon McCreath just said. The subordinate legislation is where the real detail will be and where the real impact on us will happen. We need to scrutinise it as fully as we have scrutinised the first part of the bill.

Dr Williams: I agree completely.

The Convener: Thank you. There is unanimity on that, by the sound of it. Is that okay for you, Angus?

Angus MacDonald: Yes.

The Convener: Let us move on to the powers of enforcement. How is this package of provisions going to work in practice? For example, what will it mean for industries such as whisky, aggregates and farming, where multiple permits for different regimes might be required across the business? How will companies that operate multiple sites be affected? Are you content that SEPA will apply licensing and regulation consistently across all sites?

Dr Williams: Scottish Water has a vast number of sites throughout Scotland that are subject to regulation through SEPA and through permitting, with the same site often under both water and waste regimes. We have been keen to support integration so that we can take a simplified approach to managing the interaction with SEPA and so that we can understand more clearly how things are moving forward. That will involve working with SEPA to understand, for example, the procedure at a site where there are both discharge licensing and waste management facilities. We are supportive of the approach, but we need to see how it works in practice by working jointly with SEPA.

There are examples of single permits that cover multiple sites. For instance, we have introduced a licensing regime for all our networks, which cover multiple outfalls and assets within a large geographical area. Such things can work, but it takes a lot of time and attention.

In broad terms, we are supportive of the proposed approach and are working with SEPA to understand how that can work in our sector.

Graham Hutcheon: My answer is along similar lines. Our industry is quite keen to look in detail at integrated permitting. The one note of caution is that we do not want integrated pollution prevention and control regulations lite—that is, extensive and complicated legislation that is suited to large operators being applied to small, low-risk units around the country. The legislation must be appropriate for and proportionate to single permits. In general, however, we fully support the simplification of permitting.

In addition, we support the idea of corporate permits, which would mean that, when we looked at an environmental management system for a business, we would not have to visit six or seven sites because the corporate process—not the environmental impact, but certainly the system—would be the same on every site.

11:15

Allan Bowie: We reiterate that point. We have a lot of small businesses and we fear that, if the heavy hand of corporate big business is landed on them, they will just go into meltdown. I give due credit to SEPA for looking at catchment policy and working with farmers. It is listening and is implementing a simplified scheme, while conscious that regulation must still apply—that is the crucial bit. I reiterate what Graham Hutcheon said about big corporate business.

Andy Myles: I agree that a good deal of simplification is going on in the bill, as has been discussed, and that the variety of tools that are included in the bill will allow SEPA and business to form suitable relationships. However, on SEPA's powers of enforcement, I agree completely with what Graham Hutcheon said about the bill's purpose being to ensure that the regime takes a lighter touch on one side, for the firms that are following and meeting the standards, to allow SEPA to concentrate its enforcement efforts on those who are polluting the environment or breaching the regulations.

We have questions about whether the enforcement powers in sections 12 and 15 are strong enough or should be strengthened. We would like SEPA to have the powers to get the bad guys who are distorting the markets through their activities, which fall below the standards, and to take them out of operation.

The Convener: We may come on to points about that.

Lloyd Austin: I agree with the broad principles of the approach that the bill applies, which is consistent with the better regulation approach that was discussed. We put some details on that in our submission.

I draw attention to the provision on the size of the monetary penalty in section 16(5)—

The Convener: We will come on to court powers and monetary penalties.

Lloyd Austin: Section 16(5) addresses the issue of ensuring that the methods that are adopted relate to the environmental outcome that we are trying to achieve and addresses the business of ensuring that no financial benefit arising from the offence accrues. I ask for the last bit of that to be altered to allow SEPA to have regard to the financial benefit, so that businesses at the wrong end of the scale that benefit by cutting corners can be hit in order to sort out the market and create a level playing field for those who are trying to comply.

Claudia Beamish: Does any of you have concerns about how marine licences will fit in?

Andy Myles: We took part in the BRIA exercise with officials to look at marine licences. We have serious concerns about how marine licences will fit into the process, particularly given the attempt to standardise the appeals process and make it as short as possible. At our meeting with officials, we argued—and we will continue to argue throughout the bill process—that there are serious questions about compliance with the Aarhus convention on access to environmental justice, which are not being taken fully into account.

Lloyd Austin: I agree fully with what Andy Myles just said, but I reiterate what we said in our written evidence and what Professor Reid said in his evidence: that the marine licence appeal provisions are yet another ad hoc appeal provision. Across environmental regulation and environmental legislation, there is a range of appeal procedures, to which different systems apply. Sometimes appeals are made to the sheriff court, sometimes to the High Court, sometimes to the Scottish ministers and sometimes to the Scottish Land Court. There are different procedures and different timescales.

I simply refer to the commitment in the Government's manifesto to explore the option of an environmental tribunal or court to simplify all those appeal provisions into one system. To carry on making ad hoc changes before we have done that review and explored the options of a simplified one-stop shop is an unfortunate continuation of an ad hoc approach.

Gordon McCreath: The UK Environmental Law Association heartily endorses that.

Andy Myles: The bill seeks to make an ad hoc change to an ad hoc procedure that has never been used so far. We do not know that the licensing and appeals provisions in the Marine (Scotland) Act 2010 are broken, and it seems remarkably odd that we are replacing them before they have even gone into operation. If it ain't broke, why are we fixing it?

The Convener: We note those points. Are you confident that SEPA has the ability fairly to determine the balance of probability in relation to proving that an offence has taken place?

Gordon McCreath: I have no doubt that SEPA will give that its utmost. To me, the more important point is how the appeals mechanism will deal with that. Will it be adequate to ensure due testing of the balance of probabilities? What will happen if someone is successful or unsuccessful in an appeal?

If I was to pick up on one gap in the bill above all others that requires filling and ought to be filled at this stage, it would be the need to say more about the interaction between SEPA's jurisdiction and the criminal courts' jurisdiction. There is a fundamental question on which we have no information. It looks as though, if SEPA imposes a penalty on someone, they can take that and cannot then have criminal proceedings raised against them, but it is not entirely clear whether they will nevertheless have an offence on record. If SEPA imposes a penalty on someone, does that person have the option of saying that, because a criminal offence is involved, they are not willing to have the decision against them made on the balance of probabilities and they would like to take the matter to the courts?

The Convener: Are you confident that SEPA's powers of enforcement will be proportionate? What discussions have any of the parties represented here had with SEPA on the matter? Have the local authorities had none?

Andy Rooney: None that I am aware of.

The Convener: Has Graham Hutcheon had any discussions with SEPA about enforcement?

Graham Hutcheon: We have had discussions, but we arrived at the same lack of clarity about how the mechanics would work. There are some positive things in the provisions. Having access to voluntary reparation is important, because it prevents us from going down the costly route of litigation. However, if a case goes to the courts, the courts will decide, I guess. We have reached no absolute conclusion and further clarification is required.

Allan Bowie: It is correct to say that one issue is the balance of probabilities. However, the appeals process is also an issue. The problem is really sections 13(6)(b) and 16(6)(b), which say that the grounds for appeal

"do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate".

Who will check SEPA? I am concerned that the only way to rectify the situation will be to go through the court procedure. We are trying to avoid that. If SEPA failed to comply with guidance, why should we have to go through an appeal?

Why does the thing have to stick? Can someone give me clarity on that?

The Convener: We will seek clarity—that is for sure.

Susan Love: I know that the committee will come on to sanctions. We have discussed with SEPA over the past year or so the anxiety that a lot of small businesses might feel about the discretion that SEPA will have to hand out sanctions and whether a small business will feel that it has the right to appeal and has been judged fairly. I am concerned about whether small businesses will feel that they are informed enough and whether they will be at a disadvantage, in that they will take whatever penalty is handed out to them because they will feel that they have no other option and cannot contest it.

Jim Hume: Do panel members think that the cap of £40,000 on fixed monetary penalties is appropriate? Should there be no cap, or should it be much lower?

Susan Love: Having read the evidence that the committee has received on the matter, I think that my view will probably be different from some of the others. Our question to SEPA is about the lower level of fixed penalties, which we believe might be about £500 to £1,000 for an individual or company for a relatively minor offence. I do not know what the definition of a minor offence would be, but it is easy to envisage a lot of small businesses being unaware of their responsibilities, particularly in relation to carrying waste. A fixed-penalty fine of £1,000 would be a huge sum for a small company. I am concerned about the clarity of the procedures, how and in what circumstances the fixed-penalty fines will be used, how we will ensure consistency and what monitoring will take place.

The same is true of the variable penalties that can be applied at SEPA's discretion. A penalty of £40,000 might not seem much proportionately for a large multinational company, but it would be a huge penalty for an individual company.

Andy Myles: I agree entirely with Susan Love that, with regard to penalties, a distinction must be made between the large corporate business and the small business. In general, though, we suggested in our written evidence that the cap should be lifted in several areas. Indeed, we suggested that the cap should be taken off completely for the provisions in section 26.

We should remember that for some cases £40,000 or £50,000 would be a drop in the ocean compared with the damage and costs involved. The enforcement powers and penalties are not being introduced so that SEPA can charge around the country using them, but SEPA must have a proper stick if it is to walk quietly, as Graham Hutcheon and others have suggested. We ask Parliament to ensure that the stick is adequate for dealing with the really serious dangers to Scotland's image, which is crucial for our tourism industry, whisky industry and food and drink industries and for a series of other economic purposes in Scotland.

Scotland has a history or reputation—certainly in comparison with the rest of the UK and some European countries—of not fining particularly hard. Our fines have been a lot lower than those faced by companies in England. SEPA needs to be given significant powers, not so that it can run around battering small or large companies, but so that it can deal with the exigencies and defend Scotland's reputation, environment, economy and people.

11:30

Lloyd Austin: I agree with Andy Myles and Susan Love. The key principle is to link the size of the penalty to the environmental impact and to the potential financial benefit that would be gained by subverting the regulation. That takes us back to sections 16 and 27(2). As a precedent, I refer the committee to the implementation of the EU greenhouse gas emissions trading scheme, in which the penalty is €100 per tonne of CO_2 emitted above the limits. It is absolutely clear in that climate change regulation that the fine is linked to the environmental impact that has been caused by the breach of the activity.

A large operator that is working at the margins of the law could find that £40,000 is a small enough fine to make causing a significant environmental impact worth while in a sense. We would like the limits to be raised or removed, but with the condition that the penalty should be linked to the size of the environmental impact and the financial benefit that is accrued, to address the issue about small companies and minor breaches that Susan Love raised.

Gordon McCreath: There is a fundamental question about where it is appropriate to draw the line between what SEPA does and what the criminal courts do. On the line being drawn a lot higher, we know that the civil sanctions regime down south would allow variable monetary penalties of up to £250,000. Whether that is an appropriate penalty for SEPA to go around handing out is a political decision. From a legal perspective, it needs to be absolutely clear in those situations that the appeals mechanism is adequate.

A more interesting question is about the extent to which there is a policy drive behind the reforms to put fines up. On the face of it, we might look at the variable monetary penalty powers as they

stand and say that, if SEPA has the discretion to impose fines of up to £40,000, that is consistent with where the maximum fines lie at the moment, but we seldom see those amounts coming in.

Is the intention that SEPA will hand out higher fines? The financial memorandum that accompanies the bill suggests not; it talks about fines of £3,000, which is the level that we are all fairly familiar with. There are fundamental questions about where the barrier lies between SEPA's remit and the criminal courts' remit and about the Parliament's intention on where the fine levels should fall.

Dr Williams: It is recognised that the purpose is to give SEPA a greater range of tools to allow it to deliver on its functions to protect the environment. That is understood. We need much more clarity on the guidance under which SEPA will have to operate on the range of activities that might be subjected to such a thing.

In the wider context of enforcement, how does focusing on those who are getting it wrong but who can work with SEPA to make things better sit in the sliding scale of activities and joint work that we might do with SEPA in a range of other areas? For example, we will work quite closely with SEPA on a number of things over the next five to 10 years that relate to investment to improve the environment. Those are good examples of sectoral joint working with SEPA that would not from our perspective come anywhere near higher-end enforcement but which will deliver substantial environmental improvements. The question is how that sits in the broader context, as opposed to just focusing on the fines element.

Graham Hutcheon: I support the previous statements.

I might have interpreted what I read wrongly and I am sure that people who are brighter than I am can help me. My interpretation was that the £40,000 maximum is within the civil penalty, but there is still recourse to the criminal courts. Therefore, that just gives us a parameter with which to work. Whether the figure is £30,000, £40,000 or £50,000, it gives a parameter for such fines.

If the offence was as bad as to merit further investigation and a fine above £40,000, I would expect the case to go to a criminal court for prosecution in the normal way. I am not worried about the figure; it is up for debate and someone will decide what it is. The principle is that fixed monetary penalties should lessen the bureaucracy, reduce the number of court proceedings for the majority of minor environmental breaches and clean up the process a bit.

A fine of £40,000 indicates that, in anyone's language, there has been a serious breach, and anything above that will go through the criminal courts. I am comfortable with the bill's philosophy. There is recourse to other arenas to penalise breaches of the regulations appropriately.

Claudia Beamish: I ask the witnesses to explore further the powers of the court in relation specifically—I appreciate that there may be other points—to the proposed cap on compensation orders in criminal proceedings at £50,000 in respect of costs incurred in

"preventing, reducing, remediating or mitigating the effects of ... any harm to the environment".

We have touched on the issue, but I seek other views. Does the proposed maximum adequately reflect the potential associated costs? Should compensation orders be capped? What difficulties might the courts have if they assess the benefit to be greater than the maximum potential compensation order?

The Convener: I ask for fairly short, sharp answers if possible.

Andy Myles: A short, sharp answer is that we do not believe that there should be a cap. If the courts are to use such a power, the level of compensation should be proportionate to the amount of damage caused to the environment.

To take on board Graham Hutcheon's previous answer, it is the courts that will deal with the matter; SEPA will not hand out a compensation order. I do not really know why the bill proposes a cap of £50,000.

The Convener: That has probably answered the question, so nobody else need say anything.

Graeme Dey: I seek views on the proposed power for criminal courts to make a publicity order that requires a person convicted of a relevant offence to publicise details of the offence. The submission from the Association of Salmon Fishery Boards suggests that publicity offers a potentially greater deterrent than a financial penalty, because of the fear of reputational harm. Is that right? Will the provision focus minds?

Andy Rooney: I agree that it is a very useful tool. Given that we are trying to promote sustainable development and sustainable economic growth, the only issue about it is what happens to a company that perhaps has a one-off failure. It could be reputationally damned for ever.

Graham Hutcheon: The use of the publicity order worries me a bit. If a company that operates in an industry whose reputation is built on its environmental performance commits a breach, a publicity order could be damaging, but if a company operates in an industry that has little

regard for the environment and is working at the other end of the scale, would it really be worried about a publicity order? I have three questions. How would the power to make a publicity order be used? When would it be used? Who would the orders be targeted at?

The Convener: We are looking for answers.

Susan Love: I am sorry, but I cannot give you any answers.

My concerns are much the same as Andy Rooney's. We agree that the power to make a publicity order is probably a useful sanction for the courts to have in certain circumstances, but I would be worried if it ended up being used routinely, particularly for a one-off offence that was caused by a lack of understanding or a genuine mistake on a small business's part. I am concerned about the impact on small businesses, which will probably not get advice on how to repair the damage, as they will not have the professionals that a larger company might have to advise them on how to deal with the reputational impact.

Graeme Dey: Ignorance of the law is no defence in other areas, so why should it offer a defence here?

Susan Love: Because the whole regime is about having a proportionate range of sanctions. That is not to say that a one-off mistake should not incur punishment. There will have been punishment and restoration, but is a publicity order necessary on top of that, or has the lesson already been learned? My point is that the response to each offence should be proportionate.

The Convener: Lloyd Austin, should we name and shame?

Lloyd Austin: The phrase "name and shame" perhaps links to the point that I will make, which is that any penalty should be intended to act as a deterrent to prevent similar offences in the future. We are really trying to prevent environmental damage in the first place rather than to penalise people. However, the deterrent will be different for different businesses—that depends on the nature and scale of the business involved.

The opportunity to name and shame—the bill provides that the court "may", not that it "must", make a publicity order, so it will be given a power rather than a duty—will give the court an alternative option, which will be a good option to have in appropriate cases. If there is concern about the cases in which using the power might be appropriate, it may be that—unless Gordon McCreath has other advice on what the appropriate mechanism is—the Lord Advocate could give guidance to procurators fiscal on the appropriate circumstances in which to seek such a remedy.

Perhaps a publicity order might be applied to cases involving large companies that should have known better rather than small companies that did not know better. The publicity order is an appropriate remedy to have on the menu of remedies, but the situations in which it would be appropriate might be subject to guidance and discussion.

The Convener: So the publicity order might be applied to a large arable farm as opposed to a croft.

Allan Bowie: Convener, I thought that you might point in that direction.

When people are abusing a regulation and are at it, obviously there is a need for a bigger stick. I think that we all accept that. The imposition of a publicity order will be at the court's discretion—the word "may" is very important. Bearing it in mind that any case that comes to court is pretty serious—and we should make no mistake that naming and shaming has a huge effect, regardless of the scale of the business involved—I think that, when the occurrence happened by accident, the court should take due consideration of whether the individual or company is trying to change and to rectify the position, regardless of whether the individual involved is a crofter or a small arable farmer in Fife.

The Convener: Or a large arable farmer.

Gordon McCreath: Drawing together everyone's comments, I think that the root of the issue is the fact that environmental offences are offences of strict liability, for which it does not need to be shown that the person meant to commit the offence or was negligent. There are grades of culpability when people commit such an offence, and there is precedent elsewhere in the UK for categorising those grades. South of the border, the Environment Agency has applied various categories to incidents for a number of years. A similar scheme could be used to assess the categories in which a publicity order might be used.

Alex Fergusson: Chapters 1 to 3 are all fairly subject specific, but chapter 4 leads us into the potentially murkier waters of what are called miscellaneous provisions. There is indeed a broad range of such provisions in the chapter.

I do not want to list all the provisions involved, but I notice that the submissions from the Federation of Small Businesses and the Scotch Whisky Association raise concerns about the offence of causing "significant environmental harm", on the ground that the definition of that harm, which is that it has "serious adverse

effects", seems very open to interpretation. Can Susan Love and Graham Hutcheon expand on that a bit? If anyone can give us an example of how "significant environmental harm" might be misinterpreted, that would be useful. It would also be interesting to know what discussions, if any, people have had with SEPA about those concerns.

11:45

Susan Love: As far as I recall, we have not specifically discussed with SEPA what the new offence might look like. Our concern is that, in trying to explain to our members the intentions behind the bill, we struggle to explain what the offence would look like because, to a layperson, the definition provided—that the harm may "have serious adverse effects"—is fairly vague. If Gordon McCreath could tell me that there is a well established principle here, that would be great, as I would then have an example to give my members. The definition of the new offence seemed quite vague to us in reading the bill.

Graham Hutcheon: I will reiterate that point. The provision is so broad that we have difficulty in understanding what "significant environmental harm" will mean. What will the regulator do? Will it start to interfere in our processes, in the materials that we choose and in how we operate? We need greater clarity on what "significant environmental harm" means and what actions SEPA will take in such conditions. That is the only statement that I can make on the matter. Again, the issue is a lack of clarity.

Alex Fergusson: Have you discussed your concerns with SEPA?

Graham Hutcheon: Not personally and not at that level of detail. That is an issue for our next set of discussions.

The Convener: We have one final question to ask.

Richard Lyle: Some of the miscellaneous provisions will have an impact on the 32 councils in Scotland, so I will draw on Andy Rooney's experience. What impact will the provisions on contaminated land, special sites, waste management authorisations and air quality assessments have on the day-to-day operations of Scottish councils?

Andy Rooney: Contaminated land, which is dealt with in section 34, is a legacy of the industrial past. Some areas of contaminated ground might not present too much of a problem, but those that pose significant harm to public health through groundwater, surface water or whatever can be identified as special sites. In effect, such a designation puts a blight on the land. The proposal to remove that blight—once a site has been cleaned up, obviously—is generally welcomed.

The only caveat that I might throw in relates to environmental information. As the Law Society has identified, the history would still appear in any property search, which is only fair enough. In South Lanarkshire, we have only one special site that has been declared as contaminated, but we would welcome the option to remove a site from the contaminated land register and bring it back into productive use. Another point to throw in is that, to safeguard the interests of all involved, it is likely that some monitoring of the land would continue, in case there was some change. The principle of getting land back into productive use is welcomed.

The Convener: Since everyone seems to have provided us with more than enough questions to put to the minister—we have a lot to mull over—I thank you all for a very illuminating discussion of the complex issues that are involved in the better regulation of activities and their environmental impacts. I thank you all, individually and collectively, for what has been a most fascinating session.

I ask people to leave relatively quickly, if that is at all possible, so that we can move on to our next item of business, which is in private.

11:49

Meeting continued in private until 12:29.

Scottish Parliament

Rural Affairs, Climate Change and Environment Committee

Wednesday 5 June 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Rob Gibson): Good morning everyone, and welcome to the 20th meeting in 2013 of the Rural Affairs, Climate Change and Environment Committee. Members and the public should turn off their mobile phones and other devices, as leaving them on can affect the sound system.

Agenda item 1 is a decision on whether to take in private item 4, which relates to evidence on the Regulatory Reform (Scotland) Bill. Do members agree to take item 4 in private?

Members *indicated agreement.*

Regulatory Reform (Scotland) Bill: Stage 1

10:00

The Convener: Agenda item 2 is our final evidence session on the Regulatory Reform (Scotland) Bill. I welcome the Minister for Environment and Climate Change, Paul Wheelhouse; he can introduce his staff. If you wish to make an opening statement, minister, that will be fine.

The Minister for Environment and Climate Change (Paul Wheelhouse): Thank you very much, convener. Good morning, committee.

On my immediate right is Neil Watt, who is the bill manager and deals with better environmental regulation policy in the Scottish Government's environmental quality division. Bridget Marshall also deals with better environmental regulation policy in the environmental quality division, and George Burgess is deputy director for environmental quality in the Scottish Government.

Thank you for inviting me to give evidence on the Regulatory Reform (Scotland) Bill. The Administration is focused on building a dynamic and growing economy that will provide prosperity and opportunities for all, and ensuring that future generations can enjoy a better quality of life, too. The bill is an integral part of the Scottish Government's sustainable growth agenda and reflects the fact that the protection of our environment and the sustainable management of our natural resources are not only valuable objectives in their own right but are critical to economic growth and the health and wellbeing of our communities.

Today is United Nations world environment day. It is therefore appropriate that we are meeting today to discuss a bill that will provide a framework that will protect and improve Scotland's internationally recognised environment.

I have followed the committee's scrutiny of the bill; in particular, I followed the very constructive round-table meeting with key stakeholders last week. I believe that that reflects the stakeholder-led and evidence-based approach that we have taken in developing the joint Scottish Environment Protection Agency-Scottish Government proposals. As members are already familiar with the content of the bill from the detailed evidence that was given in those sessions, I will refrain from providing another overview.

I would like to start with my view of the principles that the better environmental regulation is intended to achieve. The objective of the bill, and the wider programme that it supports, is not

deregulation; rather, it is about delivering necessary regulatory outcomes more effectively. Consistent, proportionate and targeted regulation is needed to deliver benefits for our economy, communities and environment, and to support delivery of the Scottish Government's purpose.

The statutory purpose for SEPA that the bill will introduce will give recognition to the broader role that SEPA now has and the importance of the environment to our economy and the health and wellbeing of our communities. It is important to note that, although that purpose is new, the need to balance environmental, economic and social considerations is not. As members have heard in evidence, balancing judgments are already taken by SEPA, Scottish Natural Heritage and other regulators on a daily basis. The new statutory purpose for SEPA will formalise what is already current practice and help to provide a line of sight from the Scottish Government's purpose to what our public bodies deliver. Let me be clear that this is not about sacrificing the environment to promote economic growth, as some have suggested. As is right and proper, SEPA's primary purpose is and will remain the protection and improvement of the environment. The approach reflects the fact that we cannot look at issues in isolation.

I know that the committee is interested in the bill's impacts on other regulators in my portfolio, such as SNH. Like SEPA, SNH already contributes to achieving sustainable economic growth in its work that supports farming, commercial forestry, renewable energy and tourism, to give just a few examples. The bill will help to ensure a consistency of approach across regulators and demonstrate that those in the public sector are working together.

The proportionate, risk-based framework of environmental regulation that the bill enables will better protect the environment, help legitimate businesses to flourish and protect communities. I take pleasure in highlighting the fact that there will be losers from the work: the criminals and the entrenched poor performers. It is all about providing a level playing field and protecting communities and the environment from harm.

The new framework will be easier for regulated businesses and SEPA to understand and administer and will lead to efficiencies for both. As a result of the bill, SEPA will change the way in which it prioritises its regulatory activities so that its resources are directed towards the most important, highest-risk activities that have the greatest actual or potential environmental impact on communities.

SEPA will continue to work closely with those whom it regulates and other interested parties to help to unwind complexity and deliver a more joined-up regulatory approach. The committee has heard examples of how SEPA is working proactively with key sectors to help to make improvements on the ground. I welcome the contributions from NFU Scotland, the Scotch Whisky Association and Scottish Water in that regard.

The bill will give SEPA a wider, more strategic range of enforcement tools to deploy. Combined with the new sentencing options that are given to the criminal courts, those will play a key role in tackling poor performance and non-compliance. The polluter-pays principle is already widely accepted and supported. Those proportionate enforcement powers will ensure that the criminals pay the price for remedying damage that is done to the environment.

All responsible businesses, large and small, will benefit from an effective environmental protection system for Scotland. By focusing resources on the greatest environmental harms, SEPA can more effectively target lawbreakers, support non-compliers to become compliant with regulations and protect communities and our natural environment.

The bill is a product of extensive engagement with stakeholders and we remain committed to listening to our stakeholders and acting on feedback received from formal and informal consultation. I highlight the fact that SEPA, the Crown Office and the Scottish Government have jointly arranged a stakeholder event next week to consider the enforcement measures in more detail. That will be the first in a series of better environmental regulation workshops that will run in the months ahead. I am committed to maintaining that level of engagement as we move forward with the programme.

I am happy to answer questions from the committee.

The Convener: Thank you, minister. We will kick off with some questions about the term "sustainable economic growth". Where did it originate? Does it mean economically sustainable growth, or economic growth within the limits of ecological and social sustainability?

Paul Wheelhouse: We have a definition of sustainable economic growth, which the Cabinet Secretary for Finance, Employment and Sustainable Growth highlighted in a written answer on 20 November last year:

> "building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too."—[*Official Report*, *Written Answers*, 20 November 2012; S4W-10994.]

Some people have called for a definition of sustainable economic growth to be inserted in part 1 of the bill, which we consider to be all about

supporting and empowering regulators to be accountable for the often complex and difficult decisions that they take. However, there is no compelling case for that.

There is a clear definition of sustainable economic growth and there is also a good definition of sustainable development in the current Scottish planning policy and the national planning framework 2. I understand that Scottish Environment LINK and others strongly support and highlight it as one of the best existing examples of sustainable development. That is being taken forward in the current consideration of NPF3 and the consultation on the Scottish planning policy.

The two things are not mutually exclusive. We have regulators that have a primary function of regulating on the environment, but they can also be empowered to take into account economic development.

The Convener: Although there might not be a need for a definition in part 1, we might need to have some clarity later on. We have to tease out a little further your intention in using the term. Does it give extra weight towards economic growth in policy decisions, or is it a subset of sustainable development?

Paul Wheelhouse: As I said earlier, one of the key things that we want to achieve with the bill is greater transparency. As I stated in my opening statement, regulators such as SEPA already have to take economic issues into consideration to a degree when making decisions.

There is a hierarchy of duties. SEPA's primary function is obviously to protect the environment. However, it is not unreasonable to suggest that economic considerations would be taken into account in deciding which of two options for a project, both of which had a similar environmental impact—positive or negative—SEPA would recommend for implementation.

That is a potential positive benefit of formalising something that is already happening informally and making it transparent. It is clear that sustainable development principles are extremely important, but through the provisions in the bill we want to provide a line of sight to the Government's overarching purpose so that there is a consistency of approach across all our regulators. However, providing a line of sight to that overarching purpose does not take away from their primary function, which, in SEPA's case, is to protect the environment.

The Convener: Okay. Claudia Beamish wants to come in on that point.

Claudia Beamish (South Scotland) (Lab): Good morning, minister. I would like to pursue that issue a little further. Would the purpose and effect of the bill change significantly if it included a duty to contribute to achieving sustainable development rather than a duty to contribute to achieving sustainable economic growth?

I listened carefully to what you said and have done my best to read some of the evidence and definitions. I completely take the point that, in the case of SEPA, the environmental aspects of its duties are the overriding priority when it comes to what the bill will do. In view of that, might "sustainable development" be a more appropriate term to use in the bill, given that it takes account of the environmental, economic and social aspects? Without wanting to labour the point, the concept of sustainable development is enshrined in European legislation and, as you said, in NPF2, as well as in the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010. It would be helpful if you could comment on whether it would be better to use the term "sustainable development".

Paul Wheelhouse: That is a fair point. The point that I would make—this also deals with an aspect of the convener's question that I did not answer—is that although sustainable development and sustainable economic growth are clearly related principles, they are distinct concepts. I take the point about the social and environmental aspects of sustainable development being less explicit in the definition of sustainable economic growth that I read out earlier.

The value of having a duty on sustainable economic growth explicitly set out is that it gives a clear line of sight to the Government's purpose and provides a consistency of approach across all regulators in respect of the Government's economic strategy, which has at its heart objectives on low-carbon economic growth—that is a specific strand of the strategy. In parallel, we are taking steps to ensure that all public bodies will ultimately sign up to a duty on biodiversity in support of the Scottish biodiversity strategy, which will be launched soon. As I am sure that Claudia Beamish knows, we have public duties in respect of climate change that arise from the 2009 act. There are a number of public duties in existence that will ensure that the environment is taken into account in the activities of all public bodies, including the regulators.

The value of having specific reference to sustainable economic growth in the bill is that it ensures a line of sight to what is in the Government's economic strategy, although I take on board the member's point about being more explicit about sustainable development principles. We can take that away and reflect on it.

However, I would not want to lose the link—if I can put it that way—with sustainable economic growth, which empowers the regulators to take such matters into account in cases in which a

finely balanced decision has to be made. It might be the case that two alternative proposals would have a similar outcome from the point of view of environmental impact. The proposed duty in the bill will empower a regulator to take economic impact into account in the decision and to recommend approach B over approach A, as it might have more of an impact on the economy and might therefore benefit Scottish society more explicitly. I am happy to take on board the member's point and come back to her on it.

It might help if I bring in George Burgess at this point.

10:15

George Burgess (Scottish Government): It might help to look specifically at section 38 of the bill and the new general purpose for SEPA, because that brings together the various concepts. When we gave evidence to the committee two weeks ago, we had a look at section 38, which provides that SEPA's primary purpose is

"protecting and improving the environment",

and that its subsidiary purpose is

"improving the health and well being of people in Scotland, and ... achieving sustainable economic growth."

I view those three purposes together as sustainable development. Indeed, our initial proposals on the bill were that an existing duty in the Environment Act 1995 that required ministers to give guidance to SEPA on the contribution that it should make to sustainable development in exercising its functions was superfluous, because the new purpose was sustainable development written out in longhand.

We responded to the stakeholders' wish not to see the words "sustainable development" disappear, so the requirement for ministers to provide guidance on the contribution to sustainable development will remain in legislation alongside the purpose that we have set out. We envisage having a single set of guidance on the new purpose and the contribution to sustainable development to articulate clearly how the terms interrelate.

As I see it, sustainable economic growth is a component of sustainable development, but they are not one and the same thing.

Paul Wheelhouse: As well as providing guidance, we will improve the tools that are available to make decisions about the link between economic and environmental matters with the welcome introduction, albeit that it is early days, of the natural capital index and evolving an approach in terms of ecosystem services. We are gaining an understanding of what environmental investments can deliver in terms of economic gain, and vice versa in terms of what economic investment can deliver for the environment. That will help not only those who promote projects but regulators to understand better the links between the economy and environmental issues.

Claudia Beamish: I am still puzzled, so I wonder whether you can help me to understand why, if sustainable development will be defined in guidance, it is not included in the bill. I think that understanding that might help to reassure a number of stakeholders who have made comments.

Paul Wheelhouse: I take the point that perhaps an explicit link is lacking, although George Burgess has explained that we feel that some aspects of the bill already collectively deliver the outcome that Claudia Beamish seeks. I do not want to lose sight of the importance of having consistency and line-of-sight issues delivered by explicitly bringing into the bill the purpose of sustainable economic growth. There has been a focus on sustainable economic growth because it is one of the Government's overarching purposes. There is a clear link between the Government's economic strategy and the regulators that interact with the economic community.

George Burgess: The reference to sustainable development is already in the Environment Act 1995. We do not need to refer to it in the bill, because it is already in the statute.

The Convener: Is it in section 20 of the 1995 act?

George Burgess: I think that it is in a section that is up in the 30s.

The Convener: You could remind us in writing of what section it is in.

Paul Wheelhouse: We will get back to you on that point, convener.

Nigel Don (Angus North and Mearns) (SNP): I have a point on George Burgess's comment about section 38 and the duty for SEPA, and the helpful hierarchy that puts the environment first, with the other two aspects being subordinate to that. I put it to the minister that it might help us—and, perhaps, many of those from whom we have already heard—if the general duties in the bill took a similar hierarchical approach. One of the points about sustainable economic growth is that we are not sure whether the environment or the economy comes first. My impression is that you feel that the environment comes first. If that position, which is explicitly stated in section 38, was stated as the general tenor of all the other duties for the other regulators, that would to an extent overcome our problem with what the words mean. I do not think that the problem is actually in the words; the

problem is in knowing what they mean and what the hierarchy of duties is.

Paul Wheelhouse: That is a reasonable point, but as I am not the lead minister for the bill, I can only take that back to Fergus Ewing to see whether there is an approach that he can find to accommodate that concern. However, it is worth stating that, in terms of the environmental regulators, the hierarchy is in place, in that the environment will remain the overarching responsibility and economic interest will come second.

George Burgess: To answer the convener's question, the reference to sustainable development and the guidance power is in section 31 of the Environment Act 1995.

Graeme Dey (Angus South) (SNP): How will the code of practice define sustainable economic growth so that it is readily understood and applied to the functions of the 10 listed regulators? Given the diverse nature of their remits, is one code of practice sufficient, or should each regulator receive detailed and specific guidance?

Paul Wheelhouse: That is a fair question. The code will apply to all the regulators that are listed in schedule 1, and will not be specific to any particular regulator. It will support regulators as they deliver on their economic duty, and is being developed by regulators and by business to capture and encourage best practice. It will very deliberately be the subject of substantial consultation, and will be subject to parliamentary scrutiny prior to its introduction. That process is important, and will give those who have an interest in delivery on the ground the opportunity to comment on the code of practice and guidance.

Neil Watt (Scottish Government): The code is being developed with the regulators, the purpose of which is to design the code to clarify the practicalities around how regulators' roles will be delivered.

Graeme Dey: It must be challenging to come up with what will, by definition, be quite a broad code that will cover things as diverse as charities, housing, tourism and healthcare. How will you make it relevant to such a diverse group?

Neil Watt: As the minister said, it is all about providing a line of sight to the Government's purpose. We are moving from part 1 of the bill to part 2 of the bill—section 5—and talking about SEPA's purpose before going back to part 1.

Part 1 of the bill does not establish a new purpose for the regulators; it introduces a new duty. It is important that, as Graeme Dey said, the full range of relevant regulators are involved in that and in development and implementation of the code of practice. I like to think that there will, as the work goes on, be a great deal of input from regulators on how the process will work in practice.

Graeme Dey: In previous evidence-taking sessions, we have touched on the possibility that we might end up with a pyramid structure, where there is a broad code sitting at the top, with specific policy guidance for the regulators underneath that. Is that what will happen in practice?

Paul Wheelhouse: Graeme Dey has raised a fair point about interpretation. It will be difficult in practice to have specific guidance for every sector. I guess that it is about providing guidance about the approach that is to be taken and about the interpretation of guidance. I suppose that in some respects guidance on guidance is what is often needed—I am sure that you have experienced that.

We will have to come back to the committee to talk about how we will cover the areas that are beyond my portfolio, such as tourism, to which the duty will also be applicable. Clearly, however, I do not have as great a knowledge of those other areas as Fergus Ewing. We can come back to the committee on the point, if that will be helpful.

Graeme Dey: I appreciate the difficulty that you have in that regard, minister.

Given that ministers already have primary powers to issue codes of practice with respect to enforcement of food law, should a caveat be introduced to clarify that section 5 does not prejudice those powers, as the Food Standards Authority has suggested it might? Should a caveat of that nature include all regulators?

Paul Wheelhouse: Is there a concern about how section 5 might influence the FSA? Can you expand on that?

Graeme Dey: The FSA suggested that some clarity in that regard would be useful.

Neil Watt: The new powers are intended to complement the duties on bodies such as the FSA, not to circumvent or prejudice—as Graeme Dey suggested—their other powers.

Graeme Dey: My point is in keeping with themes that we touched on earlier, such as the need for greater clarity on what the bill is about. There is an issue in that respect, is there not?

Paul Wheelhouse: There are some fundamental principles, which I set out in my opening statement. We are trying—unlike under the deregulation agenda elsewhere in these islands—to improve the clarity and transparency of regulation, although it appears that that is not as easy as we expected.

As I said, the FSA is already taking economic issues into account with regard to the public duty issue. The bill enshrines that approach formally, so that it is transparent and clear.

We are trying to introduce greater consistency among regulators, and it will be helpful to have a code of practice to inform that. We are trying to ensure that there is greater proportionality—which is a theme that will, I am sure, be addressed in later questions, so I will not stray there just now.

There are some key principles at play, and I hope that the bill will benefit all sorts of regulators. As Neil Watt said, the new code is intended to support and encourage consistent regulation and compliance with regulatory principles. It is not in any way intended to circumvent or replace other codes of practice.

Graeme Dey: That is reassuring.

Neil Watt: The issues that the committee has heard in evidence and which we are discussing today were teased out in the consultation that was run by our better regulation colleagues, who are also appearing at the Economy, Energy and Tourism Committee.

We are genuinely trying to act on concerns and to work through them with stakeholders. The commitments to developing the code with regulators and other interested parties, and to ensuring that the code is subjected to parliamentary scrutiny is part of that process. We accept and acknowledge the concerns that the committee is raising this morning.

The Convener: Thank you. We note that.

Jim Hume (South Scotland) (LD): Section 6(4)(b) states that ministers will consider whom it is "appropriate" to consult on the draft code of practice. What organisations do you consider to be "appropriate"?

Paul Wheelhouse: Jim Hume has raised an important point, which others have also raised. Section 6(4)(b) guarantees that we will consult relevant regulators and "appropriate" stakeholders. We are committed to an inclusive and open approach in undertaking a consultation, and I hope that nothing in the bill suggests otherwise.

I am aware that there may be an issue with separate lists and ensuring that there is a consistent approach with regard to who will be consulted. I am aware that all stakeholders seem to be relatively happy—at least so far—with the degree of consultation that has been undertaken. We are keen to keep that engagement going, as I said in my opening statement.

If it would help the committee, I will discuss those issues with Fergus Ewing and come back with greater clarity on whom we will consult at different stages on the code and on secondary regulation. We will have an on-going consultation exercise on issues such as equality. Those elements can all be taken in the round.

Jim Hume: That would be useful. When stakeholders gave evidence, there appeared to be no dissent from the view that the consultation should go out to the broader public and wider society. Did you consider that?

Paul Wheelhouse: The key thing is that we should make sure that those who have a direct relevant interest in particular measures are consulted. George Burgess will address the wider point about how to bring in the wider public for consultation on some of the measures.

10:30

Jim Hume: That would be useful. You mentioned that a diverse range of people—anyone and everyone—could be affected directly or indirectly.

Paul Wheelhouse: It would be fair to say that in the environmental sphere, we have a pretty good handle on who our stakeholders are. We interact with SEPA and SNH and our active stakeholder communities work very well with our regulators and with Government. I ask George Burgess to address the wider point.

George Burgess: I wonder whether requirements that there must be consultation of particular parties might be rather old-fashioned. They seem to come from an earlier day when only particular people were consulted, and not the wider public.

Practice during the past decade has been that any consultation would be an open public consultation that appears on the Scottish Government website. There would be absolutely no restriction on people feeding into it. There is some value in making sure that, as well as general consultation, there is consultation of particular parties, but I cannot think when last there was a closed consultation to which only certain people were allowed to respond. Government practice has been to use open consultations that anyone can feed into, and to have widely available and easy ways for stakeholders to become aware of upcoming consultations.

Paul Wheelhouse: It is also fair to say that we are always conscious of the degree to which there is consultation overload for some stakeholders. The point that I was making earlier is that we need to be sure that those with whom interaction is absolutely critical are aware that the consultation is happening so that we get their views on board. As George Burgess said, it is not about closing off consultation to others; it is about making sure that

those who need to know that the consultation is happening are aware of it so that they do not miss the opportunity to feed into it.

Jim Hume: I just want to get pure clarity and get it on the record. You will engage with some stakeholders to make sure that they engage with the consultation, but it will also be open to the public.

Paul Wheelhouse: As George Burgess said, that is the general practice. The consultation is available and it is an important principle of Parliament that such consultations are always open and transparent to the public.

Neil Watt: I guess that we are stereotyped as sitting at our desks waiting for written consultation responses to come in. I look at consultation responses and it is not just about reading letters; we are encouraged to get out there and speak to people. I hope that we have managed to do that in the policy areas for which I am responsible. I would like nothing better than to get out of the office and do that. We are not just talking about the formal element of consultation, important as it is.

Jim Hume: That has cleared it up quite well, thank you.

Richard Lyle (Central Scotland) (SNP): Good morning, minister. I welcome Neil Watt's comment that he is going to be out talking to people.

Many regulators already have the duty to report on sustainable development. How would you alleviate their concerns about how they can meaningfully distinguish and report on their duty to contribute to the achievement of sustainable economic growth? If they express concerns when you are out visiting them, what will you say to them?

Neil Watt: Do you mean regulators generally or SEPA specifically?

Richard Lyle: I mean regulators generally.

Neil Watt: There is a good understanding of the Government's purpose and we have already had a discussion about the definition of the terms that we have used. I would like to think that when the duty is picked up specifically in the code of practice, the discussion will be specifically about practical implementation. We are talking about the principles of better regulation and how we can ensure transparency and consistency across regulators; that is the purpose of having the duty, and that is the kind of discussion I will be having.

Richard Lyle: Imagine that I am a regulator and I do not know what sustainable economic growth means. What does it mean to you?

Paul Wheelhouse: It might be easier to look at the question as if, for the purpose of the argument, Mr Lyle was SEPA. I am sure that he would enjoy that role.

In section 31 of the Environment Act 1995, to which George Burgess referred earlier, there is a requirement to provide SEPA with guidance on the contribution it should make

"towards attaining the objective of achieving sustainable development".

That will remain alongside SEPA's new clear statutory purpose, which relates to sustainable economic growth.

We will develop a code of guidance that will make it clear how to interpret that new public duty and which will also clarify the requirements as set out in the 1995 act to deal with the sustainable development aspects. The guidance will be an appropriate place to tease out the relationship between the two concepts. Clearly, there is a degree of overlap.

Claudia Beamish referred earlier to the fact that matters are taken into account in sustainable development that are not necessarily explicit in sustainable economic growth, such as environmental and societal aspects. We can set out in guidance the matters that go beyond sustainable economic growth that are covered under sustainable development.

SEPA already has a duty to provide annual reports, as other public bodies have. We expect that future annual reports will report on the outcomes of the new duties. As I said in response to an earlier question on the public duty in respect of biodiversity, we expect SEPA, SNH and other regulators to report on that as well as on the impact in terms of climate change mitigation, sustainable economic growth and sustainable development. It is important that we give them appropriate guidance, so it is fair to raise that point. That is something that we need to work on in consultation with stakeholders.

Richard Lyle: I am glad to hear that. Thank you.

Alex Fergusson (Galloway and West Dumfries) (Con): If I picked you up correctly in your answer to the very first question, you said that Scottish Environment LINK has a very clear understanding of the definition of sustainable economic growth.

Paul Wheelhouse: I said sustainable development.

Alex Fergusson: Thank you for putting me right on that.

One of the committee's briefing papers records that

"... evidence to the Committee from Scottish Environment LINK suggested that the concept of 'sustainable economic

growth' was so poorly understood that it would lead to a 'paralysis of indecision' from regulators,"

which could, in extremis,

"lead to challenge in the courts."

If you are imposing a duty to contribute to achieving sustainable economic growth, that suggests that we will need a way of measuring and monitoring whether the regulator has upheld that duty. How do you intend to do that?

Paul Wheelhouse: That is an important point that I should have raised earlier; thank you for the opportunity to address it.

A short-life working group will be established that comprises business representatives and regulators, including SEPA, SNH and the Convention of Scottish Local Authorities. That group will develop a code of practice which, as we said earlier, will be consulted on prior to introduction. Regulatory bodies that are not involved in that working group will be kept informed and invited to contribute to it, so that even if they are not directly involved in the group, they will have an opportunity to feed into the guidance to give support on how to interpret and give clarity on sustainable economic growth, and how to report on its key features and relevant measures. That will be a key outcome to support consistent and appropriate decision-making.

We want consistency across regulators; they need to have a coherent understanding of what the concepts and requirements are.

We hope to use the bill and development of the code as an opportunity to raise awareness and understanding further among regulators in order to address the concerns that Scottish Environment LINK and others have expressed.

Alex Fergusson: It is good news that the short-life working group will be established. Will it also be able to look at what enforcement procedures might be used if a regulator is found not to be upholding its duty?

Paul Wheelhouse: Consultation on enforcement will be key. After all, we must ensure that all regulators and actors understand the relationship between the public duty and the regulator, the interpretation of those public duties and the linkages with enforcement where harm is being caused to the regulator's objectives, so that people understand where these things come in.

Perhaps Neil Watt will comment on that.

Neil Watt: Huge new reporting requirements would not be in line with the principles of better regulation, and the new requirement will fit into well-established governance structures that regulators and public bodies use to report on their performance and contribution to the Government's purpose. This is not about radical change, creating something new or adding an extra burden—we do not want to take resources away from front-line delivery—but about creating transparency and consistency.

Alex Fergusson: I entirely accept that, but if you put a duty on a regulator to achieve a certain aim and it fails to do so, you must have some mechanism for drawing that to its attention and seeking other actions that will assure everyone that the duty is being upheld. Is that not what should happen with a duty?

Paul Wheelhouse: As regulators such as SEPA and SNH in my portfolio are accountable to ministers in delivering on those outcomes, there would already be interaction with them on what they could do to improve their performance; they already report to me. For example, I recently received reports from them on their outcomes in relation to the Climate Change (Scotland) Act 2009 and the steps that they are taking to reduce their own damaging greenhouse gas emissions. Good progress is being made, but occasionally there are bumps along the way and they will write to me to explain the reason for their failure to deliver on a particular area and the steps that they are taking to address that in the forthcoming year. A mechanism already exists, but I am happy to take the committee's view on whether there are any other measures that we could consider.

Alex Fergusson: Thank you. That was helpful.

Jayne Baxter (Mid Scotland and Fife) (Lab): Good morning, minister. Your previous answer strayed a wee bit into the territory that I was going to cover, but I will still ask my question to ensure that we have an understanding on the record. Is it likely or possible that the lack of understanding of the concept of sustainable economic growth will lead to a paralysis of indecision? If that were to happen, would you intervene to move things forward?

Paul Wheelhouse: It is a fair question, but I hope that the short-life working group will provide much greater clarity on the code and how the concepts should be interpreted. I would certainly have on-going engagement with the regulators that I regularly engage with and the chief executives and chairs of those organisations if they found it difficult to interpret any aspect of our policy. That would be a vehicle for dialogue and interaction in which I would ask, "Okay, what in relation to your specific functions as a regulator are the challenges in delivering this approach?" We would provide better guidance either through a formal letter setting out supplementary guidance on interpretation or through a revision of the code. I do not know whether that has come up in discussion with Mr Ewing, but it is certainly the approach that I would be keen to take. Instead of

standing alone and aloof, I would want to have on-going engagement with SEPA and SNH to ensure that, if they were uncomfortable with anything, we would have a chance to interact and improve the situation if necessary.

Jayne Baxter: That is good to know.

Angus MacDonald (Falkirk East) (SNP): Good morning, minister. Following on from the points that have been raised by Alex Fergusson and Jayne Baxter, I wonder how, in the event of a legal challenge in the courts with regard to the concept of sustainable economic growth and the possibility of a paralysis of indecision that has been mentioned and which was raised at the round-table session by Scottish Environment LINK, you will ensure that the courts interpret the spirit of the law in the absence of national and international guidelines or definitions.

10:45

Paul Wheelhouse: That is an important point. Obviously, in recent times there have been cases in which accusations have been made that SNH or SEPA has slowed down the process of supporting an investment in a particular area or industry. It is always a challenge for regulators to protect the environment while supporting legitimate and good economic investments.

An important point is that, to support the delivery of the bill and its supporting secondary legislation, we will provide guidance to reduce the room for misinterpretation. We hope that that will help the courts, which interpret matters as they see fit. Obviously, it is for the courts to interpret the law and we cannot directly influence their interpretation, but we can provide supporting information and guidance on the intent behind the law to give as much clarity as possible about our policy objectives in introducing the legislation.

George Burgess, from his knowledge of the area, might be able to explain how the courts will interpret that guidance.

George Burgess: In looking at the requirements, the courts would no doubt look at the provisions of the bill—by then an act—and at, for instance, the code of practice. To take a hypothetical example, if there was a case about whether a regulator had complied with the code of practice, the court would obviously look at the code of practice.

In cases where the court is unclear about the purpose from the statute or the code of practice, it is possible for the court to look behind that to the parliamentary proceedings, including the proceedings of this committee, to see what the Parliament's intention was in putting the statute in place. The courts can look behind the words of the statute to discern what the purpose of the provision is.

Angus MacDonald: It is encouraging that it is acknowledged that the code of practice should be robust enough for the courts to follow. Thank you for the feedback on that.

Nigel Don: On that point, without wanting for one moment to disagree with what Mr Burgess said, I put it to him and to the minister that the last thing that anyone wants to do is to produce an act of Parliament that requires to be interpreted by the courts. The courts will interpret statutes when they are forced to do so, but surely we all recognise that it is much better to have statute that is so well drafted and clear that the courts never get involved.

Paul Wheelhouse: Nigel Don raises an important point. I suppose that there is greater scope for misinterpretation with the difficult concepts that formed the initial part of our discussions on sustainable development and sustainable economic growth. Those concepts are, if you like, outwith the comfort zone of most courts, so I think that it will be helpful to provide guidance on how they should be interpreted and delivered by regulators. That will assist the courts with the intent behind the concepts of sustainable development and sustainable economic growth.

Nigel Don: That is my point entirely.

Paul Wheelhouse: However, your fundamental point that the legislation should be as clear as possible is also fair.

Jayne Baxter: I cannot resist the temptation to point out that much of the committee's time is currently being taken up with the Crofting (Amendment) (Scotland) Bill, which is required because of the way in which provisions in the Crofting Reform (Scotland) Act 2010 were interpreted very soon after the act was passed. I know that there are many reasons for that, but I am anxious that we do not find ourselves in a similar scenario with this legislation in two or three years' time. Let us avoid any confusions of interpretation if we can possibly do so.

Paul Wheelhouse: I can assure you that, as a recent student of crofting law, I am in 100 per cent agreement with you on that point.

Let me highlight one stakeholder comment, which comes from Professor Colin Reid; I know that he had some criticisms of the bill, so I am not suggesting that he is 100 per cent enthusiastic about all of it. In his submission on behalf of the Law Society of Scotland, Professor Reid said:

"The Society welcomes the Scottish Government's drive towards the simplification of complex regulation, and generally support the adoption of measures aimed to

reduce inconsistency, streamline and clarify all and any environmental protection regimes."

That is the intent that we are trying to achieve, which I am happy has been recognised by the Law Society of Scotland. I know that there will be potential issues along the way, but believe me that I am very keen to avoid a situation in which we have problems similar to those affecting decrofting.

The Convener: Of course, crofting legislation has a court all of its own to deal with such things.

Claudia Beamish: As another recent student of crofting law, I could not agree with the minister more.

I seek further reassurance on a matter that still concerns me. I understand that there is to be a short-life working group. Will it be possible for that group to look at definitions as well as at the criteria for sustainable economic growth? If we are to take the statute forward without a definition, how can we be sure that the definition that the working group comes up with will be appropriate? It all seems to be the wrong way round.

Paul Wheelhouse: I should be clear, and I am sorry if I have confused matters.

Claudia Beamish: I am not saying that—

Paul Wheelhouse: I may have confused you by the way in which I expressed the point, rather than its being your fault. There are existing definitions, and I read out the definition of sustainable economic growth. People might disagree with it, but that is the definition that is there to give guidance on interpretation, which is the key.

Picking up on Alex Fergusson's point, Scottish Environment LINK has suggested to me in stakeholder meetings that the definition of sustainable development that we already have in planning policy is one of the best that it has seen. There is widespread support for that definition, so I do not propose that we change it or ask the working group to change it, but the group can provide guidance and support to regulators on the interpretation of that concept. As Mr Dey has said, there are those who regulate sectors in which they will not be as familiar with those concepts as SEPA and SNH would be, and we need consistency of interpretation across all regulators.

I hope that that clarifies the point. We are not talking about going back to the beginning and scrapping the definitions that we already have. We are trying to provide support and guidance to people on how to interpret those definitions in practice in their sectors.

The Convener: We are clear, just to wrap up, that sustainable development is defined in the Environment Act 1995.

Paul Wheelhouse: Not in the act itself, as I understand it. Perhaps George Burgess can explain the situation with regard to that act. There is a reference to "sustainable development" in the act—

The Convener: Yes, I know.

Paul Wheelhouse: But there is a definition of sustainable development in planning policy; Scottish Environment LINK particularly respects that definition and has used it elsewhere.

The Convener: Can we have that cited, please, so that we have it for our report?

Paul Wheelhouse: You can indeed. We can give that to you.

George Burgess: The term "sustainable development" is quite commonly used in statute. To my knowledge, there is no statutory definition anywhere in the United Kingdom of what that term means. There are, of course, commonly understood and accepted definitions, particularly going back to the Brundtland commission in the early 1990s, so there is a common understanding of the term, but you would not find a statutory definition of what it means.

The Convener: Maybe we need one in Scotland—a world-beating one. I think that we could do with that, if you can help us, because we will try to find a way in our report, drawing on the views that are expressed around this table, to clarify those terms. Sustainable economic growth has been defined to a degree by the Cabinet Secretary for Finance, Employment and Sustainable Growth, John Swinney, but we need a definition of sustainable development. The Cabinet Secretary for Rural Affairs and the Environment might like to turn his attention to that.

Jim Hume: We have several European and international obligations, such as those relating to Natura sites, sites of special scientific interest and European protected species. Could the duty to

"contribute to achieving sustainable economic growth"

be used as a counter-justification for those who want to develop protected sites or use them inappropriately, creating an impact on sustainable natural resources?

Paul Wheelhouse: I understand Mr Hume's point. I refer to our discussion about the hierarchy. The duty does not prioritise sustainable economic growth over the other regulatory purposes. It is important to recognise that, so I thank Mr Hume for raising the issue, as it gives me an opportunity to put the matter on the record. Regulators need to determine an appropriate balance, which is legitimate; however, as the committee has probably heard in evidence, the regulators make

balancing judgments every day and are comfortable with that approach.

Earlier, I commented that we are making the relationship to the Government economic strategy more explicit by introducing the public duty on sustainable economic growth. That helps to provide clarity, but regulators already have to strike a balance between the environmental impacts and the impact on sustainable economic growth. Members should be in no doubt that, for SNH and SEPA, the environmental purpose is at the top of the hierarchy—ultimately, it is their first priority. The new duty will for the first time formalise the other priorities that sit under it.

The natural assets that SNH and SEPA work to conserve and enhance are integral to sustainable economic growth, which is why the development of our ecosystem services approach and the natural capital index, to which I referred, are so important. They allow all policy makers to understand the economic value of protecting the environment so that they can see an economic return from it, and to understand that it is not merely an add-on, but is integral to a more sustainable approach to economic growth. That is one area in which there is a bit of crossover between the two concepts.

As we develop our understanding of ecosystem services, the tools in the box for making decisions on such issues will become stronger and will help us to make more rational decisions that support the protection of the environment and economic growth. I appreciate that there are always tensions between the two objectives and between them and the social objectives to which Claudia Beamish referred. However, those tensions already exist. Those are all legitimate issues to take into account. As I said, SNH and SEPA make balancing judgments every day on such matters.

Jim Hume: I want to explore the issue slightly more deeply, putting protected sites to one side. You said that SNH and SEPA will have the environment as the top priority, but the duty to contribute to sustainable economic growth will surely still apply to them to an extent. Will you explore a bit further the extent to which it will apply?

Paul Wheelhouse: We could look at what already happens. It is generally acknowledged that, in recent years, SEPA and SNH have taken a much more constructive approach and have tried to work with the developers of projects. There are good examples from across Scotland of SEPA and SNH working with promoters of local projects to ensure that development takes place in a way that delivers economic benefit and employment opportunities but does not harm the environment, when that can be avoided.

Recently, I visited the Marine Harvest offshore salmon farm at Barra. I am aware that SNH worked closely with Marine Harvest before it even submitted its application to identify areas in the Sound of Barra that would be of minimal concern and would be an appropriate place to site a fish farm with minimal damage to the environment. Although other matters might have been taken into account when the application was made, there was engagement with the developer to ensure that as much as possible was done prior to that to minimise any environmental harm. That is a good example of how a regulator can assist in the process. Ultimately, a good project appears to have taken place. Unnecessary conflict between the developer and regulator was avoided through their talking to each other and making information available to ensure that the developer chose a good site that would have a minimal impact on the marine environment.

The Convener: We have explored that issue in considerable detail, so we will move on to questions from Claudia Beamish.

Claudia Beamish: How will the code of practice ensure that SNH, SEPA and the FSA will be able to prioritise between the multiple statutory duties? Is the provision likely to change the way in which regulators operate on a daily basis?

11:00

Paul Wheelhouse: Provisions in the bill will place a duty on regulators to exercise their functions in a way that contributes to sustainable economic growth, but only to the extent that that is consistent with the exercise of their other regulatory functions. We are not asking them to do anything that would subvert their existing regulatory functions, such as protecting the environment, which is obviously at the top of the hierarchy—that addresses the point that Jim Hume made, as well.

I will put the issue the other way round. We can foresee scenarios in which two projects have a similar economic impact and one has a better environmental benefit. As things stand, we would always want the project with the better environmental benefit to be picked. However, when two projects have a similar environmental impact—positive or negative—the provisions in the bill will formally empower organisations to take account of economic impact and choose the one that has the biggest employment and social impact. The bill will balance things up.

To be absolutely clear, we would not want and do not intend the public duty on sustainable economic growth to subvert in any way SEPA and SNH's existing regulatory duties, which must be at the top of the hierarchy. I would not subvert that

principle. Only when there is no conflict will regulators be able to take economic impact into account.

I do not know whether that answers Claudia Beamish's question. It is important to recognise that SEPA is not subject to the duty in part 1 of the bill and that the duty in respect of sustainable economic growth does not apply where a regulator is already subject to a duty to the same effect. Those things need to be taken into account.

My main point is that we would not do anything that would subvert a regulator's original public duty with regard to environmental protection, for example.

Claudia Beamish: Do you have any specific comments about that with regard to the FSA?

Paul Wheelhouse: The FSA is outwith my day-to-day duties. I will refer to Neil Watt. Have you had any discussion or interaction with the FSA on that?

Neil Watt: The FSA and SNH gave evidence last week about how the duty might work in practice. I do not think that I could explain it better.

The Convener: I seek clarification of a point about the duty of SNH and SEPA to

"contribute to achieving sustainable economic growth".

Does that duty applying to those bodies' roles as statutory consultees in the planning process create a conflict of interest?

Neil Watt: It applies only to their regulatory functions.

The Convener: Okay.

Paul Wheelhouse: As the minister with portfolio responsibility for SNH and SEPA, I know that those agencies sometimes come under a lot of pressure regarding important economic projects. However, they are fulfilling their statutory duties to protect the environment, and people need to recognise that important function.

Those who apply for projects can greatly assist by ensuring that they have the appropriate information and gather the appropriate evidence to support that process. Quite often, difficulties arise because insufficient information is provided in support of an application and not because of a lack of willingness on the part of SNH or SEPA to consider the application. It is important to recognise that those agencies are there for a reason: to conserve the natural environment and protect it from harm. That is their overriding purpose. Through the bill, they will get a better line of sight on other Government policy such as the sustainable economic growth agenda. Where it is appropriate, the agencies will be able to take those matters into account in their decisions, but I would not ask them to do anything inappropriate to their primary statutory duties.

The Convener: That is very useful. We will move on to part 2, chapter 1, on environmental regulation.

Nigel Don: Part 2 largely covers SEPA and talks about control activities one way or another. In her written evidence, Dr Sarah Hendry made a point about the four sorts of control that appear to be in it: permit, registration, notification and general binding rules. I understand her point that although permits and general binding rules are things that we know about historically, the difference between a registration and a notification is not entirely clear.

My question is not necessarily a terribly technical one, but do we need to have two different things called registration and notification? Could we not just have permits, general binding rules and something else in between? Would a three-tier system be adequate?

Paul Wheelhouse: I take the point. As you have identified, schedule 2 provides for a four-tier system of authorisation, should that be required. The permit and registration have a similar legal effect. Notification is intended to be used as a means for an operator simply to tell SEPA that they are carrying out an activity in a particular location. Most likely, it would be combined with a general binding rule, so that there is a requirement on an operator to follow the rules set out in legislation or guidance and to notify SEPA that they are carrying out the activity. The Water Environment and Water Services (Scotland) Act 2003 provides for four similar tiers, so a similar approach is already being deployed. However, I take the point that we could perhaps do a little more to make it clear why that is necessary.

George Burgess may want to comment on the existing operation of a similar four-tier approach.

George Burgess: I have a couple of points on that. First, we should remember that what we are providing here is simply an enabling power. How many tiers are used in an individual bit of regulation would be a matter for the regulations. I certainly take the point that four tiers of control is probably too many. We discussed quite a lot among ourselves and with the lawyers whether three tiers of control would be sufficient—the permit, registration and general binding rules. We thought that it was best to retain the flexibility that is already in the WEWS act. In practice, though, down the line and in consultation with regulated parties, the regulations that are produced might only actually make use of a subset of the flexibility that is available there.

Nigel Don: Okay. I think that I now understand that. Notification might be an add-on to a general

binding rule process and registration might be a subset of a permit.

George Burgess *indicated agreement.*

Nigel Don: If those already exist elsewhere and they will be mixed and matched, I suspect that that is fine.

The Convener: We move on to chapter 2 and powers of enforcement, mainly related to SEPA.

Angus MacDonald: Minister, I was pleased to hear you say in your introductory remarks that environmental workshops with stakeholders will begin to be held next week. I am sure that those workshops will look at powers of enforcement.

The greater powers of enforcement will give SEPA powers such as fixed monetary penalties, variable monetary penalties, non-compliance penalties and cost recovery. As a constituency member with a number of waste management issues in my constituency, I very much welcome those. However, are you confident that SEPA will be able to determine fairly—on the balance of probabilities—whether an offence has taken place?

Paul Wheelhouse: In short, yes. We are confident that adequate safeguards are in place to protect those being accused of offences and ensure that there is a proportionate approach. Bridget Marshall has given evidence on the reasons for applying a balance of probabilities test to the evidence that SEPA must gather. There may be some interest in the relationship between criminal and civil actions and where the boundary falls. There is a role for the Crown Office and Procurator Fiscal Service in determining whether, on the balance of probabilities, something criminal has taken place—in other words, something quite malicious and deliberate rather than simply non-compliance as a result of ignorance of the requirements.

We need to distinguish the role of the procurator fiscal and the role of SEPA in the Scottish system. We are looking at other enforcement measures that SEPA can take, such as imposing an enforcement notice, which we received some responses about, and ensuring that the new enforcement measures sit alongside existing measures. We have looked at other civil penalty systems that SEPA is responsible for—such as under emissions trading, which is an area where we already have responsibility—and at other regulators that impose discretionary civil penalties.

As I am sure you are aware, there is an issue with regard to article 6 of the European convention on human rights, and an important safeguard will be the independent appeals tribunal that we are also providing. We recognise the need to keep that tribunal independent of ministers to ensure that objective decisions can be made.

Angus MacDonald: But you are confident that SEPA's powers of enforcement will be proportionate.

Paul Wheelhouse: Proportionality is, along with transparency and other issues, a key part of the bill as far as enforcement is concerned. Even in the short time that I have been in this role, I have come to see that there is quite a difference between accidental non-compliers and, for example, the serious organised crime elements that as we know and as I have previously mentioned to the committee exist in some aspects of the waste sector—I make it clear that I am not making any link with the member's constituency, but there are certainly issues in relation to other sites. For example, I recently visited a site near Ikea that had been left in a horrendous state by a waste contractor who had clearly and significantly breached the regulations and had effectively left others to meet the huge cost of clearing things up. We need the powers to tackle such sites, but at the moment SEPA has one arm tied behind its back with its limited powers and the very modest fines and fixed penalties that it can apply. We need a more proportionate system, which reflects the fact that, in certain cases, there is a serious intention to ignore regulations or do something criminal and, in other cases, things happen because people are ignorant of the regulations that they have to work within.

Angus MacDonald: If I recall correctly, the possibility of putting bonds in place for new waste management developments has been raised with the committee and I think that that would certainly help to deal with people who do not follow the rules. What discussions have taken place with SEPA on the general issue of extra enforcement powers?

Paul Wheelhouse: I will ask Neil Watt and Bridget Marshall to talk about on-going engagement as they are actively involved in discussions with SEPA not only on the content of the bill but on wider enforcement issues.

Bridget Marshall (Scottish Government): We are having very active discussions with SEPA; indeed, I have been seconded to the Scottish Government partly to ensure that that link is as strong as possible. The other important partner in all of this is the Crown Office and the Lord Advocate, and the minister and the Lord Advocate have discussed how these enforcement tools will work in practice and have explored the territory between the role of the procurator fiscal and the role of SEPA. Very active discussions are going on with all the parties involved about what will be for SEPA a quite novel use of such tools.

Neil Watt: I also point out that next week's event will be jointly hosted by SEPA, the Scottish Government and the Crown Office to ensure that questions are answered from all angles and that, if required, we explain how things will work in practice, the impacts on people and of course the intention behind all this.

Paul Wheelhouse: I am conscious that time is passing but, on intent and following on from Bridget Marshall's reference to the Lord Advocate, I should say that the whole system will operate within the framework of the Lord Advocate's guidelines, which will set out in terms of proportionality and public interest the cases referred to the procurator fiscal for prosecution and the cases that SEPA will enforce directly. There will be clarity on where the boundary lies and I hope that next week's workshop will inform the debate.

Richard Lyle: Following on from Angus MacDonald's well made point about people who dump or cause such problems, I have to say that for my whole political life I have abhorred people who leave sites in a state, who dump or whatever; I have always wanted the issue to be taken up.

Minister, you talked about criminals and people might ask why a criminal did not get dealt with to the full letter of the law and why the judge or SEPA did not hit them with a bigger fine. What is the justification for setting the cap on fixed monetary penalties at only £40,000?

11:15

Paul Wheelhouse: The £40,000 cap was chosen after detailed consideration. It is the maximum amount that can be imposed by a criminal court in summary proceedings for most environmental offences. The policy intention is not to create an imbalance between the criminal courts, and £40,000 seemed an appropriate upper limit. Were the Crown Office and Procurator Fiscal Service to determine that there had been a really serious crime and serious criminal intent, the case would not necessarily go through summary procedure; it would be heard in full in the criminal courts and evidence would be taken. In such situations, the courts could apply more severe penalties. We are not saying that £40,000 is the absolute maximum limit, but it is the maximum limit that can be set in summary proceedings. That acknowledges that there might be a public interest in getting things tackled quickly, rather than having a huge delay before ending up with the same conclusion about the level of fine. I do not know whether Bridget Marshall wants to add anything about the approach that would be taken in the criminal court and what the penalties might be in that scenario.

Bridget Marshall: The £40,000 relates to the variable monetary penalty, which is something that SEPA will be able to impose directly. That is why the cap is at £40,000. As the minister rightly said, that is the maximum for most environmental offences in summary proceedings, which are for the less serious crimes. A serious crime will be taken to a jury trial under solemn proceedings, where unlimited fines and imprisonment are available. It is important to have in mind the fact that £40,000 is the maximum that SEPA can impose directly. Any more significant offences will be referred, as currently, to the fiscals for prosecution in the criminal courts, either under summary procedure or, if they are more serious, under solemn procedure.

Richard Lyle: I am certainly glad to hear that. Criminals beware!

Alex Fergusson: In oral evidence, the Law Society of Scotland and the UK Environmental Law Association raised concerns about the implications of enforcement measures being imposed by SEPA based on the balance of probabilities, as against following court procedures where the standard of proof is beyond reasonable doubt. They raised the issue of what could be viewed as the lower level of evidence, if I can put it as bluntly as that. What approach do you see SEPA adopting in deciding whether to go for the fixed or variable fine, based on the balance of probabilities, or to pass a case on to the procurator fiscal, which would require a greater burden of proof? Will you expand on that for us?

Paul Wheelhouse: You raise a number of issues. I recognise that there will always be concerns in this area. I know that there has been substantial feedback from the consultation and the evidence that you heard last week on these sort of matters. You referred to the procurator fiscal being satisfied on the balance of probabilities that the person has committed a relevant offence. A number of safeguards are built into the system, including the Lord Advocate's guidelines, which were referred to earlier, which will set the framework for the new enforcement measures, and SEPA will revise its enforcement policy to include the new enforcement measures, so there will be a linkage between the two.

SEPA is required by the legislation to provide detailed guidance about the new enforcement measures and how they will apply, so there is clarity for those to whom they will apply—although obviously people will try to avoid committing an offence. In most cases, apart from the purely administrative type of offences, SEPA will as a matter of practicality carry out an investigation of offences. Only at quite a late stage will the evidence be available to assess whether a case is significant or less significant. I recognise the need

to ensure that there is an appropriate evidential trail to support the prosecution of any offence by either SEPA or the Crown Office and Procurator Fiscal Service.

The evidence available will not dictate whether the case will be referred to the procurator fiscal or dealt with directly. That will be determined by the Lord Advocate's guidelines, the nature of the offence and whether there was a criminal intent as determined by the balance of probabilities.

Calum MacDonald, who is SEPA's executive director, gave evidence about the training that will be given to officers and the robust national governance arrangements, which will ensure that decisions under the new enforcement measures are scrutinised at an appropriate level within the organisation and are consistent. There will be continual monitoring of how they are delivered in practice so, if any inconsistencies of approach emerge, those will be tackled and rectified.

Has that answered your question?

Alex Fergusson: It has to a certain degree. It is incredibly important to get this bit right because, if there is room for doubt, SEPA could be open to accusations of saying, "Well, we haven't got enough proof to get it through the courts, but we'll do them through the powers we have ourselves." Obviously, one does not want that to happen.

Paul Wheelhouse: The important point is that the quality of evidence is not what will determine whether the case goes through the Crown Office and Procurator Fiscal Service or is dealt with by SEPA. The question is more whether, on the balance of probabilities, it is likely that criminal intent was involved. As I understand it, if that is the case, regardless of the quality of the evidence, the matter will go to the Crown Office and Procurator Fiscal Service under the Lord Advocate's guidelines. However, if it is just a matter of regulatory non-compliance due to accident or incompetence in some respect, there would be no criminal intent and it would be more likely for SEPA to take direct enforcement action.

I do not know whether that is consistent with Bridget Marshall's understanding. I ask her to confirm that.

Bridget Marshall: I gave quite a lot of evidence to the committee two weeks ago about why we chose the burden of proof as civil. The minister referred to that. I acknowledged that Mr Fergusson's point was a criticism that could be levied at the approach that we chose, but the minister has outlined in his answers some of the safeguards that mean that it is unlikely or virtually impossible that that will happen.

The framework that the Lord Advocate will put in place will make it difficult in practice for SEPA to put its weaker cases through its own direct measures rather than referring them to the fiscals. The important point is that the sufficiency of evidence will not dictate the route that the offences will take through the new system.

Alex Fergusson: Will the Lord Advocate's guidelines be made public? Will we have access to them? If it is possible to say, when will they be in place?

Bridget Marshall: They will be made public. The workshop next week, which focuses on enforcement, is a joint workshop with the Scottish Government, SEPA and the Crown Office. The guidelines will be discussed at that workshop and will be made public subsequently.

Alex Fergusson: That is useful to us. Thank you.

Jayne Baxter: Is it possible that someone who is served with a notice of intent could decide to take their chances in, and ask to be referred to, the court because there is a need to demonstrate more proof there than the balance of probabilities? Is there any chance of the perpetrator being offered that choice?

Paul Wheelhouse: I am certainly aware of comparable systems in which somebody can choose to take the punishment or go to court—for a parking or a speeding offence, for example. That approach applies elsewhere in the system, so I appreciate the point that you are making.

I believe that that model was initially considered, but the principle of proportionality was felt to be important. If we followed that approach, some of the less significant cases could still be referred to the criminal system and, in many cases, that would be disproportionate and would reduce the benefits of speed, cost and removing such cases from the criminal justice system altogether when that is felt to be appropriate.

The appeals system is still relevant and is crucial to ensuring compliance with article 6 of the ECHR. Someone who is unhappy could still appeal, and one of the measures in the bill is to remove that appeal from ministers, so that there is not felt to be an undue balance in favour of SEPA. At least temporarily, such appeals will be heard at the Scottish Land Court. That is felt to be consistent with article 6 of the ECHR, so it is an important measure.

I take your point, but proportionality was felt to be important and, to avoid bogging down the criminal justice system with cases that were relatively minor and not of a criminal intent, we decided to go down a different route.

Jayne Baxter: Would a successful appeal against a notice preclude SEPA from pursuing

further action in the form of a second notice or prosecution?

Paul Wheelhouse: My understanding is that, if a fixed penalty is withdrawn by the tribunal, SEPA cannot have another go. At the point at which the final notice is served for a fixed or variable penalty, no further sanction can be imposed by SEPA in relation to the facts that constituted the offence, and nor can the case be referred to the procurator fiscal for prosecution. That is it, in effect; there is no double jeopardy.

Bridget Marshall will confirm whether my understanding is correct.

Bridget Marshall: That is correct. If offences continue and the facts that related to the first notice arise again, SEPA may impose another variable penalty, which might be higher, or decide to refer the case to the procurator fiscal for report because there is a course of offending that is continuing.

Paul Wheelhouse: It is worth saying that our general approach is to target our efforts on serious, regular offenders—in the criminal sense—and serial non-compliers, as part of the package of measures through which we will try to target SEPA's resources more effectively. I think that the point has been raised with NFUS.

I am aware of an instance in which a catchment had a serious problem with diffuse pollution. On investigation, it was found that there had been 5,000 breaches of regulations in the catchment. SEPA worked with NFUS, the local farming community and others to raise awareness of the issue and the importance of tackling diffuse pollution. There were repeat visits, and 75 per cent of farmers have now taken remedial action and are complying.

Where we can, we will use the potential for enforcement action from SEPA to encourage farmers or non-compliers to comply. When people consistently do not comply, we will target resources on prosecution. We will try to get people to comply in the first place, to avoid their becoming unnecessarily embroiled in the criminal justice system or indeed their being subject to direct action from SEPA.

Graeme Dey: What about relatively trivial offences? I am thinking about a company that owns multiple sites and is guilty of a series of misdemeanours at a range of sites, albeit that the offences are genuinely small fry. Should we be looking at the cumulative situation and sending a message that a company that has a bad attitude to environmental regulation will be pursued?

Paul Wheelhouse: I wholly endorse that approach. Up to now, we have probably been talking about serious breaches as opposed to an isolated and minor breach or a small number of breaches on one site. It is fair to suggest that there might be people who turn a blind eye to a series of fairly low-grade environmental breaches, such as littering, which can add up to a serious problem over their entire estate. It is right that SEPA engages with such a company, to ensure that it is aware that there is a problem across all its sites—it might not be aware that things are happening everywhere, just because of its management structure—and is given a chance to comply. If the company fails to comply, we will look to SEPA to take enforcement action.

I do not know whether such a scenario was discussed in the build-up to the introduction of the bill. Neil Watt or Bridget Marshall might comment on that.

Bridget Marshall: The issue was raised with Calum MacDonald when he gave evidence to the committee. I think that he gave an assurance that we are beginning to look across not just sectors but corporate entities. In particular, we are thinking about how we organise our inspections and audits, which might be done on a corporate basis, rather than on the basis of individual companies in a corporation.

Measures in the bill—or, rather, in the regulations that are made under the act—will allow SEPA to consider corporate permits, so that we can consider issues on a company-wide basis instead of looking at individual sites.

11:30

Paul Wheelhouse: It is worth stressing that company executives who are responsible for a large chain of companies would be accountable for the actions of their subordinates across the network. It is a matter of making them aware that they are in breach and encouraging them as accountable officers to ensure that they bring the company within the regulations.

Graeme Dey: You are right. We were given that assurance by SEPA, but it is good to get the minister's enthusiasm for tackling the issue on the record.

Richard Lyle: Minister, I am impressed that you and SEPA will take a commonsense approach to people who unintentionally break the law. It is true that, at the end of the day, they will have broken the law, but I want you to go after the people who continually break the law, turn a blind eye and think that they get away with it.

Would the appeals process that is set out in the bill add to the current ad hoc approach for dealing with environmental appeals rather than support a move to a more strategic approach for such appeals?

Paul Wheelhouse: That is a fair point. Appeals against the technical decisions that SEPA makes are usually heard by the Scottish ministers. I am aware that concern was expressed about that in the consultation. It is a good example of our having listened to the consultation responses because we have taken an approach that, at least in the interim until we know the outcome of other discussions about tribunals in Scotland, ensures that appeals will be made to a body that is wholly independent of the Scottish ministers.

The Tribunals (Scotland) Bill is following a similar timetable to the Regulatory Reform (Scotland) Bill. We intend to set up the appropriate tribunal in regulations at a future point. We will be in a position to identify the most appropriate appeals route once we know the landscape of the new tribunals system for Scotland.

I am grateful for the opportunity to highlight the Tribunals (Scotland) Bill, because it is an important part of improving the current landscape. We are undertaking a range of ambitious and significant reforms to the justice system, of which I am sure members are aware. We hope that the implementation of Lord Gill's civil courts review will also pave the way for swifter handling of cases, including public interest cases such as environmental cases. The new tribunals structure will allow in time for certain specialist civil chambers to be set up.

I appreciate that the approach might appear a bit ad hoc at the moment. However, I assure you that we are aware of the Tribunals (Scotland) Bill and the fact that the landscape of tribunals will change. The Regulatory Reform (Scotland) Bill is having to go through Parliament at the same time as that bill and we cannot prejudge what the outcome of the tribunals review will be. However, we will look for the most appropriate tribunal to which to take such cases to maintain independence of decision making from the Scottish ministers in recognition of the concern that stakeholders have expressed about the need for appeals to be heard in an objective forum.

Angus MacDonald: Regarding the commonsense approach that has been mentioned, the NFUS has welcomed at the committee on more than one occasion the more collaborative approach that SEPA is taking towards Scotland's farmers. That certainly must be welcomed.

Will you provide more detail on potential future amendments to entry and search powers under the Environment Act 1995? Have they been consulted on? How will they better equip SEPA to tackle environmental crime?

Paul Wheelhouse: I will try to give a bit of clarity.

I am sure that members are aware of the environmental crime task force that the Cabinet Secretary for Rural Affairs and the Environment has established. That is a group of experts including SEPA, the Scottish Government, the police and the Crown Office. It is tasked with supporting the delivery of the Scottish Government's commitment to tackling environmental crime and is due to report in July this year.

It is hoped that the report will provide greater clarity. We understand that it will include proposed amendments to entry and search powers for SEPA under the Environment Act 1995 to make it more fit for purpose to tackle environmental crime as well as compliance issues.

I will pick up a point made by Mr Lyle and to which you referred, Mr MacDonald, on the proportionality of the approach and targeting. I think that I have mentioned before that serious threats of violence were made to SEPA staff at the site that I visited at Loanhead, as well as at other places. That is totally unacceptable, as the committee surely will agree.

Things have been so unbalanced that it has been difficult for SEPA officers to gain entry to sites to investigate issues of non-compliance. They often face physical threats and, in some cases, their families also have been targeted—there has been stalking or intimidation outwith their day-to-day work, using social media.

A lot of very aggressive behaviour is going on, and we need to rebalance the situation so that our guys have the tools to do the job and do not face unreasonable threats in carrying out their duties.

Angus MacDonald: I agree that any intimidation of SEPA officers is completely out of order; the sooner we have powers to address that, the better.

On the national litter strategy, can you provide more detail about the potential for new powers for public bodies other than SEPA to issue fixed penalty notices?

Paul Wheelhouse: If I may, at this point I will steal the cabinet secretary's thunder and confirm that shortly there will be a Scottish Government consultation on national litter strategy that will address exactly what the member has asked about. The consultation will look at issues to do with fixed penalty notices in the future and is likely to take place over the summer, so we do not have long to wait.

That is a high priority for the cabinet secretary, who is keen to see a more concerted effort made on forms of littering in Scotland. I would hope that the bill supports the approach but, in any case, we

will be able to feed into the consultation in due course.

Angus MacDonald: If the consultation is to be announced over the summer, circulation to the committee at the same time would be helpful.

Paul Wheelhouse: I am sure that that will happen as a matter of course, but I will make sure that it is noted.

The Convener: We now move on to questions on chapter 3, which is on court powers.

Graeme Dey: Minister, what considerations would a court be required to take into account in deciding whether it was appropriate to issue a publicity order? For example, would the fact that the offence was accidental be a consideration? As the Federation of Small Businesses suggested, a small business might lack understanding of its responsibilities. Would publicity orders be confined only to very serious offences in which the perpetrator had deliberately played fast and loose with the environment, or would past misdemeanours be considered, so that a company that is guilty of a series of relatively minor breaches is eventually made subject to an order on the basis that enough is enough?

Paul Wheelhouse: That is a very good question and I am grateful for the chance to clarify. The policy intent is that publicity orders will be used only for the most serious and deliberate breaches of environmental legislation; they are an additional sentencing power to be given to the criminal courts.

How to use that sentencing power will be up to the court's discretion. If there is on-going notification that breaches are taking place and are consistently ignored, it is open to interpretation about whether that non-compliance is deliberate. We will need to clarify at what point persistent non-compliance becomes a serious offence.

We need to have a proportionate approach, and I acknowledge Graeme Dey's point about the difference between those who are perhaps a bit daft and have not paid attention to their responsibilities versus those with clear intent to seriously subvert the environmental regulations within which they are duty-bound to operate. That is where we would seek publicity orders and, it is hoped, embarrass such people into action.

Graeme Dey: Clearly, although the damage will have been done when they are used, publicity orders have a role as a deterrent to the individuals concerned and to other companies, who see what happens if they are guilty of such misdemeanours.

Paul Wheelhouse: There is huge potential for a company to suffer reputational damage. The measure is already being used elsewhere—including, I believe, Australia—and it has apparently already had an impact.

The aim is to deter actions that damage the environment and which undermine legitimate businesses, and I think that businesses will take the matters very seriously and will see the orders as a deterrent. I hope that we will not need to use the power often and that its mere threat will, as I have said, deter any actions in the first place.

Graeme Dey: Finally, will the courts receive guidance on what is deemed to be a serious offence?

Paul Wheelhouse: That is a reasonable point. Ultimately, such a decision will be at the courts' discretion but I imagine that clear guidelines on the intent will be produced.

George Burgess: The Government would never seek to guide the courts on such a matter. The procurator fiscal or the advocate depute would have an opportunity to draw the publicity order provisions to the court's attention, but sentencing is a matter for the courts and the Government would never seek provide guidance to the courts on how to use their powers.

Paul Wheelhouse: With regard to the deputy convener's point, we will need to be clear about the policy intent and to set out our understanding of the policy and where it would apply. Ultimately, as George Burgess has made clear, it is up to the discretion of the court as to when such a measure would be applied.

The Convener: Nigel Don will now ask a few questions about the miscellaneous provisions in chapter 4.

Nigel Don: I will address a number of miscellaneous things in what might be a fairly random order. First, minister, do you have anything more to say about possible amendments relating to contaminated land?

Paul Wheelhouse: Do you have any particular concern in mind?

Nigel Don: I understand from the letter that you sent the committee that you propose to lodge amendments at stage 2.

Paul Wheelhouse: We recognise that the contaminated land provisions contained in part IIA of the Environmental Protection Act 1990 are extremely technical. We think that we have got the provisions on contaminated land sites right, but we will need to make a few amendments and adjustments to the provisions on special sites to reflect the role of SEPA and local authorities. I must apologise; I appreciate that the area is hugely technical, but we hope that we can keep the amendments to the minimum necessary.

Nigel Don: We can look forward to seeing those amendments at stage 2.

Paul Wheelhouse: Indeed.

Nigel Don: That is fine. I just wondered whether there was anything to add.

On the general principle of vicarious liability, one question that has arisen is whether it extends to trusts. After all, quite a lot of our land is held in trust. Can you give us any detail on what that provision is intended to cover?

Paul Wheelhouse: You raise an important point. The vicarious liability provisions in the bill apply to non-natural legal persons such as a company or partnership, not individuals or sole traders. The intention is that they will cover any legal person—to use the vernacular—other than an individual, and they might therefore extend to unincorporated associations, bodies or persons, including trusts. If the committee has concerns that such matters need to be clarified, we will happily take them on board.

Nigel Don: I am not surprised by your reference to trusts, but I think that the mention of unincorporated associations will raise a few eyebrows. By definition, such things tend to simply appear and people do not realise that they are a part of what is going on. Has that issue been considered?

Paul Wheelhouse: I ask George Burgess to respond.

George Burgess: As the minister has said, the provisions apply to anything that the law recognises as a legal personality; as a result, if an unincorporated association has a legal personality, it will be caught. However, if it is a looser association that is not a legal person in law, the provisions will not apply. The key point is that only a legal person can hold a licence or permit from SEPA. In short, if the thing exists as a legal entity, the vicarious liability provisions will apply.

Nigel Don: On the offences, environmental harm is defined and understood elsewhere in statute, but it is not clear whether significant environmental harm is also understood in law.

11:45

Paul Wheelhouse: There are a number of existing regulatory offences under the Water Environment (Controlled Activities) (Scotland) Regulations 2011, the Environmental Protection Act 1990, the Pollution Prevention and Control (Scotland) Regulations 2012 and the Radioactive Substances Act 1993. The intention is to repeal those offence provisions and provide a single set of regulatory offences under the new, integrated regulatory framework. That is a good example of where we seek to simplify and improve the read-across of regulation.

Regulatory offences include the failure to have an authorisation or failing to comply with a condition of a permit. In the waste sector, for example, failure to comply with conditions is a major concern, as we saw recently with a large site containing tyres in Lanarkshire.

In addition, there will be the new significant environmental harm offence, which will apply when the harm caused is outside that contemplated by the regulatory system, whether or not the offender has a permit. The examples that have been given relate to the health and wellbeing of the Scottish population and protecting and improving the environment. Although they are not specified in regulation, it is possible to define instances in which harm has been caused to the public's health and wellbeing—which is obviously a major concern for the Government and, indeed, the whole Parliament—or to the protection and improvement of the environment.

The bill will bring SEPA's purpose in line with the Scottish Government's purpose, as we set out earlier, and will help to demonstrate that environmental and economic objectives are mutually supportive. There is a side benefit to taking that approach.

George Burgess: On whether significant environmental harm is a clearly understood concept, section 31 sets out when environmental harm becomes significant environmental harm. That is defined as being when

"it has or may have serious adverse effects, whether locally, nationally or on a wider scale".

We can imagine a sort of harm that is isolated locally but very significant because of what has happened in that place.

The section also provides that we can recognise harm done to a particular area, such as a Natura site, if it is designated by ministers. We are trying to give as clear a signal as we can of when environmental harm would be denoted as significant.

The Convener: That takes us to the end of the series of questions. The minister and his officials have given us a lot of material to think about for our report. I thank them very much for that highly detailed and interesting evidence.

WRITTEN EVIDENCE TO THE RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

Submissions received in response to call for views

Association of Salmon Fishery Boards
Federation of Small Businesses
Food Standards Agency
Dr Sarah Hendry, Centre for Water Law, Policy and Science, University of Dundee
Law Society of Scotland
Loch Lomond & The Trossachs National Park Authority
North Ayrshire Council
North Lanarkshire Council
Professor Colin T. Reid
Regulatory Review Group
Professor Andrea Ross
RSPB Scotland
Scotch Whisky Association (SWA)
Scottish Environment LINK
Scottish Environment Protection Agency (SEPA)
Scottish Land & Estates
Scottish Natural Heritage
Scottish Power
Scottish and Southern Energy (SSE)
Scottish Water

Supplementary written evidence

Letter from the Minister for Environment and Climate Change regarding the Committee's involvement with the Bill
Letter from the Minister alerting the Committee to potential Stage 2 amendments on the Bill
Letter from the Minister in advance of giving oral evidence on the Bill
Letter from the Minister following up on the evidence of 5 June, relating to Part 1 of the Bill

Written submission from the Association of Salmon Fishery Boards

The Association of Salmon Fishery Boards is the representative body for Scotland's 41 District Salmon Fishery Boards (DSFBs) including the River Tweed Commission (RTC), which have a statutory responsibility to protect and improve salmon and sea trout fisheries.

We welcome the opportunity to comment on the relevant sections of the Regulatory Reform (Scotland) Bill.

Overarching Comments

- We support the policy intention behind part 1, as set out in the policy memorandum, but we are concerned that the Bill as drafted may be more wide-ranging than the policy memorandum suggests.

- We welcome the policy intention behind part 2 of the Bill, but we believe that these powers should be further clarified.

- We do not believe that the general purpose of SEPA should be sustainable economic growth. This term has not been defined in law and we believe that the achievement of sustainable development is a far more appropriate purpose for an environmental regulator.

Part 1

- In the call for evidence the Committee requested views on the element of Part 1 that places a duty on stakeholders in respect of sustainable economic growth. There is no definition on the face of the Bill or in the accompanying documents as to the definition of sustainable economic growth. The Scottish Government has a specific webpage dedicated to sustainable development which states the following:

  The goal of sustainable development is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations.

  Sustainable development is integral to the Scottish Government's overall purpose - to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

- This might lead to the conclusion that sustainable development and sustainable economic growth are interchangeable terms. If this is the case, there would appear to be no necessity to include a specific duty on regulators (in part 1) and more specifically SEPA (in part 2) to contribute to achieving sustainable economic growth. A number of regulators are already under a specific duty to contribute to the achievement of sustainable development. For example: section 2 of the Water Environment and Water Services (Scotland) Act 2003 states that Scottish Ministers, SEPA and the responsible authorities must 'act in the way best calculated to contribute to the achievement of sustainable development'; section 3

of the Marine (Scotland) Act requires Scottish Ministers and public authorities to 'act in the way best calculated to further the achievement of sustainable development, including the protection and, where appropriate, enhancement of the health of that area, so far as is consistent with the proper exercise of that function'; section 51 of the Water Industry (Scotland) Act 2002 states: 'Scottish Water must, in exercising its functions, act in the way best calculated to contribute to sustainable development.' However, we are concerned that i) there is scope for the term to be misinterpreted – for example as economically sustainable growth (i.e. not environmentally sustainable) and ii) it is not clear how such a duty would interact with the current duty that SEPA, and other bodies, have to achieve sustainable development.

- It is notable that the duty set out in section 4 is qualified (*except to the extent that it would be inconsistent with the exercise of those functions to do so*). We believe that, given the uncertainty surrounding the specific meaning of sustainable economic growth, and for consistency with other legislation, the duty should be changed to one of ***contributing to achieving sustainable development***. Such a duty would not need to be qualified, in the manner set out above.

- We would also draw the Committee's attention to section 2 (2), which would allow, by regulation, a regulatory requirement to cease to have effect through repealing or revoking primary legislation. This power is qualified by subsection (3), but we would seek clarity on the scope of this power and how it might be used in future, in order to ensure that environmental protection is not compromised.

Part 2

Proposals for regulatory powers

- We are generally supportive of the proposals for regulatory powers for Scottish Ministers, but would make the following points:

    - The general purpose of protecting and improving the environment is welcome, but we believe that specific mention should also be made to national obligations relating to protecting and improving the environment.

    - We believe that the terminology included in section 9 which defines 'environmental activities' as being 'activities that are capable of causing, or are liable to cause, environmental harm' is confusing and potentially misleading. The use of the term 'environmental activities' implies that such activities would be to the benefit of the environment. We believe that alternative terminology should be considered.

    - We believe that the definition of 'protecting and improving the environment' should be expanded beyond 'ecosystems', to ensure that biodiversity, habitats and species are specifically included.

Proposed powers of enforcement for SEPA

- We agree that SEPA should have the power to use fixed and variable monetary penalties but we are not convinced that these penalties are set at the right level. There must be scope to apply a fine that would both act as a deterrent and adequately penalise those who have caused significant environmental harm. In some cases, this may include extremely large multi-national companies, and we would question whether a £40,000 fine would be an adequate deterrent in such cases. Ultimately we believe that fines should be commensurate with environmental impacts.

- We welcome the provisions relating to enforcement undertakings assuming that these are used in the manner set out in the original consultation : 'to enable legitimate operators to make amends where an offence has not led to significant environmental harm and has involved little or no blameworthy contact'. However, we would be very concerned if this approach was seen as a default option as an alternative to SEPA pursuing enforcement through the courts. In many instances, we believe that the latter is the only appropriate response.

- We support the publication of enforcement action under section 24. We would seek further information as to the circumstances under which orders would include this provision. On the basis that such publicity can often prove a greater deterrent than a financial penalty due to fears over reputational risk, we believe that publication of enforcement action should be the norm, rather than the exception.

Proposed powers to be given to courts

- We support the provisions on compensation orders. However, as we stated above, we believe that fines should be commensurate with environmental impacts, and therefore the cap of £50,000 may not be appropriate.

- As stated above, we welcome publicity orders on the basis that such publicity can often prove a greater deterrent than a financial penalty due to fears over reputational risk.

Chapter 4

- Section 31 sets out an offence relating to significant environmental harm. We would seek clarity as to the threshold or definition of *significant* in this context. Who will make the determination as to what constitutes *significant*, for the purposes of this section.

Chapter 5

- Section 38: Please see our previous comments relating to sustainable economic growth.

Written submission from the Federation of Small Businesses (FSB)

Introduction

The FSB is Scotland's largest direct-member business organisation, representing 19,000 members. The FSB campaigns for an economic and social environment which allows small businesses to grow and prosper.

We welcome the opportunity to submit comments on the Regulatory Reform Bill to the committee.

Comments

General principles

While few businesses would claim to enjoy the process of complying with regulations, most appreciate the need for legislation to protect people and the environment from harm and to prevent irresponsible and unscrupulous trading. But, when it begins to look as though business owners' time and money is being spent on box ticking with no clear benefit, they become frustrated.

In a recent survey asking about the impact of regulation on their business just under half (45%) of Scottish members indicated that the cost of complying with regulation had increased over the previous year, while just under a third (29%) felt the time taken to comply had increased. 51% indicated that the most challenging aspect of regulation was interpreting which regulations applied to their business, closely followed by 50% who felt the sheer time dealing with it was most demanding. Lastly, 17% of respondents indicated that environmental regulation was the most time consuming and difficult to deal with, though this rose to 44% for agricultural businesses.[1]

As a result, we believe that more could be done to reduce the cost and time difficulties experienced by small businesses, as well ensuring regulators behave in a way consistent with the principles of better regulation. Ultimately, this makes it easier for businesses to comply with regulation and allows them to spend more time focusing on growing their businesses.

Last year, we published a report setting out how some aspects of Scottish regulation could be improved.[2] We also responded to the Scottish Government's consultation on better regulation setting out our thoughts on general principles of reform.[3] Unsurprisingly then, we welcome the acknowledgment that regulators have a role to play in economic growth and that they should, as far as possible, carry out their regulatory activities with this principle in mind.

[1] FSB member survey, December 2011

[2] FSB Scotland, Local regulation – the case for change, 2012

[3] http://www.fsb.org.uk/policy/rpu/scotland/assets/cr__betterregulationbill_oct12.pdf

Part 2: Environmental Regulation

In our response to the 2012 consultation on an integrated framework for environmental regulation, the FSB indicated its broad support for SEPA's approach and the organisation's commitment to the principles of better regulation. [4]

In general terms, the measures in Part 2 of the Bill build on this, and previous, consultations by enabling a simplification of the current environmental regulatory regime and providing a wider, more flexible range of sanctions to achieve compliance. In principle, the FSB agrees with this approach, recognising as it does that achieving compliance is assisted when a range of sanctions is available to the regulator. [5]

While relatively few FSB members are likely to be subject to multiple licensing schemes, the move to streamline the system by creating a single permissioning framework is nevertheless a sensible step. It should reduce confusion and contradiction making it easier for businesses to understand what they are required to do.

However, most of the proposals outlined in Part 2 of the Bill are enabling clauses. The actual impact of proposals on small businesses is difficult to determine until we see regulations, guidance or procedures which will accompany the regulations and the new charging regime. As a result, most of our concerns relate to how proposals would work in practice, especially those which might, unintentionally, disadvantage small businesses. We have raised the following concerns with SEPA:

- More detail on the application of fixed penalties. The earlier consultation suggested penalties of £500 (for individuals) and £1000 (for companies) with a cap of £2500. This seems high for "relatively minor offences". While a fixed penalty notice would often be preferable to (and less expensive than) court proceedings, these are still significant sums for small businesses. (section 12)

- The application of variable penalties of up to £40,000 also provides huge discretion to SEPA. (section 15)

- The appeals process for penalties, in particular, to whom would appeals be made? (sections 13 and 16)

- Introducing enforcement undertakings, where restoration and preventative action is taken as an alternative to prosecution, is a positive measure. But we want to ensure that it does not work against small businesses. Firstly, small firms need to be made aware that this is an option and advised of action they *could* take. Secondly, we want to avoid routine use of undertakings such that 'regulatory creep', or expecting businesses to go beyond what is required to comply, becomes the norm. More generally, SEPA should introduce monitoring processes which record which types of enforcement are used against different types and sizes of business. A move towards a more flexible regime, where actions are focused on a positive outcome, is welcome.

[4] http://www.fsb.org.uk/policy/rpu/scotland/assets/cr_racce_enviroregulation310712.pdf

[5] Macrory Review, Regulatory Justice: Making Sanctions Effective, 2006

However, this kind of approach could put small businesses, without specialist environmental or legal advice, at a disadvantage compared to large businesses. (section 19)

- Ensuring that investigation costs remain cost-effective and proportionate in the event that such costs are to be recovered from the individual being investigated. (section 22)

- More detail on how vicarious liability will be determined. The rationale behind it is understandable but responsible, well run small businesses may not have the range of written policies and procedures that a large company could use to shield itself from blame. (section 29)

- The offence of 'significant environmental harm' is based on a definition of 'serious adverse effect' which seems open to interpretation. (section 31)

- It is difficult to gauge how many small businesses will benefit from a streamlined regime. Benefits could be offset by increased charges for some small businesses, under the proposed new charging regime for SEPA. More generally, models about how many businesses in different sectors will be affected by the proposed new regime, would be helpful.

Written submission from the Food Standards Agency (FSA)

- Thank you for your invitation to provide a written submission of evidence to the Committee, as part of its scrutiny of Part 1of the Regulatory Reform (Scotland) Bill, in advance of the oral evidence I will be presenting at the meeting on Wednesday 29th May.

- The Food Standards Agency (FSA) is a non-ministerial UK government department operating at arms length from Ministers and governed by a Board appointed to act in the public interest. The FSA's food safety & standards policy remit is one which is wholly devolved in the context of the provisions of the Scotland Act, and it is equally accountable to the Westminster and Scottish Parliament. As a consequence the FSA is responsible for delivering, the necessary statutory regulatory provisions with respect to its policy area in Scotland. In addition the FSA has, in its central competent authority role, the function of overseeing the delivery of food and feed regulatory enforcement by local food authorities and also the delivery of official controls in certain approved establishments.

- You have invited that we provide evidence, in particular, on Part 1 (Section 4) of the Bill which proposes that;

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

    - The Scottish Ministers may give guidance to regulators with respect to the carrying out of this duty.

    - Regulators must have regard to any such guidance.

- The following evidence outlining relevant aspects of the FSA's current strategic objectives and corporate priorities, together with some examples of how we put these into practice, should be helpful in allowing the Committee to consider the FSA's capacity to meet the new obligations on regulators proposed in the Bill.

- The main objective of the Agency, in carrying out its functions, is to protect public health from risks which may arise in connection with the consumption of food and otherwise to protect the interests of consumers in relation to food. However, the FSA is committed to the better regulation principles of transparency, accountability, proportionality, and consistency and targeting.

- The FSA recently refreshed its strategy to 2015 and one of the revised strategic outcomes is that; Business compliance is effectively supported because it delivers consumer protection. This will include a focus on effective, risk-based and proportionate regulation and enforcement. Linked to this is a current corporate priority to support growth through better, smarter regulation. In particular we are committed to remove the unnecessary burdens on business and provide effective export assurance as two ways to support growth. The removal of unnecessary burdens will help enable local authorities and ourselves to concentrate resources on higher risk areas of the food chain. We are committed

to work with local authorities and the food industry so we can be clearer on the ways in which food businesses can achieve and demonstrate sustained compliance in order to earn 'earned recognition' reducing inspection burdens, while at the same time ensuring that those who cannot or will not comply with their obligations receive greater attention. In concentrating our attentions on non-compliant businesses we will reduce the risk of food incidents and thereby help the food industry retain public confidence necessary for economic growth.

- In Scotland the FSA works with Scottish Government in delivery of its National Food and Drink Policy. In recognition of the fact that food safety underpins consumer confidence in food production, it is a key headline indicator in the policy. The FSA Food Hygiene Information Scheme (FHIS) aims to drive up standards in businesses that sell food to the public. Businesses compliant with food law requirements area awarded a pass and the number of businesses achieving a pass is used as an indicator of progress.

- In our regulatory policy making capacity, the FSA is committed to negotiate more sustainable and proportionate rules emerging from Europe, where the majority of food law is now set. One recent Scottish example of success in this area was where, following jointly funded research with the Scottish farmed salmon sector, we were able to demonstrate that the pre-existing EU requirement to freeze salmon intended to be consumed raw or almost raw was not required for farmed salmon, thereby reducing the un-necessary cost of the freezing process. We were only able to promote this policy change, because our science research showed that the parasitic worm, whose potential presence was the reason for requiring the freezing treatment, did not present itself in the farmed salmon. Therefore this is would appear to be a good example of where in exercising our functions we contributed to achieving sustainable growth, except to the extent that it would be inconsistent with our main objective of protecting public health as envisaged by Part 1 Section 4 of the Bill.

- With respect to other Sections of Part 1, we note the proposed provisions in Section 5 for Scottish Ministers to issue Codes of Practice to regulators. Within the FA policy area Scottish Ministers already have primary powers to issue Codes of Practice with respect to the enforcement of Food Law. It might therefore be useful for clarity to have a 'without prejudice to other similar primary powers' type caveat detailed within this Section.

Written submission from Dr Sarah Hendry, Centre for Water Law, Policy and Science, University of Dundee

We are pleased to have the opportunity to give evidence on this Bill and we are in general supportive of moves to rationalise and streamline regulation, especially environmental regulation, in Scotland.

We have a number of concerns, especially around the new duty for regulators with respect to "sustainable economic growth" (sections 4 and 38). We consider this an unclear concept, which will be difficult to define and enforce, and is not an appropriate focus for all regulators, especially SEPA and SNH. Their focus should be on protecting the environment, framed by sustainable development.

We have some concerns around the structure of the Bill, especially within Part 2.

In Part 2, we think there could be greater clarity about the relationship between the Bill, subsequent regulations and subsequent guidance. Partly because the regulations and guidance are not yet available, it is difficult to fully understand some provisions. Especially, we are concerned about:

- The different tiers of offences: the "significant harm" offence, the relevant offences and any other offences that may remain on the statute books but not within the penalty scheme;
- The appeals process and its relationship to the penalty scheme.

Part 1

We appreciate that RACCE is primarily concerned with Part 2 of the Bill. However we would note the extensive powers in Part 1, especially s.2, to rewrite existing legislation. Whilst we agree that it is often appropriate to use secondary legislation, for all the reasons given in the Delegated Powers memorandum, and whilst we agree that the negative resolution procedure may be appropriate, nonetheless many legislative acts that were once in primary law are now in secondary rules, and enabling powers to Ministers are often extensive. Along with the unicameral structure of the Scottish Parliament we would be concerned about the possible lack of scrutiny, for example, in deciding if regulations would have "equivalent effect" to a previous mandatory enactment.

We would agree that regulations made under ss. 1 and 2 should be made under the affirmative procedure.

We suggest that the regulatory principles in s.6(3)(a) should be stated more generally as applying to regulators, in Part 1 and Part 2, and not only as underpinning to the Code of Practice.

Especially as that is not the case, we would not agree that "sustainable economic growth" should be repeated here as a regulatory principle (s.6(3)(b)).

We would like to see (as in all cases where consultation is required by statute) a general requirement to consult the public.

Part 2

We are generally supportive of ss.8 and 9. We would agree with the suggestions made by RSPB and by Prof Colin Reid to include "biodiversity", or "habitats and species", after "ecosystems" in s.9(2)(b)(iii).

Section 10 and schedule 2 contain very broad enabling powers to secure the repeal and re-enactment of the four main consenting regimes in Scotland. Each of these is technically and legally complex and their restructuring is likely to require extensive work by the Government and SEPA, involvement of key stakeholders and public consultation. We would strongly suggest that these are appropriate subjects for affirmative procedure, to ensure proper scrutiny.

We would suggest that s.10 could be clearer as to the extensive reforms of the regulatory system that we understand are intended under this provision.

There are four tiers of control in schedule 2. Whilst permits and general binding rules are well-understood, it is not wholly clear what the difference is between notification and registration. We think a three-tiered system would be simpler and could still provide for all necessary forms of control.

We note s.11(2) and we are unclear as to its purpose. We recognise that Government obtains significant data and input from consultations at different times and on different subjects, but where the legislation imposes a specific duty to consult specific parties, we consider that should always merit a specific consultation at that time. Otherwise there is a risk that earlier responses, made to a different question, will be taken out of context in ways that the respondents did not fully intend, or overlooked. Given the importance of these reforms, it will be most important that Government allows time for full consultation as the detail emerges.

We would suggest that s.38, chapter 5 (general purpose of SEPA) would be better placed near the start of Part 2. We would also suggest that the "significant harm" offence in s.31 should be placed higher up in Part 2, before the penalty scheme. This might make it easier to understand the context of the scheme.

Chapter 2 – we are generally supportive of these new powers for SEPA, and we think they will significantly improve effective enforcement. We would like to see more focused reporting by SEPA on outputs and outcomes.

We are unclear about the desirability of the provisions in s.13(3). We note that the explanatory notes state that such an early payment is common in penalty schemes. However, we would be concerned to be sure that this is not a mechanism for liable parties to avoid not just criminal proceedings but any record of their non-compliance. Otherwise they could incur a series of such early payments without recognition of a pattern of behaviour.

We would agree with Prof Reid's comments about how the scheme will apply to ongoing breaches.

The whole question of the balance between higher penalties and lower levels of regulation is crucial to the potential success or otherwise of a 'light touch' regulatory regime.

We would support the maximum fixed penalty being set at £5000, level 5 on the standard scale, rather than £2500, level 4.The maximum will not always be used.

More generally, whilst we fully support that submission to the penalty scheme should mean that no criminal proceedings could be brought, it is not clear whether "relevant offences" will also be subject to criminal proceedings as an alternative, or whether criminal proceedings will only apply to these offences where the operator has not complied with an element of the penalty scheme. See also our comments below on relevant offences in relation to s.31.

We would support Prof Colin Reid's concerns around the need for clarity on appeals, and especially, the relationship between appeals and further proceedings; and that this should be addressed in the Bill.

Under s.15, we are concerned that the penalties may not be high enough. Whilst we appreciate that the £40,000 maximum has precedent behind it, we would like to see the possibility of penalties high enough to deter even large organisations. We appreciate that this money should not be directed to SEPA, and that it the penalty is not for remediation, compensation or cost recovery, but we would also prefer that these sums be hypothecated to environmental protection or improvement in some way.

We support the non-compliance penalties under s. 18, the general provision for enforcement undertakings under s.19, and cost recovery provisions in s.22.

Section 24(2) is unclear. If the purpose is to allow SEPA to publicise information about the wrongful activity as well as the level of penalty, which we would support, this could be more clearly expressed. Visibility of the penalties will be a major factor in effective deterrence.

Chapter 3 – Clause 26 – as the purpose is to remedy environmental harm, we do not agree that there should be a limitation on the sums payable. They should be limited by the nature of the harm in combination with the culpability of the offender; ability to pay may be relevant, but where there is ability to pay then full recovery of the costs of reparation should be possible.

We strongly support clause 27, and also clause 28.

Chapter 4 – Section 31 – we support this provision and that it should have strict liability. As noted, we think it should be located higher up in this Part, before the penalty scheme.

We have two concerns:

The definition of "significant" environmental harm: it will be important to have clarity about the meaning of "serious adverse effects". Similar language is used in other

related legal regimes, and is often restricted.[1] In particular this must not imply that the offence is only applied where there is damage to a EU designated conservation site can be proven, whilst damage to national sites (such as SSSIs) and non-designated sites is treated less seriously.

The relationship between this offence and the definition of "relevant offences" (section 39): as so much is left to future regulation and guidance, it is not wholly clear in the Bill what will be the status of, for example, the "procedural" offences; or, the permitting or causing of environmental harm that is not "significant". Will these only be subject to penalties and undertakings; or will they also be subject to potential prosecution, and if so, will that only be where a penalty has not been paid or an enforcement undertaking not complied with, or will they also be "stand alone" offences?

Linked to that, will there be a "middle tier" of offences which are not "significant harm", but not open to the penalty scheme either?

We would prefer to have some clarity around this in the Bill. We would also suggest that all orders relating to the offences be made under the affirmative procedure, and consulted on widely.

Section 32 – we would like to see the provision for compensation, and for publicity, extended to this offence. It is not clear to us that this will be the case; we read this provision separately to that on "relevant offences" in chapter 3.

Section 35 – we would agree with Prof Reid that the decision to remove special sites should be made by (or with) SEPA.

Chapter 5: General purpose of SEPA:

We agree that it is helpful for SEPA to have a statutory purpose. We would suggest that this be placed higher up in this Part.

We do not support the inclusion of the duty to contribute to sustainable economic growth for SEPA under s.38, or for Scottish Natural Heritage in particular under s.4.

We consider that "sustainable economic growth" as a concept is not well defined or understood and contains inherent and fundamental contradictions. The economy is wholly dependent on the environment, not the other way round.

We would also support the arguments made by Prof Reid and by the RSPB in regard to this provision.

We consider that the appropriate focus for environmental regulators is the environment, and sustainable development is the appropriate over-arching concept. Sustainable development takes a tri-partite approach and SEPA does therefore consider economic and social dimensions in aspects of its decision-making. "Sustainable economic growth" shifts the emphasis away from the environment and

[1] The Habitats Directive, 92/43/EEC, considers "significant effects". The Environmental Liability Directive, 2004/35/EC, and the Water Environment (Controlled Activities) (Scotland) Regulations 2011/209 use "significant adverse effects". These provisions are all restricted.

towards the economy and this is not appropriate for SEPA or SNH. Sustainable development is a well-established concept and we would support its further emphasis and refinement. Especially, we would support strong procedural duties to show progress towards sustainable development, including the use of indicators.

Schedule 3 Part 3: Environment Act 1995.

We support the amendments to s.33 and the repeal of s.36. We do not see the reasoning behind the repeal of s.32 (heritage and access) or s.34 (protection and conservation of water) though we accept the latter may be covered by s.2 of the Water Environment and Water Services (Scotland) Act 2003.

We are unclear as to the import of the amendment to s.34. If this means that the general cost benefit provisions will no longer apply to SEPA, we would not support that. We would consider that a general analysis of the costs and benefits of any regulatory action is an essential part of ensuring that such actions are proportionate, consistent and targeted, as in s.6 of the Bill.

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Society's Planning and Environment Law sub-committees have considered the Regulatory Reform (Scotland) Bill, which was introduced in the Scottish Parliament on 27 March 2013 and has the following comments to make. The Society will submit a further response to the Scottish Parliament's Economy, Energy and Tourism Committee as lead committee on this Bill which should also take into account inter alia liquor licensing matters with regard to Better Regulation.

General Comments

The Bill was considered collectively by two specialist sub committees of the Society's Law Reform Committee, with the remits of planning and environmental law respectively. 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. Further comment is made on this aspect below.

The Society welcomes the Scottish Government's drive towards the simplification of complex regulation, and generally support the adoption of measures aimed to reduce inconsistency, streamline and clarify all and any environmental protection regimes. The objectives of improving the understanding and experience of regulation by users are particularly strongly supported. The Society considers that this should result not only in the support of enterprise at a time of pressure; but also through improved understanding and greater consistency in the dissemination of good practice among regulators, with the concomitant prospect of higher environmental standards that everyone can work to.

The Society understands that this is an enabling measure, and regrets that more information is not yet available about Government's intentions as to the content of the regulations, which would be enacted. The Society is of course aware that Government would fully consult on the draft regulations to come in due course, but urges the Scottish Parliament to clarify the approach that Scottish Government intends to take even only in general terms. The Society is aware that some of the complexities and inconsistencies encountered to date can come from the differing interpretation of government guidance on various aspects of regulation, as much as from local views. Simplification of legislation and also guidance is itself a challenging task in that it requires rigour, scholarship, and a degree of self-restraint by those drafting the revisions. The Society does not underestimate the task of drafting the simplifying legislation.

The Society highlights that part of the problems encountered by both business and regulators derives from the considerable complexity and diversity of environmental protection regimes. This situation has been vividly described by SEPA in its preparatory papers on regulatory reform. These complexities have often resulted

from the carry over, with minimal adaptation or intervention, of EC environmental legislation. The benefits gained from this stream of legislation are fully recognised, and this Government has followed previous administrations in committing Scotland to the highest environmental standards, which the Society welcomes wholeheartedly.

However, The Society questions whether more could be done by committing and investing in wholesale codification and consolidation of all the environmental codes. There are patterns of very similar mechanisms in place throughout our environmental regulation regimes such as the frameworks for applications and permits; the assessment of an applicant's fitness for an environmental permit; and dispute resolution mechanisms. The problem is that in each set of environmental protection regulations, the various mechanisms have been written into a self-standing code in each set of regulations slightly differently, but that each code (i.e. waste, water, pollution prevention and control) also has significant differences each from the other. There is clear scope for a comprehensive review towards synchronising all permit and dispute resolution systems so that they are all fully congruent and correspond.

The Society does not underestimate the size of the task of codification. Investment in intellectual resources would be required. It may be that the drafting process could not be accommodated within a near timescale within the resources of the civil service. Consideration could be given by Government towards externalising the process of drafting such consolidation legislation. Such a project would have the potential both to enhance Scotland's business-friendly credentials, but also to enhance the effectiveness of our environmental protection culture.

Environmental regulation is generically administrative legislation. The Scottish Government is at present consulting on the Courts Reform (Scotland) Bill, which proposes major structural reforms to the civil courts; and reform is also proposed to the tribunals system in terms of the Tribunals (Scotland) Bill introduced on 8 May. In environmental regulation there is a proliferation of appeal or dispute resolution mechanisms, all originally designated for good reasons to do with the traditional approach to appeals. In some cases however, appeals go to the local Sheriff Court (infrequently in practice) and in others – for good reasons – appeals are referred to the Directorate of Planning and Environmental Appeals. There are also rights of statutory appeal to the Court of Session. Such appeals each have their own statutory basis, and can be understood as special categories of judicial review. The Society suggests that the Scottish Parliament considers giving guidance to the Scottish Government as to the inclusion of environmental permitting and appeals into the reforms to administrative law currently under consideration.

Specific comments

Where no specific comment is made, the Society should be understood to be broadly supportive of the measure.

Part 1: REGULATORY FUNCTIONS

Given that the regulation making power in this part is very broad, and limited information is available about the scope of the intended regulations, the Society cannot comment fully on the implications of the Bill, however the Society reiterates that the objectives of Part 1 are welcomed. The Society welcomes that the regulation making powers will be subject to the affirmative procedure in Parliament.

The Society would comment as follows on the specific sections mentioned below: -

Section 3 – Regulations under section 1: further provision

While the Society appreciates the intention behind this measure, we would highlight that given the many broadly-phrased statutory duties imposed on public authorities, not least those proposed in section 4 of this Bill, (e.g. the duty to secure best value, or the requirement to contribute to climate change targets) it is almost inevitable that local authorities and possibly SEPA will find that these will on some interpretations conflict with the duty imposed by section 3(1). Reconciling these various duties is becoming increasingly complicated and this could be used to justify non-compliance with the more precise provisions in the regulations. Such a conflict is unhelpful and should be carefully considered by Government in preparing the regulations to come.

Section 4 – Regulators' duty in respect of sustainable economic growth

The Society notes the increased use of the phrase 'sustainable economic growth', and its use in this measure. However, the framework of legislation already requires some authorities to have regard to "sustainable development" and statutory guidance on this is issued as an element of the Scottish Government's main planning policy statement, Scottish Planning Policy, which is now subject to further consultation. The Society therefore questions whether the use of two such closely similar phrases is helpful, given the possibility for disagreement as to their respective meanings, and their relative imprecision. Effective legislation is best made with precise terms.

To illustrate the point, regardless of the political merits of this provision, there are two problems with the imposition of a duty to contribute to sustainable economic growth. The first is the uncertainty of what this phrase means. This exists both at the large scale (is it economically sustainable growth, or economic growth within the limits of ecological and social sustainability?); and then in ascertaining exactly what is meant once that issue is resolved. For example it is striking that the draft Scottish Planning Policy does not provide a clear definition but offers two far-ranging paragraphs on the topic. 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.

Secondly, it is unclear what yet another duty on public bodies will achieve and how it is to fit with their other statutory duties. This raises questions of legal enforceability and where that is in doubt, what it adds that clearly authorised policy guidance cannot.

Section 5 – Code of Practice

The presence of a Code of Practice is not by itself enough to save the inherent uncertainty of the duty proposed. However, the Society welcomes the fact that the making of the Code is subject to such open and inclusive procedural requirements.

PART 2: ENVIRONMENTAL REGULATION

Chapter 1 – REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

Section 8 – General purpose: protecting and improving the environment

Given the broad powers conferred by this part of the Bill, a statement of purpose is welcome as it will assist in the interpretation of subsequent measures

Section 9 – Meaning of "environmental activities" and "protecting and improving the environment"

The definition of "protecting and improving the environment" refers to "the status of ecosystems" but the Society believes it should also include a reference to biodiversity. As noted in the Convention on Biological Diversity (1992) to which Scottish Ministers must have regard under section 1 of the Nature Conservation (Scotland) Act 2004, looking after our priceless natural heritage involves caring for it both at the ecosystem and at the species (and even local population) levels.

Sections 10 and 11

Again, these sections introduce far-reaching regulation-making powers but the Society notes that this is already the case in most legislation covered by the proposed powers. Given the significance and extent of the intended overhaul of several major regulatory regimes, there is an argument for at least the first set of comprehensive regulations being subject to the affirmative procedure in Parliament (see for example section 2 of the Pollution Prevention and Control Act 1999). It would also be preferable, as well as better practice in response to international and EC obligations on environmental information and public engagement, to have an express requirement for consultation with the public and not just with those the Ministers think fit.

The Society suggests that with the exception of local government, the list of suggested consultees in section 11(1)(b) could apply equally in relation to the code of practice provisions at section 6(4)(b) and that a similar structure should be adopted.

Chapter 2 – SEPA'S POWERS OF ENFORCEMENT

The Society reiterates the introductory comments that it is unsatisfactory for there to be a piecemeal introduction of new enforcement powers in different areas. The aspiration should be towards a standard model (or limited set of models) which could be adopted in any regulatory context, rather than being confined to environmental matters. Ideally – and realistically achievable given the resources – the same model(s) and structures should be available for use where appropriate for health and safety, consumer protection, food hygiene, etc.

The Society would suggest that there are strong arguments in favour of wholesale reform and hope that this is intended. The Society considers that given the similarity in structures in environmental legislation it should be possible to pattern all of the existing environmental enforcement powers with a consistent model.

The Society would suggest that an opportunity is being lost to assist the public purse in restricting the power to recover of enforcement costs to SEPA and not any other regulatory body (or the police).

Sections 12-17

A concern always arises when an enforcement measure which could result in criminal penalties will be based on the civil standard of proof on the balance of probabilities rather than the criminal standard of beyond a reasonable doubt. It is difficult to comment in the abstract but great care must be taken to avoid future challenge that a trial may be unfair and thus non ECHR compliant. The standard of proof required here, namely the balance of probabilities, is lower than one might expect for the imposition of penal sanctions by the state but the acceptability of this depends largely on the appeal mechanisms that will be available. This is of course not yet available for evaluation because of the lack of detail in the Bill itself. The Society would emphasise that if the standard of proof to be met is the balance of probabilities then there has to be a clear, meaningful and accessible appeals process. Currently, parties can find it less complicated simply to pay the penalty rather than appeal (despite the circumstances), which is generally not satisfactory.

The Society would also suggest that this is an example of an aspect of the proposals, which could usefully be considered in conjunction with the current tribunal reform proposals contained in the Tribunals (Scotland) Bill.

Furthermore, the current Scottish Government consultation *Making Justice Work - Courts Reform (Scotland) Bill* (referred to above) considers the issue of time limits for bringing judicial review claims. The Society is of the view that the appeals routes in this Bill should be synchronised with these other developments and that underlying principles should be developed.

Section 13 – Fixed monetary penalties - procedure

In relation to sections 13(6)(b) and 16(6)(b) and the proposal that there are no grounds for appeal where SEPA has failed to comply with guidance issued to it by the Lord Advocate under section 23(1), our understanding is that this is to ensure that failure to observe the guidance does not preclude all enforcement action. The Society considers that the proposals create a situation where it will be unclear at what point exactly the opportunity to bring a criminal prosecution is defeated. Is it intended that SEPA could revive a prosecution in compliance with such guidance? What are the implications of a successful appeal, exactly? This arises because the Bill does not provide specifically for what happens if an appeal against an enforcement action is successful. The Society believes that the Bill needs to be absolutely clear what the outcomes of a decision are.

Chapter 4 – MISCELLANEOUS

Sections 29 and 30 – Vicarious liability

The Society welcomes the extension of vicarious liability. This should avoid difficulties caused by the diverse management structures of companies and partnerships.

Section 31 – Significant environmental harm: offence

The Society welcomes the introduction of this new offence, which could prove to be a powerful deterrent. We would query whether this is intended to replace or sit alongside the existing offence of keeping etc. waste in a manner causing pollution or harm (see section 31(1)(c) of the Environmental Protection Act 1990). The Society is of the view that there may be merits in having both offences available, noting the different thresholds of harm ("*significant* harm" here as opposed to 'any harm' in the1990 Act).

Section 34 – Land no longer contaminated or to be special site

The Society broadly welcomes the initiative to provide an additional certification of land as no longer contaminated. It should be borne in mind however, that the status of the land as previously contaminated must remain available as environmental information.

The contaminated land regime is based on notoriously complex measures, and it would appear that the current proposed measures may not exactly reflect the current structure. The Society understands that further discussions will take place to ensure that these measures are technically correct, and welcomes this. The Society understands that the proposals may be tabled with a number of changes and reserves the right to comment further. As currently proposed, however, the Society would comment as follows: -

Section 35 – Carriers of controlled waste: offences by partnerships affecting registration

In relation to special sites which are the nationally significant polluted sites which can only be regulated by SEPA, section 34 inserting s78TA of the Environmental Protection Act 1990 (particularly subsections (3) and (7)), appears to allow local authorities to remove special sites from the contaminated land register. This is unsound and does not reflect the structure of the contaminated land regime. In particular, the provision as drafted currently provides that SEPA should be consulted only in relation to this, which admits of the possibility of disagreement, which is highly undesirable in relation to such sites. The committees are of the view that it should clearly remain SEPA's decision alone as to the status of special sites, which the local authorities can then implement through entries in the Register.

Chapter 5 – GENERAL PURPOSE OF SEPA

Section 38 – General purpose of SEPA

The Society generally welcomes the statement of purpose in relation to SEPA, subject to the concerns expressed above about the lack of clarity in relation to the meaning of 'sustainable economic growth'.

Written submission from Loch Lomond & The Trossachs National Park Authority

Introduction

Loch Lomond & The Trossachs National Park Authority (NPA) covers Scotland's busiest area of countryside with more than 4.5 million visitors per annum. The National Park is very close to a large number of urban areas and can suffer from high levels of visitor pressure in certain key locations, such as Loch Lomond and its shores and islands and The Trossachs. This visitor pressure includes high levels of informal camping, picnicking, fishing in and around the many loch shore locations.

The statutory purpose of the NPA is to ensure that all four aims, as set out in the National Parks (Scotland) Act 2000, are achieved collectively and in a coordinated way.

These aims are:

- To conserve and enhance the natural and cultural heritage
- To promote the sustainable use of natural resource
- To promote understanding and enjoyment (including enjoyment in the form of recreation) of the Park's special qualities
- To promote the sustainable social and economic development of the Park's communities.

If there is a conflict between conservation and enhancement of the natural and cultural heritage and the other aims that cannot be resolved, then the NPA must give greater weight to the first aim.

The strategic management of the National Park is set out in the National Park Partnership Plan 2012 -2017. The approach to visitor management in the Park is set out in pages 29 to 35. A copy can be found at http://www.lochlomond-trossachs.org/nationalparkplan/

Tackling visitor management issues

The NPA has to deal with two distinct visitor management issues. The first is the problem of success – the problems, such as litter, toileting and traffic associated with large numbers of people seeking to recreate within a relatively small and accessible area of Scotland. The second is the problem of excess – the extreme issues caused by a minority of people engaging in a range of anti-social behaviour including littering, abandoning camp sites, excessive fires, drunkenness, vandalism, criminal damage, assault, vehicular trespass etc. These categories are not always mutually exclusive and typically occur in the same geographical areas and locations within these areas.

Within the National Park there is an evidence-based approach to visitor management that seeks to ensure the most appropriate responses are put in place to deal with any issues in discussion with local residents, visitors, user groups, land managers and organisations. In the National Park visitor management is taken forward using three key tools:

a) Infrastructure and service improvements;

b) Education, outreach and volunteering;

c) Enforcement;

The Park Partnership Plan identifies the high-pressure visitor management areas where resources will be focussed.

The NPA has tackled the issues associated with success and excess in a number of different ways. This has included:

- The largest professional Ranger Service (35 permanent staff and 30 seasonal staff) in Scotland focussing on visitor management issues. This equated to 12, 828 hours of patrolling between April and September 2012. Annual ranger report available from http://www.lochlomond-trossachs.org/images/stories/Looking%20After/PDF/NPA%20Board/2012/06-12%20Agenda%20Item%2015%20-%20Ranger%20Report%20-%2010.12.12.pdf

- Investing with partners in visitor infrastructure, such as public toilets, campsites, kiosks, car parks, paths and bridges. This is progressed through the development and implementation of specific visitor management plans for priority areas in the National Park.

- Working in partnership with the police in the award winning Operation Ironworks as part of the overall Respect the Park campaign.

- Education and Outreach with schools, groups and individuals both in the National Park and from across west central Scotland.

- Establishment of a volunteer ranger service.

- Working towards a co-ordinated approach to litter management with local authorities and police .

The table below shows the types of issues encountered and recorded by ranger patrols for the 5 Lochs area of the Park (Loch Venachar, Loch Lubnaig, Loch Earn , Loch Achry and Loch Voil) :

Patrol Route	No of Patrols	Total tents observed	Total litter observed*	Total Fires observed
Loch Venachar	45	404	204	190
Loch Earn	41	1760	216	739
Loch Lubnaig	39	377	207	199

* = black bag equivalents

In addition to this data the NPA has commissioned a litter audit for the 5 Lochs area which Keep Scotland Beautiful recently completed. This provides further detailed evidence of the extent of the problem particularly at key loch shore sites, popular with visitors.

LLTNPA Call for Action

In order to help tackle the environmental and experiential impacts that litter and associated issues have on the National Park, we would **call for the introduction of enforcement powers for National Park Rangers, or authorised staff, in order to tackle littering, abandoned camp sites (often including tents, sleeping bags, bottles, chairs and associated rubbish), fires and minor environmental damage such as chopping of live trees (often used for fire wood or shelters).** The current legislation does not allow for the NPA to undertake an enforcement role which is held by local authorities whose priorities for litter management lie within urban areas and very rarely extend into the rural areas.

The NPA's has experience of using the three mechanisms for managing visitors through education and awareness raising specifically delivered as part of our "Respect the Park" campaign; physical management measures through infrastructure developments and provision at key sites including bins, toilets, picnic areas, fire pits, parking and camping, and finally the enforcement elements through byelaws for Loch Lomond and for camping management on east Loch Lomond.

The NPA would welcome further discussion on the issues, as they are crucial to ensuring success in achieving a well managed and cared for National Park both for residents and visitors.

Written submission from North Ayrshire Council

Part 1: Regulatory Functions

(i) Powers as respects consistency in regulatory function.

North Ayrshire Council supports actions which will encourage or improve regulatory functions in terms of simplifying processes and bureaucracy for businesses. We would like to see regulation that reduces any unnecessary regulatory burden on businesses especially small businesses which are the mainstay of the local economy.

It is welcomed that this Bill is suggesting that listed regulators may be required to co-operate and co-ordinate activity with each other. This should make it easier for businesses to comply with regulations.

(ii) Regulations under section 1: further provision

We are supportive of suggestions under this section which should represent a more agile and responsive regulatory system. The local economy and business will benefit from regulation which is proportionate, consistent and is aimed at situations where action is needed. Businesses need regulation that is relevant to their businesses and industry. Businesses do not want regulators intervening to make bureaucracy more complicated or difficult to comply with.

This seems to suggest that there will closer scrutiny of regulators and how they discharge their function. The Scottish Government need to be clear on who or how this will be monitored.

(iii) Compliance and enforcement

Agree that all regulators should comply with new act and that therefore regulations are applied consistently across Scotland, business sectors and all aspects relating to sustainable growth.

(iv) Code of practice on regulatory functions

Agree that a code of practice for all regulators will be beneficial to the consistent and commensurate application of regulations. This code of practice should be shared with businesses so they are aware of what the code relates to and how it will be applied. There should be a co-ordinated information campaign to ensure all relevant businesses are made aware of how regulations are applied and how they will be impacted.

(v) Code of practice: procedure

Agree that the procedures in issuing the code of practice should be consistent with better regulation and that they should be consistent with interests of business and sustainable economic growth

(vi) Powers to modify

No comment

Written submission from North Lanarkshire Council

Part 1

Any additional measure which clarifies existing legislation to allow consistency of enforcement is welcomed.

Part 2

Measures to further monitor and improve the environment are welcomed as is the provision of specific powers to SEPA to introduce financial penalties for individuals/companies who fail to comply with regulations relative to the Environment.

Regulation 8 (1) of the Bill Specifically states:

“The purpose of this Chapter is to enable provision to be made for or in connection with protecting and improving the environment, including (without prejudice to that generality) – (a) regulating environment activities, 15 (b) implementing EU obligations, and international obligations to protecting and improving the environment”.

In this respect North Lanarkshire Council particularly requests that Regulation be introduced which would specifically allow regulatory bodies within Scotland to grant an Article 6 exemption under the terms of Article 6 (3) (e) (ii) of the Groundwater Daughter Directive, 2006/118/EC. Presently within North Lanarkshire we are attempting to proceed with such an exemption under a combination of contaminated land and planning process and this is proving clumsy and problematic. Having specific legislation which provided for a process within Scotland to grant an Article 6 exemption would greatly assist in this process and allow protection of the environment whilst at the same time promoting economic growth.

Written submission from Prof. Colin T. Reid

This evidence is presented in a wholly personal capacity and does not represent the views of any institution or organisation - Prof. Colin T. Reid, Professor of Environmental Law, University of Dundee.

Part I

A general observation is that actual or perceived inconsistency can be the result of having to operate with unduly complicated and fragmented regulations. When both regulator and regulated are faced with a complex patchwork of much amended regulations, with slightly different procedural provisions in slightly different contexts, it is inevitable that the regulatory burden will seem heavier than it need be. Where there is a well-organised and consolidated set of regulations, using a consistent set of procedural models, it is easier for everybody to understand what is required and what the consequences of non-compliance are, concentrating on the real purpose of the law rather than having to spend all the available energy simply picking through the legislative maze. A simple, coherent, consistent and clear regulatory framework can be understood and operated by all concerned. The energy and effort being expended on the process leading to Part 2 of this Bill and the regulation-making that will follow should be repeated in other areas. There are resource costs in such exercises, but there is also a large pay-back for all concerned in terms of better regulation.

Section 1

The regulation making power is very broad and it is welcome that it is subject to the affirmative procedure in Parliament.

Section 3

Given the many broadly-phrased statutory duties imposed on public authorities (not least that proposed in section 4 of this Bill), it is inevitable that these will on some interpretations conflict with the duty imposed by section 3(1). There will often be plenty of room for argument over the "proper" interpretation of these duties and therefore whether there is an existing obligation to justify non-compliance with the more precise provisions in the proposed regulations. Having to juggle competing obligations is hardly adding to the simplification of the regulatory process.

Section 4

Regardless of the political merits of this provision, there are two problems with the imposition of a duty to contribute to sustainable economic growth. The first is the uncertainty of what this phrase means. This exists both at the large scale - is it economically sustainable growth, or economic growth within the limits of (ecological and social) sustainability? - and then in ascertaining exactly what is meant once that issue is resolved. For example it is striking that the draft Scottish Planning Policy, currently also under consultation, does not provide a clear definition of sustainable economic growth but offers two far-ranging paragraphs on the topic, and draws a clear distinction between pursuing sustainable economic growth and pursuing sustainable development. 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.

Secondly, it is unclear what yet another duty on public bodies will achieve. How is this duty to fit with their other statutory duties such as to secure best value, to further the conservation of biodiversity, to act in the way best calculated to meet the greenhouse gas emission targets and in the way considered most sustainable? Which is to take priority when there is a conflict? Is it conceivable that this duty will ever be legally enforced? If not, is there clear evidence that the creation of such legal duties really changes the ways decisions are taken to an extent greater than can be achieved through policy, guidance and training? Moreover, authorities already have to cope with so many duties imposed on them, that the benefit gained by singling out one or two duties as deserving special legal status has been lost by the number of duties imposed, duties which inevitably conflict in some situations.

Section 5

The presence of a Code of Practice is not by itself enough to save the inherent uncertainty of the duty proposed.

It is welcome that the making of the Code is subject to such open and inclusive procedural requirements.

Section 6(4)

There should be an express requirement for consultation with the public.

Part 2

Chapter 1

Section 8

Given the broad powers conferred, a statement of purpose is welcome.

Section 9

The definition of "protecting and improving the environment" refers to "the status of ecosystems" but there should also be reference to biodiversity, since looking after our priceless natural heritage involves caring for it both at the ecosystem and the species (and even local population) levels, as noted in the Convention on Biological Diversity (1992) to which Ministers must have regard under s.1 of the Nature Conservation (Scotland) Act 2004.

Sections 10 and 11

Again, very far-reaching regulation making powers are introduced, but this does not represent a major change since this is already the legislative position in most areas covered by the proposed powers.

Given the significance and extent of the intended overhaul of several major regulatory regimes, there is an argument for at least the first set of comprehensive

regulations being subject to the affirmative procedure in Parliament (as was the case in the Pollution Prevention and Control Act 1999, s.2(8),(9)).

It would also be preferable to have an express requirement for consultation with the public, not just those the Ministers think fit.

Chapter 2

One general observation is that it is unsatisfactory for there to be a piecemeal introduction of new enforcement powers in different areas. Although having the one system across the major environmental areas is a very welcome step forward, there should be a standard model (or limited set of models) which can be adopted in any regulatory context, rather than being confined to environmental matters. The same model(s) should be available for use where appropriate for health and safety, consumer protection, food hygiene, etc. Is it intended to replace all of the existing environmental enforcement powers with this model (e.g. those introduced under the Marine (Scotland) Act 2010, ss.46-50 and the Wildlife and Natural Environment (Scotland) Act 2012, s.40)? Similarly, why is it only SEPA and not any other regulatory body (or the police) that is being empowered to recover enforcement costs?

A second general observation is that it is difficult to comment fully on the proposals in this section when some specific issues are dealt with in the Bill and others will be included in the regulations. In particular the absence of detail on appeal mechanisms makes it impossible to comment on the acceptability or ECHR-compliance of these provisions. Whilst I can appreciate the desire to have certain major provisions fixed in the statute, the result is that it is not possible to see the overall picture.

The issue of appeals is significant, not just to ensure ECHR-compliance, but also because the initial procedure and the appeal process must be viewed together to see if there is an appropriate balance between efficiency and due process. Moreover, we are currently undergoing major restructuring of the courts and tribunal system, and detailed consideration of appeal procedures at this stage might offer opportunities for a reallocation of functions between different judicial and administrative/ministerial appeal bodies (in this area and other regulatory regimes), affecting structures and workloads and ensuring the proportionate handling of cases by bodies with the appropriate expertise. (See also comment on s.40)

Sections 12-17

The standard of proof required here, the balance of probabilities, is lower than one might expect for the imposition of penal sanctions by the state, but the acceptability of this depends largely on the appeal mechanisms that will be available, a feature on which the Bill does not provide details.

Many of the offences likely to be relevant here arise not from one-off incidents but are continuing offences. It should be made clear how the enforcement procedure works in relation to such continuing offences.

Sections 13 and 16

It should be made clear in the Bill, or at least in the regulations, what the effect of an appeal is on any notice that has been served pending determination of the appeal and also the effect of a successful appeal on the potential to take further proceedings, whether by a second notice or by prosecution. Does a successful appeal against a notice preclude further action or mean that all options are again open to SEPA and the Crown Office? It is understood that the provisions in ss.13(6)(b) and 16(6)(b) are intended to prevent a successful appeal on one ground, namely that SEPA should not have issued a notice but instead have chosen another course of action, acting as a barrier to taking that further action, but this is just one example of the wider question of the effect of appeals on the ability to seek sanctions. There is a balancing act necessary between exposing operators to double jeopardy and risking technical flaws precluding necessary enforcement action.

Section 24

Publicity for the enforcement action taken is an essential element for securing public confidence in the use of the new mechanisms.

Chapter 3

Section 27

This provision is welcome, but it does not appear that equivalent provisions in other areas of law make a striking difference to the fines imposed.

Section 28

Again this provision is welcome and matches the provision for publicity in the event of the new sanctions being imposed by SEPA.

Chapter 4

Sections 29 and 30

The extension of vicarious liability is welcome and should avoid difficulties caused by the diverse management structures of companies and partnerships.

Section 31

The relationship should be considered between this offence and the offence of keeping etc. waste in a manner causing pollution or harm – Environmental Protection Act 1990, s.31(1)(c). There may be merits in having both offences available, noting the different thresholds of harm ("significant" harm here as opposed to any harm in the 1990 Act), but if so this position should be the result of conscious consideration.

Section 32

The introduction of a wide remedial power is welcome.

Section 33

These powers are welcome.

Section 34

The power to remove a special site from the register should not be given to the local authority acting merely in consultation with SEPA (proposed s.78TA(3)). Since the whole point of special sites is that they raise issues of a nature inappropriate for a local authority to deal with, SEPA's approval should be required, or the power should lie with SEPA.

Chapter 5

Section 38

The inclusion of a duty in relation to achieving sustainable economic growth is objectionable for the reasons pointed out above.

Section 40

There has been a missed opportunity for joined-up thinking across government in relation to reform of the civil justice system, both courts and tribunals, and our compliance with the Aarhus Convention. The matter dealt with here is a symptom of a broader issue affecting the appropriate scrutiny of decision-making, the cost and speed of judicial review and the way in which appellate responsibilities are allocated between Ministers, planning reporters, courts and tribunals. This specific change should not preclude a more thorough consideration of how best to ensure genuine access to justice across a wide range of regulatory matters.

Section 41

Although the threat of adverse financial consequences for the authority may help to concentrate the minds of those responsible for poor performance, reducing the resources available is unlikely to assist improvements. The exercise of this power should be a last resort after more positive engagement between Ministers and the authority, and this might be reflected in the statutory provision.

Written submission from the Regulatory Review Group

The Regulatory Review Group would like to offer the following observations in response to Rural Affairs, Climate Change and Environment Committee's call for evidence on the Regulatory Reform (Scotland) Bill. The Regulatory Review Group (RRG) is an independent business-led committee[1] which works to promote and develop a culture and environment where both business and Government work together to create better regulation for all.

The RRG works with the Scottish Government to actively promote an improved regulatory landscape and reduce unnecessary burdens on business. From an early stage, we have been involved in informal discussions and stakeholder events with policy officials and the Minister for Energy, Enterprise and Tourism to influence thinking and development on the bill, principally on the enterprise elements, to ensure that it delivers the principles of better regulation, and consistency in particular.

Consistency in delivery and implementation are also key competitively. Issues around inconsistent interpretation, implementation and enforcement of regulation frequently come to the attention of RRG – both in generic and specific terms. While recognising that good examples of consistency being applied do exist, and that decisions need to be taken at the right level, a Scotland wide consistent approach can provide greater efficiency and effectiveness. Decisions need to be made in the right place and level, and in many cases that may be very local, but consistency in process and procedures is clearly required to support and deliver better regulation.

Respecting the principles of better regulation requires an approach that ensures regulation is transparent, proportionate, consistent, accountable and targeted only where needed. Regulation is necessary to provide protection but it also has an important role in driving competiveness and economic growth – the Government's main purpose. Ensuring regulators consider the contribution of their regulatory activity on sustainable economic growth, while finding the appropriate balance between economic and other regulatory objectives, is key to this.

RRG encourages and works with regulators to help ensure they adopt an enabling, risk based approach. While not all regulatory issues can be handled in the same way, proportionate, effective and consistent regulation should be built into any future system to become the cultural norm and deliver the desired efficiency and simplification.

Our annual reports have previously commented on the good progress SEPA has made in making better regulation work in practice and we hope the framework within the Bill will enable them to build on this. SEPA has made significant steps in the right direction by introducing much needed proportionality to environmental regulation by relating enforcement and compliance directly to risk to the environment. For many businesses their activities are, by and large, of low environmental risk and compliance issues are almost always a reflection of "confused" operators rather than those that would be placed in the "careless", "chancer" or "criminal" categories. We

[1] This response reflects the collective view of RRG but the position of individual member organisations may vary on some aspects.

would like to see implementation of the SEPA's change proposals result in the delivery of real changes to existing registration, licensing and charging regimes to truly reflect the degree of risk to the environment. These changes must move environmental regulation and its enforcement away from a catch all, 'belt and braces' approach that often results in more than just the polluter paying.

RRG would be happy to engage further with you on this as your considerations progress.

Written submission from Andrea Ross

Introduction to the Submitter

Andrea Ross is Professor of Environmental Law at the University of Dundee. She is the author of *Sustainable Development Law in the UK – from Rhetoric to Reality* (Earthscan / Routledge) and has written widely on the role of legislation (the UK, Scottish, Welsh and Canadian) in implementing sustainable development.

Scope of this response to consultation

I have the benefit of following the responses produced by the Law Society for Scotland and my colleague Professor Reid and strongly agree with the content of both. I would however, like to more specifically respond to the proposals to introduce a duty on selected public bodies to contribute to sustainable economic growth in section 4 and section 38 of the Bill.

(a) The use of the phrase sustainable economic growth

1. The Scottish Government, very usefully in my opinion, has set out a central purpose which is to 'create a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth'. This has been shortened by the Government to be a central purpose of 'sustainable economic growth'. I believe this shortened version puts the emphasis on the wrong part of the full purpose. Indeed, Scots want to be successful, they want to flourish, how that happens is most likely to be of secondary concern to them. Sustainable economic growth (or see below, the broader term of sustainable economy), like good governance and sound science are key ingredients to that success and flourishing; they are enablers but they should not be the true purpose of Government.

2. It is possible that the Scottish Government could achieve sustainable economic growth without Scotland being successful. Conversely, Scotland could be very successful and most Scots flourishing without growth. As such, the term sustainable economic growth is too narrow and restrictive an economic goal and detracts from the real objective of 'a successful Scotland with opportunities for all to flourish'. The message to the public sector is skewed by the inclusion of growth and marginalizes success or failure of Government to meet the real purpose of a successful Scotland. A broader economic goal of sustainable economy is preferred and this would allow growth (so long as it is sustainable), plateauing (only if sustainable) or even a shrinking of the economy (so long as it is sustainable) and, of course, all lead to a successful Scotland with opportunities for all to flourish. This is true regardless of the interpretation given to 'sustainable' (see below) and this broad approach is consistent with the phrasing used for the other enablers - 'good' governance and 'sound' science.

3. As noted by both Prof Reid and the Law Society, sustainable economic growth is capable of at least two very different interpretations. Is it simply the pursuit of growth avoiding large booms and busts (thus sustainable) or is it the pursuit of economic growth within the limits

of ecological and social sustainability. As discussed above, to be successful and flourish, Scotland needs an economy that operates within the ecological and social limits of the Earth for the benefit of its inhabitants now and in the future. Regardless of how this government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability. History has shown that where key decisions need to be made the need to address immediate pressures (including war, economic recession, disaster, or an upcoming election) will very often outweigh concerns about long term effect.

4. This is a good reason to consider legal duties which require public bodies to consider the long term effects of their actions.

(b) The role of sustainable development and the value of general duties

5. The evidence shows that a policy approach supported by only minimal legislation has not led to long term sustainability, nor has it acted to protect innovative and crucial procedures, institutions and goals from electoral short-termism. The more we erode the Earth's carrying capacity, the more the ability of leaders to provide just answers to economic and social crises diminishes.

6. Sustainable development, for all its definitional failings, has proven its resilience as a widely accepted, and now expected and measured, policy objective: internationally, in the EU, in Scotland and elsewhere in the UK. Most versions of sustainable development make decision makers at least consider the long term effects of their actions on the ecological limits of the Earth and its inhabitants, now and in the future.

7. Properly drafted duties on public bodies can create a meaningful framework for decision making based on sustainable development, while ensuring that this framework is iterative and flexible. They can serve to promote cultural change within government and beyond and unlike, procedures on their own, duties can be very symbolic. A significant amount of legislation already requires some authorities in Scotland to contribute to the achievement of "sustainable development", however, it is hindered by a lack of clarity in the definition of sustainable development.

8. It is recommended that the Scottish Government re-focus its efforts to properly define sustainable development for Scotland in line with its central purpose of 'a successful Scotland with opportunities for all to flourish' with the health and wellbeing of Scotland's people and environment, now and in the future, at the forefront of the definition. Scotland's current approach to governance using Economic Strategy is ideally suited to this approach, as is the central purpose of 'a successful Scotland with opportunities for all to flourish'. The inclusion of a clear, forward looking definition of sustainable development into such a clear approach to governance would, I believe, be world leading.

9. If this occurred, then a general duty on public bodies 'to contribute to the achievement of sustainable development' would be very valuable. Past experience in Scotland with specific duties and in Northern Ireland and Canada with general duties shows that in order to have any impact these duties need to be supported by legal procedures such as obligations to report, produce strategies or assessments, consult and review which are easier to enforce and monitor than the duties themselves.

Further reading

Ross. (2012) *Sustainable Development Law in the UK – from Rhetoric to Reality?* Earthscan / Routledge Publications, London Chapter 10 and Chapter 7

Ross A. (2000) "Greening Government -Tales from the new Sustainability Watchdog *Journal of Environmental Law* 12(2) 175-196.

Written submission from RSPB Scotland

Stage 1 Written Evidence

RSPB Scotland welcomes the opportunity to respond to the Rural Affairs, Climate Change and Environment Committee's call for views on the Regulatory Reform (Scotland) Bill. We outline the aspects of the Bill that we think are positive and those that give us cause for concern.

In summary:

- We fully support effective and transparent regulation.
- We oppose the introduction of a duty for regulators to contribute to the achievement of sustainable economic growth; any duty should be to achieve sustainable development.
- We believe that the sanctions in the Bill should be refined to give regulators the necessary scope and flexibility to deal with non-compliance.
- We think the regulatory powers provisions need to be clarified and strengthened.

General comments

The Bill will take forward elements of the Scottish Government's Better Regulation agenda. As stated in a previous RSPB Scotland consultation response[1], we fully support the integration and streamlining of regulation but only when this maintains a sufficient level of environmental protection. Regulations play a central role in protecting the environment and the natural capital upon which our long-term prosperity and wellbeing ultimately depend. The 2011 UK National Ecosystems Assessment clearly highlighted the wide variety of significant benefits provided by the natural environment in terms of economic prosperity, human health and wellbeing; the risks posed to the delivery of these benefits through inadequate protection and management of the natural environment; and, in particular, the importance of regulation in safeguarding and enhancing the delivery of key services.[2]

We view regulation as an essential policy tool for achieving protection of the natural environment and as a means of the UK meeting its legal obligations under EU Directives such as the Water Framework Directive and the Birds and Habitats Directives. Furthermore, given the debate about regulatory burden and the need to cut red tape in these financially straitened times, it is notable that a UK study found that costs of environmental regulation do not have a statistically significant effect on

[1] RSPB Scotland response to 'Proposals for an Integrated Framework of Environmental Regulation' consultation
[2] http://uknea.unep-wcmc.org/

employment and there was no evidence of a trade-off between jobs and the environment.[3]

RSPB Scotland is extremely concerned that the proposed duty on regulators to contribute to the achievement of sustainable economic growth will introduce a bias towards economic gain over environmental protection. As we discuss further below, we believe it is far more appropriate for regulators to have a duty to contribute to sustainable development.

We would like to draw RACCE's attention to section 2 of the Bill, which is being examined by the lead Committee. The provisions in this section would allow any regulations made under section 1 to create, amend or revoke existing regulatory requirements. Although the Bill proposes that such changes would only be permitted when equivalent regulatory requirement exists, we question how this judgement would be made. Robust and sufficient safeguards would be needed to ensure that the provisions do not result in deregulation and weakening of environmental protection.

Part 1 Regulatory Functions

Section 4 - Duty for sustainable economic growth

RSPB Scotland strongly disagrees with the proposed duty for regulators to contribute to sustainable economic growth. We are particularly worried about the consequences for those regulators, SEPA and SNH, who have duties to protect Scotland's environment and natural heritage.

We question the use of 'sustainable economic growth' over 'sustainable development' and argue that a duty for the latter is far more appropriate. Sustainable economic growth is not defined in legislation, either in this Bill or in existing legislation, nor is there any clarity about what sustainable economic growth actually is; it means different things to different people. On the other hand, sustainable development is well defined in international, European, UK and Scottish law and is underpinned by clear principles. The Scottish Government is already signed up to the UK's shared framework for sustainable development[4] and there is strong precedent for sustainable development duties in Scottish legislation, for example the Planning etc. (Scotland) Act 2006, Climate Change (Scotland) Act 2009 and Marine (Scotland) Act 2010.

We are concerned that a sustainable economic growth duty on regulators would introduce a bias towards economic aspects over the other two pillars of sustainable development: environmental and social. If it is not the Government's intention to propose a duty that puts economic issues ahead of environmental or social considerations then a new duty is not technically necessary for regulators that already have a sustainable development duty e.g. SEPA[5] and SNH[6]. Furthermore,

[3] Cole, M. A. and R. J. R. Elliott (2007). "Do Environmental Regulations Cost Jobs? An Industry-Level Analysis of the UK." The B.E. Journal of Economic Analysis & Policy 7(1); Rayment, M., E. Pirgmaier, et al. (2009). The economic benefits of environmental policy - Final Report., Institute for Environmental Studies.

[4] *One future – different paths: The UK's shared framework for sustainable development*

[5] Sustainable development duty in Section 2 of the WEWS Act 2003

SEPA and SNH already have legal obligations to have regard to social and economic factors[7] when exercising their functions. This means that economic growth can already be taken into account. It would be far more sensible to extend a sustainable development duty to all of the regulators listed in Schedule 1.

RSPB Scotland believes a more sustainable economy would be aided by the development of new measures of social and economic wellbeing to complement the traditional, but limited measure, of GDP. We agree with the recommendation from the Carnegie report[8] that there should be a shift in emphasis from measuring economic production to measuring people's wellbeing. There must be due recognition of the fact that the natural environment generates and sustains economic activity and brings wider benefits to society[9].

Part 2 Environmental Regulation

Regulatory powers (Sections 8-11)

- We support the intention in Chapter 1 regarding the need for regulations to protect and improve the environment. However, we think that some of the provisions require further clarification:

- The general purpose in section 8 includes "implementing EU obligations, and international obligations, relating to protecting and improving the environment". This should be expanded to include national obligations in order to encompass Scottish legislation such as the Nature Conservation (Scotland) Act 2004 and the Wildlife and Natural Environment (Scotland) Act 2011 and all subsidiary obligations including statutory guidance, strategies, plans and policies.

- Section 9 defines 'environmental activities' as "activities that are capable of causing, or liable to cause, environmental harm, and activities connected with such activities". The phrase 'environmental activities' implies the activity is environmentally beneficial. Therefore, when used without its supporting definition, this term could be misleading and cause confusion. We suggest that an alternative term is used, for example 'activities potentially harmful to the environment'.

- The term 'substances' within the definition of 'activities' (section 9(2)) and in Schedule 3 needs to be defined. It is critical that 'substances' will encompass invasive non-native species, the introduction of which can cause devastating environmental effects.

- The meaning of 'protecting and improving the environment' should be clarified by explicitly stating 'habitats and species' alongside ecosystems.

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[6] Section 1 of the Natural Heritage (Scotland) Act 1991
[7] SEPA: s.32 of the Environment Act 1995 and s.2 of the WEWS Act 2003; SNH: s.3 of the Natural Heritage (Scotland) Act 1991
[8] http://www.carnegieuktrust.org.uk/getattachment/edc70373-49a0-48bb-84a3-5b0a253a5a6f/More-Than-GDP--Measuring-What-Matters.aspx
[9] Wellbeing through wildlife (RSPB publication)

- Section 11 introduces provisions that require Scottish Ministers to consult before making regulations for protecting and improving the environment. The consultee list includes local government, industry and business. Environmental interests should be explicitly listed to make clear that our sector will be consulted too.

SEPA's enforcement powers

We welcome the provisions to give SEPA powers through fixed and variable monetary penalties but these could be made more effective in a number of ways. Our suggestions below are based on the recommendations in the Macrory review[10] which states that sanctions should be based on six principles: (i) aim to change the behaviour of the offender; (ii) aim to eliminate any financial gain or benefit from non-compliance; (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue; (iv) be proportionate to the nature of the offence and the harm caused; (v) aim to restore the harm caused by regulatory non-compliance; and (vi) aim to deter future non-compliance.

- Section 12(4) states that the maximum amount of a fixed monetary penalty is to be an amount equivalent to level 4 (£2500) on the standard scale, as per the Criminal Procedure (Scotland) Act 1995. We think that level 5 (£5000), the highest level on the standard scale, should be applied instead. SEPA need not use a fine of that level but it gives them the flexibility to do so if circumstances require it.

- The variable monetary penalty should not be capped at £40,000 because there must be scope to have fines that act as sufficient deterrent and adequately penalise those who have caused significant environmental harm. For businesses with large turnover, £40,000 might not have the necessary impact. Other legislation does not cap, for example, the Greenhouse Gas Emissions Trading Scheme Regulations[11] enable penalties of 100 Euros per tonne of CO2 emitted to be applied. This has resulted in operators receiving penalties well in excess of £40,000. There are clear benefits of such a system where the magnitude of fine can be linked to the potential environmental harm of an activity.

- When setting fines, there must be consideration of whether any financial benefits have accrued or are likely to accrue as a result of the offence. We note the provision in section 16: "secure that no financial benefit arising from the commission of the offence accrues to the person". We suggest that the provision should be consistent with that of section 46(1) of the Nature Conservation (Scotland) Act 2004 i.e. "The court must, in determining the amount of any fine to be imposed on a person convicted of an offence under this Part, have regard in particular to any financial benefit which has accrued or is likely to accrue to the person in consequence of the offence".

- We support the principle of enforcement undertakings but they must not be used instead of financial penalties or court action when these are a more

[10] Macrory, R.B. 2006. Regulatory Justice: Making Sanctions Effective (Final Report)
[11] http://www.legislation.gov.uk/uksi/2005/925/made/data.pdf

appropriate response. In situations where significant and irreparable environmental harm has occurred, it may be more appropriate to pursue a prosecution and restoration order.

Scottish Coal – the need for strong and effective regulation

Coal mining in Scotland is facing one of its most challenging periods for many years, with two of the largest opencast coal operators (ATH Resources and Scottish Coal) recently entering administration. Both operators have significant liabilities in relation to the restoration of their sites, with restoration costs rising into many millions of pounds at some sites. Failure to manage and restore these sites could cause immediate and serious pollution threats from contaminated mine water and put Scotland in breach of European legal requirements under the Birds and Habitats Directives. It is not yet clear how this story will unfold but it is a stark reminder of the need to regulate industry closely and effectively. A shift towards deregulation does not pay, either economically or environmentally. Scotland's regulatory framework must be sufficiently effective and robust to avoid such situations in future.

Powers of the Courts

The provisions on compensation orders will allow costs of up to £50,000 to be paid to SEPA or others for costs incurred in preventing or remediating harm to the environment. We welcome these orders but do not think that they should be capped because there must be scope for compensation to be commensurate with the damage incurred.

We are disappointed by the ad hoc nature of the marine licensing provisions in the Bill. There is a real need for a joined-up approach to judicial reform and, in this regard, we wholeheartedly agree with the points made by Professor Colin Reid in his evidence submission[12]. It remains very difficult for parties to challenge Government in the courts. We note that, prior to forming the current Government, the SNP made a manifesto commitment to explore the option of an environmental tribunal or court. This would provide an opportunity to introduce a fairer, more efficient and more cost effective initial procedure for interested parties to challenge Scottish Ministers' decisions and remove the need for immediate recourse to the courts. In its report Governance Matters[13], Scottish Environment LINK suggests that there is a strong case to be made for an environmental and land court.

12 http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Prof._Colin_T._Reid(1).pdf

13 http://www.scotlink.org/files/publication/LINKReports/LINKGovernanceMatters.pdf

Written submission from the Scotch Whisky Association (SWA)

Introduction

The Scotch Whisky Association (SWA) represents 90% of the Scotch Whisky industry. Scotch Whisky is Scotland's leading single product export. Annual shipments in excess of £4.3bn in Customs value represent over 80% of Scotland's and 25% of the UK's food and drink exports.

The vast majority of our members, including distillers, bottlers and those engaged in the wholesale and export trade of Scotch Whisky, have some type of interaction with SEPA. Licences range from simple registrations through to Integrated Pollution Prevention and Control (IPPC) permits.

Scotch Whisky is a natural product closely tied to its environment and rural communities across Scotland. Environmental sustainability is one of the industry's and Association's top priorities. Building on a range of existing company initiatives, the industry launched an ambitious and wide-reaching Environmental Strategy in in June 2009. It has been recognised and welcomed by several environmental organisations including SEPA, RSPB and WWF.

The Association and Scotch Whisky industry have developed a strong professional working relationship with SEPA. For example, the industry has, through the SWA, delivered training events for SEPA staff, improving understanding of the workings and challenges of the distilling sector and business in general. We hope that the strong partnership between SEPA and Scotch Whisky industry can be translated across other business sectors.

There has been extensive discussion within the industry about the SEPA regulatory proposals throughout their development. The Association facilitated a series of meetings between our members and SEPA to explore the impact of the proposals for the sector. The industry also provided resources and expertise to assist SEPA in developing the concept of integrated permitting, along with some real-life examples on which to test the developing model.

This Bill represents a wish to modernise and simplify the way businesses in Scotland are regulated with a greater emphasis on outcomes rather than just action. If implemented effectively, the new form of regulation should support the improvement of the environment whilst using resources more efficiently, yet ensuring Scottish businesses can grow. Subject to much detail that remains to be developed under subordinate legislation, we give a cautious welcome to this Bill.

The Bill is so wide in scope that there exists opportunity for secondary legislation to capture activities not yet subject to regulation and potentially capture activities not intended to be covered by the scope of this Bill. To ensure proper scrutiny of subordinate legislation arising from this primary legislation, we would wish to see all subordinate legislation arising from the final Act subject to the affirmative procedure and thus open to proper scrutiny.

Looking ahead to the implementation of subordinate legislation, we would wish to see the Scottish Parliament setting some indicators for the various regulators to

'measure success'. We believe that the successful implementation of the Act should be measured by the environmental outcomes it delivers rather than the number, or degree, of processes the regulators manage.

The Association is pleased to have the opportunity to respond to the Rural Affairs Climate Change and Environment Committee's invitation to comment on the Regulatory Reform (Scotland) Bill. We would be happy to provide additional information to this Committee and/or any other supporting committees. This submission focusses only on Part 2 of the Bill - Environmental Regulation.

Part 2: Environmental Regulation

Chapter 1: Regulations for Protecting and improving the environment

Scotch Whisky is closely tied to its environment and rural communities across Scotland. We broadly support the intention of the Bill that SEPA would have a general purpose '*to protect and improve the environment (including managing natural resources in a sustainable way)'.* The Bill also states that SEPA must also contribute to improving the health and well-being of the people of Scotland and contribute to achieving sustainable economic growth. We seek clarification around the definition and possible weightings given to each of these objectives and would expect full consultation on the definitions of these matters.

We support the Bill's new duty for SEPA to contribute to achieving sustainable economic growth. This adds weight to existing legislation where SEPA must consider economic factors (such as affordability and cost-effectiveness of environmental improvement measures) alongside environmental considerations. It also allows scope for SEPA to target better its interventions where the highest risks to the environment exist. Where cost-benefit analysis demonstrates that environmental improvement/pollution mitigation action is necessary, the environmental licensing framework must allow regulated businesses to focus their resources where action will deliver the greatest environmental return/improvement. We believe the Bill should be strengthened with a specific reference to a risk-base for environmental regulation.

Part 2, Chapter 1, Section 10 of the Bill gives Scottish Ministers the power to make a wide range of regulation as detailed in Part 1 of Schedule 2. It is understood that a key driver for Section 10 is to allow the setting up of a 'single regulatory framework' in regulations. In principle we see value in this proposal and we have highlighted in previous consultations the benefits of a single Controlled Activities Regulation (CAR) licence for distillery sites. We are pleased to see that this new power goes beyond 'stapling together' individual licences and offers scope for a wholesale review of existing permissions covering all relevant environmental permissions.

The aim of the single regulatory framework regulations is for a reduction in the number of licences held by businesses, significant simplification of those licences, greater ability for businesses to effectively manage their own environmental performance (which in turn should lead to a better understanding of process and impacts), reduced inspection frequency and reduced costs. One significant benefit for regulated companies is the potential to reduce the current duplication of effort required by businesses and the regulator; for example providing the same company

details and data to SEPA for a variety of different reasons or the hosting of numerous site visits and inspections from officers with different interests and from different environmental disciplines. This would, theoretically, allow for a greater consistency of approach to be taken across the various environmental media and across companies.

The Bill includes a new 'integrated' approach when it comes to environmental management. The SWA would not wish the complexity of the IPPC (Industrial Pollution Prevention and Control) style of licence to be replicated at lower risk installations. Currently IPPC variations can be lengthy and cumbersome and we would not wish to see the same process transposed onto all new licences. This would represent significant gold-plating of regulation.

There remains a real risk that this new power could be used to drive a prescriptive and detailed regulatory framework. It will be extremely important that the development and implementation of subordinate regulation be tightly managed and that a full dialogue between the Scottish Government, SEPA and regulated businesses is allowed to take place. We believe such regulations should be subject to a positive parliamentary procedure and open to full Scottish Parliament Committee scrutiny. We understand that over time, SEPA would wish to migrate existing company multiple licences to single permits. We would welcome clarification on the timetable proposed for this migration.

Part 2 Chapter 1 Section 11: *Regulations relating to protecting and improving the environment,* provides a commitment to consult with representatives of industry prior to making regulations relating to protecting and improving the environment. The Association would welcome the opportunity to be involved in these consultations.

Chapter 2 – SEPA's power of enforcement

Section 10 of the Bill allows for the development of enforcement notices, revocation and suspension notices and these proposed notices might be served on operators who are carrying out an activity whether or not they have an authorisation. We believe this is one of the real strengths of this proposed Bill – providing SEPA with the tools to deal with environmental harm and pollution from unregulated businesses. Similar sanctions already exist for regulated businesses and this proposal levels the playing field.

The Bill includes new powers under Sections 12 and 15 to make provision for SEPA to issue fixed and variable monetary penalties and furthermore that SEPA is able to recover associated costs e.g. investigation, legal etc. from those persons issued with a monetary penalty. SEPA should be required to demonstrate the amount of any fees or costs levied in a transparent manner and this should be defined in guidance.

Section 19 provides SEPA with the power to accept a voluntary enforcement undertaking. This should achieve the environmental outcome SEPA desires without having to resort to costly litigation and it is welcomed that where enforcement undertakings are accepted by SEPA, no criminal proceedings will be commenced.

We would like to underline that these additional enforcement measures should not undermine the current mature relationship which SEPA has with compliant and responsible businesses. There is a risk that if fixed penalties are used frequently by SEPA in response to minor transgressions (such as administrative errors or minor misses to reporting deadlines), this is likely to lead to a deterioration in the regulator's relationship with operators. To counter this, we believe the proposed guidance from the Lord Advocate should set out where these measures should be used alongside other enforcement tools available to SEPA. Monetary penalties should not circumvent early engagement and open dialogue with compliant companies to rectify environmental concerns. Penalty notices should not be a vehicle to generate income from minor breaches by well-performing licence holders. The guidance should also ensure consistency in the application of monetary penalties. The emphasis should be on SEPA's role of producing guidance and advice rather than resorting to penalties or threat of penalties.

Chapter 3 - Court powers

Criminal activity that results in environmental damage, would attract strong enforcement action and penalties. The Bill enables more robust penalties (including fines that better reflect the costs avoided by poor practice, that cover the cost of the environmental damage, and that cover the regulator's costs in investigating the permit breach or crime). The aim would be to drive improved behaviours from non-compliant operators.

The Association has concerns regarding the use of publicity orders and believes their use must be proportionate and only following careful consideration from the courts. Advertising the outcome of a court case proactively may have a disproportionate impact on businesses reputation.

A publicity order would be very powerful for those who trade on their environmental performance, but not for those who wilfully damage the environment. We are therefore not convinced it will drive the correct behaviours amongst the community the Bill is trying to target. Use of a publicity order on distillers might have a disproportionate impact as mis-information could be published in our international markets and international Governments could use the publicity as an excuse to introduce new trade barriers. We are unaware of any competitor spirits (tequila, Cognac etc.) whose manufacture is open to similar publicity orders. The introduction of these might put Scotch Whisky at a competitive disadvantage. Even responsible and compliant businesses will have accidents from time to time and the approach by the courts to this type of pollution incident should be different to wilful pollution. We would not wish to see this enforcement tool becoming the norm and should only be used for serious breaches that have resulted in significant harm to the environment.

Chapter 4 –Miscellaneous

Section 31 of the Bill creates the new offence of causing or permitting, or acting in a way likely to cause, significant environmental harm. We are concerned that this new power is so broad it offers SEPA the opportunity to intervene in company business matters inappropriate for regulatory intervention. For example it must not allow the environmental regulator to have any influence over a regulated company's choice of

raw materials, production schedule or product type – these are matters for the business to decide and not the regulator.

Ministers must ensure the policy intent is reflected in the regulations as there is a risk that this new power has the scope to drive disproportionate regulation on compliant businesses. The normal approach to escalation of enforcement levels should be applied.

Chapter 5 – General purpose of SEPA

See earlier points under Chapter 1.

Additional points

We are disappointed that 'beyond compliance' environmental performance is not acknowledged within the Bill and we hope this will be covered by subordinate legislation. We believe that rewarding achievements as part of the licencing regime should be part of the regulator's framework; by recognising 'champions', SEPA should have the powers to incentivise companies to innovate. Building a regulatory framework which allows SEPA to capture activities that currently are not covered by traditional regulation will ensure SEPA gain a more rounded and informed view of environmental performance by operators e.g. low carbon initiatives and on-site renewable power plants. We wish to see SEPA striving to become an 'enabler' for companies who are investing in innovative and new technologies.

We would also wish to re-iterate the importance of an effective and proportionate harmonised Risk Assessment to the success of this Bill. This would result in more assessment being associated with big risk activities with comparably less assessment associated to lower risk activities allowing SEPA to focus their resources on the high risk activities. This is one of the core principles of the regulatory change programme and should not be lost in the detail.

We would also wish Scottish Ministers to recognise that where these proposals are likely to reduce the administration burden between the regulator and operator, the internal systems and processes to manage the risks by environmental compliant operators are likely to remain unchanged.

Conclusion

The SWA welcomes the new duty for SEPA to contribute to achieving sustainable economic growth which we believe is compatible with the proper protection of the environment. Targeting those who wish to operate outside of regulations must be the main driver rather than focussing resources on compliant operators.

The SWA gives a cautious welcome to this Bill, but as it is mainly an enabling Bill, we are unable to endorse fully all the powers and duties until the detail is developed within the subordinate legislation on which there should be consultation and sufficient parliamentary scrutiny.

Written submission from Scottish Environment LINK

Scottish Environment LINK is the forum for Scotland's voluntary environment community, with over 30 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. We welcome the opportunity to offer views on those parts of the Regulatory Reform (Scotland) Bill relevant to the remit of the RACCE Committee.

Summary

- **We support the need for effective, targeted and transparent regulation for the benefit of Scotland.**

- **We strongly oppose the introduction of a duty on regulators to contribute to achieving '*sustainable economic growth'* - the duty should refer instead to '*sustainable development*'.**

General Comments

Scottish Environment LINK supports the need for effective, targeted and transparent regulation and is broadly supportive of any steps that can be taken to streamline regulation provided that this does not happen at the expense of environmental protection. The 2011 UK National Ecosystems Assessment[1] clearly highlighted the wide variety of benefits provided by the natural environment in terms of economic prosperity, human health and well-being; the risks posed to the delivery of these benefits through inadequate protection and management of the natural environment; and in particular, the importance of regulation in safeguarding and enhancing the delivery of these key services.

While we acknowledge that regulators should, and already do, account for the social and economic impact of their actions, the pursuit of economic growth must not override environmental protection or well-being. We support the Carnegie UK Trust's Report of the Round Table on Measuring Economic Performance and Social Progress in Scotland [2], which recommended that focusing on delivering economic growth as the end rather than the means is inadequate, concluding that '*we need to break our focus on economic growth and instead focus our effort on delivering well-being, now and into the future.'*

We are therefore greatly concerned by the inclusion of a duty on regulators, including environmental regulators, to contribute to achieving '*sustainable economic growth'*. Indeed we question the need for a duty to include reference to sustainable economic growth at all, given that the environmental regulators already have legislative requirements to consider social and economic factors while fulfilling their primary functions. They also have extensive statutory duties for '*sustainable development'* and it is very far from clear that these duties are compatible with a duty for '*sustainable economic growth'.*

[1] http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx
[2] http://www.carnegieuktrust.org.uk/publications/2011/more-than-gdp--measuring-what-matters

No evidence has been presented that regulation in Scotland is a significant barrier to economic growth. Environmental regulation can in fact improve well-being, drive innovation, reduce risks, create jobs, create new business opportunities and boost Scotland's international reputation and competitiveness.

We know of no legal definition of sustainable economic growth and, therefore, have no assurance that it aligns with the sustainable development definition and principles, which already have a sound basis in international, EU, UK and Scottish law. Its inclusion in environmental regulators statutory purposes could undermine, confuse and compromise the regulators' work and their achievement of environmental protection and improvement. Any statutory purpose for SEPA and other environmental regulators should refer to sustainable development as this has a clear legal framework and a set of principles which the Scottish Government has signed up to.

Should the duty remain as drafted, guidance on the meaning of sustainable economic growth, and how regulators will meet the requirements of the duty must be introduced urgently, in consultation with all affected bodies. We would expect any guidance to clarify how a growth duty would relate to current duties, and how to overcome implementation issues. There exists a grave risk here that it will prove impossible to reconcile duties for sustainable development, which **balance** economic, social and environmental development concerns, with a growth duty which clearly gives **added weight** to economic concerns alone. Parliament should take great care to ensure that any law they pass achieves a high standard of justiciability.

Part 1 Regulatory functions

Section 4 - Regulator's duty in respect of sustainable economic growth.

We strongly oppose the introduction of a duty on each regulator, and in particular, SEPA and SNH, to contribute to achieving sustainable economic growth because it threatens to damage environmental protection by conflicting with regulators' existing primary purposes. Sustainable economic growth is not defined in the Bill or anywhere else in Scottish, international, EU or UK law. If a duty is considered necessary this should be to contribute to achieving sustainable development.

Sustainable development is well defined, globally recognised, underpinned by clear principles, and the Scottish Government is a signatory to the UK's shared framework for sustainable development[3]. There is also a strong precedent for a duty to contribute to achieving sustainable development in Scottish law. In exercising functions under the Planning (Scotland) Act 1996, the Water Environment and Water Services (Scotland) Act 2003, the Climate Change (Scotland) Act 2009 and the Marine (Scotland) Act 2010, Scottish Ministers and others must do so with the objective of contributing to or furthering the achievement of sustainable development.

[3] One future – different paths: The UK's shared framework for sustainable development

There is danger that placing a sustainable economic growth duty on regulators introduces a bias towards economic aspects over the other two pillars of sustainable development: the environmental and social. As effective, independent and respected authorities, SEPA's priority should remain the protection and improvement of the environment, and SNH's to secure the conservation and enhancement of natural heritage. We note however, that those regulatory bodies already have various duties to consider economic and social issues or duties to achieve sustainable development. Under the Natural Heritage (Scotland) Act 1991, SNH has a clearly defined duty to take into account *'the need for social and economic development in Scotland or any part of Scotland' in exercising its functions.*'[4] Similarly, under Section 32 of the Environment Act 1995 (that outlines general environmental and recreational duties and is proposed for repeal in this Bill), in performing its functions, SEPA must '*have regard to the social and economic needs of any area or description of area of Scotland*'[5]. Statutory guidance on sustainable development issued under Section 31 of the 1995 Act (not to be repealed) requires that SEPA work '*to ensure that its actions do not unnecessarily constrain economic development and do not impose a greater than necessary burden on those it regulates.*'[6] Furthermore, the Water Environment and Water Services (Scotland) Act 2003 states that SEPA must '*act in the way best calculated to contribute to the achievement of sustainable development*'.[7]

On the reporting of economic considerations by regulators, the Public Services Reform (Scotland) Act 2010 imposes a range of duties on the Scottish Government and listed public bodies (including SNH and SEPA) to provide information, including an annual statement on the steps taken to '*to promote and increase sustainable growth through the exercise of its functions*' and '*to improve efficiency, effectiveness and economy in the exercise of its functions.'* [8] .

The introduction of an additional reporting requirement could result in increased costs and decreased efficiency and therefore increase burdens on businesses. In its consultation on the proposals, the Government stated that it was keen to avoid new reporting requirements which may divert time and energy away from front-line environmental duties. A number of local authorities responded to the consultation with concerns that the introduction of a new generic duty, and the additional burden of reporting associated with it, would do just that and undoubtedly stretch limited resources.

Additionally, there is also a risk of increased incidences of legal challenge where a business believes the regulator has failed to comply with the statutory growth duty, or concerned citizens believe the regulator has failed to comply with sustainable development duties. Indeed, in its response to the Government consultation, SNH noted the potential risk that by applying the new duty when making decisions or providing advice, public bodies would be open to legal challenge that the duty has

[4] Natural Heritage (Scotland) Act 1991, section 3(1)(c)
[5] Environment Act 1995, section 32(1)(d)
[6] Statutory Guidance to SEPA on sustainable development made under section 31 of the Environment Act 1995
[7] Water Environment and Water Services (Scotland) Act 2003, section 2
[8] Public Services Reform (Scotland) Act 2010, section 32(1)(a) & section 32(1)(b)

been wrongly applied. This would inevitably deflect resources and undermine the aim of more effective regulation.

We note the inclusion of the qualification that the duty would apply '*except to the extent that it would be inconsistent with the exercise of those [regulatory] functions to do so*', but would query how this would be applied and tested in practice. Where a regulator faces conflict between compliance with primary functions and achieving sustainable economic growth we would like there to be a clear guidance for resolution and priority given to fulfilling the primary functions.

Part 2 Environmental Regulation

Chapter 1 - Regulations for protecting and improving the environment

Section 8 - We are generally supportive of the proposals for revised regulatory powers for Scottish Ministers with the general purpose of protecting and improving the environment. We would however seek the inclusion of national obligations relating to the protection and improvement of the environment in addition to those listed in subsection (1)(b).

Section 9 - While we accept that the term '*environmental activities*' is defined in subsection (1), we are concerned that the term is potentially misleading as alone it implies an activity undertaken for the benefit of the environment. For example, the Organisation for Economic Co-operation and Development (OECD) defines environmental activities as '*activities which reduce or eliminate pressures on the environment and which aim at making more efficient use of natural resources.*'[9] A more appropriate term should be substituted – such as '*activities potentially harmful to the environment*'.

Section 11 - the list of representative interests that must be consulted by Scottish Ministers before making regulations includes local government, industry and business. Environmental non-government organisations might be explicitly listed in this section to make clear that this sector will also be consulted.

Chapter 2 - SEPA's powers of enforcement

While we support the inclusion of an additional range of powers to introduce fixed and variable monetary penalties (sections 12-17) we believe they could be strengthened.

Section 12 – subsection (4) states that the maximum amount of a fixed monetary penalty is an amount equivalent to level 4 on the standard scale. We believe that level 5, the highest level on the standard scale, should be applied instead. SEPA need not use a fine of that level but it gives them the flexibility to do so if circumstances require it.

Section 15 - We do not believe the proposed cap of £40,000 on variable monetary penalties is adequate to deter or penalise those who have caused significant environmental harm. Clearly, for large businesses, £40,000 might not have the necessary impact. Other legislation does not cap at such a level; for example, the

[9] http://stats.oecd.org/glossary/detail.asp?ID=6420

Greenhouse Gas Emissions Trading Scheme Regulations[10] enable penalties of 100 Euros per tonne of CO_2 emitted to be applied. This has resulted in operators receiving penalties well in excess of £40,000. There are clear benefits of such a system where the magnitude of fine is not capped and is proportionate to the environmental harm caused or takes into consideration the financial benefit accrued by the perpetrator of the offence. Additionally, we reiterate our support for the establishment of a scheme to feed any monies raised into a publically administered environmental restoration fund and would welcome such a scheme being progressed as soon as possible.

Section 19 - Enforcement undertakings would allow an operator to make reparation through restoration or environmental improvement when non-compliance has occurred. It was originally proposed in the public consultation that SEPA would use such undertakings '*to enable legitimate operators to make amends where an offence has not led to significant environmental harm and has involved little or no blameworthy contact'*.[11] We support enforcement undertakings being used on this basis. However, we feel strongly that this must not become an alternative or default option to either SEPA pursuing financial penalties or pursuing through the courts where this is a more appropriate response.

Chapter 3 - Court powers

Section 26 - The provisions on compensation orders will allow costs of up to £50,000 to be paid to SEPA or others for costs incurred in preventing or remediating harm to the environment. We welcome these orders but do not believe that they should be capped because as in the case of variable penalties we believe there must be scope for compensation to be proportionate to the environmental harm caused.

Section 27 – We support the proposed power for the court to consider the financial benefit obtained by an illegal activity, but we note that there might be difficulties for the courts if they assess the benefit as greater than the currently capped compensation order.

Section 28 - We welcome the introduction of publicity orders on the basis that adverse publicity can prove a greater deterrent than a financial penalty due to fears over reputational damage.

Chapter 4 Miscellaneous

As with Section 26 we note that the fine here is capped at £40,000, and we do not believe that they should be capped because as in the case of variable penalties we believe there must be scope for compensation to be proportionate to the environmental harm caused.

Chapter 5 General purpose of SEPA

We support the introduction of a general purpose for SEPA with regard to protecting and improving the environment, the sustainable management of natural resources and improving the health and wellbeing of the people of Scotland. This reflects the

[10] http://www.legislation.gov.uk/uksi/2005/925/made/data.pdf
[11] http://www.scotland.gov.uk/Publications/2012/05/6822/3

modern role of SEPA, which has over the years since its creation extended beyond the control of pollution and further allows SEPA to take opportunities to improve Scotland's environment where appropriate.

However, as in our comments on section 4 above, we strongly oppose the inclusion of contributing to achieving sustainable economic growth within SEPA's general purpose.

Conclusion

The comments in this submission cover our principal concerns with the Bill as introduced. There may be other matters of substance, amendment and drafting which give rise to further contributions to the passage of the Bill.

Written submission from SEPA

Part 2 of the Regulatory Reform (Scotland) Bill

We are writing to provide written evidence on Part 2 of the Regulatory Reform (Scotland) Bill. We will also be providing written evidence to the Economy, Energy and Tourism Committee on Parts 1 and 3 of the Bill.

As the Committee is possibly aware, Part 2 of the Bill has been developed jointly by Scottish Government and SEPA, with our stakeholders, and we support the provisions. This legislation helps a change agenda that we have been pursuing and delivering for several years now. Key aspects of this agenda have been and continue to be:

- Engaging much more with business and other stakeholders – so we can improve our focus on the wider needs of those influenced by our regulation
- Delivering and, where possible, improving our services, whilst living within our means
- Ensuring that environmental regulation is not unnecessarily burdensome on businesses
- Focusing our effort on the issues that matter most, working more in partnership with others and delivering more by way of measurable results for the environment, communities and the economy.

As part of this agenda, we have already reformed our scientific services, moved from having seven laboratories to two, reformed our advisory role and service on land use planning and played a key role in developing Scotland's Environment Web – a partnership to provide a joined-up service on environmental information.

What Part 2 of the Bill Means for Us

We are committed to further transforming key areas of our work and some of this can only be achieved with the support of legislative change. Many of the proposals in Part 2 of the Bill draw from good practice from across the UK, Europe and beyond. The proposals have also been developed with our stakeholders and have gained strong support. We have made a strong commitment to our stakeholders to continue to work with them to shape the detail going forward.

Single Environmental Regulatory Framework

The Bill will enable the permissioning regime in Scotland to be simpler, more risk-based and more consistent. The scope of activities we regulate will not increase or decrease significantly as a result of the implementation of the proposed regulations – it is more about improving how we can regulate existing activities.

Our stakeholders have told us that they want a simpler, clearer, more joined-up and outcome-based approach and the new permissioning arrangements will help deliver that. We also want our staff to be able to focus their effort on working with partners and regulated business to achieve real, measurable outcomes rather than working

within unnecessarily complicated systems and procedures. Many operators currently hold multiple permissions from SEPA. The simplification enabled by the Bill will also help us to move to more joined-up permissions – for example single site or operator permissions.

New Enforcement Tools for SEPA

Understanding those we regulate and why they are compliant or not is a very important part of being an effective regulator. We want to work with those we regulate to encourage and support compliance, providing information, advice and support. We also need an effective approach to enforcement.

Our current options to deal with environmental offences are limited, inconsistent and give rise to a disproportionate use of criminal sanctions. We regulate across a wide range of operators, from criminals at one end to environmental champions at the other, with the careless, confused and compliant in between. The proposed new enforcement tools will enable us to take a more proportionate and effective approach to lower level offences. This should help us to influence behaviours at an earlier stage and prevent problems from escalating into more serious offences. Cases involving anything other than minor environmental harm or involving deliberate or reckless behaviour will still be referred to the Procurator Fiscal.

We recognise the responsibility being placed on us in being given these new enforcement tools. There are a number of proposed safeguards in place and we will be working with the Crown office and Procurator Fiscal Service who will be issuing us guidance on how we should apply these enforcement measures. We will also engage our stakeholders on changes to our enforcement policy.

There will still be an important role for the criminal courts. As part of our change agenda we are starting to do more to target operators involved in criminal activities or whose negligence leads to significant impacts on the environment and communities and whose actions undermine legitimate business. We welcome the provisions aimed at giving the courts a wider range of sentencing options.

General Purpose for SEPA

The Bill also proposes a new statutory purpose for us. If enacted this will be the first time that we will have been given a single general purpose by Parliament. We welcome the broad primary purpose of protecting and improving the environment and that this includes managing natural resources in a sustainable way. Our environment is a complex system, providing a range of natural resources and services on which life ultimately depends and which need to be managed sustainably.

We also welcome the fact that the statutory purpose recognises the contribution we already make and will continue to make to health and well being and the economy. We believe that our work can and does deliver multiple benefits; for the environment, communities and the economy.

Many of the mainstays of Scotland's economy, such as established industries like tourism, agriculture and the food and drink trade, depend on our high quality air, land and water. Effective regulation can stimulate business innovation and achieving compliance or going beyond it can be a powerful marketing tool for business. We also recognise that the way we work can help to create the right conditions for new investment and business, whether this is how we organise ourselves to support emerging sectors down to how quickly we process applications for new permits.

Written submission from Scottish Land & Estates

About Us

Scottish Land & Estates represents land owners, managers and rural businesses across Scotland with wide ranging interests including agriculture, forestry, moorland management and tourism. As such environmental regulation affects nearly all of our members' day to day business activities. Scottish Land & Estates therefore welcomes the opportunity to provide comments on the relevant sections of Part One and on Part Two (Environmental Regulation) of the Regulatory Reform (Scotland) Bill to the Rural Affairs, Climate Change and Environment Committee.

Overview

Scottish Land & Estates acknowledges that a level of environmental regulation is necessary for the responsible governance of a modern economy, and further that access to good quality environmental functions and services are necessary for sustainable economic activity. We are supportive of the Government's Better Regulation agenda generally, and see this Bill as an important part of that agenda. We would wish to see that regulation is proportionate and that it is streamlined such that it does not place an undue burden on rural business interests. In this respect, we are supportive of the intentions of the Regulatory Reform (Scotland) Bill to ensure that regulatory functions are exercised in a consistent manner and in such a way as to contribute to sustainable economic growth. Further we support the proposal to introduce a Code of Practice in relation to the exercise of regulatory functions. With specific reference to Part 2 of the Bill, we are supportive of the overarching purpose of the provisions which is to enable environmental regulation to be delivered in a manner which is more risk-based, joined up and outcome-based. There are nevertheless some aspects of the Bill as it currently stands about which Scottish Land & Estates has concerns and these are noted below.

Part 1 (Regulatory Functions)

We have a general concern about the lack of a defined outcome for failure by a regulatory body to comply with the Code of Practice, and wonder whether this may dilute the benefit of the Code from the perspective of a regulated person or business. Some mechanism to hold a regulated body to account where it fails to adhere to the standards expected in the Code may be worth considering.

Part 2 (Environmental Regulation)

We acknowledge that this is largely an enabling Bill, as are so many Bills of the Scottish Parliament. As business representatives, we acknowledge the need for flexibility on the Government's part but would reiterate the message that businesses need stability and certainty in order to plan and grow.

As a regulated person or business it is impossible to know how this Bill will impact in practice because so much of the detail is yet to come in secondary legislation or codes of practice. This in itself creates uncertainty.

We would note our appreciation of the Government Bill team's commitment to consultation and their willingness to discuss the proposals with business interests such as Scottish Land & Estates. We appreciate the policy intentions behind the Bill but any assurances that can be obtained on the record by the Committee during the Parliamentary stages surrounding proportionality and transparency in the intent behind this Bill would be useful, as well as reinforcement of Ministers' commitment to continue to consult with businesses as the detail of the provisions are developed. It would be very useful to have an indication at the outset of the proposed timescales for the secondary legislation. Ideally draft Orders should be available before the Bill completes its passage through Parliament so that scrutiny can be as full as possible.

Relevant Offences

The definition of "relevant offence" is fundamental to how Part 2 of the Bill will impact so it would be very useful to have sight of the Government's proposals for this definition as early as possible. As it stands relevant offence could be anything, not even limited to offences which result in environmental harm. The reference to environment only appears in the explanatory documentation and Bill headings which imply that the offences will relate to the environment but this is not actually stated in the Bill's provisions. A link to environmental harm in the definition of relevant offence would be useful.

Variable Monetary Penalties

Scottish Land & Estates is concerned about the unspecific and open nature of the provision. While there is an upper limit penalty of £40,000, this might apply to any, as yet unspecified, relevant offence. The issue is to some extent further compounded by the broad nature of the terms "environmental activities" and "environmental harm" which mean in turn that relevant offences could be extensive and very wide-ranging in type as well as in scale of impact. The examples given in the explanatory notes which accompany the Bill of the type of offence this provision is designed to cover include failure to comply with a general binding rule, carrying waste without a registration or carrying out minor engineering activities in water without appropriate authorisation. The notes on costs indicate that it is estimated most variable penalties will be between £1,500 and £3,000. This indicates that offences at the more serious end of the spectrum are not at all common and that drawing from the same experience that enabled the costs analysis to be produced, it should be possible to develop indicative bandings.

Scottish Land & Estates would urge the RACCE Committee to recommend the inclusion of indicative bandings within the primary legislation, so that a clear steer is provided when secondary legislation is being developed and to provide comfort to the many businesses across Scotland that might be concerned about the current lack of clarity.

Fixed and Variable Monetary Penalties

Scottish Land & Estates note that both fixed and variable monetary penalties can be imposed on a person where SEPA, on the balance of probabilities, suspects that person has committed an offence. Although the person may make representation

against the notice of intent to serve the penalty and can also appeal the penalty, there is no option for the person to choose prosecution instead of the penalty. A person may feel they have a decent defence in a criminal court when judged to the criminal standard of proof. We appreciate that the aim is to remove cases from the criminal courts where it is unnecessary for them to proceed there, and in the vast majority of cases the fixed or variable penalty will be useful in this respect, but we feel that removing completely the option to proceed to court may mean there is a gap in access to justice for the occasional case where a person may well succeed in defending themselves in a criminal court.

Cost Recovery

Scottish Land & Estates appreciates the "polluter pays" principle which sits behind the cost recovery provision in the Bill. We do however have concerns about the indicative levels of cost recovery of variable monetary penalties that are given in the costs notes which accompany the Bill. These notes suggest that "*on average they are expected to be in the region of £10,000 to £20,000 per case.*" Since the estimated average variable penalty is £1,500 - £3,000, it seems grossly disproportionate that cost recovery is around six-times higher than the fine. For the business concerned the breakdown of the total amount payable between fine and cost recovery is perhaps less relevant than the impact the total cost will have on the business. This would seem to indicate a level of deterrent which is out of step with the seriousness or otherwise of the offence.

We appreciate that the intention behind these provisions is for proportionality in their implementation but there is no assurance of this in the Bill itself nor in the accompanying documentation. In the interests of transparency and proportionality it would be useful to have an explanation of how costs might be calculated or indeed whether there might be a policy of full or partial cost recovery for differing situations.

Publicity Orders

Scottish Land & Estates would like to see the circumstances around when publicity orders will be used more tightly defined. At present publicity orders could apply to any, as yet unspecified, relevant offence. As noted above, the offences could be very wide-ranging in type as well as in scale of impact.

Publicity Orders are relatively rare in UK legislation, and rightly so given this is a fairly draconian measure. However we can appreciate it could act as a deterrent in extreme cases of flagrant and repeated serious breaches of environmental regulation. Once again there is no assurance given in the Bill as to when these Orders might be used so some indication of the intention behind the provisions would be helpful. A similar provision for publicity orders appears in corporate homicide legislation. In that case the offender is given an opportunity to make representations to the court before the conditions of the order are decided. A similar safeguard is not present in the Bill and it would be useful to know why this was considered not to be necessary.

Scottish Land & Estates appreciates that at the most serious end of the environmental harm spectrum there are parallels to be drawn with corporate

manslaughter and corporate homicide. Scottish Land & Estates ask the Committee to consider how this provision might be tightened in the primary legislation to ensure it is used only for appropriately serious offences. A possible solution is to develop the banding of offences we suggest above.

Vicarious Liability

Having acknowledged the Government's commitment to consult above, we note that this is one of the few provisions in the Bill that has not been consulted upon yet the introduction of criminal vicarious liability is a significant provision which reverses the historic principle of Scots criminal law in requiring intent to convict a person of a criminal offence. This is the third incursion into criminal vicarious liability by the Scottish Parliament and this is the first time it has appeared in a Bill at introduction (previously having been inserted as a stage 2 amendment). Scottish Land & Estates has similar concerns in relation to the vicarious liability provisions that we have already expressed above in relation to the undefined list of offences to which this provision can apply. It is impossible at this stage to ascertain the likely impact on regulated persons or businesses.

The new offences relate to non-natural persons which we understand to include corporate bodies and Scottish partnerships. Many Scottish farms are operated through family partnerships so this provision could potentially affect many farming businesses. It would be useful to know whether Trusts are also intended to be targeted.

From the regulated business perspective some guidance as to what might be expected by "all reasonable precautions and all due diligence" would be very useful. For novel and potentially draconian provisions such as criminal vicarious liability there is a risk of "over-compliance" which can often impose an unnecessary burden on business. Guidance could alleviate this risk.

Further Information

Scottish Land & Estates hopes this evidence is useful to the Committee in its deliberations on the Bill and we would be happy to provide further information or elaborate on any of the points made above.

Written submission from Scottish Natural Heritage

Context

We understand that the Rural Affairs, Climate Change and Environment (RACCE) Committee have agreed to scrutinise elements of the Bill at Stage 1, and report to the Economy, Energy and Tourism Committee.

We have been asked to give evidence on Part 1 of the Bill. In particular, Part 1 (Section 4) of the Bill:

> (1) In exercising its regulatory functions, each regulator must contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so.
>
> (2) The Scottish Ministers may give guidance to regulators with respect to the carrying out of the duty imposed by subsection 25 (1).
>
> (3) Regulators must have regard to guidance given under subsection (2).
>
> (4) Subsection (1) does not apply to a regulator to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect as that mentioned in that subsection.

We also understand that the RACCE Committee has called for comment on Part 2 of the Bill and we have provided brief comment on this. We would be happy to provide further detail on this if requested.

Background and general comments

Scottish Natural Heritage (SNH) is the public agency established under the Natural Heritage (Scotland) Act 1991 with responsibility for securing the conservation and enhancement; understanding and enjoyment; and sustainable use and management of the natural heritage; and as the Government's statutory adviser on these matters.

Our Corporate Strategy identifies four high-level outcomes:

- High quality nature and landscapes that are resilient to change and deliver greater public value.
- Nature and landscapes that make Scotland a better place in which to live, work and visit.
- More people experiencing, enjoying and valuing our nature and landscapes; and
- Nature and landscapes as assets contributing more to the Scottish economy.

We are pleased to have the opportunity to present evidence to the RACCE Committee. We welcome the overarching purpose of the Bill – to achieve a range of social, economic and environmental benefits by improving and aligning regulatory functions. In doing this, it will provide a framework for linking with other initiatives, such as Planning Reform, which have a bearing on the regulatory landscape.

From the consultation and policy memorandum we understand that the Bill is primarily about regulations that do not involve us. Given our purpose and role, our interpretation of the Bill is that we have regulatory functions under:

- Section 1 (5) (a) and (b). For example, we impose requirements, set standards and give guidance; and in terms of

- Section 1 (6) (a) and (b). For example, we provide an advisory service and employ staff in delivering that service.

Our primary regulatory functions are therefore:

- Licensing of management, research and development-related activities affecting wildlife.

- Determining Operations Requiring Consent on Sites of Special Scientific Interest (SSSI).

- Providing advice to Planning Authorities and Competent Authorities on the impact of proposals on the natural heritage.

In fulfilling these functions, we have, for some time, been shifting the focus of our effort towards engagement prior to receiving an application for a licence/consent or request for advice. We want to flag up opportunities and issues as early as possible and thereby influence proposals, and if possible resolve issues 'upstream', before a formal application is submitted, ensuring that our regulatory decision or advice does not come as a surprise to other parties.

SNH comments on invited issues.

Section 4 (1).

We see this in the context of the overarching Government purpose - "to make Scotland a more successful country, with opportunities for all to flourish, through increasing sustainable economic growth'. We currently exercise all our functions in a way that seeks to maximise our contribution to this through:

- Our Corporate Plan. This is directly aligned to the national outcomes and performance indicators, and outlines the importance of Scotland's 'natural capital' for securing sustainable economic growth.

- Our licensing procedure takes account of requirements for '…preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature…'.

- We have statutory balancing duties. These require that, in exercising our functions, SNH takes appropriate account of a range of interests including; the needs of agriculture, fisheries and forestry; the need for social and economic development; and the interests of owners and occupiers of land.

Key to exercising these functions is our understanding of other interests and how our advice or decision is likely to impact on them. In order to take decisions or provide advice in a form and context that others can easily use, we are actively broadening

our understanding of wider interests. Building such 'mutual understanding' is integral to the 'solutions' orientated approach to influencing that we aspire to – to get win-win decisions.

The …*extent that it would be inconsistent with the exercise of those functions to do so***,** relates to our role in assisting Scottish Ministers meet their European and international obligations through areas of our work that are excluded from application of our balancing duty, namely: proposing new Natura sites and their subsequent protection under the Habitats etc. Regulations; implementing the same Regulations in respect of European Protected Species; and notification of SSSI under the Nature Conservation (Scotland) Act 2004

Where these functions could override our balancing duty, we exercise them as proportionately as possible. For example, we ensure as far as we are able that mitigation is adequately explored in the early stages of developing a proposal in order to suggest solutions before formal regulation processes are initiated.

Section 4 (2)

This is normal practice for SNH. We receive annual guidance from Scottish Ministers through our annual Budget Allocation and Monitoring letter (which includes details of our strategic priorities agreed with Government for the year) and may at any time receive guidance or direction on specific matters. Ministers are also able to give such direction under the Public Service Reform (Scotland) Act 2010.

Section 4 (3)

SNH is comfortable with this proposal.

Section 4 (4)

It is not fully clear how far our existing balancing duties under Section 3 of the Natural Heritage (Scotland) Act 1991 meet this requirement. There would not appear to be a conflict in broadening these duties so as to 'contribute to achieving sustainable economic growth' alongside the need for social and economic development and the needs of agriculture, fisheries and forestry.

SNH comment on Part 2 of the Bill

Our understanding is that Part 2, Chapter 1 could encompass SNH's functions. In this respect, we support the purpose of protecting and improving the environment and wider provisions for this in Chapter.

Further clarity to Section 9 could be provided by to including reference to landscape and public enjoyment of natural assets.

Written submission from Scottish Power

Thank you for the opportunity to submit comments in regard to the Regulatory Reform (Scotland) Bill. This response is made on behalf of Scottish Power. It considers the Bill against the interests of our generation, renewables, transmission and distribution business activities relating to environmental regulation in Scotland.

We are strongly supportive of the Bill, particularly in relation to the creation of a single regulatory framework, elements of the new penalty regime and the proposal to introduce mitigation and restoration options to avoid penalties or prosecution.

Our comments are set out below and relate specifically to Parts 1 and 2 of the Bill.

Part 1 - Regulatory Functions

Section 4 - Regulatory Duty in Relation to Sustainable Economic Growth

We are cautiously supportive of the proposal in the Bill to amend the duties of Regulators in relation to sustainable economic growth. This duty must, however, remain secondary to the primary purpose of environmental regulator to protect and enhance the environment. It is important that SEPA can provide certainty, predictability and good regulatory practice.

The creation of these powers and guidance, if not properly designed, can confuse regulatory purpose and could paradoxically undermine sustainable economic growth.

Part 2 - Environmental Regulation

Section 9 - Meaning of Environmental Activities

The Bill requires to set out further detail in defining what is meant by both "environmental activities" and "environmental harm".

The definition and use of the term "environmental activities" in the Bill could conceivably relate to any economic, human or natural activity that could occur (or be likely to occur) at any time. This definition appears to be far too wide. For the purposes of the Bill, our view is that the scope of environmental activities should relate to the direct impacts upon the environment arising from a specific licensed economic activity that is governed against the purpose of a particular regulation.

Similarly, the definition of "environmental harm" is also very wide and we are not sure how elements of the definition could be reasonably used in practice (eg, "offence to the senses of human beings" being a rather wide and subjective definition of harm). In other regulations, environmental harm is defined in a specific context of quality threshold or baseline condition. Harm is often also defined against specific environmental media or habitat.

Section 13 - Fixed Monetary Penalties: Procedure

In principle, the fixed monetary penalty procedure is reasonable and we look forward to reviewing the code of practice at a later date.

However, we would like to see more detail in this section of the Bill in relation to the appeals mechanism. It is not clear whether one appeals to SEPA (against decisions already made by SEPA) or to another body. If the appeal is to SEPA itself, there needs to be a mechanism within the regulatory body that ensures the appeals are considered separately to the internal enforcement function.

Section 16 - Variable Monetary Penalties Procedure

As per Section 13, above

Section 22 – Cost Recovery

The requirement to publish guidance on how SEPA will exercise its powers on cost recovery is welcome. It is important that the costs recovered from operators reflect as accurately as possible the marginal costs incurred upon the Regulator.

It would be helpful if the Bill was more explicit in definition of eligible costs within 22 (3) – ie that any costs must be directly attributable to the environmental incident and relate only to marginal costs borne by the Regulator for sole the purposes of investigation. Legal review costs that could apply to more than one company or incident may not be applicable.

Section 26 – Compensation Orders Against Persons Convicted of Relevant Offences

We note the extension of existing powers to allow the courts to fine offenders up to £50,000 to address environmental harm or damage. Subject to our comment on Section 9, we agree that this can be an important tool for regulators to protect the environment. It is not clear, however, why £50,000 was chosen as the limit value.

Section 27 – Fines for Relevant Offences: Courts to Consider Financial Benefits

The assessment of financial benefit is not always straightforward. In applying any fine that includes such benefits, a provision for a procedure for independent assessment of this should be included in the Bill. Furthermore, the Bill should give reference to powers for courts to consider financial benefit where operators "knowingly" caused the offence.

Section 28 - Powers to Order Conviction, etc for Offences to be Published

In principle, there should be no objection to naming and shaming those guilty of an environmental offence and it can often be an effective tool for environmental compliance.

However, the use of publicity orders proposed in the Bill is not straightforward. It is not clear in the Bill what is actually meant by a publicity order in practice and what content such an order should include. For example, could it relate beyond the simple facts about the judgement (and penalty) in question to include the impact on the wider environment, reference to some arguments used in the case, the required activities for remediation – issues that stakeholders will want to understand to appreciate the context of the ruling. Does such a publicity order disallow further comment on an offence or in relation to the environment affected for a period of time? Who will vet the communication from the offending party or resolve disputes about the precise nature of a possible series of communication?

In our view, for reasons of practicality and efficiency, the publicity order should not be placed upon the person(s) convicted of the offence but should remain with the Regulator.

Section 29 - Vicarious Liability for Certain Offences by Employers or Agents

The Bill proposal to limit the vicarious liability for companies is welcome. However, it would be helpful if the Bill were to request that the Government and Regulator provide guidance in this matter. Obviously, all circumstances in which this will be tested will be different, but it is important for operators to understand conditions upon which liability will be reduced or eliminated.

Section 31 - Significant Environmental Harm

We have some concerns in relation to this part of the Bill as the fine for an offence is to relate to the 'potential severity of environmental harm' rather than, as an operator, the nature of the 'breach of compliance'.

The protection from environmental harm arising from operator activities is typically protected through the structure of regulation and the balance of environmental risk that allow the regulator to provide permission for an activity. This environmental risk, in turn, directs the nature of permit authorisations. In our view, fine levels should be set out in relation to the nature of compliance breach instead.

The Bill also creates a potential overlap with other provisions in law that already provide for instances that cause significant environmental harm. Legal provisions arising from the transposition of the Environmental Liability Directive currently provide for compensatory remediation for activities that can cause environmental harm.

Section 38 - General Purpose of SEPA

We support the primary purpose of SEPA being re-affirmed in relation to its principal duties in relation to the protection of the environment. Reference to sustainable economic growth is important, but should be a secondary consideration enabled through guidance by the Scottish Government.

Written submission from Scottish and Southern Energy (SSE)

SSE welcomes the opportunity to provide evidence to the Rural Affairs, Climate Change and Environment Committee on Stage 2 of the Regulatory Reform (Scotland) Bill.

In principle, SSE supports the proposals to move to a more integrated framework of environmental regulation in Scotland and we welcome the publication of the Regulatory Reform (Scotland) Bill. We believe that, if implemented appropriately, this could significantly improve the efficiency, effectiveness and simplicity of the environmental regulatory framework in Scotland.

We have set out a number of detailed points on the Bill as drafted in the attached Appendix 1. We recognise that the Bill is in the main an enabling piece of legislation and as such, much of the detail will not become apparent until the publication of various Orders, etc. However, in the interests of clarity and consistency, we have included our views on a number of the areas covered by the Bill which we believe require clarification now. These points are consistent with that we have already made to SEPA in response to earlier consultations.

However, we do have one fundamental concern regarding the proposals for an integrated framework of environmental regulation; in short a potential move away from cost recovery and the "polluter pays" principle.

Cost recovery and the "polluter pays" principle are well established tenets of international (and Scottish) environmental law and forms the foundation of the European Union's policies on protecting the environment. In essence, these require that the polluter (or potential polluter) should be financially responsible for the costs associated with the pollution (or the costs of preventing the pollution) that arises as a result of their actions. That is, the "polluter pays" principle makes a clear and direct link between environmental risk/impact and charges. In addition to the general international norms of environmental protection, these principles are often specifically required by many EU Directives including, for example, Article 38 of the Water Framework Directive which states that:

> *"The principle of recovery of the costs of water services, including environmental and resource costs associated with damage or negative impact on the aquatic environment should be taken into account in accordance with, in particular, the polluter-pays principle."*

We are concerned that with the introduction of an integrated framework for environmental regulation, there is the potential for the clear link that currently exists between regulatory charges and regulatory effort to be severed. That is, a move to covering all SEPA's costs from across all income streams, rather than the existing direct cost-recovery model. This would create the potential for cross-subsidy between sectors and between the best and worst performing (or largest and smallest) operators. It is clear that any form of cross-subsidy is completely incompatible with the principles of cost recovery and '"polluter pays"', and as such would be significantly detrimental to the operation of environmental regulation in Scotland. Clearly any move away from these principles will also incur a risk of infraction by the EU Commission.

While we recognise that the Bill does not contain any additional powers for SEPA specifically in relation to the design and operation of its charging schemes, we do believe that the risk to the "polluter pays" principle should be recognised and addressed in the Bill. In our view, this would be relatively simple to achieve through the addition of a clause specifically prohibiting any cross-subsidy between operators in SEPA's charging regimes. This would require charges to be collected on a cost recovery basis and place a duty on SEPA and Scottish Ministers to have regard to the "polluter pays" principle when designing charging schemes and when levying penalties.

To be clear, these duties would not prevent the move to an integrated framework of environmental regulation nor the greater flexibility that SEPA is seeking to become a more outcome focused regulator. For the funding of environmental regulation in Scotland to continue to be accepted by all as a proportionate and fair model it is essential that the cornerstones of the existing system – cost recovery and the "polluter pays" principle – are explicitly protected in this way.

Appendix - SSE Comments on the Draft Bill

1) Financial Memorandum

In the Financial Memorandum, it states that the fixed and variable penalties levied by SEPA will go to Scottish Ministers and the various rights of appeal provided for in the Bill will be to an independent tribunal. As a point of clarification, do these details require to be stated in the legislation or is it sufficient clarity and certainty for these points to simply be referred to in the documents associated with the Bill?

2) Integrated Environmental Framework

In principle, SSE supports the proposal to develop an integrated framework for environmental regulation. However, in streamlining the procedures of the existing regimes into one, as is currently proposed by SEPA, it is very important that this does not result in a significant extension of SEPA's powers and/or a significant lessening of operators' rights in one or more of the regulatory regimes.

For example, consolidation of the different legislative provisions relating to appeals against decisions made by SEPA across the four main regulatory regimes could lead to an unintended consequence. In some regimes, if an appeal is made then the operator does not have to comply with any new conditions until the appeal is determined. However, in other regimes, such as CAR, the operator has to comply while the appeals process in ongoing. If the latter approach was to be adopted across all four regimes, this would clearly be a significant change to operators' rights and, in the interests of fairness and transparency, would need to be consulted on *before* becoming a fait accompli.

SSE is keen to ensure that operators' rights of appeal (or indeed any other rights) are not diminished through the move to a single regulatory procedure. Clear and specific details of each of the changes need to be provided to operators in advance of being implemented for each of the regimes with a further opportunity for operators to comment on these changes through additional consultation.

3) Financial Penalties

3.1) Sections 13 and 16 of the Bill include the grounds on which a person may appeal against a decision of SEPA in relation to monetary penalties. However, the Bill as currently drafted specifically prohibits the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate. This is despite the Bill requiring SEPA to comply with such guidance (under Section 23). The failure to comply with such guidance is a justified and reasonable ground for appeal as operators have a reasonable expectation that the guidance will be followed by SEPA. Indeed, not including this as a potential ground for appeal would appear to go against the general principles of Better Regulation.

3.2) SSE believe that the proposed £40,000 cap for a discretionary penalty is excessive and that a more reasonable cap would be between £5,000 - £10,000. There needs to be a clear distinction between actions that are wilfully or criminally negligent (where operators should be prosecuted via the courts) and those that are accidental or could not reasonably have been foreseen (where a direct financial penalty may in some circumstances be appropriate).

Setting the cap for discretionary financial penalties at the same level as the current maximum fine for the main offences in the four main regimes in summary proceedings does not draw such a distinction. Indeed, setting the cap at £40,000 may actively incentivise SEPA to levy direct financial penalties rather than prosecute via the courts as the maximum level of fine is the same, the burden of proof is lower (civil rather than criminal) and they would be certain that they could recover their costs. SSE do not believe that the intention of these proposals is to replace court prosecutions against wilful or criminally negligent operators with direct financial penalties, but rather to add another enforcement tool to allow SEPA to take action against operators where court proceedings would not be appropriate.

SSE strongly believe that the cap for discretionary financial penalties should be significantly lower than the maximum fine that can be levied through the courts, in order to maintain a distinction between court action and direct financial penalties levied by SEPA. This would also mitigate the risk faced by responsible and prudent operators and would represent a reasonable and transparent approach. At the very least, any guidance setting out how SEPA will apply such direct penalties should clearly specify the circumstances under which SEPA would take a case to court rather than relying on discretionary powers.

3.3) In relation to fixed penalties, SSE believe that they should only be available to SEPA *after* the operator has been given a reasonable chance to rectify their breach and has failed to do so. That is, once SEPA has notified the operator of the breach and requested that it is rectified. Given that, by definition, fixed penalties will only be considered for minor breaches and SEPA's stated approach to target action on the worst or continuous offenders (not responsible operators who may inadvertently miss one reporting deadline), SSE believe that this would be the most appropriate approach to adopt.

3.4) It is important to ensure that complex sites such as power stations (with the potential for multiple minor non-compliances) are not unfairly penalised by the nature of their operations compared to much simpler activities which may only have a single numerical permit condition. The type and complexity of an operation must clearly be taken into account in relation to fixed penalties.

3.5) SSE understand the rationale for SEPA publishing information on cases where a discretionary financial penalty is levied or court action taken, in order to raise awareness and act as a deterrent. However, given the minor nature of offences which would merit a fixed penalty, SSE do not believe that it would be necessary, or indeed appropriate, for individual companies that have received fixed penalties to be named. The naming of individual companies in such cases could have significant unintended consequences for the companies involved including, for example, detriment to public image which would be wholly inappropriate to the minor nature of the offence. Such an approach would also detract from the impact of publishing details of enforcement action taken for serious environmental breaches.

4) Corporate and Accredited Environmental Permits

4.1) SSE believe there may be merit in introducing corporate permits in some circumstances. For example, corporate permits may be appropriate for low risk activities which are undertaken on a regular basis within a company, such as waste management exemptions for screen wastes or transferring waste oils between sites. However, SSE believe that there are also many circumstances in which corporate permits would *not* be appropriate and as such, it is vital that any move to a corporate permit must require to be agreed with the operator in advance, i.e. voluntary not mandatory.

4.2) SSE do not see any merit in including voluntary obligations within a corporate permit. If a company wishes to go over and above what is required in their permit to improve the environment, this is a matter for them and should not be included in the permit. Permit obligations are legal requirements which, if breached, can result in legal sanctions.

In addition, the possibility of voluntary obligations being included within an operator's permit raises serious concerns about the potential for 'regulatory creep'. That is, voluntary obligations could be viewed as a means of implementing a particular Government's agenda, for example the introduction of sustainability targets on a sector-wide approach. Political or sectoral pressure could be brought to bear on an operator to accept such a "voluntary obligation". This could open up a potential route to introduce extra (non-legislative) obligations on operators for political expediency. SSE do not therefore support the introduction of voluntary obligations within permits.

4.3) Also, SSE do not see any merit in introducing accredited permits for environmental activities. SSE believe that this would be highly subjective, and could lead to higher costs for operators. As a very minimum, any move to an accredited permit must require to be agreed with the operator in advance, i.e. voluntary not mandatory.

5) Enforcement Undertakings

In principle SSE support the extension of the power for SEPA to accept enforcement undertakings across the rest of the environmental regulatory framework. However, the actions that can be offered must be tightly defined through clear guidance, required by the legislation, in order to ensure that they operate in a fair and transparent manner.

Enforcement undertakings should be limited to actions that are aimed at remediation following the environmental incident (where possible) or are directly related to the specific environmental incident (for example, to ensure that it does not re-occur), and must be proportionate to the incident. SSE do not support the inclusion of undertakings, unrelated to the environmental incident, to provide benefit elsewhere as this could potentially lead to a disproportionate and opaque regulatory enforcement regime.

Written submission from Scottish Water

Overview

Scottish Water is responsible for providing clean, safe drinking water and disposing of waste water over 95% of the households and businesses in Scotland, 365 days a year. With thousands of assets and tens of thousands of kilometres of networks across Scotland, Scottish Water represents the largest single organisation regulated by SEPA. We hold over 2,500 licences for activities regulated by SEPA and pay £11m annually to them in regulatory charges.

Scottish Water is supportive of the broad principles and objectives of the Regulatory Reform (Scotland) Bill as it provides the basis to deliver risk based, proportionate regulation. Additionally, we welcome the intention to deliver an integrated framework of environmental regulation in an effort to simplify the current regimes and deliver consistent regulation. We also acknowledge a need to broaden the range of regulatory powers at SEPA's disposal, recognising that at present in many cases SEPA may have limited options for enforcement other than to refer incidents for prosecution.

It is our understanding that through this SEPA's regulatory approach will vary according to the risks and actions of operators. There will be strong regulatory enforcement against those that wilfully operate outwith regulation and cause environmental harm, through to supportive work with operators actively seeking to improve their performance. We welcome this approach.

We would though like to have a greater understanding of how some powers in the Bill may be utilised, such as for SEPA to levy monetary penalties and courts to impose publicity orders. We would therefore welcome early sight of the guidance that SEPA would be required to publish on the use of their enhanced enforcement powers.

Specific Comments

Part 1 – Regulatory Functions

Section 4 – Regulator's duty in respect of sustainable economic growth

We support a duty on regulators to exercise their functions in a way that supports sustainable economic growth. In many respects this may be seen as an extension of the public body duty that exists under the Climate Change (Scotland) Act. The three pillars of sustainability (environment, economy and society) need to be considered in an integrated way if we are to protect the environment such that it continues to sustain a healthy society.

Section 6 – Code of Practice Procedures

We are supportive of the development of a Code that is consistent with the principles of Better Regulation and supporting sustainable economic growth. We note that this Bill is intended to take forward key proposals from the previous consultation on a Better Regulation Bill, as well as the proposals for Better Environmental Regulation.

As such, it would be important to confirm the principles of Better Regulation within such a Code of Practice.

Part 2 – Environmental Regulation

Section 10 – Regulations relating to protecting and improving the environment

We would support the broad principles of this element of the Bill. The consolidation of regulatory regimes has the potential to simplify the regulatory approach across regimes. However, we would caution that it is important that in delivering such a consolidated regulatory approach it does not default to the more stringent regulatory regime. A proportionate approach to environmental regulation based on the risk to the environment should be implemented. We would be keen to work further with SEPA to understand how this might apply in the water sector

Sections 13-16 – Fixed and Variable Monetary Penalties

We would like to have a greater understanding of how fixed and variable fines will operate. In terms of fixed monetary penalties, we understand these are primarily targeted at low level environmental crime, but it is important that clarity is provided on the range of activities and offences that may be covered.

For variable monetary penalties we understand these may be targeted at more serious environmental crime, but as above additional information on the circumstances where they may be applied is important. In addition, it must be recognised that transferring the power to fine operators to SEPA carries with it a lower burden of proof than a court sanctioned fine.

Given this, we would welcome early sight of draft guidance that SEPA intends to issue on these enhanced enforcement powers.

Section 22 – Cost Recovery

Whilst we understand and support the polluter pays approach, we have some concerns regarding how the cost recovery element will be implemented. As an operator seeking to adhere to the regulatory requirements, we contribute considerable sums each year to SEPA to enable it to regulate our activities. We would expect this to cover routine investigations into non-compliance and to work with us on other aspects of environmental performance. It will be important to understand the financial and operational framework under which cost recovery would be implemented.

Section 23 – Guidance as to use of enforcement measures

We welcome the intention to issue guidance to SEPA in relation to the exercise of its powers, and would expect consultation with operators to support the development of such guidance. The guidance should seek to clarify issues such as the appropriate enforcement actions, level of monetary penalties and cost recovery.

Chapter 3 - Court Powers

Section 26 – Compensation Orders

Scottish Water wishes to have a better understanding of how these orders may operate in practice. As a national water and wastewater undertaker, Scottish Water has thousands of assets and tens of thousand of kilometres of pipeworks across Scotland. We are concerned that the implications of additional compensatory powers beyond the present system of fines may not be fully understood.

Section 28 – Publicity Orders

As for Compensation Orders, we would expect a clear framework for issuing publicity orders to be developed through further consultation.

Chapter 5 – General Purpose of SEPA

Section38 – General Purpose of SEPA

We support the making of a general purpose for SEPA as laid out in Section 38.

Minister for Environment and Climate Change
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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014

Rob Gibson MSP
Convener
Rural Affairs, Climate Change and Environment Committee
Scottish Parliament
Edinburgh
EH99 1SP

2 May 2013

Dear Rob

REGULATORY REFORM (SCOTLAND) BILL

I am delighted that the Rural Affairs, Climate Change and Environment Committee has agreed to act as a secondary committee in scrutiny of the Regulatory Reform (Scotland) Bill. The Bill is a key strand of the Better Environmental Regulation programme, which combined with the SEPA transformation work, will enhance the way in which SEPA can work to protect and promote our environment.

Input from stakeholders has informed both the development of the Bill and the wider programme it supports. Following on from our consultation in May 2012, in conjunction with SEPA, on the policy proposals that have led to the substantive elements of Part 2 of the Bill, the Government and SEPA consulted in October 2012 on *Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency*. We have now published the analysis of the 23 formal consultation responses on this and I attach the analysis for the Parliament's information.

The majority of the proposals outlined in this consultation, launched in October 2012, relate to the new funding model, which is not directly relevant to the Bill, but is a key element of the Better Environmental Regulation programme. Of particular relevance to your consideration of the Bill is responses to the first question relating to SEPA's statutory purpose which forms Section 38 of the Bill as introduced. The specific proposals made in this consultation build on the previous consultation where a number of responses to the consultation expressed views on a statutory purpose for SEPA and a desire for this to be underpinned in legislation.

We are committed to maintaining a high level of stakeholder engagement on this programme and listening and acting on the views received.

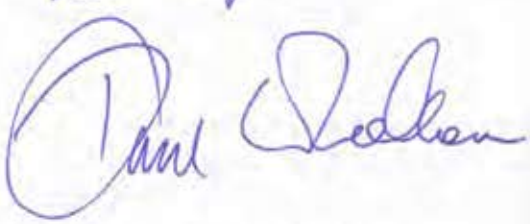
Whilst outwith the scope of the Bill, the changes to the funding model (for recovery of the costs of SEPA's regulatory functions) are essential to delivering the new regulatory approach. The thrust of the changes – which are broadly supported by respondents to the consultation, relate to a move from charging based on activity to a determination based on the level of risk from the regulated activity. In addition to introducing a more equitable framework of charging this is likely to be a strong incentive to the regulated to look for ways to reduce the overall risks of their activities and potential impacts on our environment.

The next stage of the process will consider the detailed development and implementation of the proposals. An implementation team within SEPA is being established and stakeholders will continue to be involved in the development work.

Following stakeholder feedback raised around the May 2012 consultation we are also planning to host a stakeholder workshop on the arrangements around SEPA's new enforcement tools. The purpose of this is to explore and explain the general principles behind a new enforcement approach for SEPA. It will also allow stakeholders the opportunity to contribute at an early stage of its development and discuss the general principles with Scottish Government, SEPA and Crown Office and Procurator Fiscal Service officials.

I am copying this letter to the Convenors of the Economy, Energy and Tourism Committee given that the EET Committee are the designated lead on the Regulatory Reform (Scotland) Bill. I am also copying this letter to the Convenor of the Finance Committee, given that, whilst it is not directly relevant to the Bill and the Committee's consideration of the Financial Memorandum, it is an issue of particular interest to stakeholders who are likely to be asked for comment.

Kind regards



PAUL WHEELHOUSE

Consultation on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency.

May 2013

Analysis of Responses

Introduction

The Scottish Environment Protection Agency (SEPA) and the Scottish Government have been working together on a package of measures to take forward our agenda for better environmental regulation. Modernising SEPA's existing funding arrangements by creating a new risked-based funding model is required, as part of this package, to ensure the funding approach facilitates the broader changes required. Engagement with stakeholders has been a key part of developing our approach and is ongoing. This report provides the results of the consultation we launched in October 2012[1] The future funding arrangements for the Scottish Environment Protection Agency. This consultation builds on previous proposals set out in the 2010/11[2] better environmental regulation consultation and the further joint SEPA-Scottish Government consultation in May 2012 on proposals for an Integrated Framework for Environmental Protection[3].

What did the consultation cover?

The consultation was open from the 11th of October 2012 until the 4th of January 2013. The key proposals upon which views were sought relate to the following areas:

- A new statutory purpose for SEPA.
- Adjustments to SEPA's future funding arrangements, including:
- Integration of the current charging schemes into one framework.
- Developing a charging scheme that is based on risk and operator performance.
- Building on the polluter pays principle by bringing in a charge that relates to the impact on the environment from the use of environmental resources and provides a fairer basis for the charges

Overall response

A total of twenty three responses were received, as listed in Appendix 1. These came from a diverse group including private individuals, academia, non-governmental organisations, business and the public sector. In addition to the written consultation SEPA held a total of twenty meetings with stakeholders, particularly with trade associations and other representative bodies, to help ensure understanding of the proposals so that responses were as informed and effective as possible. It is estimated that around thirty trade bodies and a hundred stakeholders attended.

[1] http://www.sepa.org.uk/about_us/consultations/idoc.ashx?docid=180c576b-f640-4db2-9ab2-6ce7359c88ac&version=-1
[2] http://www.sepa.org.uk/about_us/consultations/idoc.ashx?docid=1effdde6-6b9d-4792-9f2a-aac3dc3adf41&version=-1
[3] http://www.scotland.gov.uk/Publications/2012/05/6822

Summary findings

The consultation document asked 13 questions about various options for consideration in the proposed funding regime. An in-depth analysis has been undertaken of the responses and the summary findings for each question are contained in this report.

The support for specific aspects of the proposals was qualified largely by requests for further information, specific operational delivery issues and actual levels of charging:

1A. 62% agreed with the proposed statutory purpose for SEPA. 33% disagreed.

1B. 81 % agreed that SEPA should be given a power to compile information in relation to all its functions. 19% disagreed.

2. 76% agreed that the existing safeguards in terms of accountability, cost control and efficiency are adequate. 24% disagreed or expressed concerns.

3. 70% agreed that the principles set out in Table 1 are the right ones to inform the development of a new approach to funding. 20% disagreed.

4. 55% agreed with the use of the environmental resources principle being factored into charges to regulated business. 35% disagreed or expressed concerns.

5. 75% supported a risk based approach to charging based upon the proposed principles. 25% disagreed.

6. 50% agreed that SEPA should consider introducing a system for 'beyond compliance' incentivisation as part of its overall approach. 35% disagreed.

7. 90% agreed with the concept of introducing an intervention charge for poor performance. 5% disagreed.

8. 85% considered that SEPA should directly charge for time and resources spent in dealing with very poor performers. 10% disagreed.

9. 70% of respondents put forward their views in regard to the balance that should be struck between the total level of income generated from the standing and variable charges.

10. 60% supported option 2. 15% supported option 1 and 15% suggested an alternative model.

11. 40% supported the concept of facilitating voluntary agreements. 55% disagreed with this concept.

12. 38% agreed with the principles that would apply if value added services were to be introduced by SEPA. 52% disagreed with the proposed principles.

13. 63% supported the introduction of voluntary agreements as described for major infrastructure or construction projects. 26% disagreed.

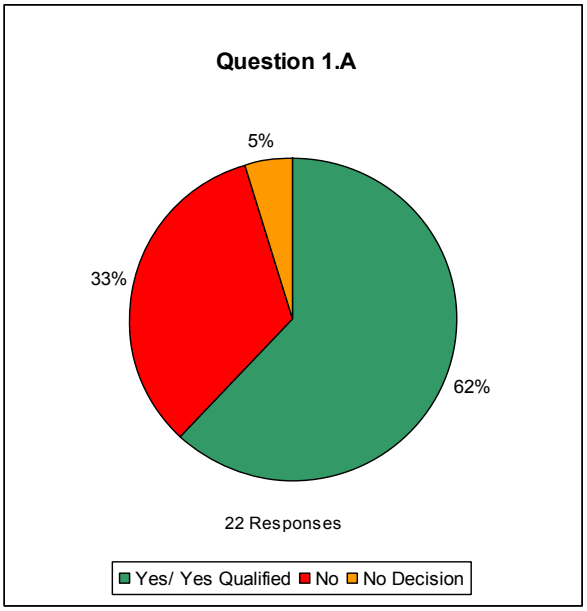
Assessment of responses

Responses were classified based on whether the 'yes' or 'no' box was ticked to the question and the responses we received were categorised as shown below.

Response category	**Definition**
Y	Yes box ticked with either no comment or else support expressed.
Yq	Yes box ticked but qualified in some way.
N	No.
No decision	Neither box ticked with respondents highlighting why they had not come to a decision.
No comment	No response.

Comments were extracted to allow the identification of common views, key issues and insights. We sometimes found that a respondee made a comment under one question but that this was more relevant to another. In this instance we made sure that it was considered under the relevant question. A summary has been provided below for each question, including a chart showing the response categories (i.e. support or otherwise), some text on the reasons for support, any caveats, concerns or reasons against a proposal and questions and requests for more information. Where more than one questions was asked we have split the summarised responses into A and B. The 'Yes' and 'Yes qualified' responses were amalgamated to give an overview of the overall level of support, or otherwise, for each question. The pie charts shown against each question below exclude the 'No comments' but, for transparency, pie charts which include the proportion of 'No comments' are shown in Appendix 2

Question 1(A) - Do you agree with the proposed statutory purpose for SEPA?



There was majority support for the proposed statutory purpose. There were a range of concerns, suggestions and requests for additional information in relation to the proposed changes.

The majority of respondents (62%) broadly welcomed the proposed statutory changes. Several were particularly positive about building in the sustainable management of natural resources into SEPA's remit.

However, three main areas of concern were raised. Firstly, the proposal to replace the provisions in section 31 of the 1995 Act relating to 'sustainable development' with provisions referring to the term 'sustainable economic growth'. It was felt that such a move would result in a blurring of the line between regulation and economic policy.

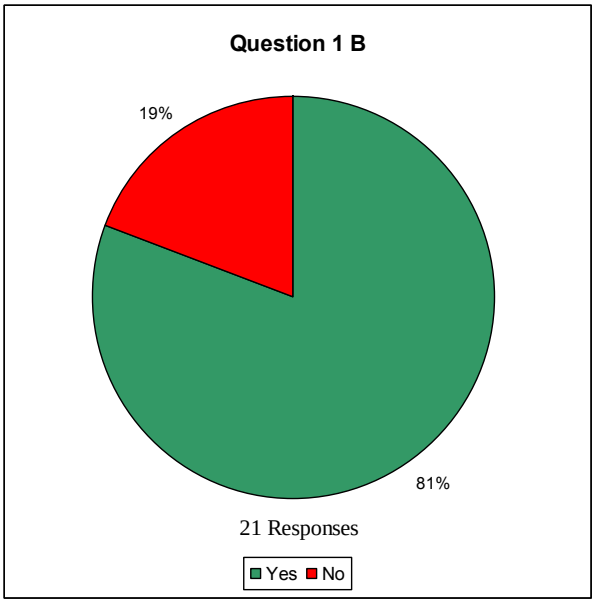
Secondly, some expressed concern about the proposed widening of SEPA's responsibilities. It was felt that there was the potential for overlap and inefficient duplication between different public sector bodies e.g. with Scottish National Heritage.

Finally, several respondents felt there was insufficient justification behind the proposed changes to various sections of the 1995 Act. Further details/consultations into the reasoning behind the changes would be welcomed.

There was a split in opinion regarding increasing SEPA's scope within areas of health and welfare, with some respondees worried about such a move and

others responding in favour. Respondents made clear that the underlying themes in existing legislation should be carried forward into any newly created legislation. Going forward, additional consultation and collaboration was sought to ensure that concerns expressed are dealt with.

Question 1(B) - Do you also agree that SEPA should be given a power to compile information in relation to all its functions?



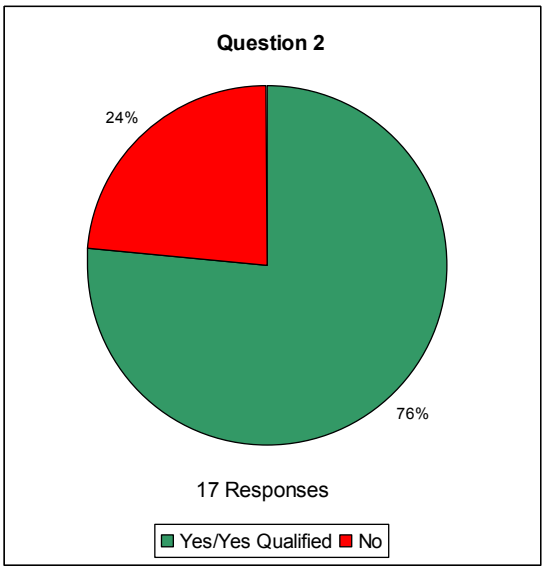
There was very strong support (81%) for SEPA being given a power to compile information in relation to all its functions.

Some of those in agreement do so on the condition that such a power would be subject to appropriate checks and balances eg. cost benefit analysis. A number of operators sought reassurance that any additional costs associated with new data collection powers will come out of the Grant-in-Aid budget and not come from regulated operators.

Those in disagreement with this proposal were of the view that SEPA already has the required powers needed to perform this task effectively. They would like to see any additional power consulted on separately.

One respondent noted their preference for SEPA compiling information on the general health of the environment and improvement trends, rather than just focusing on end-of-pipe pollution.

Question 2 - Do you agree that the existing safeguards in terms of accountability, cost control and efficiency are adequate?



There was strong agreement with the existing levels of safeguards in terms of accountability, cost control and efficiency. Some respondents suggested some enhancements.

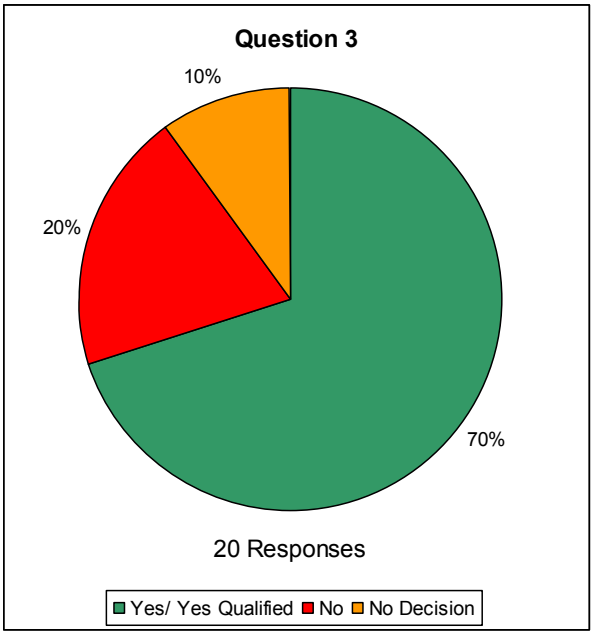
A number of regulated operators were supportive of SEPA's efficiency savings and correspondingly, the below inflation charge increases in recent years. Going forward, private operators would appreciate advance notice of any fee increases. Emphasis was also placed on the importance of not increasing stakeholders' fees to compensate for any possible reductions in GiA funding. Several respondees want to see the link between regulatory effort and charging being preserved. One respondent would like to see any charging increases being subject to parliamentary approval.

Some felt that the current levels of accountability needed to be improved. There was a view amongst some respondents that in the past, operators have not been able to obtain a clear view in a number of areas e.g. what their subsistence charges are spent on. In order to improve this situation they would like to see the link between SEPA's income (whether Grant-in-Aid or subsistence charges) and its expenditure being made publicly available at a sector level. Some also consider that this information should be made available to individual operators on request, for their individual subsistence charges. One respondent suggested a move towards direct election of board members in order to enhance SEPA's level of accountability.

A number of respondees would like to see more of a focus on conciliatory and educational strategies rather than just charging when damage is done.

A minority of respondents reported inconsistency in the service they have received.

Question 3 - Do you agree that the principles, as set out in Table 1, are the right ones to inform the development of a new approach to funding?



Subject to further detail and additional levels of clarity on implementation there was strong support (70%) for the principles set out in Table 1.

While many respondents strongly support the move to a risked based charging scheme, there was concern raised by some regarding the definition of risk – i.e. 'mitigated' or 'inherent'. Of those that raised this specific concern, the majority emphasised their preference for 'mitigated' risk. These respondents expressed their belief that this would appropriately incentive operators to guard against environmental harm. Several respondents did not agree that the risk-based approach to charging outlined in the table is in line with the polluter pays principle.

Many respondents who were in agreement also put forward amendments that they would make to Table 1:

- Several would like to see an additional principle placed under the headings of either 'fair' or 'proportionate' - the principle of direct cost-recovery. Stating that any charging model must be founded on the premise of direct cost-recovery.

- One respondent would like the simple and proportionate principle being based around understanding the requirements of the business that SEPA regulates.

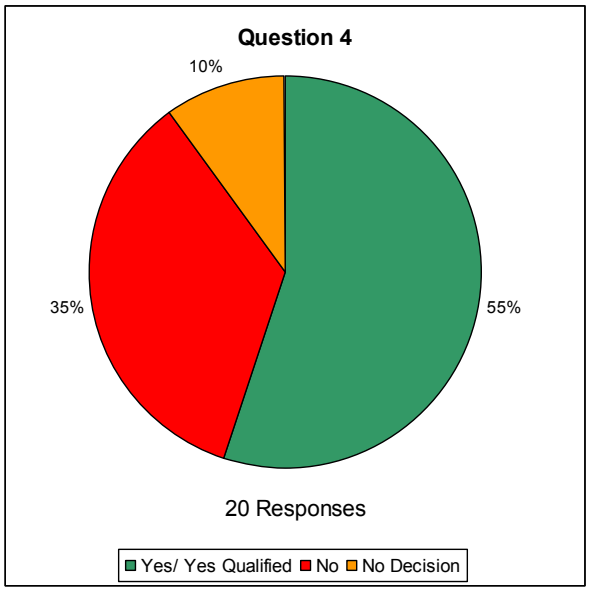
- One respondent would like to see accountable, transparency and fairness coming above the aim of being flexible and targeted. That is, Principle 3 should be Principle 2.

- One respondent disagrees with principle 5 (simple and proportionate) in that they would not like to see SEPA receive payment in respect of fines. Stating that the costs of investigation should be kept separate from the penalty.

- One respondent would like to see additional emphasis placed on operator performance.

Further information and clarity was sought with regard to how these changes would affect charges going forward – the definition of poor performance was regularly cited as a specific area where further clarification is required.

Question 4 - Do you agree with the use of environmental resources principle being factored into charges to regulated business?



There was majority support for this proposal. The predominant concern expressed related to the definition of the environmental resources principle.

Many respondents noted that all businesses and industries depend in some way on the use of environmental resources and therefore believe it entirely appropriate for this to be reflected in the charging regime.

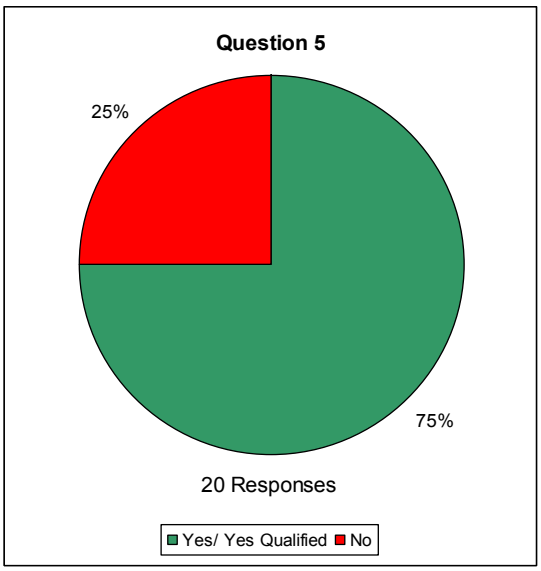
Some respondents strongly reject this charging approach, believing that it is not a development of the “polluter pays principle". One respondent expressed a view that it is an environmental resource tax. However, they would support an ecosystems approach to managing resources if any forthcoming proposals achieved that.

In terms of process a number of respondents felt that emerging concepts such as environmental value and ecosystem services are far too immature to build into a charging scheme and point out that without further clarity in this area they cannot agree with the proposals. One respondent foresees a danger that implementation of this policy could require SEPA to make judgements on the relative impact of business practices on the environment and point out that it should not be the role of the regulator to provide this function. Two respondents highlighted a specific concern that resource intensive industries may automatically be penalised for an unavoidable intensity of resource use.

There was concern expressed by one respondent that this could disproportionately affect certain businesses, without fully taking into account of the ecosystem services which they may otherwise provide. Farming was given as an example. One respondent stressed that they would not like to see charges introduced for general advice as it might increase associated costs of non-compliance at a later stage in site development. Concerns about possible double regulation were also raised.

It was felt by some that too much emphasis is being placed on the social and economic aspects of ecosystem services (i.e. the 'direct' benefits to people), without mentioning that the ecosystem services agenda should also identify potential risks to eco-receptors and address the significance of such risks.

Question 5 - Do you support a move to a risk-based approach to charging based upon the principles discussed?



There was very strong support, in principle, for a risk based approach to charging. Those in disagreement voiced particular concerns surrounding the definition of risk.

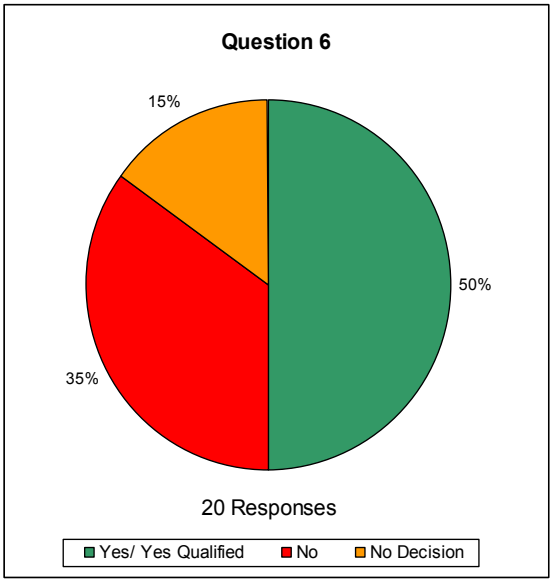
Of those in disagreement with the risk based approach to charging, a number felt strongly that the proposed changes represent an unjustifiable move away from the polluter pays principle. Any form of cross-subsidy was viewed to be inconsistent with this principle.

Other respondents were concerned about the possibility of considerations relating to SEPA's finances entering the environmental decision-making process. For instance, such a system might make it possible for any proposal at all to be authorised, no matter how great its environmental impact, provided that the operator pays enough.

Finally, given the level of complexity associated with creating a risk based charging model, some respondents question SEPA's ability to resource such a commitment.

Some operators requested further information – specifically in relation to how this new risk based regime would affect charges. Several businesses stress that they would not like to see additional financial burdens placed on them. Clarity was sought in regard to the definition of "large scale" and "high hazard".

Question 6 - Do you think that SEPA should consider introducing a system for 'beyond compliance' incentivisation as part of its overall approach? Tell us what you think and whether this should be via charges or a 'beyond compliance' framework.



While there was majority support for recognising good performance, there was a split of opinion as to whether this should be taken into account via charges or the beyond compliance framework.

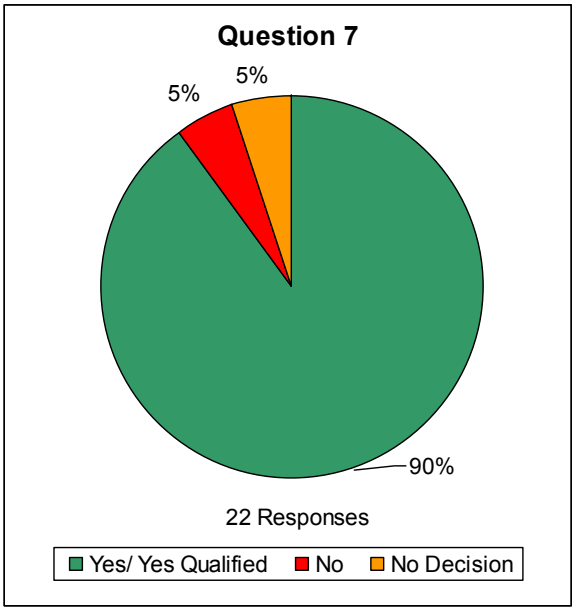
There was a strong level of support for recognising good performance. Much emphasis was placed on charging more for poor performance rather than charging less for good performance. There was a preference amongst a number of respondents that if implemented the 'beyond compliance' charging system would calculate operator performance over a number of years, possibly on a sliding scale.

A number of stakeholders in disagreement with the 'beyond compliance' proposals were concerned about the potential for regulatory creep. There was also a view expressed by some, that going beyond compliance could be construed as gold plating and would therefore be inconsistent with the Scottish Government's policy on better regulation. One respondent felt that the proposed 'beyond compliance' framework would allow SEPA to reduce its cost base, by unjustifiably reducing its regulatory effort.

It was noted by several respondents that a 'beyond compliance' system could impose greater administrative burdens on SEPA. For example, by switching on or switching off particular provisions in relevant permits for operators who are performing well. There was a worry that this could result in a diversion of resources from SEPA's core business areas.

Finally, information as to how this would affect charges was requested.

Question 7 - Is the concept of an intervention charge for poor performance something you would wish to see introduced?



There was overwhelming support for the concept of an intervention charge, with 90% of respondents agreeing with this approach in principle.

The majority of respondents who were in favour of this principle seek further information and consultation on the specifics i.e. categorisation, definition, appeals process, proportionality, mechanics of monetary collection and how the financial circumstances of the affected firm would affect charging outcomes.

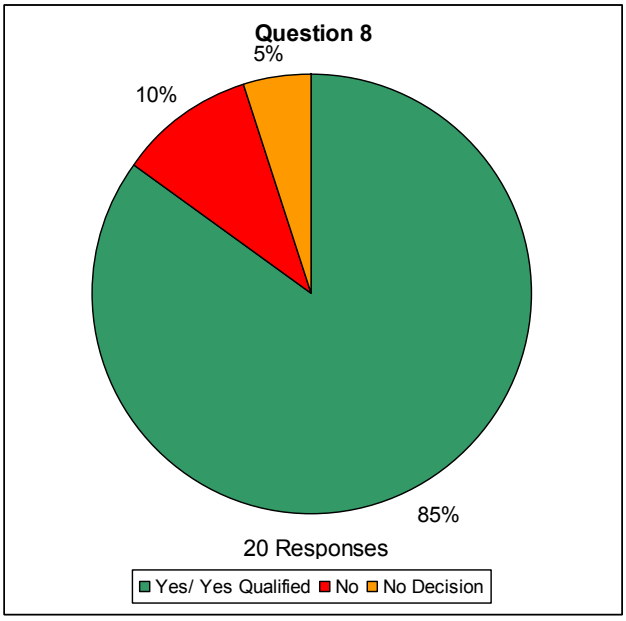
A number of respondents pointed out that if poor performance is related to financial restraints of the affected firm then perhaps an addition charge may be of no effective use. Some operators highlighted the importance of them being made aware of the choices available to them with regards to assistance

to rectify poor performance. Preference was expressed for an independent appeals procedure in instances of disputed assessments.

One respondent felt that SEPA already has powers under regulation 33(2) (a) of the Controlled Activities Regulations [4], to recover the costs of "any investigation to establish whether or not [an enforcement notice] is necessary, and if necessary, on whom it requires to be served". They therefore feel that this principle is already established.

A small number of respondents stressed the importance of providing confirming evidence to prove that the 300% levy is consistent with the required level of additional regulatory effort.

Question 8 - Do you consider that SEPA should directly charge for time and resources spent in dealing with very poor performers?



There was very strong support (85%) for direct cost recovery from poor performers.

It was viewed by the majority of respondents that this approach is in line with the polluter pays principle and is therefore a just and equitable charging mechanism. There was general agreement that SEPA should be able to make an intervention charge and/or charge directly for time and resources, spent dealing with poor performers or persistent problem operators. It was viewed as essential that there is maximum clarity and transparency around how this would be done i.e. categorisation of poor performance. It was felt by a large number of respondents that the revenues raised should be sufficient to cover the whole costs of intervention, including investigation, mitigation and remediation – in line with the polluter pays principle.

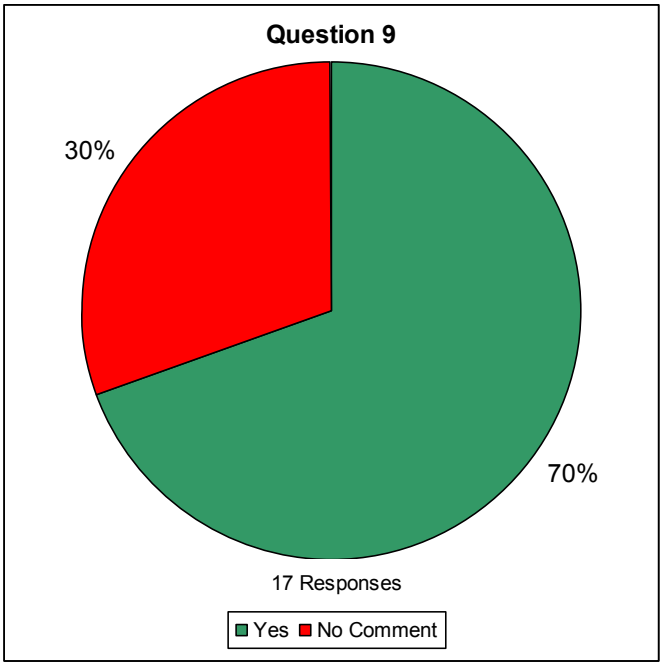
[4] http://www.legislation.gov.uk/ssi/2011/209/regulation/33/made

Concern was raised in relation to the statement “reduce the need to undertake formal enforcement action if operators improved their practices”. It was felt by some that such a direction of travel may result in an increased number of regulated businesses shirking their responsibilities.

Some respondents who disagreed with this proposal did so because of the possible relationship between poor performance and financial restraints - perhaps an addition charge would not be a helpful solution in such a case. The others believed that if guilt of non-compliance is proven then the financial consequences should be in proportion to the offence, not the investigation.

Detail on the proposals and the extent to which the differential costs would already be picked up by penalising poorer performers within the overall incentivisation scheme was sought. There was a general feeling that much more detail should be provided on the criteria to be used for judging an organisation as performing at a "very poor” level. It was stressed by a number of respondents that such enforcement action should only occur as a last resort.

Question 9 - Do you have any views on the balance that should be struck between the total levels of income generated from the standing and variable charges?

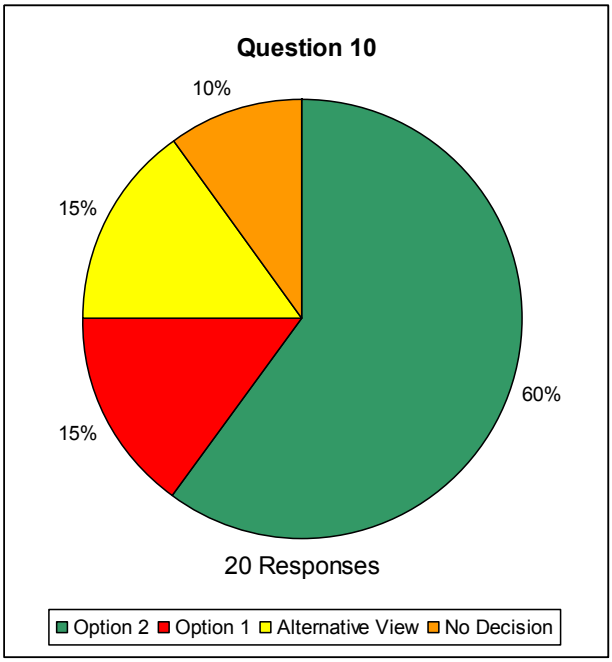


There was majority support for the introduction of a standing charge. The majority of respondents were of the view that it is fairer in principle if a wider range of operators contribute a little towards SEPA's costs for the environmental harm that they cause. A standing charge that amounts to around 10% of SEPA’s business charging income was seen to be acceptable by a number of respondents. Emphasis was placed on the importance of

ensuring that any new charges are implemented in a clear and transparent manner. It was noted that the administrative costs of collecting such a standing charge could potentially exceed any gains to be received from collections.

Some responders warned against SEPA relying on variable charging as a reliable source of income, suggesting that the fixed standing charge should be set at a high enough level so as to cover the associated costs of SEPA's regulatory duties. Reassurance that any new charges will not result in a lower GiA contribution by government was sought. Two respondees would like to see the variable element of the charge focusing on the regulatory effort associated with routine site visits - with a sliding scale based on the number of additional visits and effort required where sites present concern.

Question 10 - Would you support Option 1, Option 2 or neither of these options?



There was majority support for Option 2. Those in disagreement with this new approach were primarily concerned about the justification behind such a charge.

Option 2 consists of a standing and variable charge, with the standing charge representing the use of environmental resources component at around 10% of overall revenue, with the relative contributions of GiA and charges remaining broadly as at present. It was seen as fair that certain activities currently not liable to pay annual subsistence charges should be brought within the standing charge regime, as outlined on page 25 of the consultation paper. Some respondents believe such a charge to be fair and equitable even without mention of the environmental resources principle. It was noted by some that the cost of collection should not undermine the cost-effectiveness

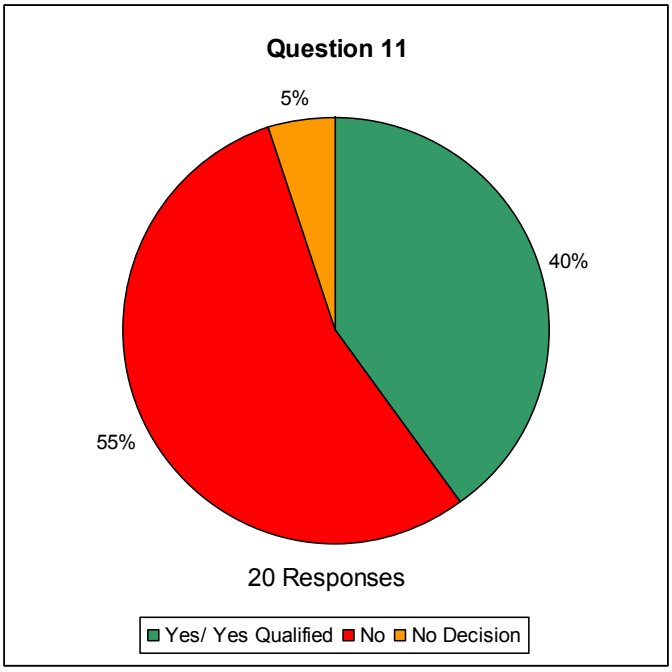
of the proposal. In order to avoid this extra collection cost, it was suggested that SEPA consider incorporate such a standing charge into the application fee for affected activities.

The majority of respondents who were in disagreement with option 2 predominantly had concerns about the justification behind the proposed new charge. Specifically, they saw limited links between the use of the 'environmental resources principle' and proposed charging levels. Other responders in disagreement with option 2 were of the view that introducing such a charge would run contrary to the proposed risk-based agenda as charges, in their view, would be transferred from larger and generally speaking higher risk operators to smaller and lower risk operators. The potentially regressive nature of such a change in charges was also highlighted. Finally, there was a worry that SEPA's open and approachable policy of offering free advice could be restricted in some way if this additional charge were to be implemented.

15% of respondents suggested alternative funding models: one based on Grant-in-Aid, planned charges to provide full cost-recovery based on regulatory effort (either with or without a standing charge element) and the introduction of a variable charge (approx. 5 – 10%) to provide SEPA with greater flexibility.

Further clarity was sought in relation to the definition of environmental risk that would be adopted by SEPA as the underpinning factor i.e. inherent or mitigated risk.

Question 11 - Do you support the concept of facilitating voluntary agreements?



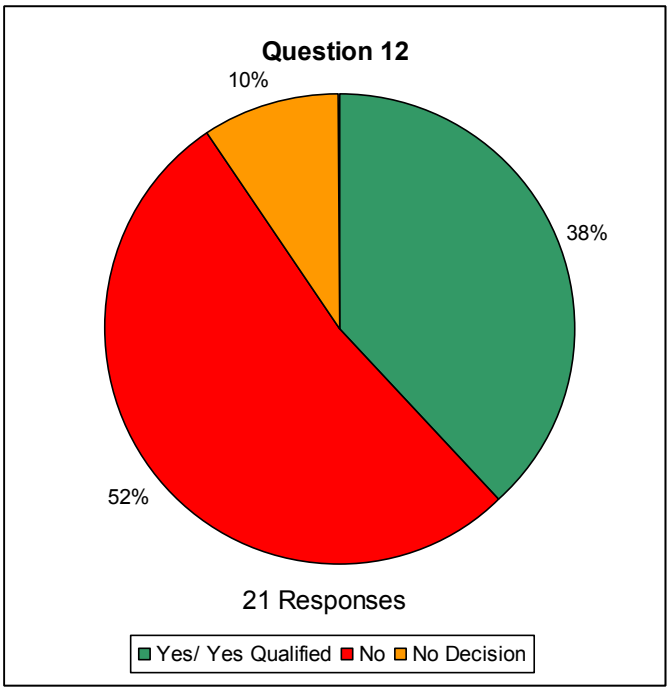
Although the majority of responders were not in favour of introducing voluntary agreements, some noted their specific interest in these arrangements.

Those in support of the proposals see this as a good opportunity for business and SEPA to work together. Some noted that they would willingly offer 'in kind' resources as well as additional funding in order to see their projects given additional regulatory support. Reassurance was sought in relation to SEPA's ability to resource appropriately any agreements entered into.

Two emerging themes surrounding the areas of disagreement arose. Firstly, there was concern that the core purpose of SEPA as an independent regulator could be diluted and as such the lines between the regulator and regulated could become blurred to no benefit. Secondly there was a concern expressed by a number of respondents that resource from core areas of SEPA business could be unfairly diverted, resulting in a two-tier level of service.

A number of respondents have requested further information with regard to the implementation of such voluntary agreements. Others seek reassurances that SEPA's role as an independent regulator wouldn't be compromised if such agreements were to be adopted going forward.

Question 12 - Do you agree with the principles that would apply if value added services were to be introduced by SEPA?
Tell us if you agree with the concept of value added services and what principles should be applied?



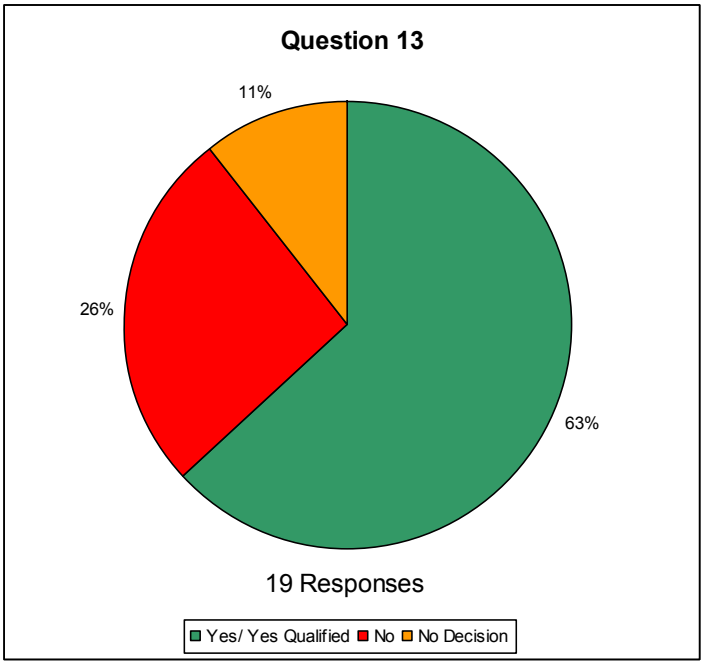
There was a low level of support expressed for the principle of value added services in the first instance, with only 38% of respondents in agreement. There was a high level of consistency amongst the issues and caveats identified by respondents concerning such services.

The majority of those that agreed with these proposals did so, on the proviso that there would be very clear guidelines to ensure separation of the regulatory role of SEPA from any service provision role. Respondents considered that any putative value-added services must be without prejudice to the proper and effective provision of SEPA's core work nor should the provision of these services be seen as a significant means of income generation. The reason for introducing such services should be solely based around the provision of services to the public where SEPA has legitimate value to add.
The main concern expressed by respondents was that such value added services would be comparable to a consultancy service and therefore offered the potential for SEPA's impartiality, objectivity and integrity as a regulator to be challenged. It was felt that such a move could bring SEPA into direct competition, and possibly conflict with, the private consultancy market. Further more, it was noted that there would be civil liability issues for SEPA to consider, should delivery dates and objectives not be met.

Another significant concern was that these proposals would result in a two-tier level of service, one funded by direct charges and the other funded by Grant-in-Aid and/or subsistence charges. It was felt that such a system could

unfairly favour larger organisations and potentially disadvantage small to medium sized enterprises (SMEs) that would not be able to afford these extra services.

Question 13 - Would you support the introduction of voluntary agreements as described for major infrastructure or construction projects as a contribution to supporting economic development and environmental protection?



The majority of responders viewed the concept of voluntary agreements for large infrastructure projects positively.

This approach was seen by many respondents as a sensible way of addressing the long-standing under recovery problem that SEPA faces.

Some of those in disagreement would actually favour a stronger, compulsory version of such agreements. They believe that SEPA should aim for a 'cost-recovery' style charge to cover all the work delivered by SEPA's staff to protect Scotland's environment.

A number of responders who were in favour of the proposals did so subject to certain caveats. Specifically, they sought assurances that such voluntary proposals would not become compulsory over time. It was suggested by a number of respondents that the under recovery of costs referred to in the paper should simply be recovered through the initial application fee.

Further clarity was also sought around the definition of large infrastructure projects of national importance. It was stressed by several respondents that they would wish to see such agreements limited to publicly funded major

infrastructure projects, which are currently not controlled via the existing environmental legislation. An example given was the Forth Road Bridge.

Those who disagreed with the proposals were concerned that this is a means to secure greater income from the larger projects without sufficient justification. In particular, they disagree with consultation paper's suggestion that fees could a fractional percentage of the total project costs (0.25% to 1%) as such a charge might not be linked to regulatory and scientific effort. Others in disagreement were concerned that voluntary charging for pre-application consultation could discourage applicants from the proper investment of time and effort in getting applications right first time, resulting in increased GIA costs to SEPA and potentially slowing economic growth. It was also raised by some that performing such voluntary agreements may detract in some way from SEPA's core resource areas at the expense of those not undertaking voluntary agreements. Finally, there was a concern that such arrangements would over time become compulsory.

Despite expressing disagreement with the proposals some responders went on to suggest that there may be circumstances in which a major developer may enter into an agreement with SEPA to fast-track, for whatever reason, the preparation of an application. In such cases they (the private operator) may be willing to offer resources to help SEPA meet an accelerated timetable.

Appendix 1 – List of Responders

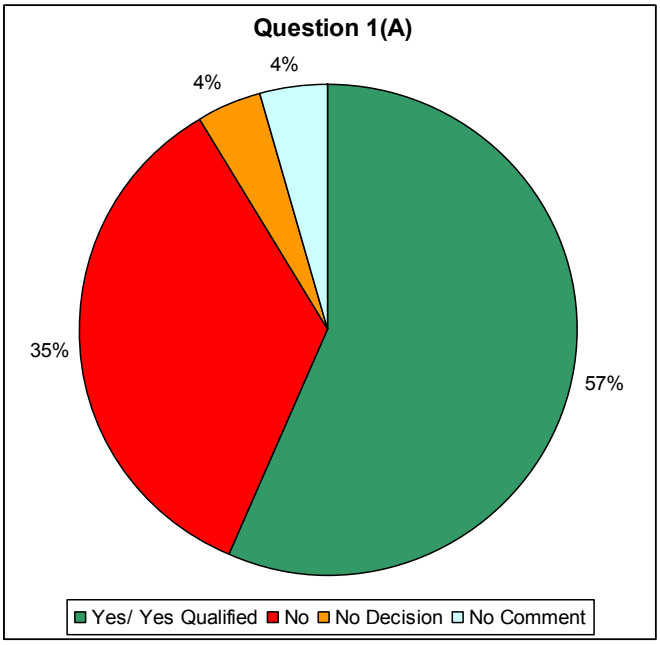
Individuals

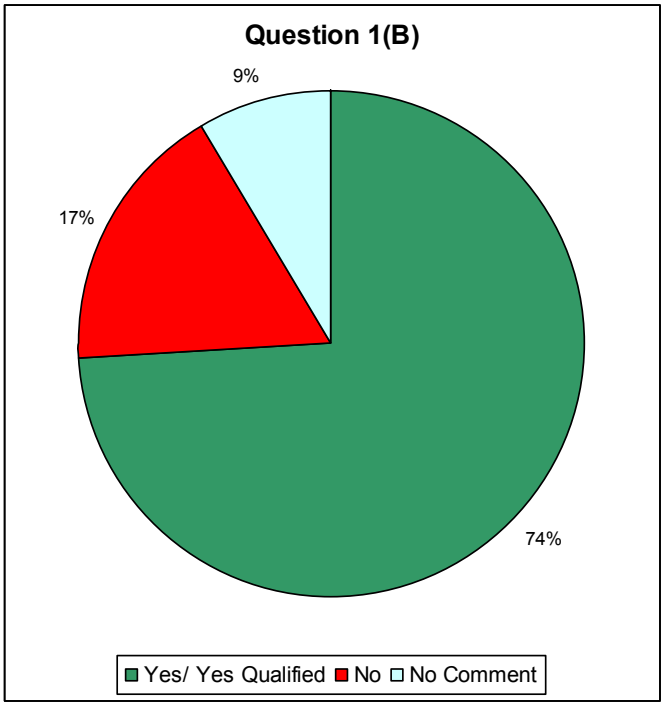
Anonymous
Gordon Millar

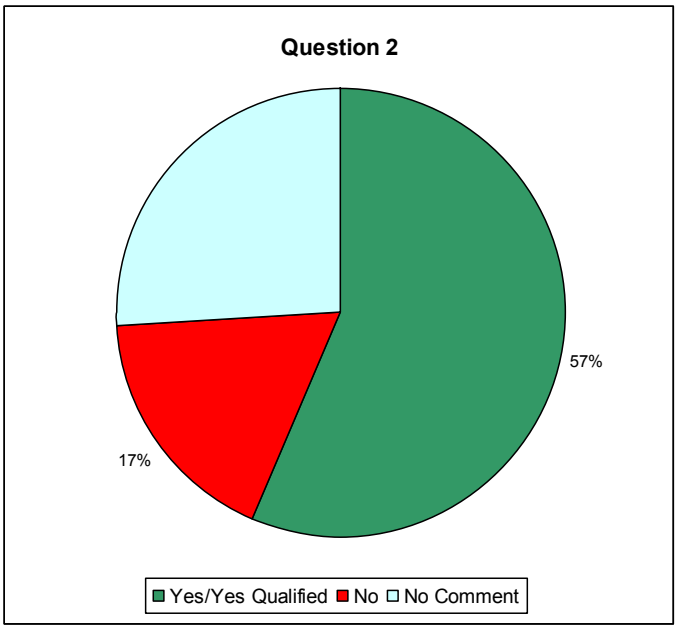
Organisations

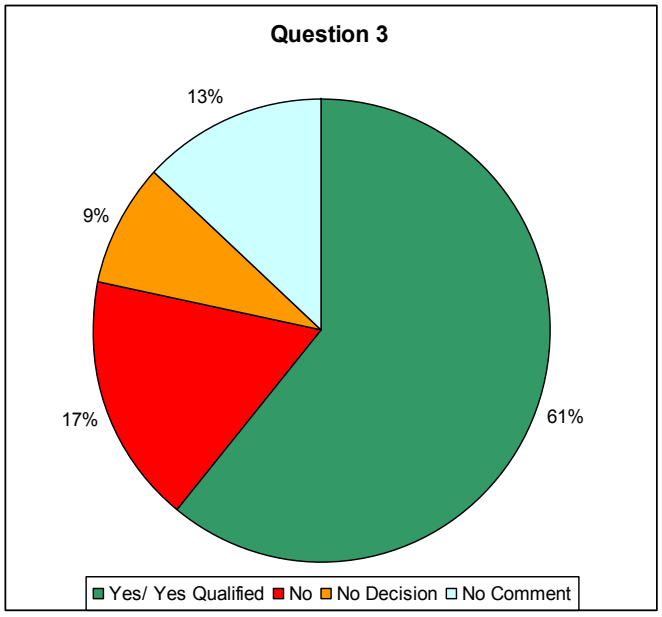
Built Environment Forum Scotland
Chartered Institution of Wastes Management
Chemical Industries Association
Confederation of Paper Industries
EDF Energy
Highland Council
IHP HELP Centre for Water Law. University of Dundee
NFU Scotland
Rio Tinto Alcan
Scotch Whisky Association
Scottish Association of Meat Wholesalers
Scottish Environment LINK
Scottish Environmental Services Association
Scottish Natural Heritage
Scottish Power
Scottish Property Federation
Scottish Water
SITA UK Limited
SSE
The Law Society of Scotland
UK Environmental Law Association

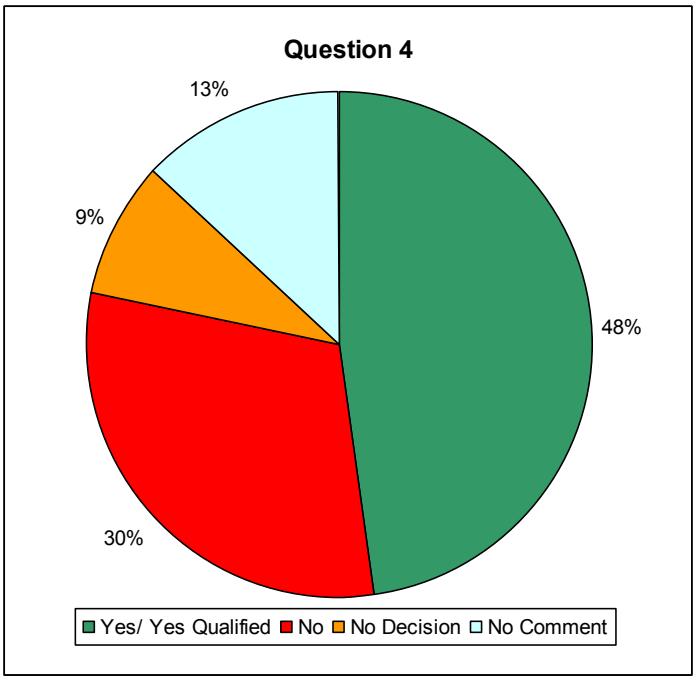
Appendix 2 – Pie Charts Incorporating Proportion of "No Comment" Responses.

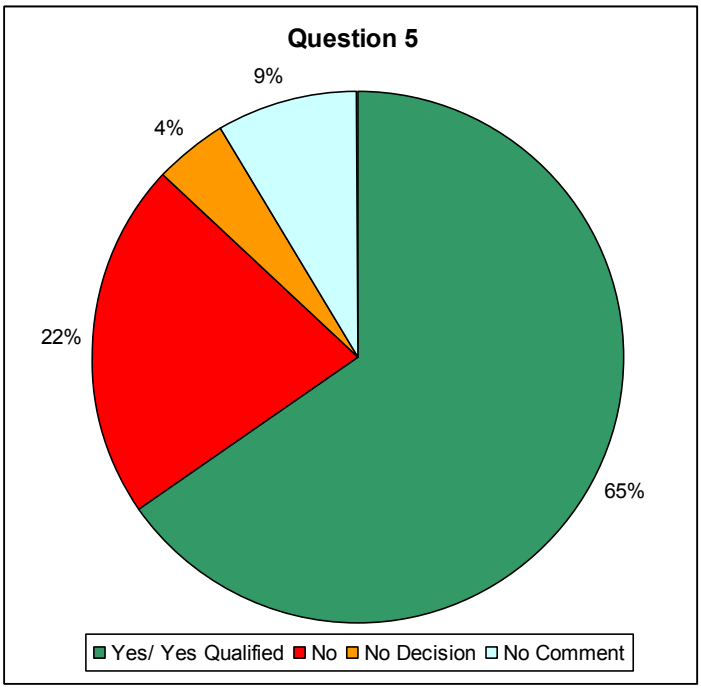


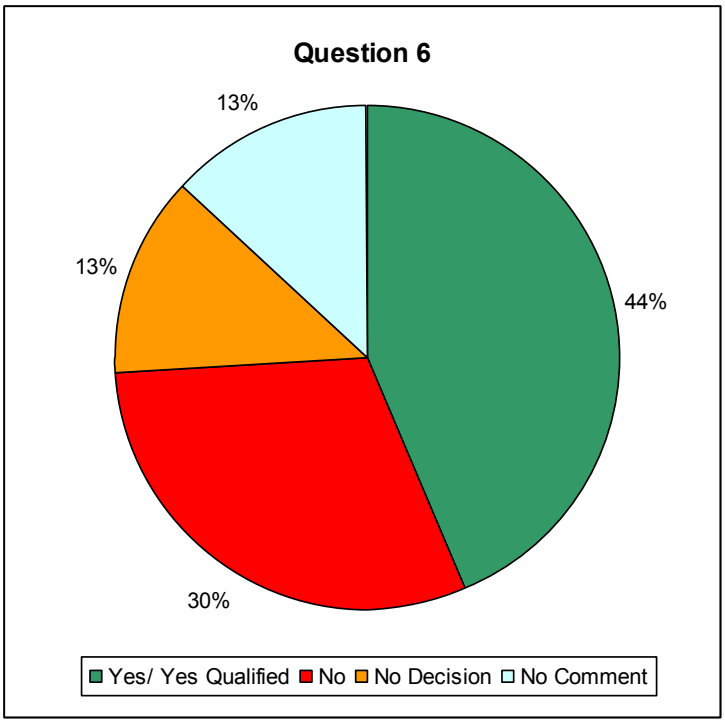



Question 2
57%
17%
Yes/Yes Qualified
No
No Comment


Question 3
13%
9%
17%
61%
Yes/ Yes Qualified
No
No Decision
No Comment


Question 4
13%
9%
48%
30%
Yes/ Yes Qualified
No
No Decision
No Comment


Question 5
9%
4%
22%
65%
Yes/ Yes Qualified
No
No Decision
No Comment


Question 6
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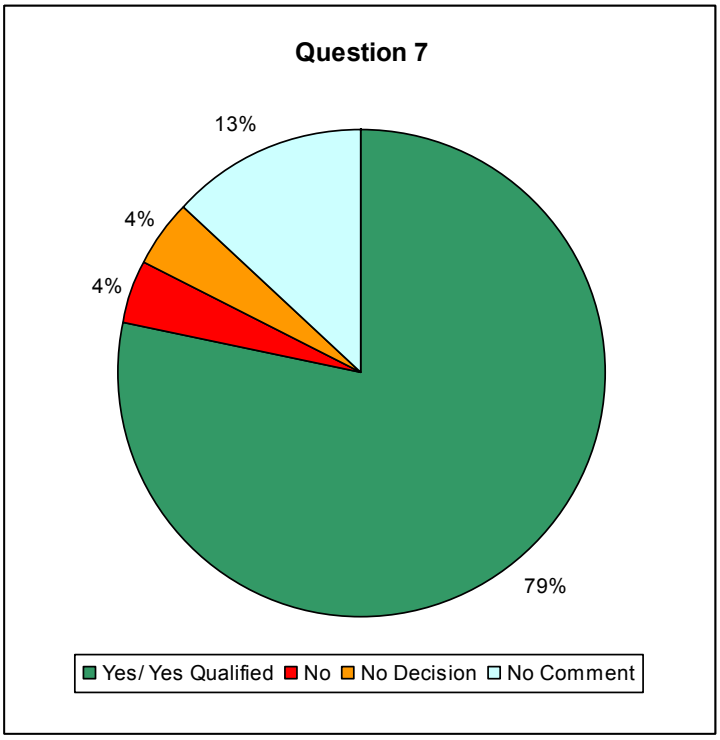
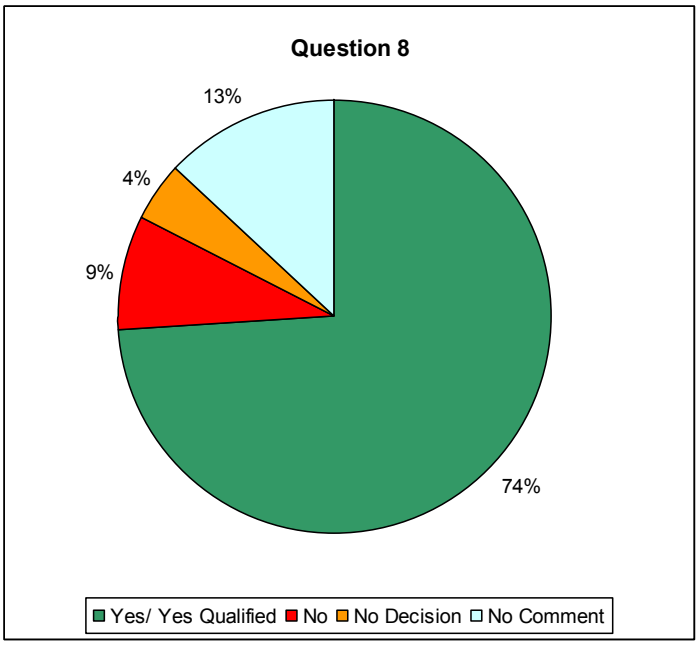
13%
44%
30%
Yes/ Yes Qualified
No
No Decision
No Comment


Question 7
13%
4%
4%
79%
Yes/ Yes Qualified
No
No Decision
No Comment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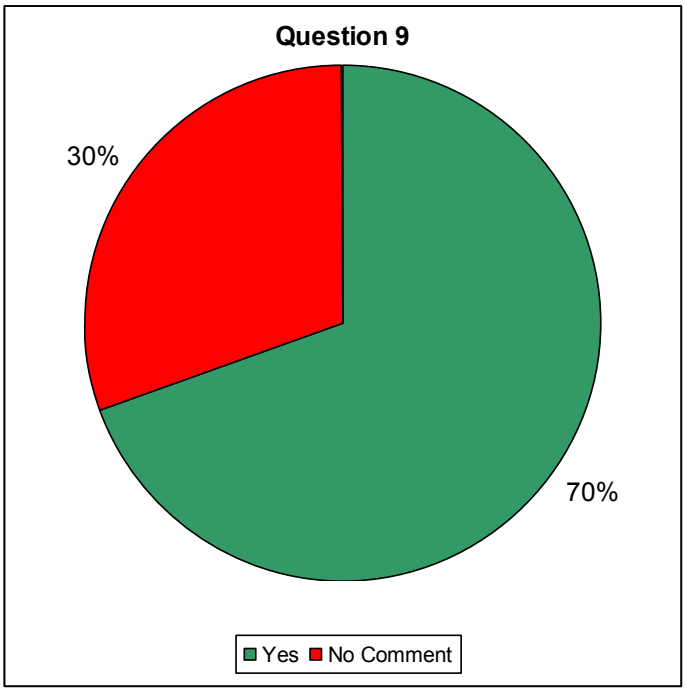
Yes/ Yes Qualified
No
No Decision
No Comment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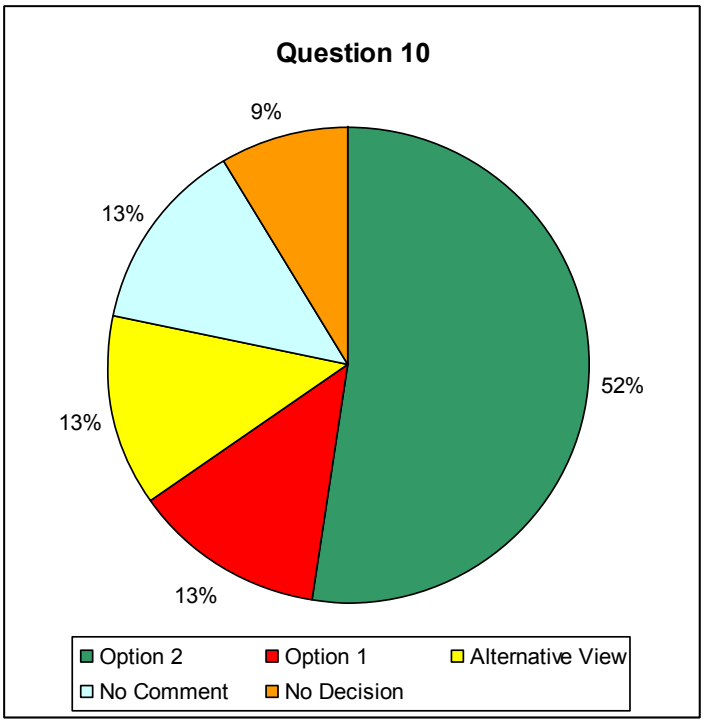
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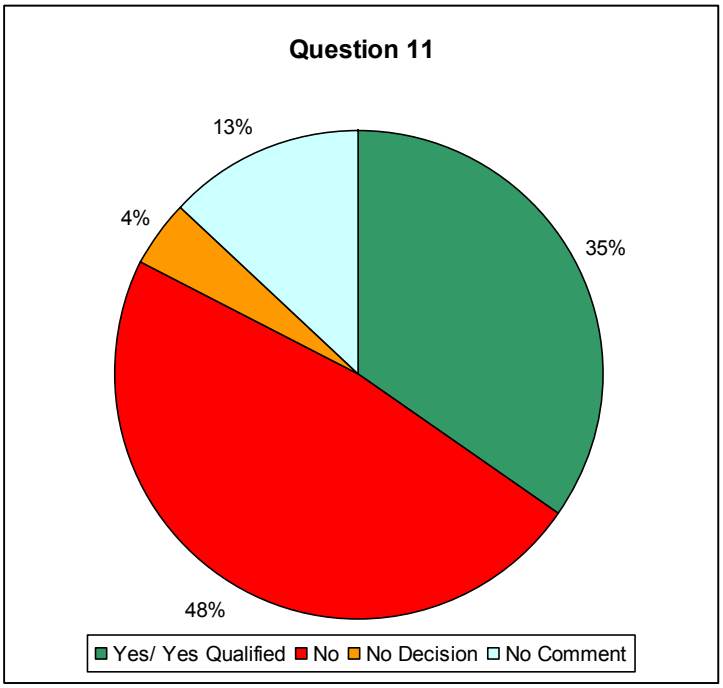
Option 2
Option 1
Alternative View
No Comment
No Decision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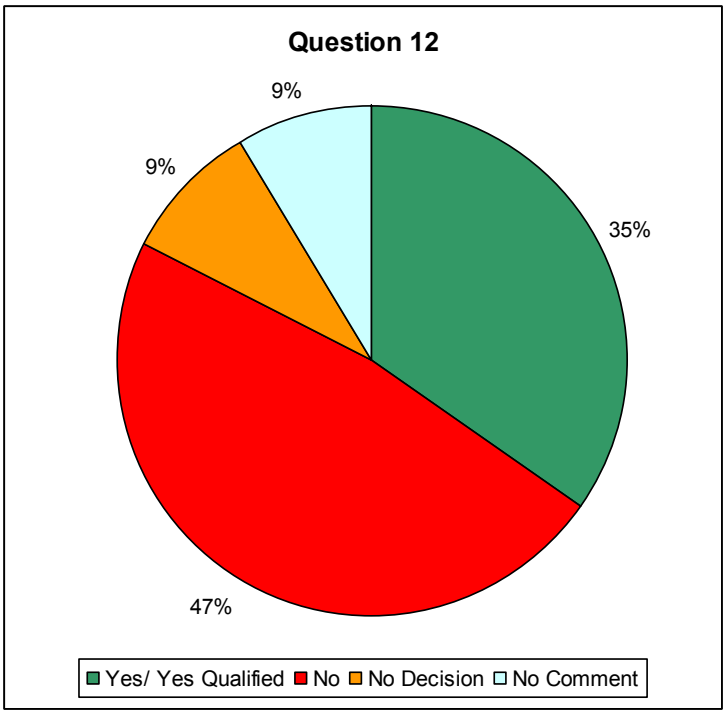
48%
Yes/ Yes Qualified
No
No Decision
No Comment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9%
9%
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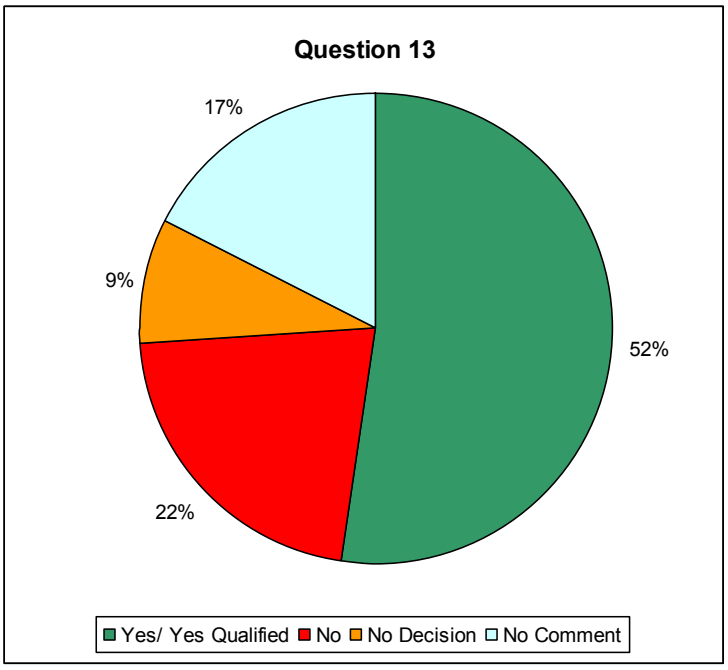
47%
Yes/ Yes Qualified
No
No Decision
No Comment


Question 13
17%
9%
52%
22%
Yes/ Yes Qualified
No
No Decision
No Comment

Minister for Environment and Climate Change
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The Scottish Government
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LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Rob Gibson MSP
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19 May 2013

Dear Rob

REGULATORY REFORM (SCOTLAND) BILL

To help the committee in its scrutiny of the Regulatory Reform (Scotland) Bill I would like to take this early opportunity to alert you to potential Stage 2 amendments likely to be of particular interest to the Rural Affairs, Climate Change and Environment Committee:

- Contaminated land – in relation to the contaminated land provisions at section 34 there are some further technical amendments required to ensure that these amendments fully reflect the role of local authorities and SEPA in relation to special sites.

- The Environmental Crime Taskforce (established by the Cabinet Secretary for Rural Affairs and the Environment) is a group of experts tasked with supporting delivery of the Scottish Government's commitment to tackling environmental crime. They are due to report in July and we are expecting them to come forward with proposals so that SEPA is better equipped to deal with environmental crime. These may include amendments to entry and search powers in section 108 of the Environment Act 1995.

- It is also possible that there may be amendments in connection with the National Litter Strategy which is currently being developed for consultation. For example, our stakeholders' summit in March discussed the possibility of extending the powers of other public bodies to issue Fixed Penalty Notices.

These potential amendments have emerged from direct feedback from stakeholders, in response to proposals under active consideration by expert groups, arising from related Programme for Government proposals, and following further detailed scrutiny and consideration of the Bill text.

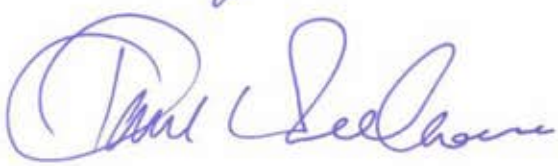
We anticipate these are likely to be the most substantial, although as will be expected not an exclusive, list of amendments likely to be brought forward.

They of course will be subject to further stakeholder input and engagement. As I mentioned in my letter of 2 May, we are committed to maintaining a high level of stakeholder engagement on this programme and listening and acting on the views received.

I trust the committee finds this information useful and I and my officials are very happy to answer any questions when we discuss the Bill with the committee in the coming weeks, or provide further written background as required.

I am copying this letter to the Convener of the Economy, Energy and Tourism Committee given their designated lead on the Regulatory Reform (Scotland) Bill.

Kind regards



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Rural Affairs, Climate Change and Environment Committee
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EDINBURGH
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4 June 2013

Dear Rob

REGULATORY REFORM (SCOTLAND) BILL

I thought it would be helpful to write in advance of my appearance on 5 June to cover some of the points which have been raised in committee as a result of its scrutiny of the Regulatory Reform (Scotland) Bill.

Publication of consultation responses

My officials provided you with evidence on 22 May. The Committee felt it important that the individual responses to the May 2012 consultation were made electronically available in addition to the analysis which we published last year. We have taken this on board and the responses (where the respondents had confirmed that they were happy for them to be made available) are now in the process of being placed on the Government's website.

Business savings

The Committee asked for an understanding of the likely cost savings to businesses. In line with the polluter pays principle, the policy intention is to help reduce the associated financial burden on the public purse and on legitimate, compliant businesses. The final impacts will be heavily dependent on the secondary legislation and will vary across sectors and companies according to the activities that they undertake and associated risks. We do expect significant benefits from the legislation and the Better Environmental Regulation programme it supports and I attach the final Business Regulatory Impact Assessment for the Committee's information. This accompanied the October consultation and included feedback received from interviews with a number of regulated businesses to understand the likely implications. We received no comments on the partial BRIA as a consequence of the public consultation.

Vicarious Liability

The Committee asked my officials for further information of how the vicarious liability provisions were developed and stakeholder input to this. In the May 2012 "Consultation on Proposals for an Integrated Framework of Environmental Regulation" there were no specific references to vicarious liability but some parts of the consultation prompted a number of stakeholders to make references to this principal in their responses. For example to question 4 on corporate or accredited permits, where stakeholders highlighted the importance of clearly identifying and assigning responsibility in situations involving multiple contractors or diverse management structures.

The preparation of provisions on vicarious liability is a specific action that we have undertaken as a direct response to stakeholder comments. We included this in the introduced Bill, rather than bring forward as a potential stage 2 amendment, as we believe inclusion was important to allow the provisions to be seen in the round and to maximise the opportunities for Parliamentary and stakeholder scrutiny.

Definition of 'Proportionate'

The Committee also asked SEPA about the use of the word 'proportionate' in the Bill and its definition. Proportionate is used once in the Bill in Part I section 6(3) where principles are listed in relation to the exercise of regulatory functions by the regulator. The principles listed are that regulatory functions should be exercised in a way which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

These principles were originally put forward by the UK Better Regulation Task Force in their report "Regulation-Less is More. Reducing Burdens, Improving Outcomes" (March 2005). This set out a framework for assessing whether new regulations were fit for purpose. This definition has subsequently been endorsed by the Scottish Government's independent advisory Regulatory Review Group as well as by the Scottish Government. The definition of proportionate in the March 2005 Report is "*regulators should only intervene when necessary. Remedies should be appropriate to the risk posed and costs identified and minimised.*" This terminology is also widely used in a European context.

Section 10 Procedures

Stakeholders have questioned that regulations made under section 10 are subject to the negative procedure. The context for this was in practice the secondary legislation introduced under the Bill will be a comprehensive recast of environmental legislation in Scotland; I believe it has therefore been suggested that the first set of regulations made under the powers in this section should be made under the affirmative procedure.

We are happy to consider an amendment for stage 2 which would require the first set of regulations made under section 10 to be subject to the affirmative procedure. This is in line with the Pollution Prevention and Control Act 1999 (section 2 (8)-(9)).

Definition of 'Environmental Harm'

At the round table session there seemed to be some confusion over the definition of 'environmental harm' and whether it was wide enough (or too wide) to cover all possible types of environmental harm. I thought it would be helpful to confirm to the committee that the definition in section 9(2) is the same definition that appears in the Pollution Prevention Control Act 1999 including "(e) impairment of, or interference with, amenities or other legitimate uses of the environment." A very similar definition appears in the Water Environment and Water Services (Scotland) Act 2003 although it is in terms of the water environment rather than the environment more generally.

Compensation Order Thresholds

Some stakeholders asked the Committee whether the amount of £50,000 as a maximum cap on compensation orders in section 26 of the Bill was too low. In relation to compensation orders, under section 249 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) (compensation order against convicted person), the provisions in section 26 of the Bill put a "gloss" on section 249. That means that in section 26(4) of the Bill, the reference to a cap on the costs of £50,000 is to be read with section 249(8) of the 1995 Act and refers only to summary proceedings. In relation to solemn (before a jury) proceedings section 249(7) of the 1995 Act provides that there is no limit to the amount that may be awarded under a compensation order. This means that in the future the amount of compensation that may be awarded will be a relevant consideration by the Procurator Fiscal in deciding whether to take proceedings by summary or solemn procedure.

Part 1 Regulators Code of Practice

The committee has picked up that the consultation provisions in Part 1 of the Bill relating to the development of the Code of Practice (section 6 (4)) and Part 2 of the Bill on the making of the regulations relating to protecting and improving the environment are drafted differently. It should be recognised that these consultation provisions are being applied in a different context in Part 1 and Part 2 of the Bill. We undertake to further review these provisions to ensure that they are as consistent as it is sensible for them to be. If necessary we will consider bringing forward amendments at stage 2 if required to achieve this.

Kind regards

PAUL WHEELHOUSE

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GLASGOW

Rob Gibson MSP
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11 June 2013

Dear Rob

REGULATORY REFORM (SCOTLAND) BILL

I agreed to come back to the committee on a number of points raised in my oral evidence on 5 June relating to Part 1 of the Bill once I had discussed with the Minister for Energy, Enterprise and Tourism:

1. In relation to the point made by Claudia Beamish MSP on whether or not the purpose and effect of the Bill would change significantly if sustainable development was substituted for sustainable economic growth

While I recognise that sustainable development is well understood in the context of environmental legislation and regulatory activity the Scottish Government is convinced that retention of the term "sustainable economic growth" is essential. The Scottish Government's central Purpose is "to focus the Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. By sustainable economic growth we mean building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too." The rationale for Part 1 of the Bill is to promote greater regulatory consistency by imposing a statutory duty in relation to sustainable economic growth, empowering regulators to further align their activities and approach with the Scottish Government's Purpose.

2. In relation to the point made by Nigel Don MSP on whether or not the hierarchal approach taken in Section 38 would be a suitable approach for setting out the duty on regulators in Section 4

While the twinned definition of the general purpose of SEPA works well in that context it would be less effective in a more general clause such as section 4 which applies to a range of regulators.

3. In relation to the point raised by Graeme Dey MSP on how other regulators are covered by the Code of Practice in Section 5

The Scottish Government recognises that many Scottish local authorities and regulators already take economic and business factors appropriately into account in regulatory activity, and is determined to build on that existing good practice to drive further performance improvements and promote consistency. Clause 5 of the Bill therefore gives Scottish Ministers the powers to issue a code of practice, linking the proposed economic duty to statutory guidance which provides clarification on the practicalities of determining an appropriate balance between economic and other regulator-specific objectives. We believe that any such Code of Practice must be developed by regulators and stakeholders and are establishing a short-life group with the following remit:

> Develop a draft Scottish Regulators' Code of Practice, for consultation later in 2013, providing guidance which regulators would have regard to when determining policies, setting standards or giving guidance in relation to their duties. The draft code should address and take account of the inter-relationship between: supporting sustainable economic growth; risk assessment; information, advice and inspections; compliance and enforcement actions; and accountability.

The proposed Code will apply to all regulators listed in schedule 1 – and will not be specific to any particular regulator. It is not intended to circumvent or replace other codes of practice, or the powers to do so. Indeed, by developing this code in an open and collaborative way, involving regulators and other stakeholders, the intention is for it to complement detailed and subject-specific codes which already exist

4. In relation to the point raised by Jim Hume MSP on whether the Bill could be clearer on who will be consulted on in relation to the Code of Practice

A short life working group, comprising COSLA, business representatives - including the Regulatory Review Group, the Federation of Small Businesses and the Scottish Chambers of Commerce - and regulators including SEPA and SNH, has been asked to develop the Code of Practice, which will be publicly consulted on prior to introduction. Regulatory bodies not involved in the working group will be kept informed of progress and invited to contribute. However, as the draft Code will then be the subject of substantive open consultation and parliamentary scrutiny the Scottish Government is not convinced of that there is merit in being more specific in the Bill. This clause is deliberately wide, providing scope to be as inclusive as possible.

I trust the committee finds this information useful in the preparation of their Stage 1 Report.

I am copying this letter to the Convener of the Economy, Energy and Tourism Committee.

Kind regards

PAUL WHEELHOUSE

The Scottish Parliament
Pàrlamaid na h-Alba

Finance Committee
Convener: Kenneth Gibson MSP

Murdo Fraser MSP
Convener
Economy, Energy and Tourism
Committee

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19 June 2013

REGULATORY REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

Dear Murdo,

The Finance Committee issued a call for evidence on the Regulatory Reform Bill's Financial Memorandum (FM) on 3 May 2013 giving a deadline of 6 June for responses. A total of four responses were received and these are attached.

Given the relatively small number of submissions received and the fact that, on the whole, they do not comment on the majority of the Bill's provisions or the information relating to them in the FM, the Finance Committee does not intend to take oral evidence on the FM.

However, one topic on which substantive comment was provided was in relation to Section 41 of the Bill (Planning authorities' functions: charges and fees) whereby, according to the FM, "if an authority fails to address performance issues, their planning application fee will potentially be reduced" (paragraph 45). COSLA, in particular, expresses concerns relating to what it terms "the planning penalty clause," which, it states, "can be summarised as follows:

- There is no definition of "good" or "bad" performance.
- A penalty clause focus[es] on inputs and outputs, not outcomes.
- It does not enable a move towards full cost recovery.

- Planning authorities don't control the whole planning system and delays are often from things outwith their control, such as section 75 agreements.
- There is no indication of the scale of a penalty nor the length of time it would apply.

The submission goes on to assert that—

> "Regularly changing fees within local authorities if they become 'poor performers' will not help local authorities improve and will make it difficult for them to plan future spending, nor will it benefit businesses who may face varying fee levels. This will create inconsistencies across Scotland, and is at odds with as one of the principles of better regulation, to promote consistency."

Your committee may wish to consider the above along with the attached submissions in advance of its further evidence sessions with Scottish Government officials and the Minister for Energy, Enterprise and Tourism and the Minister for Local Government and Planning.

Yours sincerely

Kenneth Gibson MSP, Convener

FINANCE COMMITTEE CALL FOR EVIDENCE

REGULATORY REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM ARGYLE AND BUTE COUNCIL

Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

Did you have sufficient time to contribute to the consultation exercise?

1. The Council responded to the original Better Regulation consultation but many of the comments related to enforcement principles although we, as a Council, were opposed to performance linked charges for planning. There was adequate time to respond to the consultation.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

2. The financial memorandum refers to nominal set up costs and that these should be cost neutral as a result of them being absorbed into existing workstreams. These ancillary costs relate to staff training, amendments to enforcement policies and possible IT costs associated with changes to reporting. The extent to which they can absorbed will only become clear over time. Within the overall quantum of local government costs and funding the amounts subject to consideration in the financial memorandum are marginal but in a period of significant financial challenge any additional costs which cannot be offset will simply create a budgetary pressure or increase the amounts a service or organisation has to make. Local authorities have gone through a period of significant budgetary review so it is unlikely there is scope to simply absorb additional costs. Any such costs must realise efficiencies elsewhere. Whilst there may be costs to local authorities where they operate activities regulated by SEPA this can be mitigated by close working relationships between SEPA and Local Authority environmental health services.

3. The issue that concern us most relates to the proposals around planning fees. Firstly it is our view that performance gauged on the Planning Performance Framework (PPF) not just 'speed of determination' statistics. It is also of concern that the implied reduction in fees will lead to performance improvement as this is not evidenced by experience in England where scrapping of the 'Planning Delivery Grant' in England and resulting penalisation of poorly performing local authorities led to higher staff turnover, negative perception and a continuous cycle of decline in many scenarios rather than the improvements anticipated from the Bill. As yet there is still no detail of what constitutes 'poor performance' or clarity when such a clause would be enacted. Planning performance is qualitative not just quantitative so care must be taken to ensure fair comparison is made between authorities – rural nature, geography (Islands), type of applications dealt with. Planning is also effected by the numerous external stakeholders involved in the planning process such as SNH, Transport Scotland, Historic Scotland.

Wider Issues

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

4. No comment to make on these last 2 questions.

FINANCE COMMITTEE CALL FOR EVIDENCE

REGULATORY REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM COSLA

COSLA Vision

1. The single focus of COSLA and local authorities is to improve outcomes for communities. Local government is at the heart of the government's focus on prevention, service integration and "place", effective reform and strong local services are more important now than ever. Adequate resources and effective use of them are required to achieve the positive outcomes for communities. National governance should enhance the ability of local government to achieve this as effectively as possible and deliver those benefits to communities thorough:

- Empowering local democracy
- Integration not centralisation led by community planning
- Focus on outcomes not inputs
- Local democracy needs to be at the heart of improvement and accountability

National Standards

2. As we pointed out our original response to the consultation the implementation of national standards could have a clear impact on local resourcing decisions, potentially diverting them from the frontline or other local priorities. The consultation was clear that costs will not be accepted as a justification for opting out of the national standard, yet given the potential implications on other locally decided priorities we do not agree with this. Local authorities should be able to opt out for social, health, environmental, financial, economic or local democratic reasons.

3. Given the very wide range of the enabling power it is entirely possible that national standards, when they are introduced, may not be cost neutral to local authorities depending on what the national standards are. Moreover, there may be significant variation in costs and savings across councils depending on the systems and process they already have in place and the level of enforcement required in different areas.

Planning Penalty Clause

4. We do not feel that the Financial Memorandum adequately reflects the potential costs and risks of the proposed planning penalty clause. As was made clear in our responses to the Planning Reform and Regulatory Reform consultations we do not support the introduction of planning fee penalty clause for 'poorly' performing planning authorities. The principle is counter-intuitive as 'poorly' performing councils will face reduced resources making it more difficult to improve performance. Our concerns with the planning penalty clause can be summarised as follows:

- There is no definition of 'good' or 'bad' performance
- A penalty clause focus on inputs and outputs, not outcomes
- It does not enable a move towards full cost recovery
- Planning authorities don't control the whole planning system and delays are often from things outwith their control, such as section 75 agreements

- There is no indication of the scale of a penalty nor the length of time it would apply

5. We are concerned with the lack of definition around what good or bad performance is and what planning authorities will be judged on. The indication from the Financial Memorandum is that the focus will only be on 'improving response time'. Time taken is not an indicator of quality, nor does it indicate where any problems may exist within the planning system – decisions made quickly are not guarantees of quality. The focus should be on outcomes and not inputs. The new Planning Performance Framework (PPF) is used to provide data focusing on outcomes, it supplements the Scottish Government statistics which now focus on average time taken. Applications, no matter the size, must be considered appropriately and take account of the public's views and the impacts on communities – one size will not necessarily fit all.

6. Setting an arbitrary time limit does not recognise the importance of achieving good outcomes for communities given the long term impacts of planning decisions on place-making, poor quality planning decisions increase costs to both local authorities and businesses. Local authorities have to deal with failure demand which has much greater costs than a reduced fee income and causes a negative impact on the well-being and outcomes of communities while businesses have to deal with have to deal with the implications of rushed decisions. For example, at the Amazon development in Fife, Amazon did not want a quick decision, they were content with a 7 month decision time for a quality decision and outcome rather than rushed in 3 months.

7. The proposed penalty clause focuses on inputs, in one element of the planning system in the Development Management side. It does not focus on outcomes, a key feature of which is that 93% of all planning applications are approved. Audit Scotland identified an unsustainable funding gap in resourcing the development management system. The recent fee increase begins to address this but was welcomed only as an interim measure. It should be noted that this was supplemented by additional one-off funding for renewables in some councils. This is not a sustainable solution and an appropriate fee increase, as proposed in the Scottish Government's consultation last year, is what is required.

8. Some local authorities advise that the fee increase has meant the pace of anticipated cuts has been slowed. However the planning service is subsidised by the taxpayer, it does not currently operate on a full cost recovery basis and the fee regime does not address the funding gap faced by authorities particularly when dealing with complex or locally controversial applications, such as for wind turbines, two examples of which are appended to this report. The Audit Scotland report 'Modernising the Planning System' published in September 2011 showed that cost recovery had fallen from 81% in 2004/05 to 50% in 2009/10. It is worth noting that this report focused only on the costs of development management and once you add in the other elements, such as development planning, cost of committees etc. the funding gap is even greater (as showing in the examples in appendix one). The recent 20% fee increase only slightly improves this position. It is vital that a sustainable fee regime is developed and introduced as soon as possible to deal with the anomaly of tax payers subsidising large developers. Ironically, councils which

have been very successful in attracting inward investment are borrowing more from the corporate pot to subsidise the shortfall in planning income, as it is the large developments which have the lowest level of cost recovery. This has a direct impact on the services a council can provide and cannot be sustained.

9. Moreover, even if good performance is to be dictated by the time taken, under this proposal Planning Authorities are being held accountable for all delays even when they have no control over them. As shown by the Scottish Government's planning data (Appendix Two) a key problem lies in securing legal (S75) agreements, not in reaching a Planning Permission (which is granted subject to legal agreement). The requirement for a legal agreement for major applications consistently doubles and almost triples the time taken to issue a decision. Such delays in this proposal are being attributed to planning authorities whereas they may be due to other stakeholders and arise due to a failure to secure development finance in the current financial climate. The planning penalty clause does not ensure that responsibility is appropriately attributed given the potential number of stakeholders and variables involved.

10. Additionally there is no indication of or limit on the potential level of fee reduction and it is therefore possible that the Minister could prevent a planning authority from charging any fees, reducing income to local government by £22.3m, which could have a serious impact on a local authority and all the other services they provide. Any reduction in fees will have a detrimental effect on service quality or any shortfall would have to be met from other front line services in local government, further impacting on outcomes for communities.

11. Regularly changing fees within local authorities if they become 'poor performers' will not help local authorities improve and will make it difficult for them to plan future spending, nor will it benefit businesses who may face varying fee levels. This will create inconsistencies across Scotland, and is at odds with as one of the principles of better regulation, to promote consistency.

12. The Financial Memorandum recognises that there is no clarity as to whether reducing fees may have a consequential impact on the number of applications submitted to poor performing authorities, if this were to reduce the number of applications this would have serious negative consequences for local economic recovery. We do not believe that the planning fee is the defining factor in determining development viability. There is no indication that the fee of £40,000 cited by one local authority for a £0.75 billion investment would have altered the investment decision, nor that lower fees lead to an increase in developments as fees are such a small part of major schemes. However, reducing fees is more likely to result in under resourced planning authorities which are unable to make quality decisions for communities.

13. Moreover, a penalty clause is not consistent with the principle of preventative spending and dilutes local democratic decision making and accountability. An approach which enables appropriate consideration of applications leading to quality outcomes, would in turn lead to reduced resources later relating to reduced failure demand. Focusing on speed is inconsistent with this and will lead to poorer

outcomes for communities and increased costs for local government. This runs contrary to COSLA's vision and objectives for local government.

14. In conclusion COSLA do not agree that the Financial Memorandum adequately reflects the financial impacts of a planning penalty clause and the resulting negative impact that can have on outcomes. It is also not possible to predict whether every national standard introduced under the enabling power will be cost neutral, therefore local authorities should be able to costs to affect local variation where required.

Appendix One – Planning Costs

Case study 1 - Single 74m Turbine – Local Development – Fee £638
– 167 Letters of Objection
– 59 Letters of Support
– Landscape, Biodiversity and Archaeological Advice
– Neighbour Notification, Acknowledgement of representations and Notification of Decision (this alone exceeds the fee paid)
– Coordination, Assessment of submissions and proposal, site visit(s) report by Planning Officer

Total Cost to Council minimum £3,000
FUNDING GAP of at least £2,372
COST RECOVERY at 21%

Case Study 2 - Commercial Wind farm of 12 x 126m turbines – Major Development – Fee £14950
– 247 Letters of Objection
– 198 Letters of Support
– Environmental Impact Assessment requiring Roads Engineering, Noise, Landscape, Natural Heritage, Archaeological Advice…etc.
– External consultation with SNH, H&SE, MOD….etc.
– Public Meetings
– Neighbour Notification, Acknowledgement of representations and Notification of Decision
– Coordination, Assessment of submissions and proposal, site visits, report by Planning Officer
– Committee process including Committee Site Visit

Total Cost to Council minimum £45,000
FUNDING GAP of at least £30,000
COST RECOVERY at 33%

Appendix Two – Scottish Government paper to the High Level Group

Statistics – Headline Figures

Major Developments without processing agreements (e.g. applications over 2ha or 50 houses)

- In Q1 decisions on all 83 major developments took an average of 65.4 weeks, by Q3 this had reduced to 58.9. When applications made before August 2009 (legacy cases) were removed the timescale reduced to a 36 week average.

- Average timescales for major housing developments had reduced from 104 weeks in Q1 to 66.8 weeks in Q3 (an 8 month reduction). This latest figure is almost halved when legacy cases are removed showing a 33.8 week average timescale

- The requirement for a legal agreement for major applications consistently doubles and almost triples the time taken to issue a decision. 98 weeks in Q1, 131 in Q2 and 103 in Q3. This compares to 45, 54.8 and 36.4 weeks respectively for those applications not requiring a legal agreement.

Local Developments without processing agreements (e,g, applications under 2 ha or 50 houses)

- Decision making on local developments has remained fairly static with around a 12 week average.

- Local developments with legal agreements have reduced from 83 weeks in Q1 to 65.2 in Q2, this is still almost 6 times longer than those applications not requiring an agreement (11 weeks). When legacy cases are removed this falls to 48.5 and 10.9 weeks respectively.

- Local development (non-householder) reduced by just over a week between Q1 and Q3, from 16.9 to 15.5 weeks. This included data on 30 applications submitted prior to August 2009. When removed this reduced timescales to 14.1 weeks.

- Across all 3 quarters, decisions made under two months in this category have remained static at around 55% with 7 weeks the average time taken to come to a decision on these applications. Applications taking longer than 2 months have reduced by 2 weeks to 26.4 across the same period, this is reduced to 23 weeks when legacy cases are removed.

- Across all 3 quarters local housing developments have shown a 5% increase in the number decided within 2 months from 45.4% to 50.4%, and the average timescale for these has fallen slightly from 7.4 to 7.1 weeks.

- Householder applications remain fairly consistent across all quarters with an 8 week average for decision making, reducing to 6.6 weeks in 86% of applications in Q3.

Processing agreements

- 33 applications during the period had processing agreements attached to them. 28 of them were decided within the agreed period.

	Quarter 1		Quarter 2		Quarter 3	
	No. of Apps	Avg (weeks)	No. of Apps	Avg (weeks)	No. of Apps	Avg (weeks)
All Major	83	65.4	89	80.6	80	58.9
With Legal Agreement	22	98.6	30	131.3	27	103
No Legal Agreement	49	45	59	54.8	53	36.4
Major Housing	27	104	34	83.5	32	66.8
All Local	7815	12.6	7656	11.7	7385	12.3
With Legal Agreement	129	83.4	94	66.1	110	65.2
No Legal Agreement	6979	11.1	7562	11	7275	11.5
Local non-householder	4054	16.9	4069	14.9	4110	15.5
Under 2 months	2221 (54.8%)	7.1	2184 (53.7%)	6.9	2295 (55.8%)	7
Over 2 months	1833 (45.2%)	28.8	1885 (46.3%)	24.2	1815 (42.2%)	26.4
Householder	3761	8	3587	8	3275	8.2
Under 2 months	3269 (86.9%)	6.8	3064 (85.4%)	6.7	2819 (86.1%)	6.6
Over 2 months	492 (13.1%)	16	523 (14.6%)	15.8	456 (13.9%)	17.7
Processing Agreements	No of Apps	% met	No of Apps	% met	No of Apps	% met
Major	16	66.7	8	100	6	100
Local	2	n/a	0	-	1	100

All figures include legacy cases prior to 2009 for consistency. Staff in CAS are working on revising figures from Q1 and Q2 to remove applications submitted prior to August 2009.

FINANCE COMMITTEE CALL FOR EVIDENCE

REGULATORY REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL

Consultation

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. The Council submitted comments to the consultation in autumn 2012. The response related to issues affecting Environmental Services specifically. No comments were made on any financial assumptions as there was only a partial regulatory impact assessment contained in the consultation.

2. The Council's Planning Services has responded to previous consultation exercises through Heads of Planning Scotland (HOPS) with COSLA. Comments were made supporting COSLAs resistance to the introduction of a penalty clause.

Do you believe your comments on the financial assumptions have been accurately reflected in the FM?

3. Not Applicable as no comments were made through the consultation.

Did you have sufficient time to contribute to the consultation exercise?

4. Yes. The consultation was issued in August with responses to be submitted by 26 October.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

5. The Council feel that the financial implications have been accurately reflected in the Financial Memorandum in terms of Environmental Regulation. The introduction of monetary penalties is welcome on the basis that the polluter should pay and a new ability to recover costs will assist SEPA in its regulatory activity.

6. In terms of planning authorities functions, the Council recognise that Ministers require to demonstrate that if they are to support further increases in fees, then some means to address 'poorly' performing authorities is required.

7. Finally, with regards to street trader's licences, the Council may need to review its position concerning certificates of compliance for mobile food businesses and also review its charging policy.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

8. The Financial Memorandum states that overall there will be no obvious on-going direct costs to local authorities. However, should the planning fees provision

be used against the Council there could be a financial loss. The Council support COSLA's resistance to the introduction of a penalty clause.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

9. The Council acknowledges it will require to meet any costs incurred through failure to comply with regulation or through poor performance. There are no further costs likely to be incurred by the Council other than those mentioned above.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

10. The Financial Memorandum does not refer to timescales and cost estimates over time for Councils. As the financial impact is only likely for enforcement measures for breach of Environmental regulation and Planning penalties, these would not be expected within the Financial Memorandum.

Wider Issues

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

11. The Financial Memorandum acknowledges both the Environmental regulation provisions and Planning penalties that could potentially be incurred, although not quantified.

12. The Council is unaware of any further costs.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

13. The Council is unaware of any further costs.

Other Comments

14. The Council would seek to express its concerns in relation to street trader's licences and the delays that could be caused in trying to obtain a certificate if it is lost / mislaid by the trader. At present, it is straightforward and can be dealt with internally, however this will not be the case if a certificate is issued by another local authority.

15. Finally, the Council wish to note that any further obstacles or costs passed on to businesses is unhelpful given the current economic climate.

FINANCE COMMITTEE CALL FOR EVIDENCE

REGULATORY REFORM (SCOTLAND) BILL: FINANCIAL MEMORANDUM

SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Did you take part in either of the Scottish Government consultation exercises which preceded the Bill and, if so, did you comment on the financial assumptions made?

1. The Crown Office and Procurator Fiscal Service (COPFS) did not provide a public response to either consultation exercise but has been fully engaged in working with Scottish Government (SG) and the Scottish Environment Protection Agency (SEPA) prior to the introduction of the Bill. That engagement included discussion of certain financial assumptions made in Part 2 ("Environmental Regulation") of the Financial Memorandum (FM).

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

2. Yes.

Did you have sufficient time to contribute to the consultation exercise?

3. Yes.

COSTS

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the FM? If not, please provide details?

4. Yes.

Do you consider that the estimated costs and savings set out in the FM and projected over 15 years for each service are reasonable and accurate?

5. The estimated costs and savings applicable to COPFS set out in the FM are reasonable and accurate.

If relevant, are you content that your organisation can meet the financial costs associated with the Bill which your organisation will incur? If not, how do you think these costs should be met?

6. Yes.

Does the FM accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

7. Yes. The estimate of one-fifth of cases currently reported to and prosecuted by COPFS but which may be suitable for an enforcement measure in the future can, of course, only be an approximation but is an appropriate estimate. Furthermore, the analysis of one-fifth as constituting 7 cases a year reflects current figures: SEPA reported 33 cases to COPFS in 2009-10; 37 in 2010-11 and 37 in 2011-12.

WIDER ISSUES

Do you believe that the FM reasonably captures costs associated with the Bill? If not, which other costs might be incurred and by whom?

8. COPFS is only able to comment on the costs relevant to it and, to an extent, the wider criminal justice system. The FM reasonably captures these costs.

9. Paragraph 17 of the FM does indicate that the new offence of causing or permitting serious environmental harm and the new vicarious liability offences will not lead to an increase in prosecutions and therefore costs. The example specified explains why that is so in relation to causing or permitting serious environmental harm.

10. It should also be clear that COPFS will utilise the vicarious liability provisions when the evidence and pubic interest supports a prosecution for these new offences. It is anticipated that, in the main, these charges will be additional to charges already brought in such cases against the main actor. It is therefore not anticipated that the number of prosecutions will increase.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

11. There will be some small cost to COPFS in developing the Lord Advocate's Guidelines to SEPA and in training the specialist environmental prosecutors of the Wildlife and Environmental Crime Unit on the new provisions but these will be accommodated within existing COPFS budget.

The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

40th Report, 2013 (Session 4)

Regulatory Reform (Scotland) Bill

Published by the Scottish Parliament on 25 June 2013

The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
(a) any—
(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
(ii) [deleted]
(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
(c) general questions relating to powers to make subordinate legislation;
(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Christian Allard
Nigel Don (Convener)
Mike MacKenzie
Hanzala Malik
John Pentland
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt

The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

40th Report, 2013 (Session 4)

Regulatory Reform (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 7 May, 28 May and 25 June 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Regulatory Reform (Scotland) Bill at stage 1 ("the Bill")[1]. The Committee submits this report to the Economy, Energy and Tourism Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill ("the DPM")[2].

OVERVIEW OF BILL

3. This Bill was introduced on 27 March 2013. The Economy, Energy and Tourism Committee is the lead Committee. The Rural Affairs, Climate Change and Environment Committee is a secondary Committee (for the provisions relating to SEPA and environmental regulation (Part 2), and other parts of the Bill relevant to the Committee's remit).

4. The Bill takes forward the 2011 Scottish Government commitment to improve the way regulations are applied in practice across Scotland, and to take forward the Government's Better Regulation agenda. The primary purpose is described in the DPM as "to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment."

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[1] Regulatory Reform (Scotland) Bill available here: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd.pdf

[2] Regulatory (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Delegated_Powers_Memorandum_260313.pdf

5. At its meeting of 7 May the Committee agreed to write to Scottish Government officials to raise questions on the delegated powers. This correspondence is reproduced at Annex A. At that same meeting, the Committee agreed to take oral evidence on other aspects of the delegated powers from Scottish Government officials.

6. The oral evidence session took place 28 May 2013. Following the evidence session the Committee agreed to write to the Scottish Government in order to further clarify certain points. The correspondence is reproduced at Annex B.

7. This report considers each of the delegated powers contained within the Bill. The report is structured, so that it first considers those provisions with which the Committee is content, before considering separately Parts 1 and 2 of the Bill. Commentary on Parts 1 and 2 of the Bill is split into views on the generality of the powers within the respective Parts and more specific comments on the individual powers within those Parts.

DELEGATED POWERS PROVISIONS

8. As noted above the Committee considered each of the delegated powers in the Bill.

9. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 7- Power to modify list of regulators in schedule 1

Section 12 – fixed monetary penalties

Section 15 – variable monetary penalties

Section 19(1) – enforcement undertakings

Section 19(3) – enforcement undertakings

Section 26(5) – compensation orders against persons convicted of relevant offences

Section 31(6) – significant environmental harm: offence

Section 31(9) – significant environmental harm: offence

Section 47(2) – commencement

Schedule 2, paragraph 29 - power to specify EU instruments for the purposes of paragraph 22

Schedule 2, paragraph 30(4) – substitution of new maximum fine for a summary offence

10. Subsequently, in light of the evidence received by the Committee, it agreed that it did not need to draw the Parliament's attention to the following delegated power:

Section 3(2) – Power to direct regulator who fails to comply with regulations

11. The Committee's comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

PART 1 (REGULATORY FUNCTIONS)

12. The Committee took evidence from officials at its meeting on 28 May 2013 when it considered the delegated powers in Part 1 and the powers to make regulations in Part 2. The evidence taken on Part 2 is considered separately. Consideration of Part 1 in this report begins with a summary of the Committee's main recommendations as regards this part; followed by general exposition of this section; and finally, commentary on the delegated powers within Part 1.

Part 1 – summary of recommendations

13. Set out below is a summary of the recommendations on Part 1. These are explored in greater detail later in the report.

- **The powers in sections 1 and 2 are broad powers, to make any provisions which the Scottish Ministers consider will encourage or improve consistency in the exercise by the various regulators listed in schedule 1, of regulatory functions as those are defined in section 1.**

- **The Committee has some concern that the powers in sections 1 and 2 are drawn more widely than the policy objectives for the powers, as those objectives have been explained by officials in evidence. It considers that the Scottish Government has not fully justified the proposed scope of these powers. The Committee recommends that this should be considered by the lead committee and Parliament in the further scrutiny of the Bill.**

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

- **The Committee agrees that the powers in sections 1 and 2 should be subject to the affirmative procedure and subject to the**

consultation requirements in section 1(3), if the Parliament determines that the powers are acceptable in principle.

- **The Committee also draws to the attention of the lead committee, however, that if the regulations were to propose to substantially amend, remove or create new regulatory requirements overseen by a regulator, the affirmative procedure will not enable the Parliament to amend specific provisions in the proposed instrument, as could be done if primary legislation was necessary. A "super-affirmative" form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval.**

- **The Committee has some concern that the matters which regulators will require to have regard to, in relation to contributing to the achievement of sustainable economic growth in the exercise of functions and in regard to the exercise of their regulatory functions more generally, will be set out across both the guidance under section 4 and the code of practice under section 5.**

  Quite different procedures for Parliamentary scrutiny would apply to these documents, with the guidance not being subject to any scrutiny, and the section 5 code requiring to be approved by resolution and subject to consultation requirements. The Committee accordingly draws this to the attention of the lead committee.

- **The Committee considers that there should be provision in the Bill that the guidance to regulators which would be issued under section 4, and the code of practice which would be issued under sections 5 and 6, must be published both on issue, and when any revisions are made.**

Part 1 – outline of provisions

14. Section 1 (read with section 2) confers powers on the Scottish Ministers to make regulations containing any provision which they consider will encourage or improve consistency in the exercise of regulatory functions by a regulator in schedule 1 ("a listed regulator"). This relates to regulatory functions conferred by or under an enactment. It includes the power to modify any enactment, apart from sections 1 to 3 and 7 (section 44(2)).

15. The affirmative procedure applies to the powers in section 1 (by section 44(4)(a)).

16. The list in Schedule 1 covers local authorities, Accountant in Bankruptcy, Food Standards Agency, Healthcare Improvement Scotland, Scottish Charity Regulator, SEPA, Scottish Housing Regulator, Scottish Natural Heritage, Social Care and Social Work Improvement Scotland, and Visit Scotland.

17. Section 2 sets out in considerable detail what further provisions may be contained in the regulations. This is, however, without prejudice to the general

power to make provisions that Ministers consider will encourage or improve consistency in the exercise by regulators of regulatory functions.

18. The regulations may require a listed regulator to impose, set, secure compliance with or enforce any requirement, restriction, condition, standard or outcome (a "regulatory requirement"), including a newly created one, to the extent that the regulator has the power to do so. In addition to imposing a new regulatory requirement, the regulations may also amend or remove a requirement that was imposed or set at the discretion of a regulator.

19. However, if a current enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be amended or removed if the regulations include provision that has an equivalent effect to that enactment (section 2(4)). The regulations cannot therefore amend or remove a mandatory regulatory requirement which the regulator must (by law) impose or set, unless alternative provision is made having equivalent effect (section 2(3) and (4)).

20. Requirements to encourage or improve consistency, as above, may be in the way particular regulators, their employees or agents impose, set or secure compliance with regulatory requirements, or in the way in which different regulators, their employees or agents, so impose or secure compliance (section 1(4)).

21. Before making regulations, Ministers must consult—

(a) the regulators to which they would apply;

(b) such persons or bodies as appear to Ministers to represent the interests of persons substantially affected by the proposals;

(c) such other persons or bodies as Ministers consider appropriate.

22. The definitions of "regulatory functions" and "regulatory requirements" for the purposes of Part 1 are contained in section 1(5) and (6).

23. Section 4(1) places a duty on each regulator listed in schedule 1, in the exercise of its regulatory functions, to contribute to achieving sustainable economic growth, except to the extent that that would be inconsistent with the exercise of those functions.

24. Section 4(2) provides that the Scottish Ministers may give guidance to regulators with respect to the carrying out of that duty. Regulators must have regard to the guidance.

25. Section 7 confers a power on the Scottish Ministers by order to modify the list of regulators in schedule 1, to add a person, body or office-holder having regulatory functions to the list, (or a description of such persons); to remove or amend an entry; or to specify that a function is or is not to be a regulatory function for the purpose of section 1 (power as respects regulatory consistency), section 4 (Regulators' duty in respect of sustainable economic growth) or section 5 (code of practice on exercise of regulatory functions).

26. Negative procedure applies to an order under section 7, unless it adds a regulator to schedule 1 or adds (or extends) a regulatory function of a regulator, in which case affirmative procedure applies. This is on the basis that only an addition will extend the scope of the provisions, to other bodies or functions.

Part 1 – commentary

Sections 1 to 3- powers as respects consistency in regulatory functions

27. The policy justifications as provided by the Scottish Government in oral evidence to the Committee are narrower in scope than the powers as framed in sections 1 to 3. The Delegated Powers Memorandum gives as the reason for seeking these powers—

> "…to provide sufficient flexibility to enable measures to encourage or improve regulatory consistency to be taken quickly and efficiently in response to changing circumstances without having to resort to primary legislation"[3].

28. In evidence, however, the Scottish Government officials explained that—

> "In broad terms, the background to part 1 of the bill is to promote consistency in regulation across Scotland and to empower regulators to take into account, in the performance of their duties, economic considerations, in addition to their other statutory functions, so that there is an element of equity.
>
> We propose to take powers to make regulations that would represent national standards of regulatory practice in areas that are yet to be identified."[4]

29. The Committee notes that, in the definition of "regulatory functions" in section 1(5) for the purposes of Part 1, such functions extend beyond setting standards or outcomes for activities, to other requirements, restrictions or conditions, guidance, or the enforcement of requirements, restrictions, etc. Similarly, "regulatory requirements" in terms of section 1(5) extends beyond standards or outcomes to include any requirement, restriction, or condition, in respect of which a regulator listed in the Bill, has regulatory functions.

30. Accordingly, sections 1 and 2 include powers to amend or remove existing regulatory requirements, or to create new ones in respect of which a regulator will have regulatory functions, or to require regulators to enforce compliance with new requirements where presently they may have discretion as to methods of enforcement. This is in addition to powers to secure consistency in how regulators enforce standards (or existing requirements) in particular business areas. "Regulatory functions" of a regulator in terms of section 1(6) also include providing goods and services, and employing persons.

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[3] Regulatory Reform (Scotland) Bill Delegated Powers Memorandum (SP Bill 26-DPM), Session 4 (2013), paragraph 16. Available at: http://www.scottish.parliament.uk/S4_Bills/Delegated_Powers_Memorandum_260313.pdf

[4] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 934.

31. The evidence from the Scottish Government officials also indicated that the policy intention is more to provide regulatory consistency for a particular area of business in Scotland, rather than consistency across various or all areas of regulation. A specific example was given of a national standard for the inspection of mobile food vans, and possibly wider in relation to local authority licensing of activities.[5] The full scope of the areas of regulatory practice which could be subject to the regulations is yet to be identified.

32. The Committee takes the view that ultimately the policy justifications for the powers in sections 1 and 2, and whether they will be acceptable by the Parliament, are not matters for the Committee to rule on.

33. The Committee also considered the scrutiny procedures applied to the exercise of the powers. The Government officials indicated that no consideration was given to whether a "super-affirmative" form of procedure could be an appropriate level of scrutiny for any proposals in regulations to create new regulatory requirements.[6] The Committee agrees that the powers in sections 1 and 2 should be subject to the affirmative procedure, and subject to the consultation requirements in section 1(3), if the Parliament determines that the powers are acceptable. This is however subject to the following comment in relation to the use of "super-affirmative" procedure.

34. Any "regulatory requirements" which could be amended, removed or newly created by regulations under these powers need to be requirements in respect of which a regulator listed in the Bill has regulatory functions conferred by or under enactment. However, such proposals have the potential to be very significant, and the scope of activities to which the powers could be applied is as yet uncertain.

35. **If the regulations were to propose to substantially amend or remove existing regulatory requirements overseen by a regulator, or create new ones, the affirmative procedure will not enable the Parliament to amend specific provisions in the proposed instrument, as could be done if primary legislation was necessary. A "super-affirmative" form of procedure would have a benefit (compared with the affirmative procedure) of enabling the Parliament to consider and report on draft proposed regulations, and the Scottish Government would require to consider the views of Parliament on the draft proposals, before finalised regulations are laid for approval. The Committee therefore draws this to the attention of the lead committee for consideration.**

36. **The Committee would not go so far as to recommend, however, that the exercise of all powers under sections 1 and 2 should be subject to a "super-affirmative" form of procedure. That procedure would, however, have the benefit outlined above, were the proposals to have significant effects, such as substantially amending, removing or creating new regulatory requirements overseen by a regulator. It is noted that to be within the scope of the powers, Ministers must properly consider that the regulations will encourage or improve the consistent exercise by regulators of regulatory**

[5] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 934.
[6] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 940.

functions. Therefore, the powers do not enable any amendment, removal or new creation of regulatory requirements to be proposed, without that test being satisfied.

Section 2(7) – power to direct modifications to the regulations

37. Section 2(7) confers a power on the Scottish Ministers, if they consider it necessary or expedient, to direct that for a period no longer than 6 months from the day on which the direction is given, a provision in the regulations is not to apply to a regulator, or is to apply with any modifications or conditions specified in the direction.

38. The Explanatory Notes to the Bill (paragraph 22)[7] state that this power is to enable the regulations to be adjusted quickly to take account of unforeseen circumstances. However, the power permits any such modification to how the regulations apply to a regulator and such modification is not subject to Parliamentary scrutiny. Any modification is also not for a "trial period" of up to 6 months from when the regulations would come into force. The period will have effect from the date when Ministers determine to issue a direction.

39. **As above, in the view of the Committee whether the specific power in section 2(7) to direct modification of how the regulations apply to a regulator should be given to Ministers is a matter of policy for determination by the Parliament.**

40. **The Committee draws to the attention of the lead committee that a power in this form, permitting any such modification for a period of up to 6 months from date of direction, is very unusual. The exercise of the power is not proposed to be subject to Parliamentary scrutiny.**

41. **The Committee considers that any such direction must be published on being made.**

Section 4 – regulators' duty in respect of sustainable economic growth

42. The Committee queried, in the evidence session with the Scottish Government officials, how Ministers intend to use the power in section 4 to issue guidance to regulators with respect to the duty of each regulator to contribute to sustainable economic growth.

43. The evidence from the officials indicated that it is expected that the principal source of guidance to regulators in relation to the exercise of their regulatory functions will be the code of practice provided for in sections 5 and 6.[8] The intention is for Ministers to give guidance under section 4 on "ad hoc issues" when that is required. The written correspondence from the Scottish Government on this power, of 17 May 2013, also indicates that section 4 is intended to enable

[7] Regulatory Reform (Scotland) Bill Explanatory Notes (SP Bill 26-EN), Session 4 (2013), paragraph 22. Available at: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-en.pdf

[8] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 940.

Ministers to give additional, more specific guidance to regulators, supplemental to the code under section 5.

44. The Committee observes that, despite the intention that the guidance will be supplemental to the code of practice, each will relate to differing duties of regulators. The code will, in terms of section 5, relate to the exercise of regulatory functions by a regulator, depending on which regulators and functions are specified in it. The guidance will relate to the carrying out of the new duty proposed in section 4(1). In exercising its regulatory functions, each regulator listed in Schedule 1 (from time to time) must contribute to achieving sustainable economic growth, except where it is inconsistent with those functions to do so.

45. "Contribution to achieving sustainable economic growth" is not defined for the purposes of section 4, nor what this means in connection with the functions of a specific regulator. Accordingly, the guidance will provide the content for the meaning of this duty, as it applies to each regulator and regulators must have regard to the guidance in exercising their regulatory functions.

46. The evidence provided by the Scottish Government officials, and the written correspondence to the Committee of 17 May and 5 June 2013, did not provide further information on how the guidance could expand on the contents of this duty, apart from that it will give guidance on additional "ad hoc issues". There is no provision in the Bill that the matters in guidance under section 4 will be supplemental or ancillary to the matters in the code under section 5.

47. Accordingly, the whole contents of the matters which regulators will require to have regard to in relation to contributing to the achievement of sustainable economic growth, and in connection with the exercise of their regulatory functions more generally, will be set out between the guidance and the code of practice. However only the section 5 code is subject to Parliamentary scrutiny and approval. The guidance is not subject to any such scrutiny.

48. **The Committee therefore has some concerns as to this assimilation of the contents of matters which regulators will need to have regard to, between 2 documents to which quite different levels of Parliamentary scrutiny will apply (with none at all proposed in the case of the section 4 guidance). The Committee accordingly draws this to the attention of the lead committee.**

49. **The Committee also considers that both the section 4 guidance and the section 5 code of practice must be published, on issue and when any revisions are made.**

PART 2 - ENVIRONMENTAL REGULATION

50. As noted previously, the Committee also took oral evidence from Scottish Government officials as regards Part 2 of the Bill. This section explores the Committee's views on Part 2 insofar as the delegated powers within that Part are concerned. As with the approach to Part 1, this section of the report begins with a summary of the Committee's recommendations on this Part; followed by an exposition this Part; and finally commentary on the delegated powers in Part 2.

51. The order-making powers in Part 2 in relation to enforcement, and the powers in Part 3 (miscellaneous) were considered by written correspondence (Annex A). Those powers are therefore addressed separately below.

Part 2 – summary of recommendations

52. Set out below is a summary of the recommendations on Part 2. These are explored in greater detail later in the report.

- **The powers in Part 2 of the Bill are very broad powers which would enable the Scottish Ministers to make provisions for, or in connection with, protecting and improving the environment, by regulations under section 10 if they so propose. The powers would include the ability to define and regulate new "environmental activities", defined in section 9 to mean any activities that are capable of causing or liable to cause environmental harm, and activities connected with those activities.**

  The Committee draws to the attention of the lead committee that in its view, the effect of these proposed powers would be that the Scottish Ministers could propose that subordinate legislation could make any provisions for, or in connection with, protecting and improving the environment, in general. This would remove the necessity for primary legislation in those circumstances where it is currently required. It would also however remove the ability of the Parliament to insist on primary legislation in those circumstances, (where the Scottish Ministers propose subordinate legislation under the Bill rather than new primary legislation), and the Parliament's corresponding ability to amend the proposals, as opposed to being restricted to a right to either approve or annul them.

  In such circumstances where provisions which currently require primary legislation are replaced by delegated powers, a "super-affirmative" form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval. While scrutiny by "super-affirmative" procedure is not recommended for the exercise of all powers under section 10, in the view of the Committee this should be considered further in relation to those circumstances where the need for primary legislation will be removed by Part 2 of the Bill. Given the considerable list of possible provisions which could be made by regulations under section 10 and schedule 2, this is a complex matter.

- **The Committee also has some concerns as to whether the procedures proposed in relation to the powers in section 10 and schedule 2 provide for full and adequate Parliamentary scrutiny of the respective regulations in all cases.**

  The Committee therefore recommends that the Scottish Government should also fully consider in advance of Stage 2 in which circumstances the exercise of the powers would be more

appropriately scrutinised by the Parliament by means of the affirmative procedure, rather than the negative procedure. Again given the width of the powers, this is a complex matter. The Committee considers that there should be a general review, but it should include proposals which:

(a) further define "environmental activities" under the Bill, or specify other activities as such under paragraph 1 of Part 1, Schedule 2, and then prohibit or regulate them in some manner;

(b) provide for an emissions scheme under paragraphs 2 and 24 of that Part;

(c) provide for schemes for fees or charges under paragraphs 9, 13 or 28 of that Part;

(d) create new offences in terms of paragraph 19 of that Part;

(e) permit provisions in terms of paragraph 22 corresponding or similar to provisions made by or under Part 2 of the Environmental Protection Act 1990 (waste on land), subject to such modifications as the Scottish Ministers consider appropriate, or provisions which modify the effect of the Radioactive Substances Act 1993.

- **The Committee accepts, however, that where the application of the affirmative procedure would result in a "trading up" of the scrutiny procedure compared with that provided for in existing legislation which could (prior to the Bill) regulate similar activities in a similar manner, then the existing procedure could be retained.**

- **The Committee agrees that where regulations would textually amend an Act, the affirmative procedure would apply.**

- **The Scottish Government has indicated in a letter to the Committee of 5 June 2013 that it proposes to amend section 44 at Stage 2 to provide that the first set of regulations to be made under section 10 would be subject to the affirmative procedure, but subsequently the negative procedure would apply. The Committee is not content with this proposal for the reasons set out in paragraphs 68 and 69 of this report.**

- **The Scottish Government has not provided the Committee with sufficient justification why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is either necessary or appropriate. The powers in section 2(2) of the European Communities Act 1972 already enable provisions by regulation to be made by the Scottish Ministers, in implement of EU obligations generally.**

The Committee also draws to the attention of the lead committee that those powers in section 2(2) are exercisable subject to a choice of Parliamentary scrutiny by the affirmative or the negative procedure, and the Scottish Government is accountable to the Parliament for making the appropriate choice. The exercise of the power in paragraph 22(1) is however subject to the negative procedure, unless the proposals textually amend an Act. The exercise of powers under section 2(2) are also subject to certain restrictions, which are not included in the Bill.

It is not clear to the Committee why the exercise of the power in paragraph 22(1) should differ in those respects from the exercise of the powers under the 1972 Act.

Part 2 - outline of provisions

53. Section 10(1) allows the Scottish Ministers by regulations to make provision relating to protecting and improving the environment generally. This includes for any of the purposes listed in Part 1 of schedule 2.

54. It is proposed that the negative procedure will apply to regulations, unless there is textual amendment of primary legislation, when the affirmative procedure applies (section 44(4) and (5)).

55. Regulations may, for example, provide for the scope and extent of environmental activities. "Regulated activities" are environmental activities in respect of which the regulations make provision. Regulations may provide for a prohibition on carrying on specified regulated activities, for a prohibition on carrying on an activity without authorisation; for different levels of authorisation (permit, registration, notification, or compliance with general binding rules); for procedural requirements; for administrative charges by regulators for public registers; for enforcement powers (including statutory notices); for offences for failure to comply with regulatory requirements; and for measures equivalent to those that might be made under the European Communities Act 1972.

56. "Environmental activities" are defined in section 9 to mean activities that are capable of causing, or liable to cause, environmental harm, and activities connected with such activities. They are also defined to include provision implementing any EU or international obligations relating to protecting and improving the environment (for example, the Water Framework Directive (Directive 2000/60/EC), the Waste Framework Directive (Directive 2008/98/EC), the Basic Safety Standards Directive (Directive 96/29/Euratom), and the Industrial Emissions Directive (Directive 2010/75/EU)).

57. This proposes therefore a general power to implement EU or international obligations (by regulations always subject to the negative procedure, except where textual amendment is proposed to primary legislation).

58. Ministers must before making any regulations consult any regulator on whom functions will be conferred, and such other persons as they think fit (including

persons representative of the interests of local government, industry, agriculture, fisheries or small business, as considered appropriate) (section 11).

Part 2 - commentary

The policy justifications provided by the Scottish Government for the broad powers to make environmental regulations

59. The officials from the Scottish Government explained in evidence to the Committee that the Bill seeks to simplify the legislative landscape in relation to powers to make environmental regulations. In particular the approach taken proposes to combine the broad powers which are available in the Pollution Prevention and Control Act 1999 ("the 1999 Act") to regulate pollution control and prevention with a more proportionate scheme of regulation (compared with that in that Act), which allows for different types of regulation apart from permits. The Water Environment and Water Services (Scotland) Act 2003 ("the 2003 Act") contains, in respect of control of the water environment, a more proportionate scheme, so far as enabling other types of controls apart from permits, such as licensing or registration schemes, or under general binding rules.[9]

60. The officials also explained that the proposed new powers are intended to replace and consolidate the waste regimes in the Environmental Protection Act 1990 (Part 2) and the Radioactive Substances Act 1993.[10]

61. The Committee takes the view that ultimately the policy justifications for the proposed enhanced powers to make regulations under section 10 and schedule 2, and whether they will be acceptable by the Parliament, are not matters for the Committee to rule on.

62. The Committee notes, however, that in proposing the approach which is outlined above, the powers to make environmental regulations would be considerably broadened, as well as consolidated. Indeed in the view of the Committee, the effect would be that the Scottish Ministers could propose that subordinate legislation could make any provisions for, or in connection with, protecting and improving the environment, in general. This would remove the necessity for primary legislation in those circumstances where it is currently required. It would also, however, remove the ability of the Parliament to insist on primary legislation in those circumstances, where the Scottish Ministers propose subordinate legislation under the Bill rather than new primary legislation, and the Parliament's corresponding ability to amend the proposals, as opposed to having the right to either approve or annul them.

63. The officials sought to reassure the Committee in evidence that any proposals for regulations would be fully consulted on. Attention was drawn to the recent, detailed scrutiny of regulations made under the Pollution Prevention and Control Act 1999.[11]

[9] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 942.
[10] ibid
[11] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 945.

64. **The Committee considers, however, that with the proposed widening of the powers to enable the regulation of environmental activities for any of the purposes listed in schedule 2 of the Bill, the provisions raise a matter of principle, as to the ability of the Parliament to scrutinise or amend any proposals coming forward in detail. Under the proposals, regulations could for example propose to further define "environmental activities" under the Bill, or specify other new activities as such (under paragraph 1 of Part 1, Schedule 2), and then prohibit or regulate them in some manner. The recommendations above therefore draw this to the attention of the lead committee and the Parliament.**

The Parliamentary scrutiny procedure applied to regulations under Part 2 (section 10 and schedule 2)

65. The regulations under section 10 and schedule 2 are proposed to be subject to Parliamentary scrutiny by the negative procedure in all cases, except where they propose to textually amend an Act (section 44(4)). With the proposed widening of the powers, the Committee has concerns as to whether the procedures proposed in relation to the powers in section 10 and schedule 2 provide for full and adequate Parliamentary scrutiny of the respective regulations in all cases. The Scottish Government officials suggested in evidence that it has been adequate to date that specific activities have been regulated using powers in existing legislation which have been subject to scrutiny by the negative procedure.[12]

66. **The Committee considers that this is not a matter of being bound by the precedent of previous examples. The Committee is concerned that the negative procedure may not be appropriate in all cases of the exercise of the powers under sections 8 to 10 and schedule 2 of the Bill, particularly given the considerable list of purposes for which regulations may be proposed. The assessment of the appropriate scrutiny procedure is complex, given the width of the powers proposed.**

67. **Where provisions which currently require primary legislation are replaced by delegated powers, a "super-affirmative" form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval. While scrutiny by "super-affirmative" procedure is not recommended for the exercise of all powers under section 10, in the view of the Committee this should be considered further in relation to those circumstances where the need for primary legislation would be removed by Part 2 of the Bill. Given the considerable list of possible provisions which could be made by regulations under section 10 and schedule 2, this is a complex matter. The Committee draws this to the attention of the lead committee.**

68. **The Committee also recommends that the Scottish Government should give further, full consideration to the significance of the powers and purposes in section 10 and schedule 2, and whether it would be more appropriate for some of them to be exercisable subject to the affirmative, rather than the negative, procedure.**

[12] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 946.

69. The recommendations above highlight particular, significant purposes of the regulations as listed in schedule 2. In the view of the Committee, the exercise of these significant powers (on the assumption they are agreed in principle by the Parliament) could merit scrutiny under the affirmative procedure, on account of their potential significance and effects.

70. This is again, however, made more complex by the considerable list of purposes for which regulations could be made, as set out in schedule 2. For example, it could be more appropriate for the exercise of the powers to make a new fee or charging scheme for certain environmental activities subject to the affirmative procedure, while the further exercise of the powers only to uprate the fees or charges in line with the value of money might more appropriately be subject to the negative procedure.

71. **The Committee considers therefore that the Scottish Government should review in advance of Stage 2 all the purposes for which the regulations may be proposed, and consider further in which circumstances the affirmative procedure (rather than the negative procedure) could be more appropriate for the scrutiny of the exercise of the powers, on account of their specific subject matter or effects.**

72. The Scottish Government has indicated in a letter to the Committee dated 5 June 2013 (following the oral evidence session with officials) that it proposes to amend section 44 of the Bill at Stage 2. It is intended to provide that the first set of regulations to be made under section 10 would be subject to the affirmative procedure, but subsequently the negative procedure would apply. The reason given is that it is likely that the first set will amend primary legislation.

73. **The Committee is not content with that proposal. It considers that the provision in section 44(4)(b), that the affirmative procedure will apply if the regulations textually amend an Act, is acceptable. Difficulties arise in connection with the suggested mechanism of the first exercise of the powers being subject to affirmative procedure, as applied to the powers under section 10.**

74. **For example, it would be possible for this power to be exercised on the first occasion to make minor provision for one specific purpose within the list of purposes in schedule 2. The Committee considers it to be obvious that the first exercise of the power need not necessarily be the only significant use of the power throughout the intended "lifetime" of the power.**

Paragraph 22(1)(b) of Part 1, Schedule 2 (implementing EU obligations relating to protecting and improving the environment)

75. The Committee sought an explanation in the evidence session with the Scottish Government officials as to why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is considered appropriate. The power allows the regulations to make provision that, "subject to any modifications that the Scottish Ministers consider appropriate", corresponds or is similar to any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with an EU obligation relating to protecting and improving the environment.

76. It is not clear to the Committee why the power in paragraph 22(1)(b) is appropriate, nor why the exercise of the power should be different in those respects from the exercise of the powers under the 1972 Act to implement EU obligations. The Committee asks the Scottish Government for further explanation of this, in response to this Report.

77. The officials explained that paragraph 22(1)(b) has a predecessor provision in paragraph 20(1)(b) of schedule 1 to the 1999 Act, and there is a similar power in the 2003 Act. It was explained that the provision is intended to enable the implementation of EU obligations by using the one power in this Bill only.[13]

78. **The Committee was not convinced by that explanation. It appears that that provision in the 1999 Act is not repealed by the Bill provisions – it remains in force to be used apart from this Bill, if that is considered desirable. It was not explained to the Committee what the power in paragraph 22(1)(b) adds, and why that is appropriate, compared with the general powers under section 2(2) of the European Communities Act 1972 to implement EU obligations. The Committee does not consider it to be sufficient explanation that an existing power in the 1999 (Westminster) Act, which relates to pollution control and waste, is duplicated but extended to the implementation of EU obligations relating to protecting and improving the environment in general.**

79. **The Committee considers that the Scottish Government has not provided sufficient justification to it why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is either necessary or appropriate. The existing powers in section 2(2) of the European Communities Act 1972 enable provisions by regulation to implement EU obligations generally.**

80. The Committee notes that those powers are exercisable subject to a choice of Parliamentary scrutiny by the affirmative or the negative procedure, and the Scottish Government is accountable to the Parliament for making the appropriate choice. The exercise of the power in paragraph 22(1) is however subject to the negative procedure, unless the proposals textually amend an Act. The exercise of powers under section 2(2) are also subject to certain restrictions (stated in schedule 2 to the 1972 Act) which are not included in the Bill.

Order-making powers in Part 2 and Part 3

81. As explained earlier, the report now considers those delegated powers in Part 2 and Part 3 of the Bill that were explored with the Scottish Government by way of written correspondence.

Part 2
Section 18(2)(b) – Undertakings under section 16: non-compliance penalties
Power conferred on: **Scottish Ministers**
Power exercisable by: **Order**
Parliamentary procedure: **Negative procedure**

[13] Scottish Parliament Subordinate Legislation Committee, *Official Report, 28 May 2013,* Col 949.

Provision

82. Section 15 enables the Scottish Ministers to make provision for the imposition by SEPA of a variable monetary penalty in relation to a "relevant offence" to include provision for an undertaking to be accepted, in response to a notice of intent regarding the variable penalty. Such provision may also provide for a non-compliance penalty notice to be issued, if any such undertaking is not complied with.

83. Provision made under section 15 may also provide for the amount of the non-compliance penalty to be calculated by reference to criteria specified by order by the Scottish Ministers.

Comment

84. The Scottish Government in its written response in Annex A to this Report has confirmed that as the Bill does not set out any maximum amount for a non-compliance penalty under section 18, it will consider whether it is appropriate to amend the provisions to cater for such a maximum amount.

85. The Scottish Government considers that the negative procedure is suitable for an order setting out the calculation criteria, because no penalty can be imposed using those criteria until the provision for the penalty is approved by order, which is subject to the affirmative procedure.

86. If a suitable maximum amount of non-compliance penalty is stated in the Bill, the Committee would be content that the criteria by reference to which the exact level of such a penalty is determined could be specified by order subject to the negative procedure. The Scottish Government could also consider in advance of Stage 2 whether a maximum amount stated in the Bill could be amendable by order subject to the affirmative procedure. (This would be comparable to the provision for a variable penalty in section 15(7)).

87. **The Committee notes that the Scottish Government has undertaken in advance of Stage 2 to consider whether it is appropriate for the Bill to specify an appropriate maximum amount which could be imposed as a non-compliance penalty in terms of section 18(2). The Committee considers that in principle a power should not be conferred to specify such a penalty of an unlimited amount. The Committee will consider the amendment after Stage 2.**

88. **The Committee would be content that, if a suitable maximum is specified in the Bill, the negative procedure could be applied to the exercise of the power by order to provide for the more detailed criteria, by which a non-compliance penalty is calculated.**

Section 30(6) – Liability where activity carried out by arrangement with another
Power conferred on: **Scottish Ministers**
Power exercisable by: **Order**
Parliamentary procedure: **Negative procedure**

Provision
89. This subsection relates to the provision in section 30 for vicarious liability, where a person (A) commits an offence and A is at that time carrying on a "regulated activity" for another person (B). Section 30 provides that, in those circumstances, B is also guilty of the offence. Section 30(6) enables Ministers to extend the scope of this section to apply to activities other than those that are "regulated activities" (as defined in section 9(3)).

Comment
90. The Committee observed in the correspondence with the Scottish Government (Annex A) that the policy objective of this power as explained in the DPM is "to ensure that it is possible to apply the section 30 vicarious liability provisions to activities regulated under existing legislation, pending the introduction of the new permissioning framework under section 10. As a transitional measure Scottish Ministers require flexibility to extend this to cover activities currently regulated under regulations made under, for example, the Pollution Prevention and Control Act 1999 and the Water Environment and Water Services (Scotland) Act 2003."

91. The Committee observed that the power is framed more widely, to enable an order to specify any activities as "regulated activities" for the purposes of section 30, beyond "environmental activities" as defined in section 9.

92. The Scottish Government has explained in its response (Annex A) that it agrees that the power is framed more widely than is indicated by the explanation of the policy intention in the DPM. It does not consider, however, that it is wide enough to cover the specification of any kind of activity. The Scottish Government has undertaken to consider lodging an amendment at Stage 2, to ensure that only "environmental activities" within the meaning of section 9(1) can be specified.

93. The Scottish Government has also explained that it considers that this power is necessary, beyond the separate powers to make transitional provisions, as it may be exercised before any provision in respect of "regulated activities" under the Bill is enacted.

94. **The Committee notes that the Scottish Government has undertaken to consider lodging an amendment at Stage 2 to ensure that only "environmental activities" within the meaning of section 9(1) can be specified as "regulated activities" under section 30(6)(b). The Committee agrees that this would be appropriate. It will consider the amendment after Stage 2.**

Section 39 – Meaning of "relevant offence" in Part 2
Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

Provision
95. In Part 2 of the Bill, there are a wide range of provisions which only, or may only, apply in respect of a "relevant offence". These include the offences in relation to which provision for fixed monetary penalties, variable monetary penalties and enforcement undertakings may be made. It also includes the offences in relation to which compensation orders, the vicarious liability provisions in sections 29 and 30, or the new significant environmental harm offence may apply.

96. Section 39 allows the Scottish Ministers to specify which offences constitute a "relevant offence". When read in conjunction with section 44(1), the Scottish Ministers may specify different offences for different purposes so that, for example, a limited range of offences could be specified as a relevant offence for the purposes of the fixed monetary penalty provisions, and a wider range of offences specified in relation to which compensation orders could be made.

Comment
97. The DPM explains that the policy objective of this power is that "relevant offences" for the purposes of the various enforcement provisions in Part 2 will be drawn initially from the wide range of offences present under various pieces of existing environmental legislation. Once the different provisions in this Part and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions (related to "environmental activities" as defined in section 9) to be added.

98. The Committee queried in correspondence (Annex A) that the power is framed to permit any type of offence to be specified by order, without this being limited to offences under currently relevant environmental legislation, or in relation to "environmental activities" under Part 2.

99. The Scottish Government has responded that section 39 allows the Scottish Ministers to specify that a "relevant offence" means an offence specified in an order made for "the purposes of this Part". It is contended that the purpose of Part 2 is environmental regulation, and that context imposes limits on the type of offences that may be specified under this power. It is not intended that the power will be used to specify offences relating to non-environmental activities.

100. The Committee considers that it is not free from doubt that this power could only be used competently to specify offences relating to either currently relevant environmental legislation, or "environmental activities" as defined in Chapter 1 of Part 2. While that Chapter defines "environmental activities" and the Part is headed "Environmental regulation", some provisions in Chapters 3 and 4 on court powers and vicarious liability which relate to "relevant offences" are not clearly limited to relate only to environmental activity offences.

101. It is not considered to be wholly clear therefore that the definition of "relevant offence" mentioned above means that only environmental activity offences could competently be specified.

102. **The Committee therefore notes that the policy objective of the power to specify "relevant offences" by order under section 39, for the purposes of the various enforcement provisions in Part 2, is that these will be drawn initially from the wide range of offences under various pieces of existing environmental legislation. Once the different provisions in Part 2 and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions (related to "environmental activities" as defined in section 9) to be added.**

103. **The Committee considers that it is not wholly clear in the Bill that only offences related to those environmental activities could competently be specified as "relevant offences"- for example in connection with the compensation order and fines provisions in sections 26 and 27, or the vicarious liability provisions in sections 29 and 30. It appears possible therefore that the power as drafted could be used for wider purposes than those indicated by the stated policy objectives.**

104. **The Committee therefore asks the Scottish Government to consider this further, in advance of Stage 2.**

Part 3

Section 41 – Planning authorities' functions: charges and fees
Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order**
Parliamentary procedure: **Negative**

Provision
105. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers are satisfied that the functions of an authority are not being performed satisfactorily.

106. Section 41(c) removes subsections (5) and (6) of section 252, so that all regulations made under section 252 are subject to the negative procedure. (Currently section 252(5) provides for negative procedure only where the regulations provide for the calculation of the charge or fee, and the amendments result from changes in the cost of living, the retail prices index or an inflation index, or specify the person by whom the calculation is to be made.)

Comment
107. The Committee queried in correspondence (Annex A) that the reason provided in the DPM for the proposed downgrading of the level of Parliamentary scrutiny of the regulations from affirmative to negative procedure is simply that this

is a change in the proposed policy. In response, the Scottish Government referred to other instruments containing powers to set fee levels for other activities, where the scrutiny of the instrument is subject to the negative procedure.

108. While such comparison might be useful, the Committee considers that Parliament, in considering which level of scrutiny is appropriate for regulations setting the levels of planning charges, has no requirement to apply a level of scrutiny which has been assessed previously to be appropriate in other legislation relating to fees chargeable for different types of activity.

109. **The Committee draws to the attention of the lead Committee in connection with section 41 that the powers to set planning fees and charges in section 252 of the Town and Country Planning (Scotland) Act 1997 were amended and extended by section 31 of the Planning etc. (Scotland) Act 2006. The Parliament considered in passing the 2006 Act that, with specified exceptions, the affirmative procedure would be an appropriate level of Parliamentary scrutiny for the exercise of these powers.**

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

111. **The Committee asks the Scottish Government to comment further on this, in its response to this Report.**

Section 44(1) (subordinate legislation)

112. Section 44(1) provides that any powers of the Scottish Ministers to make an order or regulations under this Act includes the power to make (a) different provision for different purposes and (b) incidental, supplemental, consequential, transitional, transitory or saving provisions.

113. The Committee explored in evidence with the Scottish Government officials why the ancillary powers in this Bill are required.

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

Section 45 – Ancillary provision

Power conferred on:	**Scottish Ministers**
Power exercisable by:	**Order**
Parliamentary procedure:	**Negative procedure, unless the order modifies or repeals primary legislation, in which case affirmative procedure**

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

116. **The Committee draws to the attention of the lead committee that it also has a concern as to the potentially wide and uncertain scope of the power in section 45 to make supplemental provisions in an order under the section, as ancillary to the powers to make regulations under sections 1 and 10 (and schedule 2) of the Bill.**

ANNEX A

Correspondence with the Scottish Government

On 7 May, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

Section 4 (Power to give guidance to regulators as to the carrying out of the duty described in section 4(1))

1. In relation to the power to issue guidance which regulators must have regard to in section 4, the Committee asks for explanation of these matters—

- So far as the guidance will give content to the scope and detail of the duty placed on regulators listed in schedule 1 to contribute, in exercising their regulatory functions, to achieving sustainable economic growth, could it be explained what the guidance could cover, with reference to examples related to the listed regulators (including local authorities), so that the Committee can further understand how this power could be exercised?

- Why has it been considered not appropriate to require the guidance to be laid in Parliament for approval, or for section 4 to provide that specified persons must be consulted on the draft (which is in contrast with the requirements in section 6(4) to (6) as regards the code of practice in relation to regulatory functions)?

Section 18(2)(b) – Undertakings under section 16: non-compliance penalties

2. The Committee asks the Scottish Government for an explanation of the following matter—

- Can the Scottish Government explain why the negative procedure is considered a suitable level of scrutiny for prescribing the amount payable for a non-compliance penalty under section 18(2), given that the affirmative procedure is considered appropriate for the scrutiny of fixing the amount of fixed and variable monetary penalties under sections 12 and 15; and in the case of section 18(2) the Bill does not set any maximum amount of non-compliance penalty that may be set in an order?

Section 30(6) – Liability where activity carried out by arrangement with another

3. The Committee asks the Scottish Government for an explanation of the following matters, in relation to the power in section 30(6).

4. The policy objective of this power as explained in the DPM is “to ensure that it is possible to apply the section 30 vicarious liability provisions to activities

regulated under existing legislation, pending the introduction of the new permissioning framework under section 10. As a transitional measure Scottish Ministers require flexibility to extend this to cover activities currently regulated under regulations made under, for example, the Pollution Prevention and Control Act 1999 and Water Environment and Water Services (Scotland) Act 2003."

5. However the power is framed wider than this, to enable an order to specify any activities at all as "regulated activities" for the purposes of section 30, beyond "environmental activities" (as defined in section 9(3)) – and with no restriction as to transitional provision.

- Could it be explained why the power could not be drawn more narrowly, when the intention is to specify further activities under the relevant existing legislation only, and as a transitional measure?

- Is this power necessary, given the scope to make transitional provisions by order proposed to be available in sections 44 and 45?

Section 39 – meaning of "relevant offence" in Part 2

6. The Committee asks, in relation to the power to specify "relevant offences" by order in section 39, for an explanation of the following matter—

7. The DPM explains that the policy objective of this power is that "relevant offences" for the purposes of the various enforcement provisions in Part 2 will be drawn initially from the wide range of offences present under various pieces of existing environmental legislation. Once the different provisions in this Part and provisions in regulations made under section 10 are brought into force, it will be necessary for new offences created under those provisions (related to "environmental activities" as defined in section 9) to be added.

8. However the power is framed to permit any type of offence to be specified by order, without this being limited to offences under currently relevant environmental legislation, or in relation to "environmental activities" under Part 2. For example, it appears that the power is capable of being used to specify offences related to non-environmental activities, for the purposes of the vicarious liability provisions in sections 29 and 30.

- Given the policy objective as set out above, why is it considered appropriate for the power to be drawn that widely? Would it be possible to narrow the scope of the power to **encompass** currently relevant environmental offences, or offences related to "environmental activities" as defined in section 9?

Section 41 - Planning authorities functions: charges and fees

9. The Committee seeks an explanation of the following in relation to the powers in section 41.

10. Section 41 (c) removes subsections (5) and (6) of section 252 of the 1997 Act, so that all regulations made under section 252 to set fees and charges payable to a planning authority are subject to the negative procedure. The

explanation given in the DPM for this change is simply that it is a change in the proposed policy.

11. However, the powers to set planning fees and charges in section 252 were amended and extended by section 31 of the Planning etc. (Scotland) Act 2006. The Parliament considered in passing the 2006 Act that, with specified exceptions, the affirmative procedure is an appropriate level of Parliamentary scrutiny of the exercise of these powers.

- Further explanation is sought as to the reasons why this downgrading of the level of scrutiny is considered to be appropriate, to assist the Committee to consider the power further.

The Scottish Government responded as follows:

Section 4 (Power to give guidance to regulators as to the carrying out of the duty described in section 4(1))

The principal and most comprehensive document for regulators will be the Code of Practice issued under section 5, which will of course be subject to Parliamentary approval. The Scottish Government believes strongly that any such code of practice must be developed by regulators and stakeholders and is therefore establishing a short-life group with the following remit:

- Develop a draft Scottish Regulators' Code of Practice, for consultation later in 2013, providing guidance which regulators would have regard to when determining policies, setting standards or giving guidance in relation to their duties. The draft code should address and take account of the inter-relationship between: supporting sustainable economic growth; risk assessment; information, advice and inspections; compliance and enforcement actions; and accountability. The draft code should also support consistent regulation at policy and operational levels.
- The Group will be encouraged to involve wider stakeholders through pre-consultation discussion.

The power in subsection (2) of section 4 enables the Scottish Ministers to give additional and more specific guidance to regulators with respect to the carrying out of the economic duty, and subsection (3) requires regulators to have regard to it. The guidance can be in any form but it would be supplementary to any relevant material within a Code of Practice issued under section 5. Unlike the Code, guidance under section 4 can (under present drafting of the Bill) be issued without being approved in draft by the Parliament. This therefore provides flexibility to quickly adjust or supplement guidance which is specific to the duty, for example in response to a specific request from a regulator.

Section 18(2)(b) - Undertakings under section 16: non-compliance penalties

The Scottish Government considers that negative procedure is suitable for an order setting out the calculation criteria because no penalty can be imposed using

those criteria until the provision for the penalty is approved by an affirmative order. In context, setting the criteria can be seen as an ancillary measure for which negative procedure is appropriate.

The Scottish Government agrees that Bill does not set out any maximum amount for a non-compliance penalty, and will consider whether it is appropriate to amend the variable penalty measures at stage 2.

Section 30(6) - Liability where activity carried out by arrangement with another

Section 30(6) allows the Scottish Ministers to specify "regulated activities" in an order made "for the purposes of this section". The policy intention is, as commented, to use the power to specify activities regulated under existing environmental legislation such as the Pollution Prevention and Control (Scotland) Regulations 2012.

The Scottish Government agrees that the power is framed more widely than that, but does not consider that it is wide enough to cover the specification of any kind of activity. The specified activity will need to be an environmental activity of some kind, as is consistent with the policy intention. While any attempt to use the power to apply the section 30 provisions to activities unrelated to the environment would undoubtedly be subject to adverse comment from the committee, we would be happy to consider an amendment to ensure that only “environmental activities” within the meaning of section 9(1) can be specified.

The Scottish Government considers that the power is necessary, even given the scope of the separate power to make transitional provisions, as it may be exercised before any provision in respect of regulated activities under the Bill is enacted.). We consider it to be a transitional power in that broad sense, rather than in the more narrow sense appropriate to transitional measures under section 44 and 45 relating to a revocation and re-enactment in respect of a particular activity.

Section 39 - meaning of "relevant offence" in Part 2

Section 39 allows the Scottish Ministers to specify that a “relevant offence” means an offence specified in an order made for “the purposes of this Part”. The purpose of this Part is environmental regulation, and that context imposes limits on the type of offences that may be specified. It is not intended that the power will be used to specify offences relating to non-environmental activities. The provisions on vicarious liability in sections 29 and 30 are still within Part 2 so the type of offences that may be specified under these provisions must also relate to environmental regulation. As above, any attempt to use the power to apply the vicarious liability provisions, or any of the other enabling provisions dependent on the “relevant offences” definition in section 39, to activities unrelated to the environment would undoubtedly be subject to adverse comment from the Committee.

During drafting of this provision, consideration was given to the model in section 38 of the Regulatory Enforcement and Sanctions Act 2008. In the context of a

system applying to multiple regulators the power to permit them to use civil sanctions is restricted to "relevant offences", i.e. those offences for which the regulator has an enforcement function. The model was considered to be unnecessarily complicated for provisions that apply only to SEPA.

The Scottish Government does not therefore consider that it is necessary, or appropriate, to narrow the scope of the power in section 39.

Section 41 – Planning authorities functions: charges and fees

It appears that it is usual for SSIs which set fees to be subject to negative procedure. For example in 2011 and 2012 instruments setting fees for the following subjects were laid before the Scottish Parliament and subject to negative procedure—

- Marine licensing (S.S.I. 2011/78, made under section 67(2) of the Marine and Coastal Access Act 2009 and section 25(1)(b) of the Marine (Scotland) Act 2010 and subject to negative parliamentary procedure under sections 316(8) of the 2009 Act and section 165(4) of the 2010 Act),
- Bankruptcy (S.S.I. 2012/118, made under section 69A of the Bankruptcy (Scotland) Act 1985 and subject to negative parliamentary procedure under section 72(1) of that Act),
- Private landlord registration (S.S.I. 2012/151 made under sections 83(3) and 878(2C) of the Antisocial Behaviour etc. (Scotland) Act 2004 and subject to negative parliamentary procedure under section 141(1) of that Act),
- Road work inspections (S.S.I. 2012/250, made under section 134 of the New Roads and Street Works Act 1991 and subject to negative parliamentary procedure under section 163(2) of that Act), and
- the Public Guardian (S.S.I. 2012/289, made under section 7(2) of the Adults With Incapacity (Scotland) Act 2000 and subject to negative parliamentary procedure under section 86(1) of that Act).

Further, section 56 of the Finance Act 19973 provides that regulations prescribing fees chargeable by Scottish Ministers regarding implementation of EU obligations are subject to negative procedure.

In these circumstances we consider that it is reasonable that instruments setting fees for planning applications should be brought into line with other fees regimes and therefore should be subject to negative procedure.

ANNEX B

Correspondence with the Scottish Government

On 30 May, the Subordinate Legislation Committee wrote to The Scottish Government as follows:

In relation to part 1 of the Bill, the Committee noted that the power in section 4 to give guidance to regulators is not subject to any Parliamentary procedure. The Committee expressed its preference that the guidance should be published and therefore seeks clarification from the Scottish Government as to whether it intends to do so.

In relation to part 2 of the Bill, Paragraph 22 of schedule 2 allows the regulations to make provisions that are capable of being made under the European Communities Act 1972. The Committee asked the Scottish Government why the power was appropriate, given that the 1972 act is the general enabling provision that allows the implementation of EU obligations by subordinate legislation. In his response, Mr Burgess stated that this is a similar power to that in paragraph 20 of Schedule 1 of the Pollution Prevention and Control Act 1999 (PPCA). Whilst the Committee agrees that the power in the PPCA is similar, it notes that it is limited to the implementation of the "relevant directives".

Further to this, the Committee noted that different scrutiny procedures apply to the regulations. In section 44 of the Bill, the regulations are subject to the negative procedure, except where there is textual amendment of an Act. Sections 2(7) to (9) of the PPCA provide that the affirmative procedure must apply to the first regulations which apply in relation to Scotland. Thereafter the regulations are subject to the negative procedure except in cases where: they create an offence, they increase a penalty for an existing offence or they make textual amendments to Acts. Section 2(7) of the PPCA further states that, except from in instances where the affirmative procedure must apply, Ministers have the discretion to choose to apply either the negative or affirmative procedure to regulations. The Committee invites the Scottish Government to confirm the level of scrutiny that is to be applied to regulations under section 44 of this Bill.

Finally, during the evidence session some Members expressed concern in relation to the Bill's consistency with European legislation. The Committee invites further reflection on this matter.

The Scottish Government responded as follows:

Part 1 – Section 4 – Regulators' duty in respect of sustainable economic growth

In relation to the Committee's question about guidance to regulators not being subject to any Parliamentary procedure, I would stress that substantive statutory guidance will take the form of the Code of Practice also proposed in part 1. This

will be subject to Parliamentary approval. As regards publication of the guidance, I can confirm that it is the Scottish Government's intention that the Code itself will be published and, having consulted Ministers, also that ad hoc ministerial guidance relevant to the economic duty will also normally be published.

Schedule 2 – Paragraph 22

The Committee is correct to note that the similar power in paragraph 20 of Schedule 1 to the Pollution Prevention and Control Act 1999 is limited to "relevant directives". However, in addition to the two Directives referred to in paragraph 20(1)(a) and (b), the definition of "relevant directives" includes "any other directive…. designated by [Ministers] for the purposes of this paragraph by order made by statutory instrument". That power to designated directives has been used frequently, most recently in making the Pollution Prevention and Control (Designation of Industrial Emissions Directive) (Scotland) Order 2011 (SSI 2011/423) as a precursor to the implementation of the Industrial Emissions Directive in the Pollution Prevention and Control (Scotland) Regulations 2012. The order designating directives, while a statutory instrument, is not subject to any parliamentary procedure. In the view of the Scottish Government, this requirement to designate directives by order adds little to transparency or oversight. That is why paragraph 22 of Schedule 2 to the Bill takes the different approach of referring generally to EU obligations relating to protecting and improving the environment, with the power in paragraph 29 for Ministers by order to specify an EU instrument as one containing such an obligation – as explained in the Delegated Powers Memorandum, this is intended to deal with cases of doubt.

Scrutiny Procedures

We assume that this question is directed to regulations under section 10. This issue was addressed in Committee (cols. 947 and 948).

The Scottish Government accepts that the scrutiny of the section 10 power differs in some respects from what is provided for in sections 2(7) to (9) of the Pollution Prevention and Control Act 1999, although it notes that the Bill provides for the same level of scrutiny as is the case under section 36 of the Water Environment and Water Services (Scotland) Act 2003.

We think that the proposed level of scrutiny is appropriate, but accept that in practice it is likely that the first set of regulations will amend primary legislation and be subject to affirmative procedure for that reason. That being so we propose to amend section 44 at stage 2 to replicate the requirement in the PPCA that the first set of regulations made under section 10 should be subject to affirmative procedure.

In evidence to the Committee, Dr Burgess suggested that the Interpretation and Legislative Reform (Scotland) Act 2010 would allow the affirmative procedure to be used even if only the negative procedure is mandated, and that this provided flexibility to use either affirmative or negative procedure depending on the subject-matter of the instrument. Unfortunately on closer consideration of the legislation it

appears that this ability to use affirmative rather than negative procedure only applies where two or more powers are combined in a single instrument.

Consistency with European Legislation

The Scottish Government considers that the Bill is fully consistent with European legislation. The Bill has been certified by the Presiding Officer and by the Cabinet Secretary for Finance, Employment and Sustainable Growth as being within the legislative competence of the Parliament, one of the tests in this connection being whether or not the Bill is compatible with EU law.

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SUBORDINATE LEGISLATION COMMITTEE

EXTRACT FROM THE MINUTES

17th Meeting, 2013 (Session 4)

Tuesday 28 May 2013

Present:

Christian Allard	Nigel Don (Convener)
Mike MacKenzie	Hanzala Malik
John Pentland	John Scott
Stewart Stevenson (Deputy Convener)	

1. **Decision on taking business in private:** The Committee agreed to take items 6 and 7 in private.

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

> George Burgess, Deputy Director for Environmental Quality, Environmental Quality Division, Joe Brown, Head of Better Regulation and Industry Engagement, Enterprise and Cities Division, and Stuart Foubister, Divisional Solicitor, Directorate for Legal Services, Scottish Government.

6. **Regulatory Reform (Scotland) Bill (in private):** The Committee considered the evidence it heard earlier in the meeting.

Scottish Parliament

Subordinate Legislation Committee

Tuesday 28 May 2013

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Nigel Don): I welcome members to the 17th meeting in 2013 of the Subordinate Legislation Committee. As always, I ask members to turn off mobile phones.

Under agenda item 1, it is proposed that the committee take items 6 and 7 in private. Item 6 is consideration of the evidence that we are about to take on the Regulatory Reform (Scotland) Bill and item 7 is consideration of the evidence that we will take later in the meeting on the Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 (SSI 2013/146). Do members agree to take those items in private?

Members *indicated agreement.*

Regulatory Reform (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is an opportunity for us to question Scottish Government officials on the Regulatory Reform (Scotland) Bill. I welcome from the Scottish Government George Burgess, who is deputy director for environmental quality in the environmental quality division; Joe Brown, who is the head of better regulation and industry engagement in the enterprise and cities division; and Stuart Foubister, who is a divisional solicitor in the directorate for legal services.

Can you give us the background to parts 1 and 2 of the bill? In particular, can you explain, in broad terms, how the bill will change the powers—in comparison with those that are currently available—to make subordinate legislation on regulatory and environmental matters?

Joe Brown (Scottish Government): In broad terms, the background to part 1 of the bill is to promote consistency in regulation across Scotland and to empower regulators to take into account, in the performance of their duties, economic considerations, in addition to their other statutory functions, so that there is an element of equity.

We propose to take powers to make regulations that would represent national standards of regulatory practice in areas that are yet to be identified.

The Convener: Would the national standards displace all other standards at that level?

Joe Brown: At this stage, it is hard to say. There is one proposed national standard elsewhere in the bill, where it is suggested that we will introduce a national standard for the licensing arrangements for mobile food vans. We are working on the food-safety element of that with the Food Standards Agency. That is quite a narrowly focused example.

We are also working with the Convention of Scottish Local Authorities to identify a range of regulatory functions in which it believes national standards could be introduced, and to bring forward proposals on those. I do not yet have those examples to present to the committee.

Other examples that came out during the consultation relate largely to aspects of licensing by local authorities in relation to alcohol and a range of other things.

The Convener: You suggested in your opening sentence that part 1 of the bill will provide consistency. Is that consistency for a particular area of business across the country or is it

consistency for all areas of regulation within Scottish law?

Joe Brown: It will be more the former; we would look to address issues that particular sectors of the business community raise with us about their regulatory experience. Sometimes that will be about regulation as a truly national standard and sometimes it will be about underpinning processes.

The example that was highlighted frequently in the consultation was alcohol licensing, in respect of which local authorities impose different forms and requirements. When we looked back at the original legislation, we could not find a particularly good explanation for that approach. As a result, what could emerge from the bill is a consistent process for businesses to go through.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): On your opening remarks, Mr Brown, I seek clarity on the bill's creation of powers for one or more of the parties that are listed in it—of course, there could be more in the future—to take economic issues into consideration. Are any of the bodies in the current list not permitted to do so or is their not doing so merely for convenience?

Joe Brown: The evidence that has been presented to us suggests that although there have been great strides in how the listed public bodies align themselves with the Scottish Government's economic purpose of promoting economic development, the approach is not consistently applied—

Stewart Stevenson: I do not mean to speak over you, but I should point out that I am not anxious to explore the policy issues; that is not the committee's remit. Instead, our approach this morning will be quite technical. If I heard you correctly, you seemed to say that the bill would for the first time enable bodies to take economic factors into consideration when making decisions, but can you point to a body that is at present inhibited from taking economic issues into consideration in decision-making processes? I ask the question simply to understand the scope of the technical detail, particularly in relation to the subordinate legislation—which is, after all, our particular interest—that will be covered.

Joe Brown: My understanding is that with regard to all the bodies that are listed, individual regulators have discretion to take economic factors into consideration in their decision making. Equally, however, they have the discretion not to do so. The intention behind the bill is to provide equity and parity to allow regulators to undertake balanced consideration of economic and other relevant factors in determining their decisions, and be held accountable for that.

Stewart Stevenson: Okay. That covers economic factors. What other things are we trying to standardise?

Joe Brown: The answer relates to the regulators' specific functions. A regulator that deals with environmental, heritage, food safety or other issues would normally have a statutory requirement to consider those factors.

Stewart Stevenson: Do you mean under the bill?

Joe Brown: I mean under the existing legislation that covers regulators' roles and functions.

Stewart Stevenson: You must forgive me; it is early in the day and my brain might not have woken itself up yet. It seems that the bill boils down to the very slight thing of enabling ministers to apply a national standard to a range of bodies in their decision making. Is that the sum and substance of what looks like a rather bigger bill than such an aim might suggest?

Joe Brown: Section 1 addresses the economic considerations and national standards. As you will appreciate, the bill is a composite one, so I would not necessarily endorse that description of it.

Stewart Stevenson: I invite you to express it in another way, then.

Joe Brown: Certainly, the bill is intended to allow us to deliver greater consistency through national standards where appropriate, and to empower regulators to take economic factors into the decision-making process.

Stewart Stevenson: But we have already established that they can do so.

Joe Brown: Yes, but to do so—

The Convener: Forgive me, but I want to move on. I am sure that we can return to the issue, but I think that we have got the point.

John Scott (Ayr) (Con): I have what is perhaps a more straightforward question, which is on consistency. Taking the bill's policy objectives into account, how has the Scottish Government ensured that an appropriate balance has been struck between primary legislation and the powers to make subordinate legislation?

Stuart Foubister (Scottish Government): Part 1 relates almost wholly to subordinate legislation because, as Joe Brown mentioned, it gives us powers to set national standards. There is nothing definite in that field yet to put down in primary legislation, so we have proceeded entirely by powers.

The Convener: We have divided up our questions into those on part 1 and those on

following parts. We are on part 1 at the moment, so if we could be clear about that, that might help the discussion.

John Scott: I was referring to part 1. Paragraph 19 of the delegated powers memorandum states that the reason for the power to make regulations in connection with regulatory functions is that it will

"provide sufficient flexibility to enable measures to encourage or improve regulatory consistency to be taken quickly and efficiently in response to changing circumstances without having to resort to primary legislation."

However, the memorandum does not seem to explain, or give examples of, how the power might be used in relation to the regulators that are listed in schedule 1. Will you explain the intended effects of the power on those regulators and perhaps give us some examples, in as much as you have not already done so for Stewart Stevenson?

Joe Brown: Perhaps the best example is the national standard in relation to mobile food vans, which is in the bill and to which I have already referred. We are introducing a different protocol on that. I will explain the policy background, where the problem came from and how we are attempting to address it.

Through business representation, we established that, across the local authorities in Scotland, two different approaches are being taken to examination of mobile food vans to assess whether the equipment in them is appropriate for food-safety purposes. When we discussed with environmental health officers the two policy approaches that are in place, there was agreement that the situation is not particularly helpful, because it creates issues for food vans that operate in several local authority areas, as they have different requirements imposed on them—seemingly arbitrarily. We also confirmed that such vans have to be inspected by each local authority.

10:15

With the Food Standards Agency, we are working towards the creation of a common and consistent standard of kit, which we expect to be delivered in December this year. Building on that common standard, the bill will allow us to eradicate the practice of multiple examinations and inspections by local authorities. We will put in place a mechanism whereby a mobile food van will be inspected against a common standard by the local authority in which the business is registered. If it passes, it passes; if it fails, it has remedies to go through.

As a result of the bill, the certificate that the food van receives from the local authority in which the business is based will be recognised by all local authorities in Scotland. That means that there will be clarity and consistency about the equipment that is required for food vans and there will no longer be multiple inspections.

The Convener: Forgive me for interrupting. That is fascinating, but I remind you that we are not worried about the policy. I think that we can all see the point, but we are not the lead committee. Our concern is about the balance between primary legislation and subordinate legislation, and the flexibility that is inherent in the proposed approach. We have heard the example and we do not have to worry about whether the system will work, because that is not our problem. Does John Scott want to pursue the issue?

John Scott: I have finished.

Stewart Stevenson: I seek a tiny wee bit of technical clarity. If the company that owns a food van is registered in Carlisle, which council will do the inspection?

Joe Brown: Do you mean if the business is registered in Carlisle?

Stewart Stevenson: Yes. The van could be trading across the border.

Joe Brown: I would have to—

Stewart Stevenson: One argument that is being deployed is that there should be consistency and a national standard. I will perhaps leave that thought with you.

Joe Brown: Yes, absolutely.

The Convener: Let us leave that thought there.

Mike MacKenzie (Highlands and Islands) (SNP): I will pick up on the same theme in broad terms. Has the Scottish Government considered whether there are any legislative provisions that set out significant regulatory functions of a body that is listed in the bill—or any other bodies that might be added in the future—in relation to which it might be more appropriate to retain scrutiny by primary legislation?

There might not be a stampede to answer. Mr Brown does not necessarily have to answer—anybody who wishes to answer can respond.

Joe Brown: As I said, the premise of that provision is to enable us to respond to practical examples of problems that are experienced by either regulators or businesses when national standards may allow a better balance between—

Mike MacKenzie: I say with respect that you have explained that more than adequately. We are talking about the balance between primary legislation, which is subject to full parliamentary scrutiny, and subordinate legislation, in relation to which the level of scrutiny is perhaps not as great.

How did you weigh the issue of scrutiny when you considered the balance between primary and subordinate legislation?

Joe Brown: I think that the balance is down to the fact that we were hearing consistently from business organisations that the way in which regulatory activities have been carried out has not always been supportive enough of businesses and economic growth to be in the best interests of the economy. We had some examples, but not a host, of areas in which national standards could be introduced. The bill allows scope for such examples to emerge organically from the business community and/or regulators.

Mike MacKenzie: I am still not quite with you, in as much as you seem to be talking to a certain extent about policy rather than legislative mechanisms, but I will move on to my next question.

Has the Government considered whether any functions of the regulatory bodies that are listed in the bill, or which could be added in the future, are not appropriate for regulation by the Scottish ministers—for example, where local authorities have a level of independence from the Scottish Government?

Joe Brown: I am not aware of there being any such specific issues. We have spoken at length to COSLA and engaged with it throughout the process of developing the policy. I am sorry to return to that, but COSLA has expressed some support for the bill, albeit particularly for moving forward following consultation, and it has not raised that issue with us.

Mike MacKenzie: The affirmative procedure will apply to the powers to make regulations in section 1. Will you explain why that level of scrutiny is deemed to be appropriate?

Stuart Foubister: That is simply because the powers are wide ranging and they will allow a fair amount to be done by way of setting national standards. Rather than try to separate out more minor matters that could have been covered by negative procedure regulations, we felt that it was better to apply the affirmative procedure to provisions that will be made by way of section 1 regulations.

Mike MacKenzie: That brings me to my next question. Sections 2(1) and 2(2) include the power to create new regulatory requirements. The potential scope of such powers is uncertain, so was consideration given to applying a higher level of scrutiny, such as the super-affirmative procedure?

Stuart Foubister: No.

Mike MacKenzie: You do not feel that, under those circumstances, that procedure might be appropriate.

Stuart Foubister: No.

Mike MacKenzie: Why not?

Stuart Foubister: The super-affirmative procedure is rarely used. I do not see the issues here as being major enough to justify use of that procedure.

Mike MacKenzie: Is that the case even when entirely new regulatory requirements are being created?

Stuart Foubister: They are still regulatory requirements. The power is not at the top end, where we would normally consider use of the super-affirmative procedure to be appropriate.

Mike MacKenzie: Okay. Thank you.

John Scott: Do you want me to go on to section 4, convener?

The Convener: Yes.

John Scott: As you will know, section 4 is on the power to give guidance to regulators as to the carrying out of the duty that is described in section 4(1). It provides for ministers to give guidance to regulators in relation to their duty to contribute to achieving sustainable economic growth, as we have discussed. Can you further explain how the Scottish ministers intend to use the power and how it could affect the regulators that are listed in the bill?

Joe Brown: The expectation is that the principal source of guidance will be the code of practice that is identified in sections 5 and 6. However, we were alert to the potential for regulators and others to raise ad hoc issues on which ministers will give guidance, and that expectation led us to include the advice-giving power in the bill.

The expectation is that the code of practice, which we are in the process of developing, will evolve over time and disseminate points that emerge through policy development. We are keen to retain the capacity for ministers to give guidance to regulators on ad hoc issues, when that is required.

John Scott: In the circumstances that you described, why has it been deemed to be appropriate not to apply any procedure to the power?

Stuart Foubister: That is simply for flexibility. As Joe Brown said, the main document will be the code of practice. We expect most things to be in there. It could include the subject matter of what could alternatively have been drafted as guidance. However, we thought that it would be useful to

have the ability to provide regulators with further guidance quickly and without parliamentary procedure when they come to us or the Scottish ministers for such guidance.

John Scott: Is speed entirely of the essence in that circumstance? Scrutiny is also important; it seems to me that you are denying any level of scrutiny.

Stuart Foubister: There is no parliamentary scrutiny on the power. However, the power is fairly limited. It is a power to give guidance as to statutory provision, and we obviously cannot give guidance that in any way falls outside the law. The ambit of what can be done under section 4 is a good deal narrower than what can be done under the code of practice in section 5.

John Scott: So we should be assured that there would be nothing for us to be concerned about in respect of that power being exercised without any parliamentary scrutiny.

Stuart Foubister: Yes—we would take that line.

The Convener: I will follow that up with a rather obvious question: can ministers not to do that at the moment anyway? If a body comes to the minister and asks, "What do we do with this, please, sir?" it will listen to the answer, so why does the minister need a power to give that guidance?

Stuart Foubister: The power is in the requirement on the regulator to "have regard to" the guidance. Admittedly, if a body specifically requests some sort of guidance from the Scottish ministers, we can provide it without legislation. The teeth in section 4 are in the fact that the regulator must have regard to any guidance that is given.

John Scott: I am just trying to get it clear in my head. At the moment, what you do in that regard must be done under legislation. Under the bill, it will only be done through guidance. Is that correct?

Stuart Foubister: No. I was saying that, at present, if there is no legislation on a matter and a body wants to know what the Scottish ministers' views are on interpretation of a statutory duty, those can be offered. I suspect that, if the matter came anywhere near lawyers, the Scottish Government would also usually offer its view, but would tell the body that the view carried no particular weight and that the body would have to take its own legal advice.

In the bill, we go a bit wider. We take a power to give guidance and say that the regulator must have regard to it.

John Scott: However, the Parliament will have no input into that.

Stuart Foubister: No, it will not, under the bill as drafted.

The Convener: I quite like that previous answer, if I may say so. Something that saves two groups of people from having to take legal advice seems to me to be an extremely good idea.

We move to part 2, which concerns environmental regulation. Mr Stevenson will take us through it.

Stewart Stevenson: I am sure that this will be an opportunity for Mr Burgess to contribute to our deliberations.

Paragraphs 34 and 35 of the delegated powers memorandum say that the powers to make regulations to protect and improve the environment are a simplification and rationalisation. However, I note that schedule 2 contains a considerable list of matters that could be included in regulations, such as

"Specifying other activities as environmental activities"

for, I think, the first time and then regulating them.

Can you resolve the tension that appears to exist between the claim of simplification in paragraphs 34 and 35 of the memorandum and what is in schedule 2, which gives ministers a pretty wide power to expand the remit of environmental regulation? How can that be seen in any meaningful sense as simplification or rationalisation?

10:30

George Burgess (Scottish Government): I will deal first with the question of simplification. The main environmental regulation regimes, which cover industrial pollution, waste, radioactive substances and the water environment, come from a variety of statutes of different vintages. That is quite a complicated mixture of primary and secondary legislation.

To return to questions that were asked about part 1 of the bill, there is quite a bit of detail on waste in the primary legislation and in the secondary legislation. The provisions on radioactive substances are from an act of 1993, which is essentially a consolidation from the 1960s. Almost all that is set out in primary legislation and causes difficulties for the Scottish Environment Protection Agency and for operators in trying to fit the regulated practices into the framework that the primary legislation sets out. Most of our industrial pollution prevention and control is dealt with under the Pollution Prevention and Control Act 1999, and the water environment is dealt with under the Water Environment and Water Services (Scotland) Act 2003.

The 1999 act has a very broad power, which is not dissimilar to the one that the bill provides, to allow ministers, by regulations, to regulate activities of any nature. A broad power already exists in that act, and our colleagues south of the border have used that power to bring together all their regulatory regimes for industrial pollution, waste and radioactivity. That power, on which the power in the bill is closely modelled, has a fairly detailed schedule of the matters that can be contained in the regulations.

In that sense, what we have provided in the bill is nothing new and is no wider than the existing powers in the 1999 act. What is different is that the 2003 act provides a much more proportionate scheme of regulation for the water environment, so that an activity could—depending on its significance—be regulated at the level of a licence or registration or simply under general binding rules.

Such flexibility and proportionality are absent from the 1999 act. I apologise to the official reporters for waving my hands in the air at this point, but we are taking the broad horizontal approach from the 1999 act, to cover a wide range of environmental activities for which all that can be done is to apply a permit, with the vertical approach from the 2003 act, which allows us to apply a much more proportionate level of regulation but in a narrow area. We are bringing the two together to get the new framework, which I sincerely hope will be quite a bit simpler and more flexible to operate for all concerned.

Stewart Stevenson: That is encouraging as a description, but I wonder whether it meets the test of simplification. If, as you suggest, the 1993 act still draws on a 1960s act in relation to radioactivity, and if the bill does not draw into itself all the powers of the 1999 and 2003 acts, is it possible to argue that you are merely spreading the legislative levers that are available across a further act without dispensing with any previous acts and that the word “simplification” is therefore not the most obvious one to use?

George Burgess: An attempt to simplify is certainly being made. The bill removes from the 2003 act the power under which the controlled activities regulations are made. We intend to do away with the power in the 1999 act if at all possible, but there are complications with legislative competence, because the issue is not entirely devolved and the 1999 act is also used to regulate industrial pollution from offshore activities, which is not within the Parliament’s legislative competence. The intention is certainly to replace everything that is regulated under the 1999 and 2003 acts with new regulations under the new power, but our ability to completely sweep away the earlier schemes of regulation is more limited.

We certainly also intend to use the new power to replace the waste regime in the Environmental Protection Act 1990 and the Radioactive Substances Act 1993—the latter is based on a 1960s model, as I mentioned—to ensure that we get a single set of regulatory procedures instead of having appeals procedures scattered across several pieces of legislation that do not all say the same thing.

Stewart Stevenson: Given the vires issues that you have just highlighted and the fact that the Government might seek to draw such matters into Scottish legislation, has the Government had any discussions with the UK Administration to get what I think is called a section 103 order to ensure that the bill can deal with such issues?

George Burgess: I will raise you one—it is actually a section 104 order.

Stewart Stevenson: Ah.

George Burgess: The issue is the regulation of energy efficiency which, as far as it is dealt with under the 1999 act, is already executively devolved. The Scottish ministers can use that power and did so most recently in making the Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/360).

Stewart Stevenson: To make it clear to those who might be reading our discussion, will you confirm that executive devolution means that the Scottish ministers may exercise the power but that Parliament may not legislate in the area?

George Burgess: That is correct, but I point out that what was executively devolved was the power for the Scottish ministers to make regulations. That power was exercised in the 2012 regulations, which came out at the end of last year.

There are complications about what precisely we can regulate. Although the regulation of pollution from offshore activities would probably not come in at any stage, we are as far as possible seeking to simplify matters and to get rid of the earlier regulation schemes.

Stewart Stevenson: I will finish by returning in the context of environmental legislation to the balance between primary and secondary powers with, in essence, everything that matters being delegated to secondary powers, which we raised in relation to part 1 of the bill. Given that secondary powers remove from Parliament the ability to amend proposed legislation—that ability comes only with primary legislation—is the Government making a commitment to being flexible about withdrawing and replacing instruments if Parliament has serious views about the structure and policy scope of secondary legislation? Given that everything will be dealt with in secondary legislation, will we as a legislature be

able to influence adequately the development of environmental legislation through the secondary legislation mechanism?

George Burgess: I am sure that ministers are always cognisant of the views of any parliamentary committee, whether it be this one or a subject committee. However, I would certainly see that as the backstop throughout the whole process, which has been a partnership project between us and SEPA.

As the proposals have been developed, there have been a number of consultations and lots of opportunities for interested parties, regulated businesses, non-governmental organisations and others to get involved in the process. If there was suddenly deep concern about a fundamental aspect of a set of regulations before Parliament, I would see that as a significant failure on our part. I am sure that, were there to be any concerns in Parliament, ministers would deal with those appropriately. The approach is to consult people as we develop the detail of the regulations, so that everyone is content with that.

We can consider the history of scrutiny in the Parliament of regulations under the 1999 act power. I mentioned the set of regulations that was approved at the end of last year. There was a brief debate in the relevant committee, because those regulations were dealt with under the affirmative procedure. However, I happened to look back at the very first set of regulations dealt with under that power, in 2000, and they went through the committee on the nod.

John Scott: Stewart Stevenson raises a valid point. When legislation is introduced by means of subordinate legislation and—most often, I suspect—negative instruments, this committee, at any rate, has little or no ability to scrutinise the policy issues. If the instrument is technically correct, it will go through on the nod here, as you say. The committee that might consider the policy issue just says, "Oh, the Subordinate Legislation Committee is quite happy with it. Next!" I feel that there is a sort of crack in the paving stones and that things could slip through, possibly without adequate parliamentary scrutiny. I want to be further reassured by you that that will not happen and that somehow or other I am being naive.

George Burgess: I am inclined to say, "Trust me, I'm from the Government," but that might not be the answer that you are looking for. I gave the example that the more recent scrutiny of regulations made under the power in the 1999 act was more detailed than the scrutiny back in 2000.

Essentially, we are asking Parliament to give ministers a power. As members have said, the power is broad. However, it is also quite clearly expressed, given the detail that is provided in schedule 2 to the bill on what can be done using that power. It is also in an area that is quite well precedented. We have existing sets of regulations, which use very similar powers, so Parliament has already seen the sort of thing that ministers would do under such powers. I hope that that, combined with adequate consultation with interested parties, is enough to ensure that nothing falls through the cracks.

The Convener: Does Mike MacKenzie have a question on that?

Mike MacKenzie: No. The issues have been explored fairly thoroughly.

Hanzala Malik (Glasgow) (Lab): I return to part 1 of the bill and the earlier discussion about levels of scrutiny. Mr Stevenson raised the point about cross-border legislation and trade and so on, which I will take a stage further. I am not looking for a response today because, if you could not respond to Mr Stevenson's point, you will be unable to answer my question.

I am looking at European legislation and wondering whether we are putting ourselves at risk of somebody taking us to the European Parliament over such issues. How do we protect ourselves against that and allow the scrutiny that is perhaps being missed? I am keen to get a response that addresses not only Mr Stevenson's point but the point about European legislation and how that would affect us.

10:45

The Convener: I am sure that consistency with European legislation is a fair issue to raise, so does Mr Burgess want to address that?

George Burgess: Part 2 deals with environmental matters, on which quite a lot is legislated for at European level. That limits the realisation of our ambitions for a simple and streamlined system because, when we implement European Union legislation, we need to ensure that we have correctly transposed all our EU obligations. We want a flexible system with different tiers of permits, but we are limited by, for example, the industrial emissions directive, which mandates that, for certain industrial activities, there absolutely must be a permit and none of the lower levels will suffice. We do what we can within the framework of European legislation and there are times when that framework is not entirely consistent, which causes us some difficulties.

Mr Brown might be better able to respond on part 1. There are certainly issues in relation to the services directive, which sets up rules on how enterprises from one part of the EU can do business in another.

Joe Brown: We are not conscious of any issue in relation to the bill and existing European legislation or requirements. We are comfortable that the provisions are compatible with EU legislation.

Hanzala Malik: I am not really comfortable with that response. It does not convince me, but I am happy for you to come back to me with some detail. You are saying that you are comfortable with the position, but I am not, which is why I asked my question.

Joe Brown: I will certainly provide additional material.

Stewart Stevenson: On the back of the discussion that we have had, it has just occurred to me that the guidance has been elevated to being a more significant part of the management framework for the policy, so I take it that a commitment has been made that all the guidance that will be provided under the powers in the bill will be published and made available for Parliament to scrutinise and respond to if it wishes to do so, even if no parliamentary process is identified with that guidance.

Joe Brown: We have not yet considered that level of detail. The code of practice to which part 1 refers will be published. As I said, we envisage that there might be a line of sight or a route for more general ministerial guidance to be absorbed in subsequent versions of that document when it is published.

Stewart Stevenson: Could I suggest—I do so personally, because I have no mandate to speak for the committee, although I see that some people are nodding—that the committee would regard it as advisable for ministers to make such a commitment to publish guidance?

Joe Brown: As I say—

Stewart Stevenson: This is not the place for you as an official to make that commitment, but I suggest that you should engage ministers on that point.

Joe Brown: Yes.

John Pentland (Motherwell and Wishaw) (Lab): I go back to part 2 and environmental regulation. In response to Mr Scott's and Mr Stevenson's questions, Mr Burgess might already have answered my question. The negative procedure applies to powers to make regulations under section 10, unless there is a textual amendment of primary legislation, to which the affirmative procedure applies. Schedule 2 includes some significant powers, such as the powers in paragraphs 28 and 30 to create new offences and to impose new fees and charges. Why is it considered to be appropriate that the negative procedure should apply save when primary legislation is to be amended?

George Burgess: I can explain that by looking at the history of what happened under the 1999 act, which, as I explained to Mr Stevenson, contains the predecessor power for a large part of what is proposed. A mixture of affirmative and negative procedure instruments have been made under that power. As I mentioned, the most recent set of regulations to implement the industrial emissions directive at the end of last year was made under the affirmative procedure.

The Interpretation and Legislative Reform (Scotland) Act 2010 allows the affirmative procedure to be used even if only the negative procedure is mandated. There is flexibility to use either affirmative or negative procedure, depending on the extent of the subject matter.

When we are required to implement European directives on environmental matters, we would do that through the proposed power. To be frank, some of those directives have little or no effect in Scotland—for example, one is coming up shortly in relation to the storage of metallic mercury, but that practice does not happen in Scotland. Legislation is needed to meet the European requirements, but it has no practical effect in Scotland.

In such cases, the negative procedure is perfectly adequate. In others, such as the first time that we use the power—and certainly when we bring in the material from radioactive substances and waste regulation—the affirmative procedure will be entirely appropriate. The affirmative or negative procedure can be used according to the instrument's significance.

John Pentland: Given the scope of the proposed powers, was consideration given to applying a higher level of scrutiny—the affirmative procedure or even the super-affirmative procedure—to the new powers to make environmental regulation that extend beyond the existing powers?

George Burgess: Yes. As I said, we have looked at the existing powers that we have drawn on and the history of parliamentary scrutiny of those powers. We consider that what is provided in the bill is appropriate for that.

John Scott: To return to European issues, paragraph 22 of schedule 2 to the bill allows the regulations to make provisions that,

"subject to any modifications that the Scottish Ministers consider appropriate,"

are similar to any provisions that are

"capable of being made, under ... the European Communities Act 1972 in connection with an EU obligation relating to ... the environment."

Why is that power appropriate, given that the 1972 act is the general enabling provision that allows the implementation of EU obligations by subordinate legislation?

George Burgess: Although that power might look a little unusual, it is nothing new. It has a direct predecessor in paragraph 20(1)(b) of schedule 1 to the 1999 act and there is another similar power in the 2003 act. It is not a new power. Rather than have separate instruments or use the powers from two acts in making the same instrument—which, as the committee knows, is technically possible—it allows a single set of powers to be used.

The Convener: Is the advantage of that the fact that, if you are making a set of regulations, it is easier to have one power that enables you to do them all in a oner rather than to refer to another power for the appropriate bit?

George Burgess: Essentially, yes.

John Scott: Given the width of the proposed substantive powers in the bill, why are further powers required to make supplemental, incidental and consequential provision? Will you give examples of how those ancillary powers might be used?

George Burgess: Which power are you thinking of in particular?

John Scott: The ancillary powers in relation to parts 1 and 2. I would need to ask others about the particular powers.

George Burgess: In relation to part 2, for example, it is very common that regulations that are made under such a power need to make consequential amendments to a variety of other bits of legislation. We might be dealing with environmental protection, but references to environmental protection regulations can frequently be found as far afield as tax legislation, so there is a need to be able to make such consequential provision.

The Convener: Forgive me—I am confused. If you are making regulations that are designed to change things anyway, why do you need the power to make supplemental provisions to the regulations that you have made to change what is there? Is that not the change process? Why do you want to add supplemental stuff to that when your power in the first place is the power to change?

George Burgess: We need to be able to make provisions that extend to other legislation. That might be the case with consequential provisions more than supplemental provisions.

The Convener: If you needed to change another piece of legislation in the process of making your regulations, surely that change should be the next line in the regulations that you make. Why do you want to have a power to do something else afterwards—other than because you forgot it the first time round? That is somewhat unkind, but that may be the point.

George Burgess: That is exactly what section 44 provides: it provides the power—within our regulation-making powers—to make supplemental, incidental or consequential provision. Without section 44, we would not have the vires to do that.

Hanzala Malik: So basically you are not confident of getting it right.

The Convener: I think that I am following you, Mr Burgess. You are saying that you need to be able to change the whole statute book; the power enables you to be quite sure that you can do everything that is necessary.

George Burgess: Yes. Without the power, we could make the environmental regulations, but we would not be able to make the changes elsewhere in the statute book where there are cross-references to the regulations. Without the power, that other legislation would not necessarily work as it was intended to, which is not a good thing to allow.

The Convener: I thank you very much for your extensive evidence. As there are no further questions, I suspend the meeting.

10:57

Meeting suspended.

REGULATORY REFORM (SCOTLAND) BILL
SCOTTISH GOVERNMENT RESPONSE TO EET COMMITTEE'S STAGE 1 REPORT

Committee recommendation		Scottish Government response
Consultation responses prior to Parliamentary scrutiny		
1	Publication of consultation responses	The Scottish Government is currently carrying out a wider review its consultation practice. We accept this recommendation and this will be clearly stated in guidance under the new procedures, which will also be shared with the Scottish Parliament.
Wider Parliamentary scrutiny, subordinate legislation and ancillary provision		
2, 3, 18 &19	DPLR Committee recommendations	The Scottish Government responded to recommendations made by the DPLR Committee in their Stage 1 Report in the letter from the Cabinet Secretary for Finance, Employment and Sustainable Growth on 25 September 2013.
National standards – a centralised approach		
4	Collaborative working with COSLA and stakeholders	We are committed to involving stakeholders at as early a stage as possible, and in line with best practice we will consult on any proposals to ensure that we deliver outcomes that meet the overall objectives of the Bill. We welcome the very positive support from COSLA in particular, as we work to deliver a shared commitment to better regulation and sustainable economic growth.

Exemption criteria and implementation		
5	Exemption criteria transparency and consistency	We expect the procedure for exemptions to be used exceptionally and any case presented would need to demonstrate evidence of the exceptional local circumstances which support a case for variation or opt-out. We remain of the view that it would be inappropriate and restrictive to define a set of exemption criteria which could be applied in all cases but will discuss the recommendation further with COSLA. In the interests of transparency, Stage 2 amendments to the Bill will be lodged to require all Ministerial directions in respect of exemptions or variations to be published.
Regulators' duty in respect of sustainable economic growth		
6	Hierarchy for SNH and other regulators	The Scottish Government responded to recommendations made by the RACCE Committee in their Stage 1 Report in the letter from the Minister for Environment and Climate Change on 5 September 2013. With regard to the new general purpose for SEPA as provided for by Section 38 of the Bill and extending similar provision to SNH, we are pleased that the EET Committee agrees that the provisions in Part 1 of the Bill make this unnecessary.
Definition of sustainable economic growth and whether the term should be changed to sustainable development		
7	Definition stated and explained in guidance	We are committed to including our definition of sustainable economic growth within the Code of Practice and presenting the draft Code to Parliament for scrutiny before it is formally adopted.

Marine licensing decisions – statutory appeal mechanism		
8	Systematic approach to appeals	The Scottish Government is a strong supporter of environmental justice and having appropriate structures to protect our environment and which will enable the best decisions to be made around activities that affect it. The Scottish Government is also currently undertaking a range of ambitious and significant reforms to the justice system. The implementation of Lord Gill's Scottish Civil Courts review and the creation of a new tribunal structure will pave the way for swifter handling of cases, including public interest cases such as environmental cases. And, a new tribunal structure will allow, in time, for certain specialist civil chambers to be set up within it. Further thought will need to be given following the establishment of the new tribunal structure what additional jurisdictions might be conferred up it, recognising the significant funding pressure on the justice system as a whole. The Scottish Government is also committed to looking carefully at the cost and funding of litigation, including public interest cases. It consulted last year on proposals for rules of court to set out a clear framework for the granting of protective expenses orders in environmental cases. This represents a significant programme of work which is being co-ordinated across the Government representing policy development, legislation and organisational transformation change. The landscape is also affected by the European Commission's on-going review of the Environmental Impact Assessment Directive which is an important tool in supporting effective consideration of the environmental issues. Once these changes have come into effect we will consider with stakeholders any need for an environmental court.

Six week appeal time limit		
9	Impact on stakeholders	It is not likely that any organisation willing to bring a challenge in the Court of Session will not have already had involvement in the licence application process and it will almost certainly have lodged representations prior to the decision being made. The organisation will not therefore be coming to the matter "cold" once the decision has been made. The 6 week period matches those applicable where a "person aggrieved" wishes to apply to the Court of Session to challenge a town and country planning decision (section 239 of the Town and Country Planning (Scotland) Act 1997) or a decision to proceed with a road scheme (Schedule 2 to the Roads (Scotland) Act 1984).
Planning Authorities' functions: charges and fees – measuring performance		
10	Measures to improve performance of agencies	Following the publication of Delivering Planning Reform (2008), a Key Agencies Group (KAG) was set up. This provided a forum for the key agencies to identify new approaches to working together, and with planning authorities, and to identify areas and actions for improvement. Audit Scotland in their report 'Modernising the Planning System' (2011) considered that key agencies and planning authorities are working together better but further progress is needed. We consider that the KAG have made good progress with implementing reform and this is generally recognised by stakeholders. Last year the Minister for Local Government and Planning met with the KAG to ensure the momentum on implementing reform was maintained and the key agencies now undertake annual reports in line with the Planning Performance Framework. We provided feedback to each agency earlier this year and will do

		so again in response to their second annual reports received in September. In addition the Key Agencies have prepared an Action Plan for 2013/14 and meet every eight weeks to discuss progress.
Linking fees to performance – resource implications		
11	Audit Scotland cost analysis	This is a recommendation for Audit Scotland to consider.
Impact on Services		
12	Monitoring performance	We are actively monitoring performance both through the Planning Performance Framework and Quarterly Statistics and would welcome the opportunity to report back to the Committee a year after policy implementation.
13	Use of performance markers	We continue to work with our COSLA partners, through the High Level Group on Planning. The details of assessing performance are currently being considered and the recommendations of the Committee are proposed to be discussed at the next meeting of the Group in January. We will inform committee of the outcome once discussions are complete.
Alternative approaches to improving performance		
14	Fee reduction measures	These details are to be agreed through the High Level Group on Planning. Setting working arrangements and processes are explicit in the remit of the Group. As with Recommendation 13 the Scottish Government proposes to discuss these matters at the next meeting of the Group in January and will inform the Committee of the outcome once discussions are complete.

Street traders' licences		
15	Inspection of mobile food business and coordination with new food body	The changes to Street traders' licenses will not impact on a food authorities ability to inspect a food business operating in its area to ensure food hygiene practices are being properly implemented and public health protected. We will also ensure engagement and coordination on this with the proposals for a new food body continue.
Policy and Financial Memoranda		
16 & 17	Detail in Bill documents and consultation process	The Scottish Government notes both the committee's helpful comments and constructive views made by witnesses in this regard. These will be fed into the current review of the Scottish Government's guidance for Bill teams and reflected in future drafts.

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The Scottish Government

LEGACY 2014
XX COMMONWEALTH GAMES

Rob Gibson
Convener
Rural Affairs, Climate Change and Environment Committee
Scottish Parliament
Edinburgh
EH99 1SP

5 September 2013

Dear Rob

REGULATORY REFORM (SCOTLAND) BILL AT STAGE 1

I would like to take this opportunity to thank the Committee for its report on the Regulatory Reform (Scotland) Bill. I welcome this very positive report which acknowledges the benefits leading from the proposed legislation, the support for the policy intention and the new powers for SEPA.

My officials and I also greatly welcome the ongoing and constructive dialogue with the Committee and the valuable input provided by Committee members, witnesses and other stakeholders during evidence sessions. Whilst, as your report identifies, there were some questions around specific points, there was overarching support for the intended better environmental regulation outcomes.

The Scottish Government remains committed to maintaining this high level of stakeholder engagement and to listening and acting on the views received. Along with SEPA and Crown Office and Procurator Fiscal Service (COPFS) we jointly hosted a workshop on 11 June 2013 to consider the enforcement measures in the Bill in more detail (for details and outcomes please see our better environmental regulation homepage). This is the first in a series of better environmental regulation workshops that will run in the months ahead.

As regards the Committee's report itself, this raised a number of points and recommendations for Part 2 on Environmental Regulation some of which I would like to take this opportunity to address:

Section 28 - Publicity Orders

I welcome the Committee's support for the introduction of publicity orders as an additional sentencing power for criminal courts. As I stated during the evidence session, the decision as to whether such an order would be issued will be for courts to decide. Responding to views raised in consultation, clear guidance as to the use of publicity orders, and other new sentencing options will, however, be provided for courts to assist them in making such decisions.

Section 38 – Sustainable Economic Growth and Sustainable Development

During the evidence sessions, we discussed in detail the respective merits of reference to "sustainable economic growth" versus "sustainable development" in the Bill and whether there was scope for including definitions of these terms in the legislation. I note the Committee's recommendations on these points in its report principally relating to the provisions in Part 1 of the Bill.

The Scottish Government defines sustainable economic growth as "building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too". This can be viewed on the Scottish Parliament's website in answer to written PQ S4W-10994 by the Cabinet Secretary for Finance, Employment and Sustainable Growth John Swinney on 20 November 2012. The intention of the duty on regulators to contribute to sustainable economic growth is to provide transparency and promote a broad and deep alignment with the Scottish Government's purpose. The Scottish Government's commitment to sustainable development is reflected in its purpose of creating a more successful country, with opportunities for all of Scotland to flourish through increasing sustainable economic growth. As the Performance Framework identifies, solidarity, cohesion and sustainability are key drivers of sustainable economic growth, and improving the social, health, environmental and economic opportunities for all of Scotland is key to maximising the nation's economic potential.

I would like to reiterate that the duty, where it applies, does not prioritise sustainable economic growth over other regulatory objectives identified. Regulators themselves need to determine an appropriate balance, as many of them, including SNH and SEPA, already do. In addition, the duty to contribute to sustainable economic growth does not replace the duties that regulatory bodies, such as SEPA, have as regards sustainable development. In view of these points, I believe it is right and proper that the reference to sustainable economic growth be retained in the Bill.

As I said in evidence to the Committee on 5 June 2013:

"There is a hierarchy of duties. SEPA's primary function is obviously to protect the environment. However, it is not unreasonable to suggest that economic considerations would be taken into account in deciding which of two options for a project, both of which had a similar environmental impact—positive or negative—SEPA would recommend for implementation."

I do recognise the Committee's desire to see sustainable development promoted but I remain unconvinced that there is a compelling case or need for the inclusion of detailed definitions of sustainable economic growth and sustainable development in the Bill (not least because the Bill does not actually use this term other than in reference to other legislation). As we already have broad but clear definitions for these terms, our intention is to provide these in guidance. This practice is not uncommon. For example, both the Environment Act 1995 and the Planning etc (Scotland) Act 2006 include reference to sustainable development. However, neither contains a definition of the term, with both Acts giving Ministers the ability to issue guidance. The Scottish Government recently consulted on the draft Scottish planning policy which included guidance on sustainable development. In response to stakeholder wishes, expressed during consultation on the Regulatory Reform (Scotland) Bill, the requirement for Ministers to give SEPA guidance on sustainable development will remain in legislation. In addition, as you are aware, the intention is that the duty on sustainable economic growth will be clarified via a statutory code of practice for regulators.

Rather than looking at definitions of sustainable development, recent discussions at domestic[1] and international level[2] have instead focussed on embedding and mainstreaming the principles in government and society. This is a key objective of the better environmental regulation programme.

Scottish Natural Heritage

With reference to the committee's comments on the new general purpose for SEPA as provided for by Section 38 of the Bill and extending similar provision to SNH, I believe the provisions in Part 1 of the Bill make this unnecessary. The position of SNH is very similar to that of SEPA in that they already consider their role in delivering the Scottish Government's Purpose. The Natural Heritage (Scotland) Act 1991 places SNH under a duty to:

"take such account as may be appropriate in the circumstances of....the need for social and economic development in Scotland or any part of Scotland".

Under the provisions introduced by Part 1 SNH will also in future consider the new duty in the context of their wider contribution to delivering the Scottish Government's purpose. Unlike SNH, SEPA had never been provided with a statutory purpose and this Bill has provided a useful opportunity to fill this gap.

The natural assets that SNH works to conserve and enhance are integral to sustainable economic growth. However, like SEPA, and as you heard in evidence from representatives from both bodies, and indeed from myself, the provisions in the Bill place a duty on regulators to exercise their functions in a way that contributes to sustainable economic growth only to the extent that it would be consistent with the exercise of their existing, core regulatory functions to do so.

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[1] for example at the Sustainable Development Research Network workshop in Edinburgh on 30 April 2013

[2] for example at Environment Council in Luxembourg on 18 June 2013 as outlined in my letter to the committee the following day; and also in points raised by EU Commissioner for Environment Janez Potočnik in his evidence to the committee on 20 June 2013

Other

There are a number of other aspects of the Committee's report where it may be helpful for me to provide additional detail, to further clarify the policy intention or to address inaccuracies:

- Paragraph 113 – This paragraph states that the nature of the offence and whether or not criminal intent was involved will be taken into consideration when determining the balance of probabilities. It is perhaps more accurate to say that the nature of the offence and whether or not criminal intent was involved will be taken into consideration when deciding whether or not to refer the case to the Procurator Fiscal, rather than the standard of evidence.

- Para 117 - In terms of the point raised by RSPB on coal restoration and bonds you will be interested to note that the Minister for Energy, Enterprise and Tourism is leading the Scottish Opencast Coal Task Force[3] which brings to the table the complete range of interests concerning the future of the industry, the communities it affects and the matters concerning the legacy of unrestored sites which require to be resolved. As part of this a restoration bonds working group chaired by Professor Russel Griggs (also chair of the independent Regulatory Review Group), with energy and planning policy officials and the coalfield planning authorities, has been working since last October to investigate the ways in which financial guarantees are secured and the reasons why they have in some cases been ineffective. Site restoration is, as you know, a key requirement of the planning consent issued for each opencast coal site. Financial guarantees take many forms and it is this field that the group has been working to clarify, in order to inform the Task Force's work. It is expected that both the working group and the Task Force will meet again in the autumn ahead of further action by Scottish Ministers. As noted briefly by Dr Burgess in evidence to the Committee, as well as the bonds described above which are part of the planning regime, SEPA already has powers in relation to waste management facilities such as landfills to require adequate financial provision to be in place to ensure that obligations arising from permits are met and closure procedures are followed. The Bill will allow this to apply more generally to environmental activities that may be regulated under section 10. As drafted, this is an adjunct to the "fit and proper person" test – we are considering whether the power to require financial provision should be clarified.

- Paragraph 123 – A drafting point, this paragraph states that a cap of £40,000 is to be applied in relation to fixed monetary penalties, which is not correct. A cap of up to £2,500 is to be applied in relation to fixed monetary penalties and a cap of up to £40,000 is to be applied in relation to variable monetary penalties.

[3] http://www.scotland.gov.uk/News/Releases/2014/07/coal-taskforce01072013

- Paragraph 124 – The final sentence of this paragraph states that where there is serious criminal intent the case should not be heard through summary procedure 'but instead should be heard in full in the criminal courts then the court could impose a more severe penalty'. This should say 'but instead should be heard on indictment (or solemn procedure) in the criminal courts then a court could impose a more severe penalty'.

- Paragraphs 37 and 165 – I have raised these points with the Minister for Parliamentary Business Joe Fitzpatrick and we have agreed that they will be fed into the current review of the Scottish Government's guidance for Bill teams.

The Minister for Energy, Enterprise and Tourism Fergus Ewing intends to respond directly to the Committee on the points raised in relation to Part 1 of the Bill on Regulatory Functions.

I hope this response is helpful and my officials and I would be pleased to provide any further information or clarification that the Committee may require.

I am copying this letter to the Convenor of the Economy, Energy and Tourism Committee given their designated lead on the Regulatory Reform (Scotland) Bill.

Kindest regards

PAUL WHEELHOUSE

DELEGATED POWERS AND LAW REFORM COMMITTEE

26th Meeting, 2013 (Session 4)

Tuesday 1 October 2013

Regulatory Reform (Scotland) Bill

Response from the Scottish Government

Background

1. The Committee reported on the delegated powers in the Regulatory Reform (Scotland) Bill[1] on 25 June in its 40th report of 2013. A summary of the recommendations contained in the report is reproduced at Annex A.

2. Further information on the Bill can be found in the explanatory notes provided by the Scottish Government.[2]

3. The response from the Cabinet Secretary for Finance, Employment and Sustainable Growth to this report is reproduced at Annex B.

Scottish Government response

Super-Affirmative Procedure

4. The application of the "super-affirmative" procedure enables the Parliament to consider and report on draft provisions, before an instrument is laid for approval. The Committee recommended in its report that, given the potential scope of the powers in sections 1, 2 and 10 of the Bill, this higher level of scrutiny may be appropriate for some of the powers contained in these sections. In its stage 1 report on the Bill, the Committee asked the Scottish Government to give further consideration to this matter.

5. In its response, the Scottish Government stated that it did not consider these enabling powers to be unusual and therefore to merit a higher level of scrutiny. The Government also contended that when the "super-affirmative" procedure had been used in the Public Services Reform (Scotland) Act 2010 it had been applied to powers which were significantly more extensive than those in this Bill.

[1] Regulatory Reform (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd.pdf

[2] Regulatory Reform (Scotland) Bill explanatory notes available here: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-en.pdf

Part 1

Section 2(7)

6. Section 1 (read with section 2) confers powers on the Scottish Ministers to make regulations containing any provision which they consider will encourage or improve consistency in the exercise of regulatory functions by a regulator in schedule 1. This relates to regulatory functions conferred by or under an enactment. Section 2 sets out in what further provisions may be contained in the regulations.

7. Section 2(7) confers a power on Scottish Ministers to issue directions which modify the regulations, for a period of no longer than 6 months. The directions may provide that a provision in the regulations should not apply to a regulator or that certain modification or conditions should be applied to the regulations.

8. The Committee drew to the attention of the lead committee that a power in this form, permitting any such modification for a period of up to 6 months from date of direction, is very unusual and that the power is not proposed to be subject to Parliamentary scrutiny.

9. In response to a recommendation in the Committee's report, the Scottish Government agreed to bring forward an amendment at stage 2 providing for the publication of any such directions.

Sections 4 and 5

10. Section 4 provides for Ministers to give guidance to regulators in relation to their duty to contribute to achieving sustainable economic growth. This is intended to be supplemental to the Code of Practice which is provided for in Section 5.

11. In its report, the Committee expressed concern that guidance for regulators would be set out over 2 documents and that the documents were subject to different levels of parliamentary scrutiny (with no scrutiny being applied to the section 4 guidance). Accordingly, the Committee drew this to the attention of the lead committee.

12. The Committee recommended that both the code of practice and the section 4 guidance should be published when first issued and again when any revisions are made. The Scottish Government agreed to bring forward amendments at stage 2 which would provide for this.

Part 2

Procedure for Regulations under Section 10

13. The proposed powers in section 10 allow Ministers to define and regulate new "environmental activities." These powers are based on, but wider than, the current powers in the Pollution Prevention and Control Act 1999 in connection with pollution, and the powers in the Water Environment and Water Services (Scotland) Act 2003 in connection with protecting the water environment.

14. The powers would allow Ministers to propose that any provisions for, or in connection with, protecting or improving the environment could be made using subordinate legislation, removing the need for primary legislation. The Committee drew this matter to the attention of the lead committee, noting that the Parliament would not be able to insist on the use of primary legislation in relation to environmental activities and, as a result would not be able to amend the proposed powers.

15. The Committee also noted in its report that regulations under section 10 and schedule 2 are proposed to be subject to Parliamentary scrutiny by the negative procedure in all cases, except where they propose to textually amend an Act (section 44(4)).

16. The Committee expressed concern regarding the level of scrutiny applied to the provisions in section 10 and asked the Scottish Government to consider the circumstances in which where the negative procedure is proposed, given the width of the powers, the affirmative procedure would be a more appropriate level of scrutiny.

17. The Committee also suggested that the "super-affirmative" procedure may be a more appropriate level of scrutiny for the provisions to define and regulate new environmental activities which currently require primary legislation but which, under the powers proposed in section 10, will be replaced by delegated powers.

18. The Scottish Government's response in relation to the general use of "super-affirmative" procedure in this Bill is detailed in paragraph 4 of this paper.

19. In relation to Section 10 specifically, the Scottish Government makes reference to the existing powers in the Pollution Prevention and Control Act 1999 noting that the enabling powers in this act are broad and that the powers are subject to negative or affirmative procedure as opposed to the "super-affirmative" procedure. The Government also notes that, although the Environmental Protection Act 1990 is in force, directives in relation to this area are not implemented by primary legislation.

20. The Scottish Government also acknowledged the complexity of these matters and agreed to give them further consideration.

Section 39

21. Section 39 allows Scottish Ministers to specify which offences constitute a "relevant offence" in relation to various enforcement provisions in part 2 of the Bill.

22. In its report, the Committee considered that the Bill did not make it wholly clear that only offences relating to environmental activity could be specified as "relevant offences."

23. The Committee therefore queried whether the power had been drawn wider than is necessary to fulfil the Scottish Government's stated policy intentions.

24. In its response to the Committee, the Scottish Government re-emphasised its intention that any order in which "relevant offences" are set out will relate only to environmental activities as detailed in part 2 of the Bill.

Part 3

Section 41

25. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. ("the 1997 Act") The new provision in subsection (1A) enables Scottish Ministers to make regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers are satisfied that the functions of an authority are not being performed satisfactorily.

26. Section 41(c) removes subsections (5) and (6) of section 252, so that all regulations made under section 252 are subject to the negative procedure.

27. In its report, the Committee determined that the negative procedure was not an appropriate level of scrutiny to apply to regulations made under section 252, noting that when section 252 of the Town and Country Planning (Scotland) Act 1997 was amended by the Planning (Scotland) Act 2006 the affirmative procedure was applied.

28. In its response to the Committee's report, the Scottish Government stated that its policy position in relation to the choice of procedure applied to section 252 had changed and that the Scottish Government now considers the negative procedure to be the appropriate level of scrutiny for all planning fees regulations.

29. The Scottish Government went on to note that the majority of fee-making powers contained in Acts of Scottish Parliament since 2006 were subject to the negative procedure, that this level of procedure stills provides Parliament with the opportunity to scrutinize an instrument and that the option to bring forward an annulment motion would be available.

Part 4

Sections 44 and 45

30. Sections 44 and 45 provide that Ministers may, by order, make such incidental, supplemental, consequential, transitional, transitory or saving provision (collectively known as ancillary powers) as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of the Act.

31. In its report the Committee expressed concern that the powers were wide and uncertain in scope, allowing powers which were already extensive and also potentially uncertain in scope to be supplemented further using the ancillary powers.

32. In its response, the Scottish Government stated that the powers are not uncertain in scope as they are limited by the scope of the provisions which they will supplement.

Schedule 2, paragraph 22(1)(b)

33. Paragraph 22 of schedule 2 of the Bill allows the regulations to make provisions which, subject to any changes which the Scottish Ministers consider appropriate, are similar to any provisions capable of being made under the European Communities Act 1972 in connection with EU obligations relating to the environment.

34. In its report, the Committee considered that this power was unnecessary as the existing powers in section 2(2) of the European Communities Act 1972 enable provisions by regulation to implement EU obligations generally. The Committee was therefore unclear as to why the use of this power was appropriate.

35. In its response to the Committee the Scottish Government stated that this was a "common sense provision" which would align domestic and EU powers to allow all appropriate provisions to be made under one set of regulations.

Conclusion

36. Members are invited to make any comments they wish on the Bill at this stage. Given the Scottish Government's commitment to bring forward amendments, it is probable that the Committee will have a further opportunity to consider the Bill after stage 2.

Recommendation

37. **Members are invited to note the Scottish Government's response on the Bill and to make any comments they wish at this stage.**

ANNEX A

Part 1 – summary of recommendations

1. Set out below is a summary of the recommendations on Part 1 of the Bill.

- **The powers in sections 1 and 2 are broad powers, to make any provisions which the Scottish Ministers consider will encourage or improve consistency in the exercise by the various regulators listed in schedule 1, of regulatory functions as those are defined in section 1.**

- **The Committee has some concern that the powers in sections 1 and 2 are drawn more widely than the policy objectives for the powers, as those objectives have been explained by officials in evidence. It considers that the Scottish Government has not fully justified the proposed scope of these powers. The Committee recommends that this should be considered by the lead committee and Parliament in the further scrutiny of the Bill.**

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

- **The Committee agrees that the powers in sections 1 and 2 should be subject to the affirmative procedure and subject to the consultation requirements in section 1(3), if the Parliament determines that the powers are acceptable in principle.**

- **The Committee also draws to the attention of the lead committee, however, that if the regulations were to propose to substantially amend, remove or create new regulatory requirements overseen by a regulator, the affirmative procedure will not enable the Parliament to amend specific provisions in the proposed instrument, as could be done if primary legislation was necessary. A "super-affirmative" form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval.**

- **The Committee has some concern that the matters which regulators will require to have regard to, in relation to contributing to the achievement of sustainable economic growth in the exercise of functions and in regard to the exercise of their regulatory functions more generally, will be set out across both the guidance under section 4 and the code of practice under section 5.**

Quite different procedures for Parliamentary scrutiny would apply to these documents, with the guidance not being subject to any scrutiny, and the section 5 code requiring to be approved by resolution and subject to consultation requirements. The Committee accordingly draws this to the attention of the lead committee.

- **The Committee considers that there should be provision in the Bill that the guidance to regulators which would be issued under section 4, and the code of practice which would be issued under sections 5 and 6, must be published both on issue, and when any revisions are made.**

Part 2 – summary of recommendations

2. Set out below is a summary of the recommendations on Part 2 of the Bill.

- **The powers in Part 2 of the Bill are very broad powers which would enable the Scottish Ministers to make provisions for, or in connection with, protecting and improving the environment, by regulations under section 10 if they so propose. The powers would include the ability to define and regulate new "environmental activities", defined in section 9 to mean any activities that are capable of causing or liable to cause environmental harm, and activities connected with those activities.**

  The Committee draws to the attention of the lead committee that in its view, the effect of these proposed powers would be that the Scottish Ministers could propose that subordinate legislation could make any provisions for, or in connection with, protecting and improving the environment, in general. This would remove the necessity for primary legislation in those circumstances where it is currently required. It would also however remove the ability of the Parliament to insist on primary legislation in those circumstances, (where the Scottish Ministers propose subordinate legislation under the Bill rather than new primary legislation), and the Parliament's corresponding ability to amend the proposals, as opposed to being restricted to a right to either approve or annul them.

  In such circumstances where provisions which currently require primary legislation are replaced by delegated powers, a "super-affirmative" form of procedure would enable the Parliament to consider and report on draft provisions, before an instrument is laid for approval. While scrutiny by "super-affirmative" procedure is not recommended for the exercise of all powers under section 10, in the view of the Committee this should be considered further in relation to those circumstances where the need for primary legislation will be removed by Part 2 of the Bill. Given the considerable list of possible provisions which could be made by regulations under section 10 and schedule 2, this is a complex matter.

- **The Committee also has some concerns as to whether the procedures proposed in relation to the powers in section 10 and schedule 2 provide for full and adequate Parliamentary scrutiny of the respective regulations in all cases.**

  The Committee therefore recommends that the Scottish Government should also fully consider in advance of Stage 2 in which circumstances the exercise of the powers would be more appropriately scrutinised by the Parliament by means of the affirmative procedure, rather than the negative procedure. Again

given the width of the powers, this is a complex matter. The Committee considers that there should be a general review, but it should include proposals which:

(a) further define "environmental activities" under the Bill, or specify other activities as such under paragraph 1 of Part 1, Schedule 2, and then prohibit or regulate them in some manner;

(b) provide for an emissions scheme under paragraphs 2 and 24 of that Part;

(c) provide for schemes for fees or charges under paragraphs 9, 13 or 28 of that Part;

(d) create new offences in terms of paragraph 19 of that Part;

(e) permit provisions in terms of paragraph 22 corresponding or similar to provisions made by or under Part 2 of the Environmental Protection Act 1990 (waste on land), subject to such modifications as the Scottish Ministers consider appropriate, or provisions which modify the effect of the Radioactive Substances Act 1993.

- **The Committee accepts, however, that where the application of the affirmative procedure would result in a "trading up" of the scrutiny procedure compared with that provided for in existing legislation which could (prior to the Bill) regulate similar activities in a similar manner, then the existing procedure could be retained.**

- **The Committee agrees that where regulations would textually amend an Act, the affirmative procedure would apply.**

- **The Scottish Government has indicated in a letter to the Committee of 5 June 2013 that it proposes to amend section 44 at Stage 2 to provide that the first set of regulations to be made under section 10 would be subject to the affirmative procedure, but subsequently the negative procedure would apply. The Committee is not content with this proposal for the reasons set out in paragraphs 68 and 69 of this report.**

- **The Scottish Government has not provided the Committee with sufficient justification why the power in paragraph 22(1)(b) of Part 1, Schedule 2 is either necessary or appropriate. The powers in section 2(2) of the European Communities Act 1972 already enable provisions by regulation to be made by the Scottish Ministers, in implement of EU obligations generally.**

  The Committee also draws to the attention of the lead committee that those powers in section 2(2) are exercisable subject to a choice of

Parliamentary scrutiny by the affirmative or the negative procedure, and the Scottish Government is accountable to the Parliament for making the appropriate choice. The exercise of the power in paragraph 22(1) is however subject to the negative procedure, unless the proposals textually amend an Act. The exercise of powers under section 2(2) are also subject to certain restrictions, which are not included in the Bill.

It is not clear to the Committee why the exercise of the power in paragraph 22(1) should differ in those respects from the exercise of the powers under the 1972 Act.

ANNEX B

Correspondence from the Cabinet Secretary for Finance, Employment and Sustainable Growth, dated 25 September 2013:

The report raises a number of points and recommendations on scrutiny procedures which I and my officials have considered again at length. I would like to take the opportunity to address these and set out how we currently view these issues.

The issue of scrutiny procedures is a significant one for a Bill such as this where the enabling powers are broad. However, I would like to take the opportunity to remind the Committee of the evidence of Dr George Burgess (at columns 943-946 and 948 Official Report, 28 May 2013) where he explained that this type of approach to legislating for environmental regulation is not unusual. The trend in both the UK and Scottish Parliaments has been to provide broad enabling powers under a Bill, with a schedule which provides the detail on what can be done using the Bill (see Pollution Prevention and Control Act 1999 (PPC Act) and Water Environment and Water Services (Scotland) Act 2003).

Super-Affirmative Procedure

Before I respond to the specific recommendations on the parts of the Bill I would like to make some general points on "super-affirmative" procedure, which is proposed by the Committee as the form of Parliamentary procedure to scrutinise the more significant sets of regulations made under sections 1 (as read with section 2) and 10 of the Bill. Whilst I do not have any objections to the principle of "super-affirmative" I remain unconvinced that it is necessary for the provisions in, and principles behind, this Bill.

Whilst these enabling powers are broad, they are bounded by the terms of sections 1, 2 and 10, and the purposes in schedule 2, respectively and are not unusual, as per my opening comments above. I understand that "super-affirmative" procedure was used in the Public Services Reform (Scotland) Act 2010 but the powers taken in that Act are much more extensive than the powers set out in this Bill.

In the cases of the water environment and pollution control the approach is already one of making regulations under broad enabling powers. In the case of waste regulation most of the law required to implement waste directives is made under the PPC Act powers or the European Communities Act 1972 powers under either negative or affirmative powers. In this area, although the Environment Protection Act 1990 is still in force, primary legislation is not used to implement directives. It is also worth noting that in relation to radioactive waste and substances regulation the powers within the PPC Act are wide enough already to repeal and reimplement the Radioactive Substances Act 1993. This is the approach that has been taken in relation to radioactive waste and substances regulation in England and Wales under the Environmental Permitting (England and Wales) Regulations 2010.

Part 1

Section 2(7)

The Committee has recommended that directions modifying how the regulations apply to a regulator must be published on being made. The provisions within section 2(7) of the Bill enable account to be taken of any compelling case for variation should exceptional local circumstances merit it - respecting the value which can be attached to local flexibility. Any decision would be subject to detailed consideration of the case presented and should Ministers direct a variation, this would be published. The Scottish Government will lodge an amendment to provide for publication.

Sections 4 and 5

With regard to the recommendation on the publication of section 4 guidance and the section 5 Code of Practice, the principal and most comprehensive document for regulators will be the Code of Practice issued under section 5 which will be subject to Parliamentary scrutiny. The power in subsection (2) of section 4 enables the Scottish Ministers to give additional and more specific guidance to regulators with respect to the carrying out of the economic duty, and subsection (3) requires regulators to have regard to it. The guidance can be in any form but it would be supplementary to any relevant material within a Code of Practice issued under section 5. Unlike the Code, guidance under section 4 can (under present drafting of the Bill) be issued without being approved in draft by the Parliament. This therefore provides flexibility to quickly adjust or supplement guidance which is specific to the duty, for example in response to a specific request from a regulator. In the interests of openness and transparency, the Code of Practice and any guidance would be published on issue and when any revisions are made. Amendments to provide for this will be lodged by the Scottish Government.

Part 2

Procedure for Regulations under Section 10

I note that the matter is complex and the Scottish Government is giving consideration to the matters raised and how they could best be addressed.

Section 39

With regard to the point on whether it is wholly clear in the Bill that only offences related to those environmental activities could competently be specified as "relevant offences" under section 39, I would emphasise that the purposes of any order in which "relevant offences" will be set are the purposes of Part 2 of the Bill, namely environmental regulation, and it is not intended that "relevant offences" in respect of which SEPA may issue fixed or variable monetary penalties, for example, or offences where the courts will have additional sentencing options or to which

vicarious liability provision will apply, will include offences relating to non-environmental activities.

Part 3

Section 41

The Scottish Government acknowledges that when section 252 of the Town and Country Planning (Scotland) Act 1997 was amended by the Planning (Scotland) Act 2006 the policy position was that fees regulations should be subject to affirmative procedure. The exception to this was that regulations making amendments to fees consequential upon changes in the cost of living, in the retail prices index or in an inflation index or making provision specifying the person by whom the calculation is to be made were to be subject to the negative procedure. The policy position has since changed and the Government is now of the view that the negative procedure provides the appropriate level of scrutiny for all planning fees regulations, as it does for a significant number of fees regulations. The planning fees regulations would still be subject to parliamentary scrutiny and anyone who has concerns about any of the provisions will be able to lodge a motion to annul.

The Scottish Government refers the Committee to its response to the Subordinate Legislation Committee's letter of 7 May 2013 where it indicated that it is usual for SSIs which set fees to be subject to negative procedure and gave a number of examples.

To expand on that point, 28 asps with power to make subordinate legislation which sets fees have been enacted since the beginning of 2006. There were 26 instances of fee making powers which were subject to negative procedure, 9 of fee making powers which were subject to affirmative procedure and one of a fee making power which was subject to affirmative procedure the first time it was used and thereafter to negative procedure.

Of the instruments subject to negative procedure, the Scottish Government acknowledges that some of the fees are for relatively minor activities or for a single activity. However, some of those fees are for activities of greater significance or importance. For example under section 25 of the Marine (Scotland) Act 2010 Scottish Ministers can make negative procedure regulations setting the fees for applications submitted under the marine licensing scheme. Further, under section 4 of the Transport and Works (Scotland) Act 2007, subordinate legislation setting fees payable for applications for the construction of railways, tramways and canals was subject to affirmative procedure the first time it was exercised but to negative procedure thereafter (so the first instrument could be replaced in its entirety by a negative procedure instrument). As stated in our response to the SLC's letter of 7 May 2013, regulations made under section 56 of the Finance Act 1973 prescribing fees chargeable by Scottish Ministers regarding implementation of EU obligations are subject to negative procedure.

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

Part 4

Sections 44 and 45

With regard to the point on scrutiny of the power to make incidental, supplemental, consequential etc. provision, this type of power is required to make subordinate legislation which is directly connected with the legislation that it seeks to supplement or in respect of which it is incidental or consequential. The provision is not uncertain in scope as it is limited by the scope of the provisions being supplemented etc.

Schedule 2, paragraph 22(1)(b)

We note the Committee's concerns in the report around why this power is needed and whether it is duplication.

Our position remains that this is a common sense provision aligning domestic and EU powers so that all the necessary provision can be made under one set of enabling powers. This reflects the evidence given by Dr George Burgess (column 949 Official Report 28 May 2013). It is also not a new power we are taking as there is a similar power in PPC Act and Water Environment and Water Services (Scotland) Act 2003 to allow provisions to be made under one set of regulations.

I hope this response is helpful and my officials and I would be happy to provide any further information or clarification that the Committee may require.

I am copying this letter to the Conveners of the Economy, Energy and Tourism and Rural Affairs, Climate Change and Environment Committees given their interest in the Bill.

REGULATORY REFORM (SCOTLAND) BILL
SUMMARY OF STAGE 2 GOVERNMENT AMENDMENTS

Amendment	Description
Section 1 Regulatory Functions	To exempt local authorities' planning functions from the duty in section 1, as sustainable economic growth is already an established part of planning policy and practice.
Section 2 Regulations under Section 1: Further Provision	To require any direction for variation made by the Scottish Ministers to be published. This will ensure transparency and acknowledges the recommendation of the Delegated Powers and Law Reform Committee.
Section 4 Regulators' duty in respect of sustainable economic growth	To require any guidance to be published. This will ensure transparency and acknowledges the recommendation of the Delegated Powers and Law Reform Committee.
Section 5 Code of Practice	To require any Code of Practice to be published. This will ensure transparency and acknowledges the recommendation of the Delegated Powers and Law Reform Committee.
New section after Section 7 Primary Authority	To provide a framework for a "primary authority" scheme for Scotland, whereby a business which has branches in a number of local authority areas may form a partnership with one local authority to receive tailored support in relation to a range of regulation (which will be specified following further consultation). This will help businesses comply through tailored support – enhancing local authority cost efficiency; improving consistency of regulation.
Sections 12, 14, 15, 17, 19 and 20 Criminal proceedings	Clarifying amendments to a number of sections of the Bill to ensure that references to where criminal proceedings etc. may not be taken are used consistently throughout the sections and include, as appropriate, alternative disposals available to the Procurator Fiscal. Also to specify the extent to which

	enforcement measures that are taken preclude further enforcement measures being taken.
Section 17 Imposition of Variable Monetary Penalty	To clarify that it is not possible to prosecute in cases where a combination of undertaking and variable monetary penalty have been imposed but not complied with.
Section 18 Non-compliance penalties	To set an upper limit on the maximum amount for non-compliance penalties that can be set by order, linked to the maximum amount of the non-compliance penalty to the maximum amount of the variable monetary penalty to which the non-compliance penalty relates. This implements a recommendation from the Delegated Powers and Law Reform Committee.
Section 28 Publicity orders	To allow directors of a company and similar office-holders to be prosecuted for the offence of failure to comply with a publicity order in certain circumstances.
Sections 29 and 30 Vicarious liability	To remove the limitations in section 29(1)(b) and section 30(1)(d) so that these sections apply to the officers or members of an unincorporated body, or trustees, being natural persons acting in their capacity as appropriate. This will provide clarity that the provision in section 29 and 30 apply to unincorporated bodies (eg trusts), who would otherwise lack separate legal personality and therefore lack capacity to contract, to employ staff and to enter into agency or other arrangements with another person otherwise than through officers or members of such body.
Section 30 Vicarious liability	To make clear that regulated activities for the purposes of section 30 can only be "environmental activities" within the meaning of section 9. This amendment arises from a recommendation of the Delegated Powers and Law Reform Committee.
Section 31 Significant Environmental Harm: Offence	Technical, clarificatory amendments to simplify the drafting of the offence. There is no change of scope of the offence.

Section 32 Remediation order compliance	To provide imprisonment as a sentencing option for failure to comply with a remediation notice to bring it in line with other offences. The term of imprisonment which may be imposed is not exceeding 12 months on summary and not exceeding 5 years (with or without fine) on indictment. The introduction of "culpable officer" provisions would allow the prosecution of directors of a company and similar office-holders of other bodies, as well as the company/body, for this offence in certain circumstances.
New section Carrier bag offences	Amendment to the section 88 of the Climate Change (Scotland) Act 2009 to provide for the imposition of fixed penalties as part of enforcement of carrier bag charging offences. This will provide local authorities (or other 'enforcement authorities') with a more proportionate and cost-efficient enforcement option.
New section SEPA's Investigatory Powers	The Environmental Crime Task Force has been examining opportunities where the Regulatory Reform (Scotland) Bill could further help tackle environmental crime. The proposed amendments focus on SEPA's investigatory powers and are likely to include: a) power to take original documents/records; b) removing the requirement for 7 days' notice for bringing heavy plant onto sites or entering residential property; c) power to require any person to attend a specified place at a reasonable time to answer questions; d) power to require confirmation of identity; e) establishing an additional purpose of determining any financial benefit which has accrued or is likely to have accrued as a consequence of the offence, including to assist the courts in discharging the requirement in section 27 to have regard to financial benefit in setting fines; f) allowing execution of warrants in another sheriffdom. These amendments will help in SEPA having the right powers to investigate more effectively serious environmental crime. The proposed new powers have appropriate safeguards built in. The new powers will also allow SEPA to assess more effectively financial benefit which has accrued as a result of any offending.

Section 34 Contaminated land	Technical amendments to section 34 to ensure it fully reflects the role of local authorities and SEPA in relation to special sites; and to prevent the Crown becoming liable for any remediation costs in respect of land falling to it as *bona vacantia.* Also minor amendments to the abandoned mines provisions in Control of Pollution Act 1974 to better deal with cases where land falls to the Crown.
New section Smoke control zones	Amendments to sections 20 and 21 of the Clean Air Act 1993 to allow Scottish Ministers to authorise fuels which can be burnt in smoke control areas and allow exemption of boilers, stoves, fireplaces etc. for use in smoke control areas administratively rather than by regulations or order. This will avoid the need for new SSIs each time the list of fuels/appliances need to be updated, and enable manufacturers to have their products legally approved more quickly.
Section 42 Street Traders' Licences	To clarify the position on certification of compliance for street traders based outwith Scotland.
Section 40 Marine licence applications: Appeals	To make provision to provide that leave to appeal is required for these appeals, together with a time limit for the leave to appeal application to be made to the court.
Schedule 1 List of Regulators	To include the Scottish Fire and Rescue Services (SFRS) in the Schedule 1 List of Regulators. This will align SFRS with other regulators within the Bill and thereby promote and support SFRS's enforcement of fire safety legislation with better regulation and contributing to achieving sustainable economic growth through regulation that is consistent, efficient and effective.
Schedule 2 Environmental protection: Fit and proper person	Amendments to schedule 2 to enable regulations to make provision enabling permits and registrations to be varied, suspended or revoked if the person holding the registration or permit ceases to be a fit and proper person. It also enables a transfer of a permit or registration to be refused when the proposed transferee is not a fit and proper person.

Schedule 3 Assault and hindrance of SEPA Officers	To amend the offence in section 110 of the Environment Act 1995 to include assault and hindering as well as obstruction of SEPA officers, and increase the penalties for these offences.
Schedule 3 Proof of routine matters	To amend sections 280 and 281 of and Schedule 9 to the Criminal Procedure (Scotland) Act 1995 to streamline the evidential procedure provided for more straightforward routine matters relating to environmental offences, including sampling and scientific report evidence.
Schedule 3 SEPA interviews	To extend section 277 of the Criminal Procedure (Scotland) Act 1995 to SEPA interviews. This will allow transcripts of SEPA interviews to be sufficient evidence of the making of the transcript and its accuracy (as is currently the case for police and Customs interviews).
Schedule 3 Offenders' previous conviction history	To amend section 69 and 166 of the Criminal Procedure (Scotland) Act 1995 to provide the procedure by which fixed, variable and non-compliance financial penalties can be put before the court following conviction. This will ensure that the offender's history of engagement with SEPA can be taken into account when courts are determining sentences.
Schedule 3 National Litter Strategy Enforcement	Amendments to Environmental Protection Act 1990 regarding which organisations and individuals may issue fixed penalty notices for littering and flytipping, and to require offenders to provide their name and address to those persons with enforcement powers.
Schedule 3 Placing of waste bins	Technical amendments to the Environmental Protection Act 1990 regarding the placing and removal of receptacles for waste (ie "bins"), to ensure that the requirements that can be made by local authorities regarding the placing of receptacles includes the removal of these receptacles following collection, and include specifying the times for placing and removal.

Schedule 3 Consequential amendments in consequence of repeal of air quality assessments	Amendments to the Environment Act 1995 in consequence of the repeal of a requirement for local authorities to assess air quality in section 84 of that Act by section 37 of the Bill.
Schedule 3 Repeal of spent provisions of old enactments	Further amendments eradicating spent provisions and clearing up the legislative landscape.
Schedule 3 Consequential amendments in consequence of repeal of noise abatement zones	Amendments to the Environmental Protection Act 1990 in consequence of the repeal of the noise abatement zone provisions in the Control of Pollution Act 1974.
Schedule 3 Consequential amendments to the Water Resources (Scotland) Act 2013	Consequential amendments to the Water Resources (Scotland) Act 2013 relating to the provisions of Chapter 1 of Part 2 of the Bill on environmental regulation.
Schedule 3 amendments to Natural Heritage Act 1991	Amendments to the Natural Heritage (Scotland) Act 1991 relating to references to “enactment”, principally to ensure that Scottish Natural Heritage can delegate functions under Acts of the Scottish Parliament to its officers.
Schedule 3 Clean Air Act 1993: Mines and quarries.	Amendments to section 42(6) of the Clean Air Act 1993 provisions relating to combustion of mine and quarry refuse, to correct definitions that no longer operate properly in relation to quarries.

EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 3, No. 46 Session 4

Meeting of the Parliament

Tuesday 12 November 2013

Note: (DT) signifies a decision taken at Decision Time.

Regulatory Reform (Scotland) Bill: The Minister for Energy, Enterprise and Tourism (Fergus Ewing) moved S4M-08240—That the Parliament agrees to the general principles of the Regulatory Reform (Scotland) Bill.

After debate, the motion was agreed to (DT) (by division: For 74, Against 35, Abstentions 0).

Regulatory Reform (Scotland) Bill: Financial Resolution: The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney) moved S4M-06623—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Regulatory Reform (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b) of the Parliament's Standing Orders arising in consequence of the Act.

The motion was agreed to (DT) (by division: For 74, Against 0, Abstentions 35).

Regulatory Reform (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): The next item of business is a debate on motion S4M-08240, in the name of Fergus Ewing, on the Regulatory Reform (Scotland) Bill.

I call Paul Wheelhouse to speak to and move the motion.

14:45

The Minister for Environment and Climate Change (Paul Wheelhouse): I am pleased to open the debate on the general principles of the Regulatory Reform (Scotland) Bill. A number of committees—in particular, the Economy, Energy and Tourism Committee and the Rural Affairs, Climate Change and Environment Committee—have taken both written and oral evidence in their consideration of the bill. I thank all those who gave evidence to the committees.

I also thank those who responded to the various consultations for their invaluable contributions. Those contributions have provided firm foundations for the legislative proposals that have been introduced and important clarity on a shared understanding of where change is needed.

I have read the committees' reports, and I am pleased to note that the committees agree that the bill's principles are sound and that they are broadly supportive of them.

Both the Minister for Enterprise, Energy and Tourism and the Minister for Local Government and Planning are alongside me today, reflecting the fact that regulatory reform is a cross-government agenda. The three of us will be pleased to speak to our respective portfolio interests in the bill during the debate.

As members will be aware, the Scottish Government has a clear and unambiguous purpose. That purpose is to focus Government and public services on creating a more successful country, with opportunities for all Scotland to flourish, through increasing sustainable economic growth.

The key components of that purpose—a successful and flourishing Scotland, the creation of opportunities for all, and sustainable economic growth—cannot, and will not, be achieved in isolation from one another. Put simply, our country will not flourish without sustainable economic growth but such growth will be of little value if it does not lead to the better, flourishing Scotland that we all want to see.

The bill will improve the way in which regulations are developed and applied, creating more favourable business conditions and better protecting our environment. It will support and empower regulators and provide a clear line of sight between regulatory activity and the Scottish Government's purpose. Collectively, the changes will support those who are regulated to comply; support the protection of communities, businesses, individuals and the environment; and support more effective and transparent delivery by a wide range of regulators.

The bill will introduce a range of measures to deliver consistent and proportionate regulation while maintaining local accountability. That will include both the definition and implementation of national standards and systems and a duty on regulators to give due regard to sustainable economic growth in their decision making.

A statutory code of practice will also be developed, which will describe in more detail how regulators will apply regulatory principles and good practice in order to find the optimum balance between regulatory and economic factors.

Jenny Marra (North East Scotland) (Lab): Will the minister explain how the principle of sustainable economic growth will be tested given that it has no clear legal definition?

Paul Wheelhouse: I will come on to that point, and I hope that Jenny Marra will understand as I develop my speech just how we will take forward the approach.

The bill also contains provisions to improve the performance of planning authorities by establishing a link between planning fees and performance. In addition, the bill will change the mechanism for bringing legal challenges to offshore energy decisions.

The bill aims to give clarity to regulators on what is expected of them. There are those who say that the protection of the environment and the promotion of sustainable economic growth are incompatible and that it is an either/or choice. I understand and respect their view, but I disagree with the argument that has been made. The two approaches can be compatible, mutually supportive and in harmony.

Scotland's environment is a national asset that is worth protecting not only because of its beauty and contribution to our national identity, but because it is vital to our economic success. Our understanding of the ecosystem services delivered by our environment and natural resources is developing apace, and we estimate that our natural environment generates between £21 billion and £23 billion of value a year for Scotland.

Many of this country's most successful sectors, such as tourism, food and drink—for example, trout and salmon farming and shellfish growing—

and renewables, depend on a clean and healthy environment. It therefore makes absolute sense, from an individual commercial as well as a national economic perspective, that we protect those resources not just for now but for future generations.

As I said in evidence to the RACCE Committee,

"SEPA's primary purpose is and will remain the protection and improvement of the environment."—[*Official Report*, *Rural Affairs, Climate Change and Environment Committee*, 5 June 2013; c 2323.]

That includes the sustainable management of natural resources.

At present, both the Scottish Environment Protection Agency and the businesses it regulates operate in an unnecessarily complex legislative landscape. Much of that is down to the iterative way in which regulation has been developed over the years, particularly given the significant requirements created by Europe. It has resulted in complexity and a lack of transparency for regulated sectors and businesses. The new framework that the bill will deliver will be easier for regulated businesses and SEPA to understand and administer. That will lead to efficiencies for both and, it is hoped, improved compliance levels.

As a result of the bill and as part of our wider better environmental regulation programme, SEPA will change the way in which it prioritises its regulatory activities. That will ensure that its resources are directed towards the most important, highest-risk activities that have the greatest actual or potential environmental impact on communities. Most of all, the bill will protect our environment and, in the round, reward and encourage good behaviour. Let us help to prevent non-compliance rather than mop up breaches after the fact.

The bill is not a leap into the unknown. We already have an example of better environmental regulation in the way in which the water framework directive has been implemented in Scotland.

Jenny Marra: Can the minister clarify whether he has the power to reorganise SEPA's activities through regulations? Does he require primary legislation for that?

Paul Wheelhouse: The bill includes a number of measures that are required. We certainly feel that the bill will move SEPA and other regulators on to a footing that provides them with more enforcement powers so that they are more able to take action to prevent serious breaches of environmental regulation. I hope to explore those issues further as I develop my speech, but I will happily come back to Ms Marra's point later.

The implementation of the water framework directive has enabled the creation of a single permissioning structure and simpler, more consistent procedures. That is similar in approach to the model that we intend to introduce for the other regimes. The benefits of that approach have included: excellent stakeholder engagement; close working between the regulator and the regulated; a better understanding of regulations; and a simpler, more efficient regulatory service. The European Commissioner for the Environment, Janez Potočnik, praised Scotland's approach as an exemplar when he visited the Royal Highland Show earlier this year.

Improving regulation is an important agenda not only in Scotland but elsewhere in the United Kingdom and across Europe. However, it is important to recognise that, while the agenda elsewhere is focused on deregulation or a "bonfire of red tape", our agenda is clearly focused on better regulation and on ensuring that things work effectively for regulators and those that they regulate. Our vision is for Scotland to be a world leader in environmental protection, and I believe that the best way to achieve that is through creating a system of consistent, proportionate and targeted regulation that works.

The statutory purpose for SEPA that the bill will introduce will give recognition to the broader role that SEPA has and recognise the importance of the environment to our economy and to the health and wellbeing of our communities. It is important to note that, although the purpose is new, the need to balance environmental, economic and social considerations is not. As we heard in the evidence to committees, balancing judgments are already taken by SEPA, Scottish Natural Heritage and other regulators on a daily basis. The new statutory purpose for SEPA will formalise what is already current practice and will help to provide a line of sight from the Scottish Government's purpose to what our public bodies deliver.

Let me reiterate for the record that we reject the argument that our agenda is about sacrificing the environment to promote economic growth, as some have suggested. As is right and proper, SEPA's primary purpose is, and will remain, the protection and improvement of the environment. Section 38 of the bill gives primacy to the function of environmental protection, including the sustainable management of natural resources. That will always be at the top of SEPA's hierarchy of responsibilities. However, the approach reflects the fact that we cannot look at issues in isolation.

The fundamental principle of sustainable development is that it integrates economic, social and environmental objectives. SEPA's new statutory purpose acknowledges the three elements of sustainable development but gives clear primacy to the environmental element. I want to be clear in placing that point on record.

Claudia Beamish (South Scotland) (Lab): In view of those remarks, why does the minister not see it as appropriate to include the term "sustainable development" on the face of the bill?

Paul Wheelhouse: I point out to Ms Beamish that, as I hope to explore further, section 38 establishes SEPA's three areas of responsibility: health and wellbeing, which represents the social dimension; sustainable economic growth, which represents the economic argument; and, above both, environmental protection and the sustainable management of natural resources. Although the term "sustainable development" may not be used, the three pillars—if you like—of sustainable development are included in the bill in a clearer and more explicit way than would be the case if there was simply a reference to "sustainable development".

Let me be equally clear that the duty to contribute to sustainable economic growth will not replace the duties that bodies have as regards sustainable development. Ministers will continue to give guidance on sustainable development in line with statutory obligations.

The bill will also give SEPA a wider, more strategic range of enforcement tools to deploy. Combined with the new sentencing options that are being given to the criminal courts, those will play a key role in tackling poor performance and non-compliance. The polluter-pays principle is already widely accepted and supported. The proportionate enforcement powers that we propose will ensure that the offenders pay the price for remedying damage that is done to the environment.

All responsible businesses, large and small, will benefit from an effective environment protection system for Scotland. By focusing resources on the greatest environmental harms, SEPA can more effectively target lawbreakers, support non-compliers to become compliant with regulations, and protect communities and our natural environment. To put the new enforcement tools in context, SEPA's approach has been, and will continue to be, about achieving the right outcomes. Sometimes that needs enforcement tools, but sometimes it does not.

This morning, I opened a conference in Peebles at which the focus is on the approach that we have taken in Scotland to reducing diffuse pollution. That approach has involved SEPA in a programme of partnership working with the rural sector. There is always the need for a regulatory backstop but, to achieve the maximum benefit for water quality, SEPA has worked closely with the sector and farmers through a campaign to provide advice on compliance with the diffuse pollution general binding rules and to improve performance.

The outcome of that approach has been encouraging, with 79 per cent of farms that have been revisited by SEPA having improved their performance without the need to revert to enforcement measures. That is a clear example of the proportionate and effective approach that SEPA has taken and wants to continue to take in other areas. The conference has attracted interest from Government, regulators and the rural sector across the rest of the UK. Further, our approach has been quoted by Commissioner Potočnik as an exemplar in Europe, and a recent Chinese delegation is considering how the approach could be adopted in China.

Let me be clear that, where individuals and businesses deliberately or negligently damage the environment, the powers in the bill will enable SEPA to take robust enforcement action. Criminality will not be tolerated. During a visit to a waste site on the outskirts of Edinburgh earlier this year, I was horrified to hear evidence of serious threats of violence being made against SEPA officers and in some cases their families, as well as evidence of stalking of SEPA officers on social media. That is totally unacceptable. I can therefore confirm that the bill will be supported by a stage 2 amendment that will make such behaviour a specific offence.

As I said at the outset, I welcome the vital contribution that stakeholders have made to the development of the bill. I also acknowledge and appreciate that there are diverse and strongly held views on a number of areas that the bill covers. We are committed to working with stakeholders, and I encourage all stakeholders to continue to engage to help shape the work. The bill is largely an enabling bill, and much of the detail will be set out in regulations. Our door remains open for stakeholders to help shape the development of those regulations and their associated guidelines.

The bill is not about introducing new regulations; it is about strengthening the effectiveness of regulations that the Parliament has approved. It is about delivering better regulation. We have strong stakeholder support for much of that work, which will deliver greater regulatory consistency and transparency, efficiency benefits for regulators and the regulated, and protection of the Scottish public, businesses, communities and the environment. However, some will not benefit from the work: serial poor performers, who are a burden on their competitors and a risk to sustainable economic growth and all that it stands for.

I commend the Regulatory Reform (Scotland) Bill to the Parliament and I urge members to support the principles underlying it at decision time.

I move,

That the Parliament agrees to the general principles of the Regulatory Reform (Scotland) Bill.

The Deputy Presiding Officer (John Scott): I call Murdo Fraser to speak on behalf of the Economy, Energy and Tourism Committee.

14:58

Murdo Fraser (Mid Scotland and Fife) (Con): I am pleased to contribute to this debate on behalf of the Economy, Energy and Tourism Committee, which is the lead committee on the bill. I thank all those who provided written and oral evidence to the committee, as well as my fellow committee members and members of other committees that considered the bill at stage 1. I also thank our team of clerks, who supported us so ably, and the members of the Scottish Parliament information centre who provided advice.

The committee welcomed the introduction of the bill and agreed to recommend to the Parliament that its general principles be agreed, although I should say that that was not a unanimous view of the committee, as two members dissented. As the lead committee, we took evidence on parts 1, 3 and 4. I will concentrate on the issues that are raised in our stage 1 report.

As the minister pointed out, the bill is wide ranging and covers a range of discrete policy areas. Part 1 has three main proposals: first, it gives the Scottish ministers the power to encourage or improve consistency in the exercise by regulators of their functions; secondly, it introduces a new duty on regulators to contribute to achieving sustainable economic growth; and, finally, it includes a code of practice to assist regulators.

The aim of the enabling power is to improve how regulations are developed and applied so that they create a more favourable set of business conditions while delivering environmental benefits. Standardisation of the way in which regulations are implemented is intended to tackle the economic impact on the business community of dealing with inconsistently applied regulations.

The committee heard concerns that the power for ministers would centralise decision making and, thus, remove democratic accountability and local knowledge from the decision-making process. That point was made particularly by local authorities.

The committee welcomed the fact that the Scottish Government and the Convention of Scottish Local Authorities agreed a memorandum of understanding to achieve consistency in the exercise of regulatory functions and future national standards. We also welcomed the collaborative approach that that demonstrates and hope that it will result in national standards that are transparent and workable and which take account of local circumstances.

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): The Scottish Government places on record its gratitude to COSLA and to Stephen Hagan for the assistance that he has given in the work that we have done in that regard. I offer Mr Fraser, as convener of the committee, an unqualified assurance that our collaborative work with COSLA will continue throughout the bill's passage to ensure that it does not imperil local democracy in Scotland.

Murdo Fraser: I thank the minister for that assurance, which I am sure committee members will welcome.

The committee heard that there is widespread support for inclusion in the bill of exemptions that enable regulators to opt out of national standards where exceptional local circumstances exist. Witnesses asked for clarity on the circumstances in which an exemption would apply and for a consistent approach to be adopted.

We recommended that the exemption criteria be included in the forthcoming code of practice or the guidance that will accompany the bill. It is a little disappointing that the minister did not agree that that is necessary, but the proposal to publish ministerial directions in respect of the exemptions or variations is welcome. It would be helpful if, when he speaks, the minister could clarify where those directions will be published and how he will ensure that regulators are aware of them.

I turn to probably the most contentious issue in the bill, which is the duty on regulators to contribute to achieving sustainable economic growth. We received a lot of evidence on that provision and witnesses raised a number of concerns about it. We also heard that, at the moment, there is no legal definition of sustainable economic growth and, as a consequence, regulators could face legal challenges in respect of how they choose to comply with the duty.

The committee was clear that, for regulators to be able to comply with the duty, they must understand its meaning. During the evidence-taking sessions, we heard many different definitions of sustainable economic growth—somebody even suggested the one from Wikipedia, although I am not sure that that is helpful to the law-making process—but the Scottish Government provided us with its definition and explained that that is the one that it wants regulators to use.

Because, in the end, it might be a matter for the courts to decide, the Scottish Parliament and Government have a duty to minimise the risk. The committee asked the Scottish Government to ensure that its definition of sustainable economic

growth be explicitly stated. If it will not appear in the bill, it must be absolutely clear in subsequent guidance. We also asked for a commitment to be made that drafts of guidance be submitted to Parliament for scrutiny prior to being published.

In his response to our report, the minister indicated that the definition will be included in the code of practice, which is subject to parliamentary scrutiny, but he made no mention of providing in the guidance to regulators details of how they will be expected to comply with the duty. Given the importance of that point, I would be grateful if he would address it when he speaks later.

The Law Society of Scotland, among others, expressed the firm view that the duty raises questions of legal enforceability. Many witnesses questioned how regulators would be able to demonstrate that they have contributed to achieving sustainable economic growth and expressed concerns that it might leave their decisions open to legal challenge. There was a particular concern in relation to planning applications and, therefore, we were pleased that the minister decided to exclude the planning functions of local authorities from compliance with the new duty.

Many witnesses also raised concerns about a conflict of interest. We heard in an intervention by Jenny Marra about the existing definition of sustainable development. Some people said that it would be better for that to be in the bill because it is better understood. The Scottish Government was quite clear in its response to that and, in evidence, the minister said that regulators were not to prioritise sustainable economic growth over other duties and that the code of practice would provide guidance to them on balancing competing duties. That, again, is why the code is so important.

The committee wants to take evidence from stakeholders on the draft code of practice before the final version is laid before the Parliament. We also welcome the Scottish Government's commitment to publish the guidance that will accompany the bill and to consult widely on the draft code.

I turn to part 3 of the bill, which deals with three points, the most contentious of which is the issue of linking the level of planning fees to the performance of a planning authority. It is clear to the committee that an efficient and effective planning system benefits us all. We heard a lot of views from the business community that it wants to see a more streamlined planning system.

The business community was of the view that the 20 per cent uplift in planning fees that will be introduced should be reflected in an improvement in planning authority performance. However, many of those who gave us evidence thought that reducing the income to underresourced planning authorities would only exacerbate the problem. The committee welcomed the minister's confirmation that positive measures would be used initially before any reduction in planning fees.

When it came to measuring performance, the committee was not convinced that the Scottish Government's statistical data could adequately determine the performance of planning authorities. The committee welcomed confirmation that the Scottish Government will now use quantitative and qualitative measures to assess performance.

We are aware that COSLA remains opposed to linking planning fee levels to the agreed performance markers. It is important that that issue is resolved prior to the conclusion of the bill's parliamentary passage. Any update on progress from the minister today would be welcome.

The Minister for Local Government and Planning (Derek Mackay): Will the member take an intervention?

Murdo Fraser: Right on cue, minister.

Derek Mackay: I may never convince COSLA that a penalty mechanism is in its interests. However, the Scottish Government believes that it is in the interests of the planning system not only to have positive mechanisms to improve performance but to have a penalty mechanism should all else fail.

Murdo Fraser: I am grateful to the minister for that intervention. It is interesting that, during stage 1 evidence sessions, there was a clear divergence of opinion between the business community, which was very enthusiastic about those proposals, and people on the other side, particularly in local authorities, who were much more concerned. The adoption of a conciliatory approach by the Scottish Government, which is more about carrot than stick, will go down very well with COSLA.

I am aware that I am short of time so I will briefly cover a couple more points.

The committee largely welcomes the marine licensing provisions in the bill, which will streamline the current process. Similarly, there was unanimous support for improving the certificate of compliance for mobile food vans so that those who travel around the country selling burgers and ice creams no longer have to get 32 separate licences but can rely on one, which I am sure will be very welcome.

The Government has indicated that a number of amendments will be introduced at stage 2. One of those is on primary authority, which we look forward to taking evidence on at stage 2. There was some suggestion at the last minute that there

will be other proposals: one on the imposition of fixed penalties in relation to carrier bags, one on the abandoned mines provisions in the Control of Pollution Act 1974 to deal with cases in which contaminated land falls to the Crown, and one on allowing the Scottish ministers to authorise fuels that can be burned in smoke control areas. We look forward to hearing more details about those amendments, either in the course of the debate or subsequently.

This is a comprehensive, wide-ranging bill. It is well intentioned and has generally been welcomed. It was certainly the majority view of the committee that it should proceed.

15:08

Jenny Marra (North East Scotland) (Lab): As the Federation of Small Businesses has pointed out, regulation is necessary to protect our environment and communities from harm. Through the bill, we have the opportunity to enshrine in law the expectations, practices, relationships and penalties for the many bodies that carry out regulatory functions. Sadly, however, the bill falls short of such expectations.

Labour members' speeches today will cover different sections of the bill. My colleague Margaret McDougall will focus on part 1 and Claudia Beamish will examine some of the environmental aspects in part 2. That leaves me to introduce the main areas that we feel need to be addressed. Central to our concerns, and reflected in a wide range of evidence to the Economy, Energy and Tourism Committee, is the loss of local accountability when regulations are made, changed or removed.

The bill will give the Government a great deal of power over future regulatory reform, but there is little in the way of scrutiny of how that power will be used. Indeed, the committee report states that it heard from many witnesses who had difficulty understanding the implications of the proposed enabling power because of the lack of detail on the circumstances in which it would be used, or to whom it would apply. The Scottish Council for Development and Industry and the Law Society of Scotland both expressed concern that there is no clarity around the duty, which makes it difficult to interpret what the bill will achieve in practice. The Law Society urged Parliament to clarify the approach that the Scottish Government is taking.

My fear is that the approach that the Government is taking is to centralise the power to set, change and create new regulations that will fulfil the more modest policy intention of providing national standards in regulation. In the process, we are losing transparency and accountability, because the bill will not allow Parliament to scrutinise those powers, although they are being centralised, or to scrutinise the changes to the regulatory frameworks that they will bring.

Given that a number of businesses and stakeholders are voicing similar concerns, we need to know what action the Scottish Government is taking to ensure that changes will be made democratically and transparently. In particular, I urge the Government to reconsider whether the super-affirmative procedure is a more democratic way of exercising its powers.

With regard to the national standards themselves, I appreciate that there is a need to eradicate duplication and inconsistency. However, must that come through the sacrifice of local decision making? Unison and the Scottish Trades Union Congress have both questioned whether the legislation strikes the right balance. Unison stated:

"Authorities must be able to set their own standards and respond to local situations."

Although I am glad that the minister is working with COSLA, I urge the Government to consider whether the bill needs to be amended to reflect the memorandum of understanding that has been agreed. As Andrew Fraser of North Ayrshire Council said:

"It is unusual for legislation to require a non–statutory memorandum of understanding to make it acceptable and workable."—[*Official Report, Economy, Energy and Tourism Committee*, 5 June 2013; c 2946]

I agree. We need legislation that is sustainable on its own. If the Government is to introduce national standards, it has a responsibility to balance those standards with the duty on local authorities to respond to local needs.

In turning from a provision that is not in the bill to one that should not be in it, I will touch on the duty to promote sustainable economic growth. Just 29 per cent of those who were consulted agreed that that duty should be in the bill; there are serious concerns about how it will work in practice, which have already been aired. The STUC, in its submission to the committee, argued strongly that a mandatory duty on regulators to pursue economic growth could create a conflict of interests in relation to their function to regulate.

Paul Wheelhouse: I am grateful to Jenny Marra for taking an intervention, but I hope that she picked up the point that I made in my opening speech that we have a situation in which SEPA, for example, is being asked to look at sustainable economic growth in the context of health and wellbeing, but the overriding statutory duty on environmental protection and sustainable management of natural resources takes primacy in that arrangement of three different duties. Those are three pillars of sustainable development.

Jenny Marra: I thank the minister for that clarification. From my reading of the bill, it seems to me that the duty on sustainable economic growth overrides many of the other regulatory considerations—we are looking for clarification on that—and that is certainly the concern of many people who gave evidence to the committee. Only 29 per cent of those who were consulted agreed that the duty should be in the bill, because it overrides other regulatory functions. The STUC notes that duties that were placed on the Financial Services Authority that prevented it from introducing new regulatory barriers or discouraging the launch of new financial products severely weakened its ability to regulate the banking sector effectively, which illustrates that conflict of interests.

Scottish Environment LINK has said that the duty could override environmental protection or wellbeing and the Law Society has raised significant concerns about the validity of a duty that is not properly defined in law, as we have rehearsed this afternoon. Unison has stated that without a legal definition it will be hard for regulators to make clear-cut decisions, and they may be left vulnerable to challenge through the courts, even with the minister's proposed code of practice.

Fergus Ewing: Does Jenny Marra not recognise that, on the regulator's duty in respect of sustainable economic growth, section 4 quite clearly states:

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

That surely makes it clear that what Jenny Marra has said—that the economic duty would override those functions—is factually incorrect.

The Deputy Presiding Officer: Ms Marra, I will give you a little more time.

Jenny Marra: I do not accept the minister's assertion. If there is a duty with regard to sustainable economic growth without a properly defined legal interpretation of that, the matter becomes a very grey area that is open to many arguments in court. That is the view of the Law Society of Scotland and of many people who gave evidence to the committee. It may not be the minister's view, but only 29 per cent of consultation respondents agreed that the duty should be included. I think that we will have an on-going debate about that this afternoon, and probably at stage 2 and stage 3, but we should really get to the nitty-gritty of what the impact of the duty will be.

The implications were put to the committee by Professor Andrea Ross of the University of Dundee—a legal expert—who wrote to the committee:

"Regardless of how this government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability."

Given the level of opposition, I am not convinced that the duty should be in the bill. I see no reason why the widely used and legally defined duty for sustainable development is insufficient.

Derek Mackay: For clarity, will Jenny Marra tell me whether the Labour Party supports sustainable economic growth?

Jenny Marra: The Labour Party does indeed support sustainable economic growth, but not at the cost of absolutely everything else, such as hard-fought-for health and safety regulations that are very important to workers and our local authorities.

I fear that the bill suffers from one narrow aim: to centralise power. The detail is scant on how it will be used, but we know that that power will be exercised here in Edinburgh, rather than in our communities. Regulations must work for the communities that they keep safe, the businesses that they affect and the environment that they protect.

We are uneasy with much of the bill and when we take out those concerns we are left with a reorganisation of SEPA, for which we do not need primary legislation. That leaves us with not much to support at all.

Paul Wheelhouse: Will Jenny Marra take an intervention?

Jenny Marra: I have taken all the interventions so far, but I think that I am out of time.

The Deputy Presiding Officer: The member is close to closing.

Jenny Marra: We will vote against the principles of the bill tonight and we hope that the Government will reconsider many of the measures before stage 2.

15:18

Gavin Brown (Lothian) (Con): We welcome much of what is in the bill today. We think that it is a step in the right direction, although there is still much to do on regulatory reform, both in principle and in the bill itself, so we will vote for the bill at 5 o'clock today.

It is a common complaint from business of all shapes and sizes that the volume and burden of red tape is too much. In the recent Federation of Small Businesses in Scotland survey, 45 per cent

of those who were surveyed said that the cost of compliance had risen over the past year, and 29 per cent said that the time that is taken in order to comply with regulation had increased over the past year. Some regulation clearly is necessary and some of it is less so, but having as much regulation as we have can stifle potential and innovation and, ultimately, make us less productive as a country.

We welcome the bill, the better regulation agenda and, indeed, the work of the regulatory review group. It is not just regulation itself, of course, but the way in which it is interpreted and enforced that causes much of the angst across the business community.

Let us look at some of the key issues, many of which have been touched on. First, section 4—which is entitled "Regulators' duty in respect of sustainable economic growth" and is to be read in conjunction with sections 5 and 6—provides that regulators

"must contribute to achieving sustainable economic growth".

That is a principle that I and my party support—indeed, there was something pretty similar in our manifestos in 2007 and 2011. The provision gives a signal that sustainable economic growth is a priority for Government. It raises the profile of the issue, and it sets out a clear vision: Scotland needs sustainable economic growth.

I do not agree with Jenny Marra's suggestion that the provision will override all the other duties that regulators have. The minister was right to point out the precise wording of section 4 in that regard. Two parts of the section are relevant. First, section 4 provides that regulators

"must contribute to achieving sustainable economic growth".

The achievement of sustainable economic growth is therefore not an overriding duty, but something to which regulators must contribute.

Secondly, in relation to the duty to make such a contribution, section 4 provides for a clear exception for all regulators, where

"it would be inconsistent with the exercise of"

their

"functions to do so."

Before we even consider that guidance will be produced, those two points in section 4 mean that the argument about the duty overriding all other duties is overblown and ought not to be central to the debate.

Questions were asked and fair points were made by people who are against and people who are in favour of the principle. The conclusion was that the success of section 4 and the bill as a whole will depend almost entirely on the guidance and code of practice that the Government will issue under sections 5 and 6. The FSB was right to say that how the code is monitored and reported on will determine how effective it will be in changing practice. I hope that ministers will focus on that in their speeches, in the context of subsections (2) and (3) of section 4.

Fair questions were asked by people who are in favour of the principle. How will we ensure that the duty is enforced at operational level, where it matters? How will we avoid legal challenge? That is a fair question, which Jenny Marra and other members asked. None of us wants to see time being taken up in the courts. How will we ensure that the meaning is narrowed down, so that that does not happen?

People who are concerned that the section 4 duty might override other duties have asked how it will sit alongside regulators' primary purpose, and how regulators will balance their priorities. It is crucial that the code of practice and guidance are right in that regard, so I was pleased to hear from the Economy, Energy and Tourism Committee's convener that the committee will take evidence on the code of practice and the guidance in order to ensure that Parliament and the Government get things right.

It is possible to get things right. I trawled through the written submissions to the committee and noted that the Office of the Scottish Charity Regulator said that it

"already reports on sustainable growth, as required by"

section 32(1)(a) of the Public Services Reform (Scotland) Act 2010. The approach in the bill is therefore not without precedent. One regulator must already comply with a provision, the wording of which is pretty close to what is in the bill. There is much to be done, but I am persuaded that it can be done at stages 2 and 3.

We heard about primary authority partnerships. We strongly approve of the approach, which will bring cost efficiency for businesses and local authorities, and greater consistency across the board, which is important for all concerned. It would be helpful to hear from the minister, in his closing speech, about the analysis of the responses to the consultation, and about the Scottish Government's updated position on that.

We heard about the planning authorities. I do not know whether the planning minister will speak in the debate, but it would be helpful to hear from the Government what its definition of unsatisfactory performance is likely to be, what levels of reduction we are talking about and what measures could be put in place.

Derek Mackay: Will Gavin Brown take an intervention?

Gavin Brown: Do I have time, Presiding Officer?

The Deputy Presiding Officer: Yes, you do.

Gavin Brown: I am happy to take the intervention.

Derek Mackay: I thank Gavin Brown. I do not have a dedicated speaking slot, but I am here to answer questions such as those he has asked. We have a high-level group, which has established high-level principles around what is good performance, thereby enabling us to define poor performance. There will be a range of measures whereby we will be able to determine whether a planning authority is performing well or not, in the way that Murdo Fraser outlined.

The Deputy Presiding Officer: You should close now, Mr Brown.

Gavin Brown: I am grateful for the minister's intervention and am pleased to hear that work is being done on the matter. I simply note that Audit Scotland said that data must be qualitative and quantitative, and that the SCDI—which is very pro-business in much of what it says—warned of creating

"false incentives to prioritise speed over optimal results."

Both pieces of advice are worthy of note.

As the committees that have been involved have made clear, there is still work to be done on the bill and no doubt other suggestions will be made in the course of the debate. However, because it is a step in the right direction, we will support the bill, come 5 o'clock.

The Deputy Presiding Officer: We move to the open debate.

15:25

Mike MacKenzie (Highlands and Islands) (SNP): I am pleased to speak in the debate not just because I am a member of the Economy, Energy and Tourism Committee, but because of my previous career of running a business for many years, when I often used to ask myself, "Who regulates the regulators?"

It was clear to me then that much of our regulation was inconsistent and disproportionate, and that regulatory powers were often placed in the hands of people who used them unwisely and without proper regard for the wider consequences. That said, I fully acknowledge that I have a particular genetic defect that sometimes gave me difficulties when it came to dealing with regulators. Members might not be surprised to learn that I completely lack the forelock-tugging gene; as hard as I try, I cannot force my hand up to grasp it. Regulators did not always appreciate that.

The recent FSB survey of its members indicated that a substantial proportion reported an increase in the cost of dealing with regulation over the past year. I wonder how that cost has increased over the past 30 years, although I suspect that we already know what the answer is. I also wonder about the wider cost to our country with regard to growth or, indeed, the lack of growth and prosperity, and about the impact on numbers of jobs, on living standards and on tackling poverty. In this matter, I pay particular regard to the voices of small businesses, because the burden of regulation often falls most heavily on their shoulders—in other words, the shoulders of those who are least able to bear it.

That said, I fully understand the need and requirement for regulation. After all, without it, we cannot function as a civilised society, and the quality of our life and environment would plummet. As a result, in considering improvements to regulation, we need to make it more consistent and make it a less blunt instrument. I believe that that is exactly what the bill will do—not as a final solution, but as a step on the road towards better regulation.

With regard to environmental regulation, I believe that the bill gives SEPA a valuable toolkit that will enable it to protect our environment more effectively, thereby freeing up resources to tackle serious environmental problems and crimes while offering a lighter regulatory touch to businesses that have every intention of complying.

It is often the case that regulation varies from one local authority to another for no good reason.

Alison Johnstone (Lothian) (Green): Is Mike MacKenzie aware that, in its written evidence, the STUC said that Scotland is already

"a good place to do business"

and that it is

"part of the second least regulated product market in the developed world and the third least regulated labour market"?

Mike MacKenzie: I am not quite sure exactly how one might measure that, but I certainly listen carefully to Scottish businesses on these matters.

As I was saying, regulation often varies from one local authority to another for no good reason. The committee heard evidence to that effect. Some regulators, principally local authorities and COSLA, said in evidence that they are unhappy about that because it conflicts with the concept of local democracy. Unfortunately, they were unable to give a single example of it happening in practice; it seems that their concerns are purely abstract. In any case, I welcome the Government's

assurance that it is prepared to consider exceptions.

Witnesses also expressed concern about the economic duty. I am afraid that the apparent opposition of some regulators to sustainable economic growth rather makes the case for that duty to be enshrined in legislation. I cannot understand why anybody should be opposed to that duty, or why the term "sustainable" seems not to be understood. Much of the discussion seemed to be merely semantic, and none of the witnesses was able to give a single practical example to illustrate their concerns.

Alison Johnstone: I can give Mike MacKenzie an example. The building of a golf course on a site of special scientific interest is an example of the environment taking second place to economic considerations.

Mike MacKenzie: As I said, none of the witnesses gave us an example and, in some quarters, the jury is still out on that matter.

Planning fees prompted some interesting discussion. Some witnesses were firmly of the belief that, because planning delivers a public good, full cost recovery through fees is inappropriate. Our planning system is the midwife to sustainable economic growth, so I am delighted that the minister is focusing on a range of improvements that will help to deliver that growth while protecting and improving the quality of our built and natural environments. The notion that sustainable economic growth is incompatible with that is a dismal notion that could condemn us to slow growth and failure to achieve any of our aspirations. The minister intends to increase planning fees, but it is only proper that developers and the public alike also see an increase in performance.

I look forward to the forthcoming code of practice, which will offer reassurance to anyone who has remaining doubts about the bill, and to the enhanced and economic growth that the bill will help to deliver.

15:31

Margaret McDougall (West Scotland) (Lab): I am happy to take part in the debate as a member of the Economy, Energy and Tourism Committee. The Regulatory Reform (Scotland) Bill aims to cut back on the hoops that certain organisations need to jump through by streamlining and standardising certain parts of the process. However, I have several concerns that I hope will, at the very least, be addressed at stage 2. I will focus on the increasingly centralised agenda that is displayed in the bill and the planning changes that are set out. I will also briefly mention street traders' licences.

Local democracy is central to our society and, where possible, we should devolve powers to where they are most applicable. Although we all support consistency, we must not strip local councils of their functions. In written evidence to the committee, COSLA spokesperson Michael Cook stated:

"Local communities should remain empowered and have the right to differing standards to reflect different locally required outcomes."

Mike MacKenzie: Will the member take an intervention on that point?

Margaret McDougall: I need some time to proceed.

Unison stated in written evidence:

"Authorities must be able to set their own standards and respond to local situations. National standards and systems conflict with the bottom up approach recommended in the Christie Commission report which the Government welcomed. Local authorities have a range of different aims".

Mike MacKenzie: Does the member acknowledge that, although Mr Cook made that theoretical point, he was unable to give any practical examples of where that has occurred?

Margaret McDougall: COSLA was very straightforward in not supporting the proposal. I will use another quote from COSLA later in my speech.

I fully agree that, in most cases, there is no one-size-fits-all solution. Planning authorities operate in diverse communities and need different strategies and solutions for their own unique situations. Otherwise, we run the risk of national standards undermining local democracy.

Derek Mackay: Will the member take an intervention on that point?

Margaret McDougall: I will do so if the minister is brief.

The Deputy Presiding Officer: Please be brief, minister.

Derek Mackay: Is the member not conflating what she sees as consistency or centralisation and what we propose for planning? South of the border, if a planning authority is performing poorly, the minister takes absolute control of that planning department through his inspectorate. I am not proposing that for Scotland. We propose to encourage conditions that will improve performance and, if that fails, that the poorly performing planning authority will not enjoy continued increases in planning fees, which would be unfair.

Margaret McDougall: I thank the minister for that intervention, but I think that all those who gave evidence agreed that removing funding from

a local planning authority would be detrimental to that authority.

We should not be looking to burden local authorities with a set of national standards that do not work for them. Although I acknowledge the need for consistency, I argue that it might be better for that to be provided not by central Government but through best practice guidelines and co-ordination.

The proposal to link planning application fees to the performance of the planning authority would mean that the Scottish ministers could reduce fees to underperforming planning authorities when it was felt that they were operating less than satisfactorily. We need to be extremely careful about the way in which the proposal is implemented. Despite the proposal forming a relatively small part of the bill, the question on it was one of the most frequently answered of all the consultation questions.

The Royal Town Planning Institute stated in its submission that it was

"disappointed that Ministers intend to pursue a statutory mechanism to penalise authorities who they consider under perform".

It went on to say that it would be "counterproductive to withdraw funding", and that

"a national continuous improvement programme ... should be put in place".

What does the Government mean by unsatisfactory performance? That is not defined anywhere in the bill. Who will make the decision about whether performance is satisfactory or unsatisfactory? In an earlier intervention, the minister mentioned that there was a working group. When will that working group report to the committee or to the Parliament?

Derek Mackay: Will the member take an intervention?

Margaret McDougall: Yes.

The Deputy Presiding Officer: The member is now in her final minute, so Mr Mackay's intervention must be very brief.

Derek Mackay: I will be happy to share all the workings of the high-level group with all members so that they are fully informed about the key performance indicators. I hope that that will give the member some reassurance.

Margaret McDougall: I am now running very short of time.

What role will democratically elected councillors play under the new system? I understood that it was their job to scrutinise the process. Is that function to be removed? COSLA is not supportive of the bill's proposal, as Stephen Hagan stated in his letter to the Economy, Energy and Tourism Committee, in which he described it as

"fundamentally too much Ministerial interference in the operations of a specific council service".

What discussions is the Scottish Government having with councils to resolve the issue? What role will councillors have under the new system?

I hope that the Scottish Government will take on board the concerns that I have raised and make the necessary changes at stage 2 to avoid the distinct feeling of creeping centralisation that local authorities are experiencing in relation to some of the proposals in the bill.

15:38

Graeme Dey (Angus South) (SNP): I do not think that any reasonable person would question the wisdom or desirability of what the bill seeks to achieve—surely everyone benefits from improved regulation and an improved ability to regulate. The challenge in relation to the areas of the bill that the Rural Affairs, Climate Change and Environment Committee scrutinised as a secondary committee lies in ensuring that, in facilitating sustainable economic growth, we in no way compromise or give rise to the possibility of compromising protection of our environment or our natural heritage.

The committee's scrutiny of the bill centred on part 2, which covers environmental legislation, along with those areas of part 1 that relate to SEPA and SNH. In its submission, SNH revealed that it had no difficulty with the principles of the bill but admitted that it was not fully clear on its priorities and purpose. It should be acknowledged that SEPA revealed itself to have a clear understanding of its role. It stated that its new general purpose, as drafted in section 38 of the bill, accurately reflected the manner in which it currently operates.

The Minister for Environment and Climate Change told the committee that he did not intend the duty on sustainable economic growth to subvert in any way the existing regulatory duties of SEPA and SNH, and that regulators would take economic impact into account only when there was no conflict. Despite that, the committee came to the view that, given SNH's hugely important role in securing the conservation, enhancement, understanding, enjoyment, sustainable use and management of the natural heritage, a provision similar to the one that is provided for SEPA in section 38 might reasonably be included.

The minister indicated that he did not feel that to be necessary. However, although we were largely reassured by the minister's evidence, we remained of the opinion that the hierarchical model that is set out in section 38 might still be deployed

to provide that clarity. The intention is understood, but we were simply of the view that it might be more clearly understood were the Government prepared to take the suggested approach.

The minister indicated that regulators would be able to identify the outcomes of their new duties in future annual reports, but the committee was concerned that if regulators were unclear on what the duty would mean for them in practical terms, that would impinge on their ability to report. However, we welcomed the Government's commitment to produce, in consultation with stakeholders, appropriate guidance.

The undertaking given that the statutory code of practice will be comprehensive and define what is expected of regulators as regards their duties under section 4 is also to be welcomed, provided that the guidance includes clear instruction on how to resolve any conflict that arises between compliance with their primary functions and achieving sustainable economic growth.

Of course, things have moved on with the creation of the Scottish regulators code of practice working group to develop the draft code, with a view to entering into full consultation later in the year, and the Minister for Energy, Enterprise and Tourism reiterating in evidence and again today that sustainable economic growth is not to be prioritised over other regulatory objectives but is simply something to which regulators must have regard. The direction of travel is therefore one that satisfies the concerns of this member of the committee.

However, concern was expressed in the evidence that we took about how a high-level code of practice that is designed to be applicable to a wide range of regulators could be meaningful and effective. Subsequent ministerial reassurance that the new code was designed not to replace but to complement the detailed and specific subject codes that are already in existence—in other words, the already well-functioning codes specific to individual regulators would remain their driver—has helped to allay those fears. However, like the Economy, Energy and Tourism Committee, we in the Rural Affairs, Climate Change and Environment Committee might well renew our interest in the subject prior to the draft code being finalised and laid before Parliament.

I very much welcome the planned enhancing of SEPA's powers of enforcement through the bill and planned Government amendments. The package of measures that we might end up with by stage 3, judging by what is in the bill as drafted and the Government's proposed stage 2 amendments, will give those who police and protect our environment the means to do so effectively. I welcome the planned new section focusing on SEPA's investigatory powers with a view, among other things, to determine any financial benefit that has accrued in relation to serious environmental crime.

I similarly welcome the proposed amendments to schedule 2, which will mean that permits can be varied, suspended or revoked if the holder ceases to be deemed a fit and proper person and that a permit transfer can be refused if the would-be transferee is not a fit and proper person. I also welcome the intended amendments to sections 69 and 166 of the Criminal Procedure (Scotland) Act 1995.

Concerns were raised that SEPA might use its new powers to impose fixed-penalty fines in relation to weaker cases rather than pursue the issue through the court process. However, SEPA stated in evidence that in practice it would still have to carry out a thorough investigation into the evidence and that guidelines to be provided by the Lord Advocate would further direct its approach. The committee was told that the nature of the offence and whether criminal intent was involved would be taken into account in determining the balance of probability.

As a member of the committee, I was particularly pleased to learn that regulations made under the bill will enable SEPA to consider issues on a company-wide basis rather than an individual-site one. That will ensure that organisations that have a corporately bad attitude to the environment will be appropriately held to account, not just slapped across the wrist because at an individual location level their actions are not deemed to be significantly serious. Plans to issue publicity orders are also a step forward, because they might be used alongside or in place of alternative sentences, and someone who is convicted of an offence would be required to make public details of the misdemeanour and the sentence imposed.

Discretion on whether to deploy that approach would lie with the courts. However, it strikes me that, used in a commonsense way, that would draw a distinction between a one-off accidental breach and a perpetrator deliberately playing fast and loose with the environment. It is another useful weapon in the environmental protection armoury. Allowing directors of a company and similar office-holders to be prosecuted for the offence of failure to comply with a publicity order in certain circumstances is a logical accompanying step.

I welcome moves to better protect SEPA officials from threats of violence and intimidation. The committee heard of cases of serious organised environmental crime in which SEPA officials had been subjected to such threats. SEPA officers do hugely important work on our behalf

and they must be afforded the fullest protection and backing.

15:44

Claudia Beamish (South Scotland) (Lab): As a member of the Rural Affairs, Climate Change and Environment Committee, I identify myself with many of the remarks that my colleague Graeme Dey made.

I want to speak about the term "sustainable development". I ask ministers to consider including that in the bill and, further, I ask them not to include the term "sustainable economic growth" without a clear statutory definition. I do not believe that this is just semantics. As others have said, the term "sustainable economic growth" lacks legal clarity, and in my view it does not represent a sufficiently holistic approach, so it is more likely to founder. There is already a term whose legal meaning is clear and which is holistic by definition, and that is "sustainable development". For those reasons, and others that colleagues have raised, we will not be able to support the bill at this stage.

Paul Wheelhouse: Will the member take an intervention?

Claudia Beamish: Very briefly. I want to develop my point.

Paul Wheelhouse: I am grateful to the member. I hope that I will not disrupt her flow. I just wanted to point out that, at the European environment council level, the member states are currently discussing the definition of sustainable development, and the German Government has pointed out that it does not even include the word "environment". In European policy, a lot of thinking needs to be done on how to define sustainable development. In section 38, we make it quite clear to SEPA exactly what we mean.

The Deputy Presiding Officer: I will give you a little extra time, Ms Beamish.

Claudia Beamish: I will go on to develop arguments about the rationale for adopting the five pillars of sustainable development, so I will proceed on that basis.

As we all know, sustainable development takes into account the social, environmental and economic, which in my view fuses them into one and provides a way forward. Sustainable economic growth, though, is wrong-footed in that way. Further, the word "sustainable" has had too many meanings attached to it when it is the precursor to "economic growth". Does the phrase refer to growth that is sustainable or to an environmental or social brake on growth? Further, sustainable economic growth can entail irredeemable degradation of the planet, increasing inequality and even arms production, and a poor diet leading to obesity. Those are bad factors, but they are still defined in that way. Sustainable economic growth can also entail debt, which can be sustained for decades, as we have seen.

Significantly, there appears to be confusion about what sustainable economic growth really means. There is concern about the lack of clarity in policy definition itself, which could cause confusion in the development of regulation as the Government and successive Governments act in a range of areas. Even worse, in the draft marine plan, which is out to consultation, we read:

"The ... High Level Marine Objectives ... reflect and incorporate the five guiding principles of sustainable development, which the Scottish Government acknowledges as an important element of increasing sustainable economic growth."

So sustainable development now becomes a subset of sustainable economic growth in Scottish Government policy.

As we have heard, there are concerns that confusion may lead us to the courts. In written evidence to the Rural Affairs, Climate Change and Environment Committee, Professor Colin Reid of the University of Dundee stated:

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

I think that we can all agree that legislation must be robust and clear. The recent Crofting (Amendment) (Scotland) Act 2013 is a salutary reminder of what can happen to people if it is not. In the words of the Law Society of Scotland's written submission to our committee,

"Effective legislation is best made with precise terms."

The term "sustainable economic growth" is not clear and precise enough. We are more likely to get it right with the term "sustainable development", as it reflects a more holistic approach, and a range of stakeholders argue for it to be used in the bill.

Scottish Environment LINK is concerned about the economic growth duty on regulators. It states:

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

The Scottish Council for Voluntary Organisations highlights in its briefing that the importance of sustainable development was recognised in the passage of the Water Resources (Scotland) Bill, which was amended at stage 2 in response to the Economy, Energy and Tourism Committee's recommendation to give equal emphasis to all three pillars of sustainability rather than just the economic aspects.

The national performance framework aims for a flourishing and prosperous Scotland through the balance of 50 indicators including biodiversity,

carbon and equality issues and, as members know, much work is being done on the appropriateness of gross domestic product being Scotland's only top-line measure of progress. Strangely, the two committees that were involved in the passage of the bill were unable to agree on that issue at stage 1.

Mike MacKenzie: Will the member take an intervention?

Claudia Beamish: I am sorry, but I cannot do so now.

The Deputy Presiding Officer: The member is in her final minute.

Claudia Beamish: The Economy, Energy and Tourism Committee, which is the lead committee, noted the "conflicting views" of stakeholders, but asked only that "sustainable economic growth" be

"explicitly stated and explained in subsequent guidance",

but not on the face of the bill. That is not good enough.

The Rural Affairs, Climate Change and Environment Committee, which is the secondary committee and my committee, expressed concerns in its report to the lead committee. It said:

"The Committee agrees with stakeholders that if a duty to contribute to achieving sustainable economic growth is to be included in the Bill then, to ensure clarity and to safeguard against any reinterpretation of its intended meaning at a later date, a definition of the term should be included on the face of the Bill."

Finally, that committee said:

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

I whole-heartedly support that approach.

15:51

Bruce Crawford (Stirling) (SNP): I hope that, whatever our differences are this afternoon, we can agree on the need to place an emphasis in the bill on assisting business in Scotland and on creating an environment in which business can flourish, while recognising that we need to offer protection to people and the natural environment in which they live.

I will discuss a particular case in my constituency that is presenting considerable challenges to a number of my constituents. A situation has arisen through no fault of their own, and the current regulatory framework does nothing to ease their plight.

The bill is an opportunity to look afresh at the regulatory framework and identify ways in which to improve it—for instance, by making legislation that promotes better consistency of approach across the country and thus assists businesses in understanding what standards are expected, while acknowledging local circumstances.

I was taken by the mention of "pointless inconsistency" in the MSP briefing from the Federation of Small Businesses. That is what the bill is really about. That clearly causes frustration to businesses and I hope that it can be addressed by the bill's proposals, as it is a recurring theme with the businesses and individuals I speak to in my constituency, particularly regarding the actions of local authorities and organisations such as SEPA and SNH.

Another key aspect of the bill is the environmental standards that it encapsulates. I very much welcome that thrust.

I turn to an environmental matter in my Stirling constituency. The bill has the potential to have a major beneficial impact on some of my constituents. I will explain what I mean.

Around 18 months ago, I was contacted by constituents from Blanefield about contaminated land in a part of the village that had been built on the site of an old printworks. It was found that the houses, which were built in the 1930s, were situated on land that had been contaminated with high levels of lead and other hazardous substances. After testing and retesting, 13 properties are now in need of remediation due to the level of contamination. The residents in Blanefield and Stirling Council have come together to work to find the best possible solution to that matter, but they face many obstacles.

First, the cost of remediation to Stirling Council and my constituents is extremely high, partly due to the cost of the landfill tax. Estimates suggest that the cost of cleaning the land is likely to be over half a million pounds.

Secondly, my constituents' main concern after remediation is that, although the land may be made safe, their properties will still be listed on the contaminated land register. As things stand, if a local authority finds a site to be a significant threat to human health, it may issue a notice that identifies the land as contaminated and places it on the contaminated land register, but even when the land is remediated and no longer meets the contaminated land criteria, it will remain on the register, as the legislation does not provide for a site to be taken off that public record. My constituents will have to endure the stress of their homes being on contaminated land, the financial

cost of remediation and the upheaval during the clean-up process, and, once the land has been made safe, their properties will remain on the contaminated land register. As members can imagine, that is causing my constituents a great deal of unease.

The bill will provide an opportunity to alleviate some of my constituents' anxieties. I have been in correspondence with the Minister for Environment and Climate Change about the issue and he was able to inform me of the Scottish Government's intent that the bill should give local authorities the power to declare that land that they have previously identified as contaminated is no longer contaminated and need not remain on the register. Closer examination of the bill's provisions on that subject suggests, however, that further clarification is required. I say that because Stirling Council officials have pointed out to me what the SPICe briefing paper has to say about section 34:

"Section 34 relates to contaminated land and special sites, and amends the Environmental Protection Act 1990 by proposing the following provisions: ...

enabling the local authority or SEPA to remove from a register of contaminated land a notice designating a special site; if it considers that the land in question should no longer be specified as such."

However, that provision appears to relate only to designated special sites and the SPICe briefing describes a special site as follows:

"This is a specific designation for land where e.g. oil has been extracted, purified, or refined; or explosives processed or manufactured."

There does not appear to be a provision that would allow the land that could be determined to be contaminated land on the former Blanefield printworks site to be removed from the register of contaminated land once it has been remediated.

Providing this example, as I have done today on behalf of my constituents in Blanefield—I have no doubt that there are other affected communities in Scotland—demonstrates an area in which ordinary individuals' lives could be improved by the bill. I look forward to hearing the Scottish Government's response today, or certainly before stage 2, so that I can consider whether to lodge amendments.

In the meantime, I fully support the bill's intent to bring a better regulatory framework into being in Scotland.

15:57

Alison Johnstone (Lothian) (Green): I thank the witnesses, who have given valuable input into the bill, and the clerks for their sterling work. As always, they have enabled us to scrutinise the bill and bring it to stage 1.

I dissented from the committee's recommendation to the Parliament that the bill be passed and I will argue why I believe that changes should be made.

Section 4 of the Regulatory Reform (Scotland) Bill introduces a new duty for regulators. If the bill is passed, the regulators that are named in schedule 1, such as local authorities and the Food Standards Agency, must, when carrying out their regulatory functions,

"contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so."

That provision hands regulators a conflicted remit. We are asking that, while regulators are doing their main job, they should focus on another job, unless that other job distracts them from their main job. As confusing duties go, that one is up there. In a world of limited resources, focusing on another outcome will inevitably reduce someone's ability to deliver their primary purpose.

Paul Wheelhouse: I hope that I made it clear in my opening remarks that this provision is not a case of distraction; it is a case of looking at where there is a conflict. Indeed, the Minister for Energy, Enterprise and Tourism made the same point. If there is a conflict between the regulator carrying out their sustainable economic growth function and their primary objective, they are not required to do the former. If a regulator's primary objective is environmental protection, it is only right and proper that it should prioritise that.

Alison Johnstone: When the Minister for Energy, Economy and Tourism gave evidence to the committee, he suggested that that was not the case. It is okay for ministers to say one thing, but what is written in the bill is what becomes law. In Scotland, we should be passing legislation that is clear and focused and gives our public bodies and businesses clarity about what is expected of them. It is not good enough to argue that the courts can decide in cases of doubt.

The FSB's briefing for today says that 51 per cent of its members found that the most challenging aspect of regulation was interpreting which regulations applied to their business. The new duty will make the picture no clearer and it could make the role of the regulator less clear.

Regulators help to stop the tiny minority of people who may cheat or deceive, thus gaining an economic advantage over businesses that are playing by the rules. This is how regulators help our economy to operate smoothly: they enable a fair, competitive environment for business to develop and they should be allowed to focus on their main purpose.

Unison reported that many of its members were concerned that the duty

"will leave their decisions open to a range of challenges when they give priority to ensuring public safety over that of the environment."

The Law Society of Scotland said that it would

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

It also questioned our ability to enforce such a duty, and suggested that that may just add a further complication to process. Andrew Fraser from North Ayrshire Council thought that

"the duty will end up as a lawyers' charter".—[*Official Report*, *Economy, Energy and Tourism Committee*, 5 June 2013; c 2955.]

The bill will allow—and the Government plans to produce—guidance and a code of practice to help, among other things, regulators interpret what the economic duty means for them. I welcome the role that the committee will play in considering the code, but the primary problem remains: the duty in primary legislation risks diluting the main role of regulators and skewing decision making, instead of promoting a balanced consideration of economic, social and environmental priorities. Regulators such as SNH already have a challenging enough time protecting our environment.

Let me be clear: nobody wants regulators to act in inefficient or overly complicated ways and unnecessarily interfere with business, but they must be able to focus on their job. I have yet to see convincing evidence that there is a major problem here that requires regulation. Regulators are willingly engaged with the regulatory review group and good progress is being made in non-legislative ways. Why add complications with unnecessary legislation and new duties when collaborative initiatives are working?

The definition of sustainable economic growth, as we have heard, received a lot of attention from witnesses and the committee. That is quite right—the phrase has never appeared in primary legislation before. The bill is a first and it should be scrutinised closely. I do not have strong views on where or whether any definition is spelled out. The real question is whether that is the right duty to place on regulators in the first place.

During scrutiny it became clear that the duty would play havoc with decisions made in the land use planning system. Under current legislation, as I have mentioned, a golf course took precedence over a site of such special scientific interest that an eminent scientist described it as

"Scotland's equivalent to the Amazon."

I welcome ministers' intentions to lodge an amendment to exclude a local authority's planning functions at stage 2, as I can only imagine what decisions could arise if a duty to promote sustainable economic growth impacted on planning decisions.

To me, the Economy, Energy and Tourism Committee's report on the subject reads like a cogent argument against any economic duty, but the conclusions, agreed by majority vote, do not follow. There was significant witness concern, both during the bill's consultation and stage 1 scrutiny, that the duty would skew decision making. Many suggested that the duty should refer to sustainable development. That term is understood well: it has international currency, it is embedded in Scots law and it explicitly balances economic, social and environmental issues. I hope that the minister will explain why that concept in law was not used instead.

It is the Government's right to focus policy on a single purpose, even if some of us question the concept, but there is a difference between the Government's policy and what the Parliament should write into law.

The Deputy Presiding Officer (Elaine Smith): Before moving on to the closing speeches, I remind members that all members should be in the chamber for closing speeches if they have participated in a debate. I note that Margaret McDougall is not in the chamber.

16:03

Jamie McGrigor (Highlands and Islands) (Con): I am pleased to close today's debate for the Scottish Conservatives. I, too, thank those organisations that have provided briefings for today, and those who took part in the various consultations. I commend the Economy, Energy and Tourism Committee, ably led by my friend Murdo Fraser, on a thorough stage 1 report. I also welcome the work undertaken by the Rural Affairs, Climate Change and Environment Committee as secondary committee in relation to part 2 of the bill.

There have been some good speeches from across the chamber and a good deal of consensus. Gavin Brown has set out the Scottish Conservative position. I therefore want to pick up on some of the issues that have emerged during the debate.

There has been general agreement that the Scottish Government's five principles of better regulation, namely that the bill should be transparent, accountable, proportionate, consistent and targeted where needed, are sensible and appropriate.

There has also been recognition of the need to ensure that, while regulation should protect Scotland's built and natural environments, which are key assets for our country that are vital for our

economy and wellbeing, it should do so without placing undue burdens on business and should help to support economic growth. We all recognise that this is a balancing act—and a challenging one.

The volume, type and cost of regulation is a big issue for businesses throughout Scotland, especially small and medium-sized enterprises, including many SMEs in my region of the Highlands and Islands, which often raise the matter with me. Last year, the Federation of Small Businesses said that around 30 per cent of its members cited regulation as the biggest barrier to growth, with 62 per cent of its members reporting that the costs of complying with regulation have increased over the past four years. The Confederation of British Industry Scotland stated:

"Red tape is a significant and avoidable constraint on business investment and growth".

Policy makers need to address that issue.

Regarding part 2 of the bill, I welcome the proposals to update the role of SEPA as our environmental regulator and I welcome the fact that SEPA's objectives will include helping to achieve sustainable economic growth—we all need growth. I was pleased to note that, in its submission to the Rural Affairs, Climate Change and Environment Committee, SEPA stated that it is committed to continue

"Engaging much more with business"

and

"Ensuring that environmental regulation is not unnecessarily burdensome on businesses",

which I must say has often been the case in the past. CBI Scotland has been positive about the progress that SEPA has made in those regards, and I hope that that can continue.

On part 3 of the bill, I welcome the proposal in section 40 for a single appeals system for offshore marine energy projects. On section 41, I note that the linking of planning fees to performance was one of the most frequently answered of all the consultation questions. We support the Government's aim of seeking to eliminate undue delay in the planning system and we support the linking of planning fees to performance, as that should incentivise planning authorities. We are aware of concerns about how planning authority performance will be measured and we look forward to seeing the Scottish Government's guidance on that. We also agree with representatives from the business sector that they should be able to expect an improvement in performance from increases in planning fees.

In conclusion, the Scottish Conservatives support the consolidation and streamlining of regulation at every level, wherever that is possible. The Minister for Environment and Climate Change will know that my crofting constituents—many of whom I visited last weekend on Skye—would dearly love to see that applied to some of the legislation that engulfs their sector, although some of those issues are being considered by the crofting law group's sump.

We want regulation that is concise, precise, easy to understand and transparent. We look forward to the bill helping to achieve that aim and we look to ministers to improve the bill further at stages 2 and 3.

16:08

Jenny Marra: I began the debate by talking about the importance of regulation to our communities and to our environment. Regulations keep us safe, they contribute to sustainability and they make the everyday easier. For regulatory reform to work, it must be built by Government, yes, but also by the communities that benefit directly from it.

Under the bill as it stands, I fear that we will lose the democratic element to our regulation, lose the input of the representatives who are closest to people and, therefore, risk suffering from regulation that works against our local communities and businesses rather than with and for them. I completely agree with Bruce Crawford that regulation is about creating the conditions for business to flourish while protecting people. I completely agree with that assertion, which the Minister for Enterprise, Energy and Tourism challenged me on in my opening speech. We want to see the ideal conditions for business, but we need the balance that Bruce Crawford talked about. I do not think that the bill goes to the heart of striking that balance properly.

I am not opposed to national standards, but the bill must do the responsible thing by telling us unequivocally how national standards will work with our local authorities, whose duty is to serve the needs of the community.

Principles in a memorandum of understanding offer small comfort compared to the clarity of the law, but I fear that the Government is not prepared to clarify its law because it does not yet know the impact of the changes that it proposes. What good is a duty to promote sustainable economic growth to a regulator whose function is to penalise businesses when they flout environmental standards? How will that balance be struck and who will make that decision? The experts—the Law Society of Scotland, which regulates and represents its members—tell us that it might be the courts, which are already overburdened, yet we are being asked to take comfort in a code of practice that has not yet been thought of.

I ask the minister to seriously consider the issue. The cart is being put before the horse. All that we really know is that power will come to Edinburgh, but we do not know how it will be used. The bill will give the Government the power to introduce, amend and delete regulations without proper oversight by the Parliament. That is the stuff of a Government that is more concerned about where power lies than about how the power is used and that is not why we fought for this Parliament.

I urge the Scottish Government to seriously consider the remarks of the Law Society with regard to section 4, "Regulators' duty in respect of sustainable economic growth". The guidance that Fergus Ewing relied on earlier in his intervention has not yet been thought of or drafted, but it is what the lawyers would refer to in deciding on such cases. It is worth reiterating the Law Society's concerns. In written evidence, it said of the duty:

"The underlying question in relation to the avoidance of burdens on commerce must be whether the imposition of this new duty actually contributes to better regulation or merely adds a further complication to process. If the duty is imposed, the failure to write it into decisions, difficult, as it is to apply, may only result in generating a further ground for appeal of the decision."

I ask the minister in his closing remarks to address that concern about section 4. Concerns have been voiced from across the chamber. The duty will cause problems in local authorities and in the courts, so I ask the Government to review the issue before stage 2.

I want better regulation for Scotland, but I do not believe that the bill guarantees that in any way. My colleague Claudia Beamish made a good case for including a provision on sustainable development in the bill; that was echoed eloquently by Alison Johnstone. I ask the Government to make that one of its considerations.

We have made clear our view that the principles of the bill are currently unsupportable, although I hope that the Government is listening carefully and will come back with alternative proposals.

Gavin Brown: The Economy, Energy and Tourism Committee recommended to the Parliament that the general principles of the bill be agreed. Half the Labour members on the committee voted against that, and half the Labour members voted in favour of it. Can the member explain that?

Jenny Marra: That is exactly correct. I am clarifying our position, which is that the general principles of the bill are unsupportable. I hope that the Government listens carefully to those considerations and comes back with proposals that we can support.

16:14

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): I thank members for their contributions to the debate. I pay tribute to Murdo Fraser, the convener of the Economy, Energy and Tourism Committee, for the way in which he presented the arguments, and I thank the clerks of that committee, who as always performed a power of work in the background to assist members in their scrutiny of the bill.

We have had a useful debate, although I cannot say that any of it has been desperately surprising, because we have rehearsed and rehashed arguments that were put at some length in committee and perhaps probed to a greater extent, as is possible given the committee procedure.

I hope that I will cover most of the points raised in the debate but, as always, I am happy to correspond with any member should I fail to deal with any significant point in this relatively short speech.

Better regulation is an important example of the Government's determination to use every available lever to support sustainable economic growth and make Scotland a more successful country with opportunities for all to flourish. The Regulatory Reform (Scotland) Bill is a key element of our continuing work to deliver better regulation.

As Jamie McGrigor stated, better regulation should be characterised by a number of principles: it should be transparent, accountable, proportionate, consistent and targeted. Those principles have been expounded and developed by Professor Russel Griggs and the regulatory reform group, whose recommendations are always worthy of careful scrutiny by members of the Parliament and have helped us enormously in a great many areas of Scotland's economic and environmental life.

The bill will help to provide a favourable business environment, in which companies can grow and flourish. Successful businesses create wealth and jobs, as well as improving communities and ordinary people's lives.

I was delighted at the support that the business community in Scotland evinced for the bill. Much reference has been made to the Federation of Small Businesses, which has taken a particular interest in the bill. It starts off its briefing not by talking about business, economic growth and jobs but by saying:

"We know that regulation is necessary to protect communities and the environment from potential harm. We also know that it protects small businesses, employees and the public from the irresponsible and unscrupulous practices of a minority."

That is the beginning of the FSB's comments and it is extremely welcome.

We are for better regulation, not for removing all regulation. Regulation meant that children were no longer put down mines or up chimneys. Regulation—the Parliament has seen a lot of it—helped to deal with some of the horrific illnesses and problems associated with asbestos. Regulation has produced a health and safety regime in our oil and gas industry that is regarded as an example to other countries around the world.

Regulation is not per se wrong but necessary. However, it must be the best regulation and conform to the principles that we have described. Laws and regulations play an essential role in fostering a prosperous, fair and safe society. They provide essential rights and protections for citizens, consumers, workers, businesses, communities and the environment. In so doing, they also support sustainable economic growth. However, as ever, we are ambitious for Scotland and want much better regulation—better in concept and development.

I am delighted to have worked, along with the Scottish Government officials to whom much credit is due, with our key stakeholders, especially COSLA. I mentioned Stephen Hagan and those who work with him in COSLA. We have spent quite a lot of time trying to reach a modus operandi with which COSLA and local authorities in Scotland can broadly feel comfortable. We are on course to achieve that, but that work will continue.

We have also engaged closely with SEPA and SNH on their role. Paul Wheelhouse has led that aspect of the work. In his opening remarks, he covered clearly how it relates to the bill's provisions.

I am delighted that the bill reflects the views and active input of the key stakeholders. To suggest that it does not is somewhat unfair to all those who have been involved in that serious work. However, the committee's consideration of the bill will also enhance it, and we will lodge a number of amendments based on its recommendations. We listen carefully to what the committees say, as is right and proper.

I am delighted, too, that Mr Wheelhouse will lodge amendments designed to protect those who are working for SEPA from assaults and attacks on them in the course of their employment. That was covered very clearly by Graeme Dey in his contribution. As Mr Wheelhouse indicated, protection will be extended to employees who face that type of threat in their work in the same way as we have extended such protection to other emergency services workers.

Out of a sense of inquisitiveness, I turn to those members who would vote against the bill today and say to them that, were the bill to go no further, one effect would be that that protection could not be extended to the workers of SEPA. This is really an issue for members of the Labour Party to consider. Were they, as appears to have been indicated, to vote against the principles of the bill—rather than being split down the middle, which is what they appear to have been in committee—rather than to try to amend it, improve it and deal with the points that Claudia Beamish and others made, the effect would be to deny SEPA employees the very protection that I would have expected Labour members to wish to extend. Perhaps, even at this late stage, they will reconsider.

I turn to what is perhaps the main point, which Jenny Marra—to be fair to her—Alison Johnstone and several other members mentioned, and that is economic growth. As I think the committee has recognised and acknowledged, we have made it absolutely clear that the duty in respect of sustainable economic growth will be clearly set out in a strategic code of practice. I recall that we alluded in committee to the fact that John Swinney has already provided a definition of sustainable economic growth in response to parliamentary written question S4W-10994. Although the code of practice will not necessarily duplicate that definition, the suggestion that there is no definition perhaps means that people need to pay a bit more attention to what we have said in the course of this session of Parliament, including what the Cabinet Secretary for Finance, Employment and Sustainable Growth said in responding directly—as is right and proper—to a parliamentary question.

Having listened to businesses, and with the endorsement of local authorities, we are minded to lodge amendments to introduce a framework for primary authority in Scotland, which will deliver consistent regulation through partnership working with local authorities. A more supportive business environment through consistent, effective and efficient regulation will be provided through other specific measures in the bill, such as the integrated framework for environment regulation; linking planning fees to satisfactory performance of planning authorities; speeding up the process of resolving legal challenges to offshore marine energy projects; and introducing a transferable certificate of compliance for mobile food businesses applying for street traders' licences.

Incidentally, that matter was originally raised by a member of the CBI at a meeting that I had with it a couple of years ago. That shows, I hope, that this Government is ready to, and does in practice, consider and respond to appropriate matters raised by businesses and organisations such as

the FSB, the CBI, the SCDI, the Scottish Chambers of Commerce, the Institute of Directors and, of course, the trade representative organisations.

I thank those representatives of the STUC with whom I have engaged. It is fair to say that we have not reached total agreement on matters but, of course, we continue to engage regularly and very seriously with the STUC.

I am determined that we will promote among all Scottish regulators a broad and deep alignment with the Government's purpose of focusing government and public services on creating a more successful country, with opportunities for all of Scotland to flourish through increasing sustainable economic growth. I believe that Parliament shares that ambition, as indeed do regulators and business. We will therefore continue with a team Scotland approach, working with regulators, business and others to deliver sustainable economic growth for Scotland.

Regulatory Reform (Scotland) Bill: Financial Resolution

16:25

The Deputy Presiding Officer (Elaine Smith): The next item of business is consideration of motion S4M-06623, in the name of John Swinney, on the financial resolution for the Regulatory Reform (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Regulatory Reform (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b) of the Parliament's Standing Orders arising in consequence of the Act.—[*John Swinney.*]

The Deputy Presiding Officer: The question on the motion will be put at decision time.

Decision Time

17:00

The Deputy Presiding Officer (Elaine Smith): There are four questions to be put as a result of today's business.

The first question is, that motion S4M-08240, in the name of Fergus Ewing, on the Regulatory Reform (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)

Against

Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hilton, Cara (Dunfermline) (Lab)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

The Deputy Presiding Officer: The result of the division is: For 74, Against 35, Abstentions 0.

Motion agreed to,

That the Parliament agrees to the general principles of the Regulatory Reform (Scotland) Bill.

The Deputy Presiding Officer: The second question is, that motion S4M-06623, in the name of John Swinney, on the financial resolution on the Regulatory Reform (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)

Abstentions

Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hilton, Cara (Dunfermline) (Lab)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)

The Deputy Presiding Officer: The result of the division is: For 74, Against 0, Abstentions 35.

Motion agreed to,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Regulatory Reform (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b) of the Parliament's Standing Orders arising in consequence of the Act.

Regulatory Reform Bill – Stage Two Amendments

Carrier Bag Offences

COSLA wrote to the Cabinet Secretary for Rural Affairs and the Environment on the issue of carrier bag charging on 20 September 2013, a copy of which is appended for information to the Committee. As can be seen from this letter we argued for more proportionate enforcement tools and therefore support the amendment to provide local authorities with the power to issue fixed penalty notices with regards to this.

Contaminated Land

COSLA has no objection to the proposed amendment to give local authorities the power to remove sites from the contaminated land register once they are satisfied they have been properly remediated. Given the extremely complex nature of this issue and the potential risks around it local authorities must have full discretion as to if and when they use this power. Moreover it must be up to the local authority to determine the evidence required to validate the remediation of a site.

20 September 2013

Richard Lochhead MSP
Cabinet Secretary for Rural Affairs and the Environment
St. Andrew's House
Regent Road
Edinburgh
EH1 3DG

Dear Richard

Carrier Bag Charging – Fixed Penalty Notices

At the Development, Economy and Sustainability Executive Group on 5 September the issue of enforcement of the carrier bag charging when it comes into force in October 2014 was raised. It was noted that at present there are no civil penalties and therefore the only avenue of enforcement is through the criminal courts. Given the nature of the offences this action will frequently be neither proportionate nor efficient, with large costs for local authorities, businesses and an already very busy court system.

The Executive Group would suggest that the Scottish Government consider whether under these circumstances the legislation will be effective and achieve the intended outcomes. The Executive Group suggest that enabling officers to use more proportionate action, for example through fixed penalty notices, would provide local authorities with an efficient enforcement tool to facilitate meaningful compliance with the legislation. Officers have indicated that fixed penalty notices would be a welcome tool to enable effective enforcement of the legislation to deliver the intended outcomes.

You will also be aware that at the previous Executive Group on 20 May this year, the issue of fixed penalty notices was raised in relation to section 46 to support local authorities in their ability to ensure communities are taking a full and active part in available waste collection schemes. The Executive Group agreed that the provision of powers for fixed penalty notices within section 46 be considered.

The principle of providing local authorities with the power to apply fixed penalty notices within their discretion applies to wider enforcement issues such as the Tobacco and Primary Medical Services (Scotland) Act 2010. Given the Scottish Government's commitment to the principles of better regulation, and specifically proportionality, which are clearly identified in the current Regulatory Reform (Scotland) Bill, it would seem appropriate that the Scottish Government consider the tools local authorities have at their disposal to enable compliance and enforce in a proportionate and targeted manner where appropriate.

Yours sincerely,

Cllr Stephen Hagan
COSLA Spokesperson
Development, Economy and Sustainability

Call for evidence response from the Scottish Retail Consortium

About the Scottish Retail Consortium

1. The Scottish Retail Consortium (SRC) is the lead trade association for retailers operating in Scotland and has been representing the interests of the retail sector since the Scottish Parliament's inception in 1999. The SRC membership accounts for over 80 per cent of the retail sector comprising retailers large and small selling food and non-food and operating on the high street, in rural communities, out of town and online.

2. The importance of the retail sector to the Scottish economy is clear. In 2010, retail was one of the three largest contributions to services Gross Value Added (GVA), contributing £5.8 billion (10.6%) of total services.[1] Scottish retail sales totalled £28bn in 2012 and over one third of consumer spending goes through shops.[2] The retail sector remains one of the largest private sector employers in Scotland employing around 235,000 people.[3]

Fixed Penalties

3. As a point of principle the SRC does not support the imposition of fixed penalties and sanctioning in general terms. We believe that better regulation means securing compliance through a risk, evidence and advice based approach. Fixed penalties can lead to a tick box approach to enforcement whereby businesses are reluctant to seek advice, a greater number of penalties are imposed for minor infringements and rogue retailers accept an administrative penalty as one of the costs of doing business their way. We do not, therefore, support the amendment and believe it to be somewhat ironic that it is through the Regulatory Reform Bill, propagated on better regulation, that this provision is being introduced.

4. Justice is about fairness, equity, evidence and proof, not just administrative expedience and cost. We are concerned that the introduction of fixed penalties could shift the burden of proof away from the enforcer having to prove that the retailer has infringed the regulations towards the retailer proving that it has not. Indeed the level of proof required for an administrative penalty could inevitably be lower than that required if an alleged offence is heard by a court. This is particularly problematic where, as is the case with the proposed Single Use Carrier Bags Charge (Scotland) Regulations 2014, compliance will be open to a relatively wide interpretation based quite heavily on guidance to which enforcers, legally, have no requirement to consider.

5. In addition, enforcement will be undertaken by 32 different authorities, some of which could quite conceivably reach different interpretations of the regulations and supporting guidance. Not only is this lack of consistency in enforcement counter-

[1] Scottish Government, (2012), *Scottish Annual Business Statistics 2010*
[2] Extrapolated from: Office for National Statistics Retail Sales Index
[3] Office for National Statistics, March 2012

productive for those retailers wanting to take a national approach to compliance, and thereby reducing compliance costs and administrative burdens, the ability to apply fixed penalties will mean that a local authority will have to make a less rigorous defence of why its interpretation differs than, for example, it would if the enforcement action went to court.

6. Finally, if there is sufficient scope for a local authority to take its own different approach to enforcement, and if the burden of proof for enforcement action is diminished, then the system could be open to the same resource-creep which has been evident with parking fines whereby fixed penalties are seen as a legitimate revenue source rather than a tool to achieve compliance in a risk, evidence and advice based approach.

7. In the event, therefore, that the Committee supports the provision to provide for fixed penalties the SRC would request that the following points are considered:

   a) The level of proof required to impose a fixed penalty should be comparable as if in court.
   b) There should be the opportunity and mechanism in place to allow retailers to appeal the fixed penalty.
   c) All fines should be allocated to consolidated revenue.
   d) Depending on severity of the offence, the decision of whether to accept a fixed penalty or proceed to court should rest with the retailer and not the enforcer.
   e) In order to ensure a consistent approach to enforcement and a more proportionate application of fixed penalties The Single Use Carrier Bags Charge (Scotland) Regulations 2014 should be brought into the scope of Primary Authority arrangements if these arrangements are provided through the Regulatory Reform Bill.

November 2013

Minister for Energy, Enterprise and Tourism
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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES SCOTLAND

Murdo Fraser MSP
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Economy, Energy and Tourism Committee
Scottish Parliament
Holyrood
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12th November 2013

Dear Murdo,

REGULATORY REFORM (SCOTLAND) BILL – PRIMARY AUTHORITY PARTNERSHIPS

I would like to express my thanks to the Committee for your Stage 1 Report on the Regulatory Reform (Scotland) Bill.

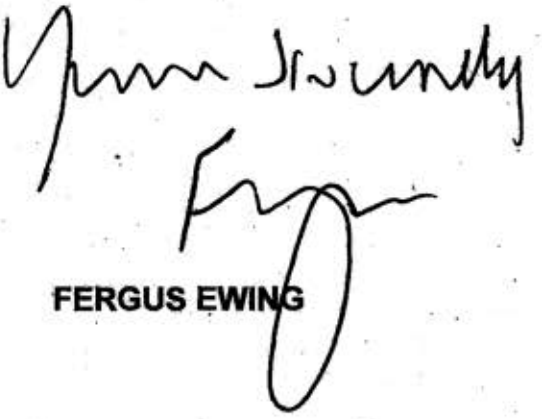
As I explained to the Committee on 11 September this Bill will streamline and make regulation more effective, will protect our people and environment, and contribute towards helping our businesses flourish and create jobs. As part of this process, I stated that we had also consulted on the merits of introducing primary authority partnerships into Scotland. The analysis of responses to this consultation has now been concluded and I attach for your information the report and associated Scottish Government policy statement. This has now been published on the Scottish Government website.

Sixty-four percent of respondents supported the introduction of some form of primary authority partnership – all businesses and industry associations supported primary authority. The response from local authorities was also mostly positive. While there is clear support for a primary authority model to be available in Scotland as part of the Better Regulation toolkit there is also a recognition it should not encroach on local democracy. This means we need to look carefully at which devolved regulations should be in scope. As such we will continue working with COSLA and other key stakeholders on that complicated set of issues.

I would also ask the Committee to note that operational factors must play a part in ensuring that primary authority in Scotland delivers concurrently for communities and business. Whilst the consultation responses did endorse several core elements of best practice already undertaken in the UK approach, there were other areas identified, from interactions with the existing UK model to infrastructure for quality control and dispute resolution, which will require further careful and detailed consideration. Again, my officials will continue working

with COSLA, individual local authorities, relevant professional bodies and business. Liaison with the UK Government and other Devolved Administrations will also be required to optimise cross-border regulatory arrangements.

I trust this is helpful.



FERGUS EWING

Primary Authority Arrangements relating to the Devolved Regulatory Responsibilities of Local Authorities in Scotland

Analysis of consultation and Policy Statement

PRIMARY AUTHORITY ARRANGEMENTS RELATING TO THE DEVOLVED REGULATORY RESPONSIBILITIES OF LOCAL AUTHORITIES IN SCOTLAND

ANALYSIS OF CONSULTATION AND POLICY STATEMENT

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Section 1: Introduction

1. The Regulatory Reform (Scotland) Bill was introduced to the Scottish Parliament on 27 March 2013. The Bill and supporting documents can be found on the Scottish Parliament website.

2. The primary purpose of the Bill is to improve the way regulation is developed and applied: continuing to protect individuals, communities, and the environment, while also creating more favourable business conditions in Scotland and delivering benefits for the environment. It will help businesses to flourish and create jobs.

3. Taking account of the Proposals for a Better Regulation Bill consultation, there are four mainstream enterprise elements of the Bill: a regulation making power to encourage or improve consistency in the exercise of regulatory functions; a duty to contribute to sustainable economic and business growth in regulatory activity; a code of practice in relation to the exercise of regulatory functions; amending requirements for certificates of compliance for mobile food business street trader licence applications. The Bill will also: support SEPA's transformation programme and improve the way environmental regulations are applied in practice across Scotland; change the mechanism for bringing legal challenges to offshore energy decisions; and improve the performance of planning authorities by establishing a legislative link between planning fees and performance.

4. The Regulatory Reform (Scotland) Bill as introduced did not feature a specific and additional proposal which emerged from a number of business responses to the earlier consultation (Proposals for a Better Regulation Bill): that some equivalent of UK Primary Authority partnerships should be adopted in Scotland.

5. The UK Government's established Primary Authority initiative allows a business which has branches in a number of local authority areas to form a partnership with one local authority in order to receive tailored support in relation to a specified range of reserved regulation. That "primary" authority is resourced by the business to assist in three ways: by issuing assured advice, co-ordinating enforcement action across all locations used by the business, and developing an inspection plan for the business as a whole.

6. The Consultation on Primary Authority Arrangements relating to the Devolved Regulatory Responsibilities of Local Authorities in Scotland sought views on whether some equivalent initiative should be adopted in Scotland, in the context of Scottish regulation. A set of deliberately open questions provided a framework for establishing whether there is broad support for a Scottish equivalent – and what that would involve. The consultation ran from 28 June to 23 August 2013, although some leeway was afforded to a small number of organisations who requested more time to respond.

7. The substantive elements of this document are structured as follows:
   - Section 2 provides an analysis of the consultation responses;
   - Section 3 is a Scottish Government policy statement, based on Ministerial consideration of the views expressed by stakeholders.

8. The consultation document and all responses are available at: http://www.scotland.gov.uk/Consultations/Closed?rowId=1649#conRow1649

Section 2: Analysis of consultation responses

9. This report – prepared jointly by Scottish Government and COSLA officials – provides both a rigorous analysis of, and concise report on, the main issues arising from written responses to the consultation. The analysis supplies information which underpins the policy statement in Section 3 in relation to whether a Primary Authority initiative in Scotland should be established.

10. This section provides:
    - A list of the 42 individuals and organisations which responded (see Appendix).
    - A summary of the issues raised in those responses, highlighting key recurring themes and identifying the number and broad characteristics of respondents and an analysis of respondents' views on each specific question in the discussion document setting out both qualitative and quantitative perspectives.

KEY FINDINGS

- 42 responses, the main groups were: 15 local authorities and related organisations; 10 business and trade associations; 5 individual businesses; and 5 professional bodies.
- The majority of respondents (64%) supported the introduction of Primary Authority partnerships although this support was frequently qualified. 24% were opposed while the remaining 12% did not indicate a preference.
- 100% of the businesses and industry associations who responded supported Primary Authority.
- Support from local authorities was mixed, with 47% supporting Primary Authority and 33% opposing it.
- 79% of respondents supported listing the specific devolved legislation that would be in scope.
- There was no local authority support for including planning, alcohol or civic licensing within Primary Authority partnerships – although this was not the view of business.
- 64% agreed with the proposed definition of eligibility.
- 90% agreed with the focus on assured information and advice, inspection plans and enforcement action.
- 86% supported an equivalent of the UK fee and charging regime for cost recovery.

Consultation Respondents

Group Type	Number	Percentage
Local Authorities and Related Organisations	**15**	**36%**
Public Bodies	**4**	**10%**
Business and Trade Organisations	10	24%
Businesses	5	12%
Businesses and Industry Associations	**15**	**36%**
Professional Firms and Bodies	**5**	**12%**
Third Sector Bodies	**1**	**2%**
Trade Unions	**1**	**2%**
Individuals	**1**	**2%**
Total	**42**	**100%**

QUESTION ONE

Q.1 – In principle, do you favour the introduction of Primary Authority Partnership arrangements relating to the devolved regulatory responsibilities of local authorities in Scotland? Why? What impact would this have on current local discretion?

11. This question was directly answered by 88% of respondents, with 64% in support of the introduction of Primary Authority partnership arrangements and 24% against. 12% did not indicate a preference and have been recorded as neutral in the below table.

Respondent Groups	Yes	No	Neutral	Total
Local Authorities and Related Organisations	7	5	3	15
Public Bodies	1	1	2	4
Businesses and Industry Associations	15	0	0	15
Professional Firms and Bodies	4	1	0	5
Third Sector Bodies	0	1	0	1
Trade Unions	0	1	0	1
Individuals	0	1	0	1
Total	**27**	**10**	**5**	**42**
	64%	**24%**	**12%**	**100%**

12. From those that indicated a definite preference, 73% supported the introduction while 27% were against it.

13. 100% of businesses and industry associations supported the proposal. The key reasons for their support were cited as greater consistency which enables more efficient running of business practices and ensuring compliance to regulations. Many mentioned the success of the current UK model and therefore welcomed the proposal to introduce a Scottish model for devolved matters. However, there were some concerns from businesses that were the scheme to depart significantly from the UK model this in itself could create more inconsistency rather than less.

14. The response from local authorities was much more mixed: 58% of those that indicated a clear preference supported the introduction, while 42% opposed. Throughout all local authority responses, including those that supported the proposal, it was clear that there were some issues which were not covered by consultation which would need to be addressed to ensure a successful scheme, were one to be introduced.

15. Of the wider public bodies which responded there was again a mixed view with one supporting, one opposed and two who did not indicate a preference. 80% of the professional firms and bodies supported the proposal, while the third sector body, trade union and individual who responded were opposed to Primary Authority.

16. Respondents suggested a number of specific areas of concern or complexity including:

- Ensuring a robust challenge/dispute resolution mechanism for other local authorities to use if they disagree with the actions of a primary authority. The Better Regulation Delivery Office (BRDO) has this role for the UK scheme. Respondents also noted the resource implications associated with this challenge mechanism.

- Clear guidance and best practice to ensure that efficient and effective primary authorities are developed and maintained across Scotland, with clear and transparent performance measures.
- Ensuring that there is no impediment to taking enforcement action when public health and safety is at risk.
- That entering into a partnership should be optional and subject to negotiation and agreement between the business and local authority.
- That Primary Authority partnerships are most likely to benefit large business to the potential disbenefit of SMEs who cannot afford them – that it could lead to a system where compliance advice is only available to those who can pay.
- The impact that an increased number of Primary Authority partnerships may have on the quality and resources available to other businesses as resource focus is diverted to servicing the Primary Authority partnership; even though costs are recovered this may not be enough to hire additional capacity, meaning officers have reduced capacity for their previous everyday activity or advice.

17. Local authorities were also clear that there were obvious conflicts between local democracy and Primary Authority in the context of licensing schemes which were designed and legislated to give local control and even encourage variation to recognise local circumstances. This issue is addressed in more detail in question two.

Q1A – If you do not support, in principle, the introduction of Primary Authority arrangements for the devolved regulatory responsibilities of local authorities in Scotland, do you favour an alternative model which would optimise consistency and compliance, including costs and administration? Please provide details.

18. Several respondents, particularly from local authorities and the professional body which did not support Primary Authority, expressed a desire for an extension of, and renewed investment in, the Home Authority model rather than the introduction of Primary Authority. They argued that this should be done on a 'free to all' basis which would embrace all businesses, irrespective of their size or ability to pay for regulatory advice. They did not indicate how local authorities would resource this approach, or indeed what other barriers to implementation of "Home Authority Plus" currently exist.

19. A further suggestion was strengthening the relationship between Business Gateway and regulatory services to provide holistic free advice. This could mitigate the concern or risk suggested (that the expansion of the Primary Authority scheme leading to a system where compliance advice is only available to those who can pay).

20. It was further suggested that a more consistent approach specifically to licensing decision-making can be achieved if regulations, orders and statutory guidance are clear and up to date about the role and function of the license system.

QUESTION TWO

Q2 – The UK approach lists relevant regulatory responsibilities in Schedule 3 to the Regulatory Enforcement and Sanctions Act. Should relevant devolved regulatory responsibilities of local authorities in Scotland also be specified in legislation as "in scope"? Why?

21. Two thirds (67%) of respondents answered this question.

Respondent Groups	Yes	No	No Comment	Total
Local Authorities and Related Organisations	7	4	4	15
Public Bodies	1	0	3	4
Businesses and Industry Associations	12	0	3	15
Professional Firms and Bodies	2	1	2	5
Third Sector Bodies	0	0	1	1
Trade Unions	0	1	0	1
Individuals	0	0	1	1
Total	**22**	**6**	**14**	**42**
	52%	14%	33%	
Percentage*	**79%**	**21%**		**28**

(* this is the percentage when not counting those who have not commented.)

22. Of the 28 respondents who answered this question 79% were in support of specifying the legislation which would be "in scope". This support was quite even across all respondent groups. Local authorities which suggested it should not be specified were those who were opposed to the scheme in principle. 100% of business and industry associations which provided a response felt that the legislation should be specified. Of the professional firms and bodies which commented two agreed that legislation should be specified, while the one that did not had opposed the scheme in principle.

Q2A – Which specific devolved regulatory responsibilities of local authorities in Scotland should be specified in legislation as "in scope"? Why?

Q2B – Are there any specific devolved regulatory responsibilities of local authorities in Scotland which should **not** be specified in legislation as "in scope"? Please explain your rationale for such exclusion?

23. The second and third parts to this question saw some of the greatest disparity between respondents. Though there was generally support (from those that support the principle of Primary Authority) that the Scottish model should cover the equivalent legislation to the current UK model (where possible given the current devolution settlement) there were conflicting opinions on other areas, particularly around licensing.

24. Legislation that was consistently cited across all respondent groups to be included as "in scope" were:
    - Agriculture Act 1970
    - Animal Health Acts
    - Antisocial Behaviour etc. (Scotland) Act 2004
    - Feed (Hygiene and Enforcement) (Scotland) Regulations 2005
    - Housing (Scotland) Act 2006, Part 3 and Schedule 3
    - Official Feed and Food Controls (Scotland) Regulations 2005
    - Tobacco Advertising and Promotion Act 2002
    - Tobacco and Primary Medical Services (Scotland) Act 2010

25. Moreover, legislation related to food safety and standards was also frequently suggested. However, it was suggested that it would be necessary to wait until the new Food Standards Agency for Scotland was established to ensure that a coherent scheme is developed.

26. Ten respondents, almost exclusively businesses and industry associations, expressed the desire for alcohol and/or civic licensing to be included in the scope of Primary Authority. This was directly opposed by 14 other respondents, mainly local authorities and the professional firms and bodies. No local authorities supported the inclusion of planning or alcohol and civic licensing. They highlighted conflict with licensing schemes which were designed to allow, and even encourage, local consultation, sensitivity to local circumstances and democratic decision making which do not lend themselves to direction from a central source. This specifically covers alcohol licensing, civic licensing and planning, where there were strong arguments that these areas could not be "in scope".

27. Several respondents mentioned that there was a potential lack of clarity within the consultation over what Primary Authority could cover. It is therefore possible that some regulators may not have considered stating what should or should not be included as "in scope" as they were unaware that there was the potential they could be (this comment was particularly made by some responding on behalf of licensing and given the lack of responses from a planning perspective is likely that planning departments had not considered the possibility they might be covered by Primary Authority).

QUESTION THREE

Q3 – Should business eligibility to engage in a Primary Authority Partnership be restricted to "any business, charity or other organisation that is regulated by two or more local authorities in respect of a relevant function"? Please explain your view.

28. Again, two thirds (67%) of respondents answered this question.

Respondent Groups	Yes	No	No Comment	Total
Local Authorities and Related Organisations	8	3	4	15
Public Bodies	1	0	3	4
Businesses and Industry Associations	6	7	2	15
Professional Firms and Bodies	2	0	3	5
Third Sector Bodies	0	0	1	1
Trade Unions	0	0	1	1
Individuals	1	0	0	1
Total	**18**	**10**	**14**	**42**
	43%	24%	33%	
Percentage	**64%**	**36%**		**28**

29. 64% of respondents to this question supported the proposed definition for eligibility, however there are some points worth noting from the 36% who did not agree.

30. Within local authorities support was higher, with 73% agreeing and 27% disagreeing with the definition. Those that did not agree proposed removing the criteria that the business, charity or other organisation be regulated by two or more local authorities. These were generally councils which covered a large geographical area who felt that there were businesses operating multiple premises within a single council area who may wish to enter into a Primary Authority partnership for the additional support in compliance that a Primary Authority partnership can bring to business.

31. From the business and industry associations only 46% supported the proposed definition. Most business responses favoured an expansion to groups such as trade associations as has recently been introduced to the UK model. They argued that this enabled greater access to the benefits of Primary Authority, particularly for SMEs. This was not a unanimous view, even within the business group, and several respondents across all groups commented unfavourably on the change in the UK as they struggle to see how this will be successful in practice.

32. All those that commented from the other respondent groups (i.e. public bodies, professional firms and bodies, and individuals) supported the definition suggested.

QUESTION FOUR

Q4 – Should Primary Authority Partnership arrangements relating to the devolved regulatory responsibilities of local authorities in Scotland follow the current or planned UK model in terms of the focus on assured information and advice, inspection plans and enforcement action? Please explain your view, particularly in relation to any scope to optimise consistency and compliance, including costs and administration.

33. 69% of respondents answered this question.

Respondent Groups	Yes	No	Other	No Comment	Total
Local Authorities and Related Organisations	9	1	2	3	15
Public Bodies	1	0	0	3	4
Businesses and Industry Associations	14	0	0	1	15
Professional Firms and Bodies	2	0	0	3	5
Third Sector Bodies	0	0	0	1	1
Trade Unions	0	0	0	1	1
Individuals	0	0	0	1	1
Total	**26**	**1**	**2**	**13**	**42**
	62%	2%	5%	31%	
Percentage	**90%**	**3%**	**7%**		**29**

34. This question had the clearest level of support with 90% of the respondents who answered this question in support of the focus on assured information, advice, inspections plans and enforcement action. Several businesses stated that they found assured advice to be particularly valuable. Only one respondent opposed the suggested focus due to their concerns around the proposed incoming changes to inspection plans under the UK model.

35. The two professional firms and bodies which responded to this question supported the suggested focus. All 14 of the businesses and industry associations which responded supported the suggested focus and several stated that they found assured advice to be particularly valuable.

QUESTION FIVE

Q5 – Should Primary Authority Partnership arrangements relating to the devolved regulatory responsibilities of local authorities in Scotland follow the UK model in terms of fees and charging regimes? If not what alternative model should be adopted? Please explain your view.

36. 81% of respondents answered this question.

Respondent Groups	Yes	No	Other	No Comment	Total
Local Authorities and Related Organisations	10	1	1	3	15
Public Bodies	0	1	0	3	4
Businesses and Industry Associations	12	1	1	1	15
Professional Firms and Bodies	2	0	0	3	5
Third Sector Bodies	0	0	0	1	1
Trade Unions	0	0	0	1	1
Individuals	0	0	0	1	1
Total	**24**	**3**	**2**	**13**	**42**
	57%	7%	5%	31%	
Percentage	**83%**	**10%**	**7%**		**29**

37. There was very clear support for following the UK model in terms of fees and charging regimes, with 83% of respondents to this question in support of the cost recovery model. This support included 83% of local authorities, 86% of businesses and industry associations and 100% of professional firms and bodies.

38. Local authorities were clear that without a model of cost recovery Primary Authority is not a viable scheme. Aside from their support of the principle of cost recovery, regular comment from the business respondents was that clear guidance on how local authorities should calculate these fees would be welcomed.

QUESTION SIX

Q6 – What, if any, additional considerations should be taken into account in considering whether or not to introduce Primary Authority arrangements relating to the devolved regulatory responsibilities of local authorities in Scotland? What measures, if any, should be considered to avoid the potential for forum shopping? Please explain your view.

39. One issue that was identified was managing the relationship between two different Primary Authority schemes in Scotland and the UK. A number of respondents noted that having two different schemes may not improve consistency as much as desired for companies which operate across the UK as a whole.

40. In relation to forum shopping there were mixed views as to whether this was indeed an issue, though where it was considered to be it was suggested that good guidance and best practice from bodies such as COSLA or Scottish Government could ensure that any and all Primary Authority partnerships were of a high quality. This issue also emphasised the requirement for some sort of body to undertake a monitoring role and dispute resolution when required, as the BRDO does for the UK Government.

41. As mentioned in the summaries of questions one and two, there were clearly some areas where more detail of the scheme is required to enable respondents to provide a fully informed view.

Section 3: Policy Statement

42. This analysis of stakeholder views confirms three major themes.

43. First, that there is clear support for a Primary Authority model to be available in Scotland as part of our Better Regulation toolkit.

44. Second, that Primary Authority should not encroach on the legitimacy of local democracy. Related to that, there is as yet no clear consensus around exactly what devolved regulations should be in scope. Planning decisions are determined in accordance with the local development plan, and we are making progress, through the planning reform next steps programme, to encourage improvements to the planning service to ensure that it fully supports economic recovery through promoting the plan-led system, driving improved performance, and by focusing on delivery and simplifying and streamlining the system. The consultation also confirms that licensing is a complex area where the wide divergence of business and local authority views and the significant potential impact of Primary Authority arrangements will require further careful and detailed consideration. We are very keen to continue working with COSLA, with individual local authorities and relevant professional bodies, and with business on this. Within government we recognise also that the legal context for civic licensing in Scotland is substantively different – better in most respects – compared with the rest of the United Kingdom.

45. Third, operational factors will also be important in ensuring that primary authority in Scotland delivers concurrently for communities and for businesses. Consultation responses have clearly endorsed a few core elements of best practice evident from the original UK approach which should feature in Primary Authority in Scotland:
    - Eligibility – while the potential benefits to businesses is clear, there is as yet insufficient evidence to make a compelling case for the inclusion of trade associations.
    - The role of the primary authority – in terms of issuing assured advice, co-ordinating enforcement action and developing inspection plans.
    - Explicit identification of regulations to which Primary Authority applies.
    - The power, indeed requirement, for local authorities to charge appropriate fees for the additional compliance services being provided to companies that enter into a partnership. This is a crucial factor in terms of maintaining a "universal" service to all other businesses, and avoiding the identified risks of displacement or de-prioritisation.

46. In contrast, the consultation process has also identified other areas, from interactions with the existing UK model to infrastructure for quality control and dispute resolution, which will require further careful and detailed consideration. We welcome the endorsement of the existing Home Authority model and the recognition that there may be more we can do to support the compliance endeavours of businesses which have multiple outlets in one local authority area. Again, on all these matters, we are very keen to continue working with COSLA, with individual local authorities and relevant professional bodies, and with business. We will also liaise closely with the UK Government (and indeed other Devolved Administrations) to optimise cross-border regulatory arrangements.

47. As a key first step the Scottish Government will bring forward stage 2 amendments to the Regulatory Reform (Scotland) Bill which will create a legal framework for

implementation of Primary Authority arrangements relating to the Devolved Regulatory responsibilities of Local Authorities in Scotland.

APPENDIX: LIST OF CONSULTATION RESPONDENTS

RESPONDENT	GROUP TYPE
Aberdeenshire Council	Local Authorities and Related Organisations
Alcohol Focus Scotland	Third Sector Bodies
Asda	Businesses and Industry Associations
Boots UK Limited	Businesses and Industry Associations
British Hospitality Association	Businesses and Industry Associations
Co-operative Retail Trading Group	Businesses and Industry Associations
East Ayrshire Council	Local Authorities and Related Organisations
East Lothian Council	Local Authorities and Related Organisations
Falkirk Council	Local Authorities and Related Organisations
Federation of Small Businesses Scotland	Businesses and Industry Associations
Food Standards Agency Scotland	Public Bodies
Highland Council	Local Authorities and Related Organisations
Home Retail Group	Businesses and Industry Associations
Institute for Archaeologists	Professional Firms and Bodies
Midlothian Council	Local Authorities and Related Organisations
Mr Sean Hoath	Individual
NHS Ayrshire and Arran	Local Authorities and Related Organisations
North Lanarkshire Council	Local Authorities and Related Organisations
Police Scotland	Public Bodies
Renfrewshire Council	Local Authorities and Related Organisations
Royal Environmental Health Institute of Scotland	Public Bodies
Sainsbury's	Businesses and Industry Associations
Scotch Whisky Association	Businesses and Industry Associations
Scottish Retail Consortium	Businesses and Industry Associations
Scottish Council for Development and Industry	Businesses and Industry Associations
Scottish Fire and Rescue Service	Public Bodies
Scottish Food and Drink Federation	Businesses and Industry Associations
Scottish Grocers' Federation	Businesses and Industry Associations
Society of Chief Officers of Environmental Health in Scotland	Professional Firms and Bodies
Society of Chief Officers of Trading Standards in Scotland	Professional Firms and Bodies
SOLAR Licensing Working Group	Professional Firms and Bodies
South Ayrshire Licensing Board	Local Authorities and Related Organisations
South Lanarkshire Council	Local Authorities and Related Organisations
The Law Society of Scotland	Professional Firms and Bodies
The Scottish Beer and Pub Association	Businesses and Industry Associations
The Scottish Licensed Trade Association	Businesses and Industry Associations
The Spirit and Wine Trade Association	Businesses and Industry Associations
Trading Standards Scotland	Local Authorities and Related Organisations
Trading Standards Services, Glasgow City Council	Local Authorities and Related Organisations
UNISON	Trade Unions
West Dunbartonshire Licensing Board	Local Authorities and Related Organisations
West Lothian Council	Local Authorities and Related Organisations

Ministear airson na h-Àrainneachd agus Atharrachadh Aimsir
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The Scottish Government
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LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Rob Gibson MSP
Convener
Rural Affairs, Climate Change and Environment Committee
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EH99 1SP

14 November 2013

Dear Rob

REGULATORY REFORM (SCOTLAND) BILL – FURTHER INFORMATION ON STAGE 2 GOVERNMENT AMENDMENTS

Following the Stage 1 debate I wanted to follow up the letter issued by the Minister for Energy, Enterprise and Tourism to the Economy, Energy and Tourism (EET) Committee on 6 November 2013 and provide you with further information about the Scottish Government's proposed amendments at Stage 2.

I understand that the lead EET Committee intend to issue a call for evidence on the proposed Government amendments mentioned by Mr Fraser in yesterday's debate, namely:

- Carrier bag offences - fixed penalties;
- Contaminated land; and
- Smoke control zones.

These amendments relate to sections of the Bill scrutinised by the Rural Affairs, Climate Change and Environment Committee and I trust the information in the attached annex is useful both to the committee and those considering responding to the call for evidence.

Once Stage 1 of the Bill is complete it is our intention to lodge the Government Stage 2 amendments as quickly as possible to allow the Parliament and stakeholders as much scrutiny time as possible.

My officials would be happy to provide further information on any of these proposed amendments should the committee find it useful.

Kind regards

PAUL WHEELHOUSE

Carrier bag offences – Fixed penalties

We are proposing an amendment to the Climate Change (Scotland) Act 2009 to provide for fixed monetary penalties as part of enforcement of offences created by carrier bag charging regulations made under Section 88 of that Act. This would provide local authorities (or other 'enforcement authorities') with a more proportionate and cost-efficient enforcement option.

The RACCE Committee is aware that the proposed Single Use Carrier Bags Charge Regulations have been laid for the initial 90 day representation period up to 11 December and published on the Scottish Government website. They will require all retailers to charge at least 5p for single-use carrier bags from October 2014.

We feel that for certain breaches of the Regulations a civil penalty will be the most proportional and effective enforcement option. However, the Climate Change (Scotland) Act powers do not allow for this. So the draft regulations only include criminal penalties for failure to comply with the regulations (on summary conviction a fine not exceeding the statutory maximum, or indictment and conviction a fine).

To address this issue, and after further discussions with retailers and COSLA, we will be proposing an amendment to the Climate Change (Scotland) Act 2009 to provide for fixed monetary penalties as part of enforcement of offences created by carrier bag charging regulations made under Section 88 of that Act. This would give local authorities (or other 'enforcement authorities') access to a more proportionate and effective enforcement option than currently exists.

We understand the importance of working closely with retailers, and we will continue to do so to ensure they understand their responsibilities. Experience from Wales suggests that retailers have worked constructively to implement the scheme and discussions with retailers suggests there will be a similar outcome in Scotland. However, for the small number of cases where enforcement may be necessary, we want to ensure that local authorities have an option which provides a realistic threat of enforcement action without the need for court action and associated costs for all sides.

The proposed amendment would enable the level of fixed penalties to be set using secondary legislation but limited at level 2 on the standard scale. The intention is that they should be set at £200 which would be in line with fixed penalties proposed for flytipping offences and those for sale of tobacco offences under section 27 of and Schedule 1 to the Tobacco and Primary Medical Services (Scotland) Act 2010. This would also be sufficiently below the £300 maximum Fiscal Fine level to ensure there is an incentive for offenders to opt for a fixed penalty. Enforcement authorities would also have a duty to take account of guidance (as is already the case for carrier bag charging regulations under section 88 of the 2009 Act).

If the Parliament agrees with this proposed amendment, there would be time for the necessary secondary legislation to be laid ahead of the implementation date of 20 October 2014.

Since this issue has only emerged recently, we were keen to notify the Parliament as soon as possible.

Section 34 Contaminated land

Further amendments to the Environment Protection Act 1990 Part IIA- contaminated land provisions to prevent the Crown becoming liable for any remediation costs in respect of land falling to it as "bona vacantia" [1] .

Also minor amendments to the abandoned mines provisions in Control of Pollution Act 1974 to better deal with cases where land falls to the Crown.

Part IIA of the Environmental Protection Act 1990 provides a regime for dealing with contaminated land in Scotland. Section 34 of the Regulatory Reform (Scotland) Bill already makes provision for a number of amendments to Part IIA.

Following the insolvency of Scottish Coal and another opencast coal company and the fate of property held by those companies, the question of whether onerous property can be "disclaimed" by the liquidator is currently before the Court of Session.

On the dissolution of a company, property and rights held prior to dissolution are deemed by section 1012 of the Companies Act 2006 to be *bona vacantia* and "belong to the Crown" and vest and may be dealt with in the same manner as other *bona vacantia* accruing to the Crown.

Property falling as *bona vacantia* is dealt with in Scotland by the Queen's & Lord Treasurer's Remembrancer (QLTR), a non-ministerial office-holder in the Scottish Administration. In most cases it will have some value and the QLTR will dispose of it with the proceeds going to the Scottish Consolidated Fund.

The vesting in the Crown under section 1012 of the 2006 Act is subject to a power in section 1013 for the QLTR, as the Crown's representative, to disclaim it. The effect of such a disclaimer is dealt with in sections 1014, and 1020 to 1022. Section 1014 provides that property that is disclaimed is deemed never to have vested in the Crown.

The difficulty that has been identified is the potential for the Crown to be identified as an "appropriate person" under the contaminated land regime in Part IIA of the 1990 Act. The mechanism for determining the appropriate person is set out in section 78F. In essence, the first port of call for the determination is the person(s) who caused or knowingly permitted the contamination. However in the absence of any such person being found, as may happen when the company causing the contamination has been dissolved, the owner or occupier of the land for the time being is an appropriate person. This could include the Crown if the land vests as *bona vacantia*. The QLTR is concerned that by taking any form of control of such property, eg to help effect a transfer to a third party, they risk being left liable particularly if a transfer does not work out. They have a certain amount of protection from section 40(4) of the Crown Proceedings Act 1947 so long as the Crown does not take possession or control of the property, but steps that may be taken to transfer it to a third party could be considered to fall into this category.

The position of persons who may take on responsibility for property in some sort of official capacity is already recognised in section 78X of the 1990 Act. Subsection (3) provides that a

[1] The expression *bona vacantia* means ownerless goods. In Scots law, ownerless goods fall to the Crown, whose representative in Scotland is the Queen's & Lord Treasurer's Remembrancer. The expression is applied within the QLTR Office to the assets of dissolved companies, the assets of missing persons and lost or abandoned property. The realised value of such assets is paid by the QLTR into the Scottish Consolidated Fund for use of the Scottish Government on behalf of the people of Scotland. For further information, see www.qltr.gov.uk/content/bona-vacantia .

"person acting in a relevant capacity" does not incur personal liability for the cost of remediation (except where the remediation is as a result of their unreasonable actions). The persons acting in a relevant capacity include insolvency practitioners (including trustees in bankruptcy), and the Accountant in Bankruptcy. But there is no special protection for the Crown or QLTR. In relation to some of those listed, the estate vests in the office holder (eg trustees in bankruptcy); in others (eg liquidators of companies) the estate remains vested in the company and the office holder simply has a power to manage it.

The amendments will extend the protection afforded by section 78X of the 1990 Act to extend to the Crown and the QLTR in relation to property falling as *bona vacantia*.

There are similar issues in Part IA of the Control of Pollution Act 1974 (abandoned mines), which like the provisions on contaminated land was inserted by the Environment Act 1995. It requires mine owners to give 6 months advance notice of proposed abandonment to SEPA. Failure to comply is an offence. Special provision is made for abandonment of rights or disclaimer etc by those "acting in a compulsory capacity", including liquidators and trustees of a bankrupt's estate. This will be extended to include disclaimer by QLTR under section 1013 of the 2006 Act. NB in this legislation "mine" relates to deep mines rather than opencast.

Smoke control zones

Amendments to sections 20 and 21 of the Clean Air Act 1993 to allow Scottish Ministers to authorise fuels which can be burnt in smoke control areas and allow exemption of boilers, stoves, fireplaces etc. for use in smoke control areas administratively rather than by regulations or order. This will avoid the need for new SSIs each time the list of fuels/appliances need to be updated, and enable manufacturers to have their products legally approved more quickly.

Section 20 of the Clean Air Act 1993 prohibits and makes an offence the emission of smoke from a chimney within a smoke control area. It is a defence to this offence to prove that the emission was not caused by the use of any fuel other than an "authorised fuel". Authorised fuels, per subsection (6), are those declared by Ministers by regulations to be authorised fuels.

Section 21 provides a further power for Ministers by order to exempt any class of fireplace from the provisions of section 20 if they are satisfied that they can be used for burning fuels other than authorised fuels without producing a substantial quantity of smoke.

The powers in section 20 and 21 have most recently been exercised as regards Scotland in the Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2010 (SSI 2010/272) and the Smoke Control Areas (Authorised Fuels) (Scotland) Order 2010 (SSI 2010/271.)

In practical terms, fuels and appliances are tested on behalf of the four UK administrations by a consultant – if the tests are passed the fuels/appliances are authorised/exempted. However the Act requires fuels to be authorised by regulations and appliances to be exempted by order, so new SSIs are required each time the lists are updated. We perceive this to be an inefficient use of time and resources. As a result of this the Scottish Government normally prepare updates annually, which means that manufacturers and suppliers with products that have passed the tests but just miss the deadline wait months for their products to be legally approved, and this is not good for business.

The proposal is that amendments to the Clean Air Act 1993 would allow the process to be done administratively rather than by SSI. Defra is taking a similar approach in England through the draft Deregulation Bill.

Regulatory Reform (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Section 1	Schedule 1
Sections 2 to 10	Schedule 2
Sections 11 to 43	Schedule 3
Sections 44 to 48	Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Jenny Marra

113 In section 1, page 1, leave out line 26 and insert—

<( ) such persons as appear to the Scottish Ministers to be likely to have an interest in, or to be affected by, the proposed regulations, and

( ) members of the public.>

Fergus Ewing

9 In section 1, page 2, line 17, at end insert—

<but does not include any such functions exercisable by a planning authority,>

Schedule 1

Fergus Ewing

10 In schedule 1, page 33, line 8, at end insert—

<Scottish Fire and Rescue Service>

Section 2

Fergus Ewing

11 In section 2, page 3, line 28, at end insert—

<( ) The Scottish Ministers must publish (in such manner as they consider appropriate) any direction given under subsection (7).>

Section 4

Alison Johnstone
Supported by: Claudia Beamish

1 In section 4, page 4, line 22, leave out <economic growth> and insert <development>

Fergus Ewing

12 In section 4, page 4, line 26, at end insert—

<( ) The Scottish Ministers must publish (in such manner as they consider appropriate) any such guidance.>

Alison Johnstone
Supported by: Jenny Marra

2 Leave out section 4

Section 5

Fergus Ewing

13 In section 5, page 4, line 32, at end insert—

<( ) The Scottish Ministers must publish (in such manner as they consider appropriate) any code of practice issued under subsection (1).>

Section 6

Alison Johnstone
Supported by: Jenny Marra

3 In section 6, page 5, line 15, leave out from <and> to end of line 18

Alison Johnstone
Supported by: Claudia Beamish

4 In section 6, page 5, line 17, leave out <economic growth> and insert <development>

Jenny Marra

114 In section 6, page 5, leave out line 22 and insert—

<( ) such persons as appear to the Scottish Ministers to be likely to have an interest in, or to be affected by, the proposed regulations, and

( ) members of the public.>

Jenny Marra

115 In section 6, page 5, line 24, at end insert—

<( ) When laying a draft under subsection (5), the Scottish Ministers must also lay before the Parliament a statement giving details of—

(a) the consultation undertaken under subsection (4), and

(b) the changes (if any) which, in light of the views and comments received by them, the Scottish Ministers have made to the proposed draft.>

Section 7

Alison Johnstone
Supported by: Jenny Marra

5 In section 7, page 6, line 4, leave out <, 4>

After section 7

Fergus Ewing

14 After section 7, insert—

<PART 1A

PRIMARY AUTHORITIES

7A Scope of Part 1A

(1) This Part applies where—

(a) a person carries on an activity in the area of two or more local authorities, and

(b) each of those authorities has the same relevant function in relation to that activity.

(2) In this Part (other than section 7E), "the regulated person" means the person referred to in subsection (1)(a).

7B Meaning of "relevant function"

(1) In this Part, "relevant function", in relation to a local authority, means a regulatory function—

(a) exercised by that authority, and

(b) specified for the purposes of this Part by order made by the Scottish Ministers.

(2) In subsection (1), "regulatory function" has the same meaning as in section 1(5).

7C Nomination of primary authorities

(1) For the purposes of this Part, the Scottish Ministers may nominate a local authority to be the "primary authority" for the exercise of the relevant function in relation to the regulated person.

(2) The Scottish Ministers may delegate their function under subsection (1) to another person.

(3) Sections 7F and 7G apply in any case where a primary authority is nominated under this section in relation to the regulated person.

7D Nomination of primary authorities: conditions and registers

(1) The Scottish Ministers may nominate a local authority under section 7C(1) in relation to the regulated person only if—

(a) the Scottish Ministers consider the authority suitable for nomination, and

(b) the authority and the regulated person have agreed in writing to the nomination.

(2) The Scottish Ministers may in particular consider as suitable for nomination under subsection (1)—

(a) the local authority in whose area the regulated person principally carries out the activity in relation to which the relevant function is exercised, or

(b) the local authority in whose area the regulated person administers the carrying out of that activity.

(3) The Scottish Ministers may at any time revoke a nomination under section 7C(1) if they consider that—

(a) the authority is no longer suitable for nomination, or

(b) it is appropriate to do so for any other reason.

(4) Subsection (2) applies in relation to a revocation of a nomination as it applies in relation to a nomination.

(5) The Scottish Ministers must maintain or cause to be maintained a register of nominations.

(6) Subsections (1) to (5) apply in relation to a person to whom the function under section 7C(1) is delegated as they apply in relation to the Scottish Ministers.

7E Primary authorities: power to make further provision

(1) The Scottish Ministers may by order make further provision about the exercise of relevant functions by primary authorities in relation to persons (in this section, "regulated persons").

(2) The provision that may be made under subsection (1) includes provision—

(a) requiring a local authority other than the primary authority (an "enforcing authority") to notify the primary authority before taking any enforcement action against a regulated person pursuant to the relevant function,

(b) prescribing the circumstances in which—

(i) the enforcing authority may not take any enforcement action against a regulated person,

(ii) the primary authority may direct the enforcing authority not to take any enforcement action against a regulated person,

(iii) the enforcing authority must notify the primary authority that it has taken enforcement action against a regulated person,

(c) specifying time periods for the purposes of paragraph (b),

(d) prescribing the circumstances in which provision made by virtue of paragraphs (a) to (c) does not apply including, in particular, circumstances—

(i) where the enforcement action is required urgently to avoid a significant risk of serious harm to human health, the environment (including the health of animals or plants) or the financial interests of consumers,

(ii) where the application of provision made by virtue of those paragraphs would be wholly disproportionate,

(e) requiring an enforcing authority to notify the primary authority, as soon as reasonably practicable, of any enforcement action it takes against a regulated person in circumstances prescribed under paragraph (d).

(3) In subsection (2), "enforcement action" means any action—

(a) which relates to securing compliance with or enforcement of any requirement, restriction, condition, standard, outcome or guidance in the event of breach (or putative breach) of the requirement, restriction, condition, standard, outcome or (as the case may be) guidance,

(b) taken with a view to or in connection with—

(i) the imposition of any sanction (criminal or otherwise) in respect of an act or omission, or

(ii) the pursuit of any remedy conferred by an enactment in respect of an act or omission.

(4) Where a relevant function consists of or includes a function of inspection, an order under subsection (1) may make provision for or about an inspection plan including, in particular, provision for or in connection with—

(a) prescribing the circumstances in which a primary authority may make, revise or withdraw an inspection plan,

(b) specifying the matters that a primary authority must take into account in preparing an inspection plan,

(c) specifying the matters that must be included in an inspection plan,

(d) prescribing the circumstances in which a primary authority must consult a regulated person in relation to the carrying out of the function of inspection,

(e) prescribing the arrangements for notifying a local authority about the making, revising or withdrawal of an inspection plan,

(f) specifying the duties of a local authority in relation to an inspection plan,

(g) prescribing the circumstances in which a local authority must notify a primary authority before carrying out the function of inspection.

(5) An "inspection plan" is a plan made by a primary authority containing recommendations as to how a local authority with the function of inspection should exercise that function in relation to a regulated person.

(6) Before making an order under subsection (1), the Scottish Ministers must consult—

(a) any primary authority to which the order would apply,

(b) such persons or bodies as appear to the Scottish Ministers to represent the interests of persons substantially affected by the proposed order, and

(c) such other persons or bodies as the Scottish Ministers consider appropriate.

7F Advice and guidance

(1) The primary authority has the function of giving advice and guidance to—

(a) the regulated person in relation to the relevant function,

(b) other local authorities having the relevant function as to how they should exercise that function in relation to the regulated person.

(2) The primary authority may make arrangements with the regulated person as to how the authority will exercise its function under subsection (1).

7G Power to charge

The primary authority may charge the regulated person such fees as it considers represent the costs reasonably incurred by it in exercising functions as the primary authority under or by virtue of this Part in relation to the regulated person.

7H Guidance

(1) The Scottish Ministers may issue guidance to local authorities about the operation of this Part including, in particular, guidance about—

(a) inspection plans for or about which provision is made under an order under section 7E(1),

(b) arrangements under section 7F(2),

(c) the charging of fees under section 7G.

(2) A local authority must have regard to any guidance issued to it under this section.

(3) Before issuing guidance under this section, the Scottish Ministers must consult such persons as they consider appropriate.

(4) The Scottish Ministers must publish (in such manner as they consider appropriate) any guidance issued under this section.

(5) The Scottish Ministers may at any time vary or revoke any guidance issued under this section.>

Schedule 2

Alison Johnstone

116 In schedule 2, page 35, line 11, at end insert—

<(3A) Securing that permits have effect subject to the condition that the person to whom a permit is granted, including any person to whom a permit is transferred, must satisfy a regulator that the person has made, or will make, adequate provision by way of financial security to enable the person—

(a) to operate any regulated facility in accordance with a permit for the duration of that permit, including any condition imposed connected with remediation of a site,

(b) to comply with—

(i) any condition imposed or notice served by a regulator,

(ii) any court order obtained by the regulator to secure compliance with any such notice served,

(c) to pay to the regulator any costs arising to secure compliance with any condition, notice or court order.

(3B) In sub-paragraph (3A), "adequate provision by way of financial security" means financial provision which is sufficient in value, secure and accessible as required.>

Paul Wheelhouse

15 In schedule 2, page 37, line 11, at end insert—

<( ) to be varied, suspended or revoked as mentioned in paragraph (a) in consequence of the person to whom the permit was granted or (as the case may be) who is authorised to carry on the regulated activities to which the registration relates ceasing to be a fit and proper person within the meaning of the regulations,>

Paul Wheelhouse

16 In schedule 2, page 37, line 12, at end insert—

<( ) Providing for the transfer of a permit or registration to be refused if the person to whom it is proposed to be transferred is not a fit and proper person within the meaning of the regulations.>

Paul Wheelhouse

17 In schedule 2, page 42, line 5, at end insert—

<*Fit and proper persons*

The regulations may make provision that the conditions subject to which a registration or permit has effect include a condition that the person authorised to carry on the regulated activities to which the registration relates, or to whom the permit is granted, must remain a fit and proper person within the meaning of the regulations.>

Section 11

Jenny Marra

117 In section 11, page 7, line 22, leave out from <and> to end of line 25 and insert—

<( ) such persons as appear to the Scottish Ministers to be likely to have an interest in, or to be affected by, the proposed regulations, and

( ) members of the public.>

Section 12

Paul Wheelhouse

18 In section 12, page 8, line 2, leave out <relevant offence> and insert <offence to which the penalty relates>

Paul Wheelhouse

19 In section 12, page 8, line 4, leave out from second <on> to end of line 5 and insert <in relation to an offence constituted by an act or omission if a fixed monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.>

Paul Wheelhouse

20 In section 12, page 8, line 9, leave out <relevant>

Section 13

Paul Wheelhouse

21 In section 13, page 8, line 24, leave out <relevant offence> and insert <offence to which the penalty relates>

Section 14

Paul Wheelhouse

22 In section 14, page 9, line 23, after <13(2)(a)> insert <in respect of an offence constituted by an act or omission>

Paul Wheelhouse

23 In section 14, page 9, line 24, leave out from <for> to end of line 26 and insert <may be commenced against the person in respect of that offence constituted by that act or omission—>

Paul Wheelhouse

24 In section 14, page 9, line 31, leave out <such>

Paul Wheelhouse

25 In section 14, page 9, line 31, after <proceedings> insert <in respect of that offence constituted by that act or omission>

Paul Wheelhouse

26 In section 14, page 9, line 36, leave out <, no criminal proceedings for the relevant offence> and insert <in respect of an offence constituted by an act or omission, no criminal proceedings>

Paul Wheelhouse

27 In section 14, page 9, line 37, leave out <the act or omission giving rise to the penalty> and insert <that offence constituted by that act or omission>

Paul Wheelhouse

28 In section 14, page 9, line 38, at end insert—

<( ) The references in subsections (1)(a) and (3) to criminal proceedings being commenced are to be read as if they included references to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.>

Section 15

Paul Wheelhouse

29 In section 15, page 10, line 7, leave out <relevant offence> and insert <offence to which the penalty relates>

Paul Wheelhouse

30 In section 15, page 10, line 9, leave out from second <on> to end of line 10 and insert <in relation to an offence constituted by an act or omission if a variable monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.>

Paul Wheelhouse

31 In section 15, page 10, line 21, leave out <relevant>

Section 16

Paul Wheelhouse

32 In section 16, page 10, line 36, leave out <relevant offence> and insert <offence to which the penalty relates>

Section 17

Paul Wheelhouse

33 In section 17, page 12, line 2, at end insert—

<( ) either—>

Paul Wheelhouse

34 In section 17, page 12, line 4, at end insert <, or

( ) both such a penalty is imposed on, and such an undertaking is accepted from, a person.>

Paul Wheelhouse

35 In section 17, page 12, line 5, leave out from <for> to end of line 7 and insert <may be commenced against the person for an offence constituted by an act or omission if the variable monetary penalty or, as the case may be, the undertaking related to that offence constituted by that act or omission.>

Paul Wheelhouse

36 In section 17, page 12, line 14, at end insert—

<( ) The reference in subsection (2) to criminal proceedings being commenced is to be read as if it included a reference to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.>

Section 18

Paul Wheelhouse

37 In section 18, page 12, line 26, at end insert—

<( ) Where provision is included as mentioned in subsection (1), it must provide that the maximum amount of the non-compliance penalty that may be imposed in any case is not to exceed the maximum amount of the variable monetary penalty to which the non-compliance penalty relates in such a case.>

Section 19

Paul Wheelhouse

38 In section 19, page 13, line 19, leave out from <for> to end of line 21 and insert <may be commenced against the person from whom the enforcement undertaking is accepted in respect of an offence constituted by an act or omission if the undertaking relates to that offence constituted by that act or omission,>

Paul Wheelhouse

39 In section 19, page 14, line 18, at end insert—

<( ) The reference in subsection (4)(a) to criminal proceedings being commenced is to be read as if it included a reference to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.>

Section 20

Paul Wheelhouse

40 In section 20, page 15, line 4, after <penalty> insert <in respect of an offence constituted by an act or omission>

Paul Wheelhouse

41 In section 20, page 15, line 5, leave out <in respect of a relevant offence in relation to which> and insert <if, in respect of that offence as constituted by that act or omission>

Paul Wheelhouse

42 In section 20, page 15, line 13, leave out <or> and insert—

<( ) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or>

Paul Wheelhouse

43 In section 20, page 15, line 16, after <must> insert <also>

Paul Wheelhouse

44 In section 20, page 15, line 16, after <penalty> insert <in respect of an offence constituted by an act or omission>

Paul Wheelhouse

45 In section 20, page 15, line 17, leave out <in respect of a relevant offence in relation to which> and insert <if, in respect of that offence as constituted by that act or omission>

Paul Wheelhouse

46 In section 20, page 15, line 25, leave out <or> and insert—

<( ) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or>

Section 28

Alex Fergusson

118 In section 28, page 20, line 8, at end insert—

<( ) In deciding on the terms of a publicity order that it proposes to make, the court must have regard to any representations made by the prosecutor or by or on behalf of the person.>

After section 28

Paul Wheelhouse

100 After section 28, insert—

<Corporate offending

(1) Subsection (2) applies where—

(a) an offence under section 28(7) is committed by a relevant organisation, and

(b) the commission of the offence involves the connivance or consent, or is attributable to the neglect, of a responsible official of the relevant organisation.

(2) The responsible official (as well as the relevant organisation) commits the offence.

(3) In this section—

"a relevant organisation" means—

(a) a company,

(b) a limited liability partnership,

(c) a partnership (other than a limited liability partnership), or

(d) another body or association,

"a responsible official" means—

(a) in the case of a company, a director, secretary, manager or similar officer of the company,

(b) in the case of a limited liability partnership, a member of the partnership,

(c) in the case of a partnership (other than a limited liability partnership), a partner of the partnership, or

(d) in the case of another body or association, a person who is concerned in the management or control of its affairs,

and in each case includes a person purporting to act in a capacity mentioned in any of paragraphs (a) to (d) of this definition.>

Section 29

Alex Fergusson

119 In section 29, page 20, line 25, at beginning insert <in the course of carrying out a regulated activity>

Paul Wheelhouse

47 In section 29, page 20, line 26, leave out from <and> to end of line 27

Section 30

Paul Wheelhouse

48 In section 30, page 21, line 7, at end insert <and>

Paul Wheelhouse

49 In section 30, page 21, line 8, leave out from <and> to end of line 9

Paul Wheelhouse

50 In section 30, page 21, line 29, at end insert—

<( ) An order under subsection (6) may specify only activities that are environmental activities within the meaning of section 9.>

Section 31

Paul Wheelhouse

101 In section 31, page 21, line 32, leave out subsection (1) and insert—

<(1) It is an offence for a person to—

(a) act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or

(b) fail to act, or permit another person not to act, in a way such that (in either case) the failure to act causes or is likely to cause significant environmental harm.>

Paul Wheelhouse

102 In section 31, page 22, leave out lines 4 to 6 and insert <permits another person to act or not to act as mentioned in that subsection>

Paul Wheelhouse

103 In section 31, page 22, line 10, leave out subsection (3) and insert—

<( ) A person who acts, fails to act or permits another person to act or not to act as mentioned (in each case) in subsection (1) commits an offence under that subsection whether or not the person—

(a) intended the acts or failures to act to cause, or be likely to cause, significant environmental harm, or

(b) knew that, or was reckless or careless as to whether, the acts or failures to act would cause or be likely to cause such harm.>

Section 32

Paul Wheelhouse

104 In section 32, page 23, line 29, after <occasion> insert—

<(a)>

Paul Wheelhouse

105 In section 32, page 23, line 29, at end insert—

<(b) vary the steps specified in a remediation order.>

Paul Wheelhouse

106 In section 32, page 23, line 34, at end insert—

<(ii) imprisonment for a term not exceeding 12 months, or

(iii) both.>

Paul Wheelhouse

107 In section 32, page 23, line 35, at end insert—

<(ii) imprisonment for a term not exceeding 5 years, or

(iii) both.>

After section 32

Paul Wheelhouse

51 After section 32, insert—

<*Offences relating to supply of carrier bags: fixed penalty notices*

Offences relating to supply of carrier bags: fixed penalty notices

(1) The Climate Change (Scotland) Act 2009 is amended as follows.

(2) After section 88 insert—

"*Carrier bag offences: fixed penalty notices*

88A Offences relating to supply of carrier bags: fixed penalty notices

(1) A person authorised for the purpose of this section by an enforcement authority may give a person a fixed penalty notice if the person so authorised has reason to believe that the person to whom the notice is given has committed a relevant offence.

(2) In subsection (1), "relevant offence" means an offence provided for in regulations made under section 88.

(3) The Scottish Ministers may by regulations make further provision about fixed penalty notices under subsection (1).

(4) Subject to section 89, the regulations may in particular include provision about—

(a) the enforcement authority in relation to the regulations; and

(b) the functions of that authority in relation to fixed penalty notices.

(5) Schedule 1A makes further provision about fixed penalties.".

(3) After schedule 1 insert—

"SCHEDULE 1A

(introduced by section 88A(5))

FIXED PENALTIES

Preliminary

1 In this schedule, unless the context otherwise requires—

"enforcement authority" means the enforcement authority provided for in the regulations;

"notice" means a fixed penalty notice given under section 88A(1);

"the offence" means the offence to which the notice relates;

"prescribed" means prescribed by the regulations;

"the regulations" means regulations under section 88A(3).

Content of fixed penalty notice

2 (1) A notice must give reasonable particulars of the circumstances alleged to constitute the offence.

(2) A notice must also contain the following information—

(a) the amount of the fixed penalty;

(b) the payment deadline;

(c) the discounted amount and the discounted payment deadline;

(d) the name of—

(i) the enforcement authority to which payment should be made; or

(ii) a person acting on behalf of the enforcement authority to whom payment should be made;

(e) the address at which payment should be made; and

(f) the method by which payment should be made.

(3) A notice given to a person must state that—

(a) any liability to conviction of the offence is discharged if the person makes payment of—

(i) the fixed penalty before the payment deadline; or

(ii) the discounted amount before the discounted payment deadline;

(b) the payment of a fixed penalty is not a conviction nor may it be recorded as such;

(c) no proceedings may be commenced against the person in respect of the offence unless the payment deadline has passed and the discounted amount or fixed penalty has not been paid;

(d) the person has the right to make representations as mentioned in paragraph 8.

Period in which notice can be given

3 A notice may not be given after such time relating to the offence as may be prescribed.

Amount of penalty

4 (1) The amount of the fixed penalty, and the discounted amount, are such amounts as may be prescribed.

(2) The maximum amount of the fixed penalty that may be prescribed is an amount equal to level 2 on the standard scale (within the meaning of section 225(1) of the Criminal Procedure (Scotland) Act 1995).

(3) The discounted amount prescribed must be less than the maximum amount of the fixed penalty.

Deadlines for payment

5 (1) The payment deadline is the first working day occurring at least 28 days after the day on which the notice is given.

(2) But the enforcement authority may extend the payment deadline in any particular case after the notice is given if it considers it appropriate to do so.

(3) The discounted payment deadline is the first working day occurring at least 14 days after the day on which notice is given.

(4) But the enforcement authority may extend the discounted payment deadline in any particular case after the notice is given if it considers it appropriate to do so.

(5) On extending the payment deadline under sub-paragraph (2), or the discounted payment deadline under sub-paragraph (4), the enforcement authority must notify the recipient of the notice.

(6) In this paragraph, "working day" means any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

Method of payment

6 The fixed penalty (and the discounted payment amount) is payable—

(a) to the enforcement authority or the person acting on its behalf specified in the notice;

(b) at the address specified in the notice; and

(c) by the method specified in the notice.

Restriction on proceedings and effect of payment

7 (1) The earliest date that proceedings for the offence may be commenced is the day after the payment deadline.

(2) But no such proceedings may be commenced against a person if—

(a) the person makes payment of the discounted amount on or before the discounted payment deadline (or that deadline as extended under paragraph 5(4)); or

(b) the person makes payment of the fixed penalty on or before the payment deadline (or that deadline as extended under paragraph 5(2)).

(3) In proceedings for the offence, a certificate which—

(a) purports to be signed by or on behalf of a person having responsibility for the financial affairs of the enforcement authority; and

(b) states that payment of an amount specified in the certificate was, or was not, received by a date so specified,

is sufficient evidence of the facts stated.

(4) Where the enforcement authority is a local authority, the reference to a person having responsibility for the financial affairs of the enforcement authority in sub-paragraph (3)(a) is to be read as a reference to the person who has, as respects the local authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration).

Withdrawal of fixed penalty notice

8 (1) A recipient of a notice may make representations to the enforcement authority as to why the notice ought not to have been given.

(2) If, having considered any representations under sub-paragraph (1), the enforcement authority considers that the notice ought not to have been given, it may give to the person a notice withdrawing the notice.

(3) Where a notice under sub-paragraph (2) is given—

(a) the enforcement authority must repay any amount which has been paid in pursuance of the fixed penalty notice; and

(b) no proceedings may be commenced against the person for the offence.

Effect of prosecution on fixed penalty notice

9 Where proceedings for an offence in respect of which a notice has been given are commenced, the notice is to be treated as withdrawn.

General and supplemental

10 The regulations may make provision about—

(a) the application by enforcement authorities of payments received under this schedule;

(b) the keeping of accounts, and the preparation and publication of statements of account, in relation to such payments.

11 (1) The regulations may prescribe—

(a) the form of notices including notices under paragraph 8(2);

(b) the circumstances in which notices may not be given; and

(c) the method by which fixed penalties may be paid.

(2) The regulations may modify sub-paragraphs (1) and (3) of paragraph 5 so as to substitute a different deadline for the deadline for the time being specified there.

12 The enforcement authority must have regard to any guidance given by the Scottish Ministers to it in relation to the functions conferred on it by the regulations.”.>

Paul Wheelhouse

108 After section 32, insert—

<Corporate offending

(1) Subsection (2) applies where—

(a) an offence under section 31(1) or 32(7) is committed by a relevant organisation, and

(b) the commission of the offence involves the connivance or consent, or is attributable to the neglect, of a responsible official of the relevant organisation.

(2) The responsible official (as well as the relevant organisation) commits the offence.

(3) In this section—

“a relevant organisation” means—

(a) a company,

(b) a limited liability partnership,

(c) a partnership (other than a limited liability partnership), or

(d) another body or association,

“a responsible official” means—

(a) in the case of a company, a director, secretary, manager or similar officer of the company,

(b) in the case of a limited liability partnership, a member of the partnership,

(c) in the case of a partnership (other than a limited liability partnership), a partner of the partnership, or

(d) in the case of another body or association, a person who is concerned in the management or control of its affairs,

and in each case includes a person purporting to act in a capacity mentioned in any of paragraphs (a) to (d) of this definition.>

Section 34

Paul Wheelhouse

52 In section 34, page 24, line 21, at end insert—

<( ) In section 78F (determination of appropriate person to bear responsibility for remediation), after subsection (5) insert—

“(5A) But where the contaminated land is owned or occupied by the Crown by virtue of its having vested as *bona vacantia* in the Crown, or its having fallen to the Crown as *ultimus haeres*, the Crown is not an appropriate person under subsection (4) or (5) for the purposes of this Part.”.>

Paul Wheelhouse

53 In section 34, page 24, line 24, leave out <a local authority>

Paul Wheelhouse

54 In section 34, page 24, line 25, at beginning insert <a local authority>

Paul Wheelhouse

55 In section 34, page 24, line 26, leave out <and>

Paul Wheelhouse

56 In section 34, page 24, line 26, at end insert—

<( ) the land is not designated as a special site by virtue of section 78C(7) or 78D(6) above; and>

Paul Wheelhouse

57 In section 34, page 24, line 27, at beginning insert <the local authority>

Paul Wheelhouse

58 In section 34, page 25, line 11, at end insert—

<( ) A non-contamination notice shall not prevent the land, or any of the land, to which the notice relates being identified as contaminated land on a subsequent occasion.

( ) Where land, or any of the land, to which a non-contamination notice relates is subsequently identified as contaminated land, or is subsequently designated as a special site by virtue of section 78C(7) or 78D(6), subsection (3)(b) above does not prevent a remediation notice being served in respect of the land.>

Paul Wheelhouse

59 In section 34, page 25, leave out lines 35 to 38 and insert—

<( ) the Scottish Environment Protection Agency has given the local authority a notice under section 78Q(4) above that the land to which the notices relate is no longer land which is required to be designated as a special site; and

( ) the date specified in the notice given under that section has passed.>

Paul Wheelhouse

60 In section 34, page 26, line 9, leave out <subsections (2) and> and insert <subsection>

Paul Wheelhouse

61 In section 34, page 26, line 18, leave out <and> and insert—

<( ) each person—

(i) who appears to the Scottish Environment Protection Agency to be an appropriate person in relation to that land, and

(ii) in respect of whom details have been given by the Scottish Environment Protection Agency to the local authority sufficient to enable notice of such removal to be given; and>

Paul Wheelhouse

62 In section 34, page 26, leave out lines 24 and 25

Paul Wheelhouse

63 In section 34, page 26, line 31, at end insert—

<( ) In section 78X (supplementary provisions), in subsection (4), after paragraph (f) insert—

"(g) in relation to property and rights that have vested as *bona vacantia* in the Crown, or that have fallen to the Crown as *ultimus haeres*, the Queen's and Lord Treasurer's Remembrancer.".>

After section 34

Paul Wheelhouse

64 After section 34, insert—

<*Amendment of powers under section 108 of Environment Act 1995*

Amendment of powers under section 108 of Environment Act 1995

(1) The Environment Act 1995 is amended as follows.

(2) In section 108 (powers of enforcing authorities and persons authorised by them)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (b) is repealed,

(ii) after paragraph (c) insert—

"(d) of determining whether any of the following offences are being or have been committed—

(i) an offence under section 110 of this Act;

(ii) an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 (offences relating to significant environmental harm);

(iii) an offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (statutory offences: art and part and aiding or abetting) as it applies in relation to an offence mentioned in sub-paragraph (i) or (ii) above;

(iv) an attempt, conspiracy or incitement to commit an offence mentioned in sub-paragraph (i) or (ii) above; or

(e) in a case only where the person is authorised by SEPA, of determining whether, and if so to what extent, any financial benefit has accrued or is likely to accrue to a person in connection with an offence mentioned in subsection (1A) below which the authorised person reasonably believes is being or has been committed.",

(b) after subsection (1) insert—

"(1A) The offence is a relevant offence (within the meaning of section 39 of the Regulatory Reform (Scotland) Act 2013) for the purpose of provision made under section 16, or of section 27, of that Act).",

(c) in subsection (4)—

(i) in paragraph (h), after sub-paragraph (iii) insert—

"(iv) to ensure that it is available for use as evidence in any proceedings for an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013;",

(ii) in paragraph (j), the words from "to answer" to the end become sub-paragraph (i) of that paragraph, and after that sub-paragraph insert "; and

(ii) without prejudice to the generality of paragraph (c) above, to attend at such place and at such reasonable time as the authorised person may specify to answer those questions and sign such a declaration;",

(iii) after paragraph (j) insert—

"(ja) in a case only where he is authorised under subsection (1) or (2) above by SEPA, and without prejudice to the generality of paragraphs (c) and (j) above, to require any person whom he has reasonable cause to believe to be able to give any information relevant to an examination or investigation under paragraph (c) above, to provide the person's name, address and date of birth;",

(iv) after paragraph (k) insert—

"(ka) as regards any premises which by virtue of an authorisation from SEPA he has power to enter, to search the premises and seize and remove any documents found in or on the premises which he has reasonable cause to believe—

(i) may be required as evidence for the purpose of proceedings relating to an offence under any of the pollution control enactments, or under section 31(1) of the Regulatory Reform (Scotland) Act 2013, which he reasonably believes is being or has been committed; or

(ii) may assist in determining whether, and if so to what extent, any financial benefit has accrued or is likely to accrue as mentioned in subsection (1)(e) above;",

(d) in subsection (5), after "with" insert ", or whether an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 is being, or has been, committed,",

(e) in subsection (6), paragraph (a) and the word "and" immediately following it are repealed,

(f) after subsection (7) insert—

"(7A) An authorised person may not exercise the power in subsection (4)(ka) above to seize and remove documents except under the authority of a warrant by virtue of Schedule 18 to this Act.

(7B) Section 108A applies where documents are removed under that power.

(7C) Subsections (7D) and (7E) apply where a document removed under that power contains information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.

(7D) The information may not be used—

(a) in evidence for the purpose of proceedings mentioned in paragraph (ka)(i) of subsection (4) above against a person who would be entitled to make such a claim in relation to the document; or

(b) to determine whether any financial benefit has accrued or is likely to accrue as mentioned in subsection (1)(e) above.

(7E) The document must be returned to the premises from which it was removed, or to the person who had possession or control of it immediately before it was removed, as soon as reasonably practicable after the information is identified as information described in subsection (7C) above (but the authorised person may retain, or take copies of, any other information contained in the document).",

(g) in subsection (12), at the end add ", except in a case where the proceedings relate to—

(a) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements and declarations), or

(b) another offence where in giving evidence the person makes a statement inconsistent with the answer.",

(h) in subsection (15)—

(i) after the definition of "authorised person" insert—

""document" includes any thing in which information of any description is recorded (by any means) and any part of such a thing;",

(ii) in the definition of "pollution control functions", paragraph (a) is repealed.

(3) After section 108, insert—

"**108A Procedure where documents removed**

(1) An authorised person (within the meaning of subsection (15) of section 108 of this Act) who removes any documents under the power in subsection (4)(ka) of that section shall, if requested to do so by a person mentioned in subsection (2) below, provide that person with a record of what the authorised person removed.

(2) The persons are—

(a) a person who was the occupier of any premises from which the documents were removed at the time of their removal;

(b) a person who had possession or control of the documents immediately before they were removed.

(3) The authorised person shall provide the record within a reasonable time of the request for it.

(4) A person who had possession or control of documents immediately before they were removed may apply to SEPA—

(a) for access to the documents; or

(b) for a copy of them.

(5) SEPA shall—

(a) allow the applicant supervised access to the documents for the purpose of copying them or information contained in them; or

(b) copy the documents or information contained in them (or cause the documents or information to be copied) and provide the applicant with such copies within a reasonable time of the application.

(6) But SEPA need not comply with subsection (5) above where it has reasonable grounds for believing that to do so might prejudice—

(a) any investigation for a purpose mentioned in paragraph (a), (d) or (e) of subsection (1) of section 108 of this Act; or

(b) any criminal proceedings which may be brought as a result of any such investigation.

(7) In subsection (5) above, "supervised access" means access under the supervision of a person approved by SEPA.

(8) A person who claims that an authorised person or SEPA has failed to comply with the requirements of subsection (1), (3) or (5) above may apply to the sheriff for an order under subsection (10) below.

(9) An application under subsection (8) above—

(a) relating to a failure to comply with the requirements of subsection (1) or (3) above may be made only by a person who is entitled to make a request under subsection (1) above;

(b) relating to a failure to comply with subsection (5) above may be made only by a person who had possession or control of the documents immediately before they were removed.

(10) The sheriff may, if satisfied that the authorised person or SEPA has failed to comply with the requirements of subsection (1), (3) or (5) above, order the person, or as the case may SEPA, to comply with the requirements within such time and in such manner as may be specified in the order.".

(4) In Schedule 18 (supplemental provisions with respect to powers of entry)—

(a) in paragraph 2—

(i) after sub-paragraph (1) insert—

"(1A) If it is shown to the satisfaction of the sheriff or a justice of the peace, on sworn information in writing, that there are reasonable grounds for the exercise in relation to any documents of a power in section 108(4)(ka) of this Act, the sheriff or justice of the peace may by warrant authorise SEPA to designate a person who shall be authorised to exercise the power in relation to the documents in accordance with the warrant and, if need be, by force.",

(ii) for sub-paragraph (3) substitute—

"(3) A warrant under this Schedule in respect of the power in section 108(6) of this Act to enter any premises used for residential purposes shall not be issued unless the sheriff or justice of the peace is satisfied that such entry is necessary for any purpose for which the power is proposed to be exercised.",

(iii) after sub-paragraph (4) add—

"(5) A sheriff may grant a warrant under this Schedule in relation to premises situated in an area of Scotland even though the area is outside the territorial jurisdiction of that sheriff; and any such warrant may, without being backed or endorsed by another sheriff, be executed throughout Scotland in the same way as it may be executed within the sheriffdom of the sheriff who granted it.",

(b) in paragraph 3—

(i) after "shall" insert ", if so required,",

(ii) the words "designation and other" are repealed.>

After section 37

Paul Wheelhouse

65 After section 37, insert—

<*Smoke control areas: fuels and fireplaces*

Smoke control areas: authorised fuels and exempt fireplaces

(1) The Clean Air Act 1993 is amended as follows.

(2) In section 20 (offence of emitting smoke in smoke control area where emission caused by use of fuel other than authorised fuel)—

(a) after subsection (5) insert—

"(5A) In this Part, "authorised fuel" means a fuel included in a list of authorised fuels kept by the Scottish Ministers for the purposes of this Part.

(5B) The Scottish Ministers must—

(a) publish the list of authorised fuels; and

(b) publish a revised copy of the list as soon as is reasonably practicable after any change is made to it.

(5C) The list must be published in such manner as the Scottish Ministers consider appropriate.",

(b) in subsection (6), for "In" substitute "Except as provided in subsection (5A), in".

(3) In section 21 (power by order to exempt certain fireplaces)—

(a) the existing text becomes subsection (5); and for the word "The" at the beginning of that subsection substitute "Except where subsection (1) applies, the".

(b) before that subsection insert—

"(1) For the purposes of this Part, the Scottish Ministers may exempt any class or description of fireplace from the provisions of section 20 (prohibition of smoke emissions in smoke control areas) if they are satisfied that such fireplaces can be used for burning fuel other than authorised fuels without producing any smoke or a substantial quantity of smoke.

(2) An exemption under subsection (1) may be made subject to such conditions as the Scottish Ministers consider appropriate.

(3) The Scottish Ministers must—

(a) publish a list of those classes or descriptions of fireplace that are exempt under subsection (1), including details of any conditions to which an exemption is subject; and

(b) publish a revised copy of the list as soon as is reasonably practicable after any change is made to the classes or descriptions of fireplace that are so exempt or to the conditions to which an exemption is subject.

(4) The list must be published in such manner as the Scottish Ministers consider appropriate.".

(4) In the title of section 21, the words "by order" are repealed.

(5) In section 29 (interpretation of Part 3), in the definition of "authorised fuel", for "20(6)" substitute "20".>

Section 38

Alison Johnstone
Supported by: Jenny Marra

6 In section 38, page 28, line 23, leave out from second <and> to end of line 24

Alison Johnstone
Supported by: Claudia Beamish

7 In section 38, page 28, line 24, leave out <economic growth> and insert <development>

Section 40

Fergus Ewing

111 In section 40, page 30, line 6, at end insert—

<**Applications under section 63A: requirement for leave**

(1) No proceedings may be taken in respect of an application under section 63A(1) unless the Inner House of the Court of Session has granted leave for the application to proceed.

(2) The Court may grant leave under subsection (1) for an application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and

(b) the application has a real prospect of success.

(3) The Court may grant leave under subsection (1) for an application to proceed—

(a) subject to such conditions as the Court thinks fit, or

(b) only on such of the grounds specified in the application as the Court thinks fit.

(4) An application under section 63A(1) may be made even though the Court has not granted leave for the application to proceed.".>

Section 41

Margaret McDougall

120 In section 41, page 30, line 18, at end insert—

<(1AAA)Before making provision such as mentioned in subsection (1A)(da), the Scottish Ministers must prepare and publish guidance setting out the principles to which they must have regard in determining whether the functions of a planning authority are not being, or have not been, performed satisfactorily.

(1AAB)Before preparing and publishing guidance under subsection (1AAA), the Scottish Ministers must consult—

(a) each planning authority,

(b) such other persons as appear to the Scottish Ministers to have a significant interest in such guidance, and

lay the guidance before the Scottish Parliament.>

Margaret McDougall

121 In section 41, page 30, line 18, at end insert—

<( ) Before making provision such as mentioned in subsection (1A)(da) such that the charge or fee payable to a planning authority is lower than that payable to another planning authority, the Scottish Ministers must take all reasonable steps to support the planning authority to improve the performance of its functions.>

Margaret McDougall

122 In section 41, page 30, line 18, at end insert—

<( ) Where the Scottish Ministers make provision such as mentioned in subsection (1A)(da) such that the charge or fee payable to a planning authority is lower than that payable to another planning authority, they must ensure that the lower charge or fee is not set—

(a) at a level, or

(b) for a period,

that will adversely affect the performance of, or as the case may be the range of services offered by, the planning authority.>

Margaret McDougall

123 In section 41, page 30, line 18, at end insert—

<( ) Before making provision such as mentioned in subsection (1A)(da) such that the charge or fee payable to a planning authority is lower than that payable to another planning authority, the Scottish Ministers must lay before the Scottish Parliament a statement setting out—

(a) the percentage variation by which, and

(b) the period for which,

they propose to vary the fee or charge.>

Margaret McDougall

124 Leave out section 41

Section 42

Fergus Ewing

66 In section 42, page 30, line 29, leave out <one> and insert <a food authority in Scotland>

Fergus Ewing

109 In section 42, page 30, line 30, after <subsection> insert—

<(a)>

Fergus Ewing

68 In section 42, page 30, line 33, at end insert <, or

(b) where no such food authority has registered the establishment for those purposes, a food authority which is—

(i) the licensing authority to which the application mentioned in subsection (4) in respect of the activity is made, or

(ii) another licensing authority to which an application for a street trader's licence in respect of the activity is or has been made.".>

Schedule 3

Paul Wheelhouse

69 In schedule 3, page 43, line 33, at end insert—

<Sewerage (Scotland) Act 1968

(1) The Sewerage (Scotland) Act 1968 is amended as follows.

(2) In section 29A (priority substances etc.), in subsection (3)—

(a) the word "or" immediately following paragraph (a) is repealed, and

(b) for paragraph (b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013, or

(c) any directive concerning the same subject-matter as the directive mentioned in subsection (1).".

(3) In section 38H (Controlled Activities Regulations), for subsection (3)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".>

Paul Wheelhouse

70 In schedule 3, page 44, line 5, at end insert—

<( ) In section 46 (receptacles for household waste), in subsection (4)—

(a) the word "and" immediately following paragraph (d) is repealed,

(b) after paragraph (e) add—

"(f) the removal of the receptacles placed for the purpose of facilitating the emptying of them; and

(g) the time when the receptacles must be placed for that purpose and removed.".

( ) In section 47 (receptacles for commercial or industrial waste), in subsection (4)—

(a) the word "and" immediately following paragraph (d) is repealed,

(b) after paragraph (e) add—

"(f) the removal of the receptacles placed for the purpose of facilitating the emptying of them; and

(g) the time when the receptacles must be placed for that purpose and removed.".>

Paul Wheelhouse

71 In schedule 3, page 47, leave out lines 1 to 5

Paul Wheelhouse

72 In schedule 3, page 47, leave out lines 10 to 14

Paul Wheelhouse

73 In schedule 3, page 47, line 14, at end insert—

<*Water Resources (Scotland) Act 2013*

(1) The Water Resources (Scotland) Act 2013 is amended as follows.

(2) In section 5 (qualifying abstraction), in subsection (2), for the words from "20(3)(b)" to the end of the subsection substitute "23(5) of the 2003 Act.".

(3) In section 21 (Controlled Activities Regulations), for subsection (5)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

(4) In section 50 (Controlled Activities Regulations), for subsection (5)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".>

Paul Wheelhouse

74 In schedule 3, page 47, leave out lines 21 to 24 and insert—

<(a) in subsection (1), in paragraph (a)—

(i) for the words "officer of a local authority" substitute "person or a constable", and

(ii) the words from "in" to the end of paragraph (b) are repealed,

(b) in subsection (4), paragraph (b) and the word "or" immediately preceding it are repealed,

(c) after subsection (8) insert—

"(8A) If an authorised person proposes to give a person a notice under this section, the authorised person may require the person to give him his name and address.

(8B) A person commits an offence if he fails to give his name and address when required to do so under subsection (8A) above.

(8C) A person who commits an offence under subsection (8B) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale.",

(d) in subsection (11), in paragraph (a), for the words from "the" where it first occurs to "committed" substitute "a proper officer",

(e) after subsection (11) insert—

"(11A) In subsection (11) above, "proper officer" means—

(a) in a case where a notice under this section is given by an officer of a local authority authorised as mentioned in paragraph (a) of the definition of "authorised person" in subsection (13) below, the officer who has, as respects the authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration);

(b) in a case where a notice under this section is given by an officer of Loch Lomond and The Trossachs National Park Authority authorised as mentioned in paragraph (b) of that definition, the proper officer for that Authority appointed under paragraph 12(3) of schedule 2 to the National Parks (Scotland) Act 2000.",

(f) in subsection (12)—

(i) after "payable", where it second occurs, insert—

"(a) in a case such as is mentioned in paragraph (a) of subsection (11A) above,", and

(ii) at the end insert—

"(b) in a case such as is mentioned in paragraph (b) of that subsection, to Loch Lomond and The Trossachs National Park Authority; and as respects the sums received by that Authority, those sums shall accrue to that Authority.",

(g) in subsection (13)—

(i) for the definition of "authorised officer" substitute—

""authorised person" means—

(a) an officer of a local authority who is authorised in writing by the authority for the purpose of issuing notices under this section in relation to a relevant offence committed in the area of the authority;

(b) an officer of Loch Lomond and The Trossachs National Park Authority who is authorised in writing by the Authority for the purpose of issuing notices under this section in relation to a relevant offence committed in the area designated as the National Park for which the Authority is established; or

(c) such other persons as may be specified by order made by the Scottish Ministers.", and

(ii) the definition of "proper officer" is repealed, and

(h) after subsection (13) insert—

"(13A) The Scottish Ministers may by order make such modifications of this section as they consider necessary or expedient in connection with the specification of a person by an order under paragraph (c) of the definition of "authorised person" in subsection (13) above.

(13B) An order under subsection (13A) above may include provision—

(a) applying any provision of this section to such a person with such modifications as may be specified in the order;

(b) for any such provision not to apply in relation to such a person.".>

Paul Wheelhouse

75 In schedule 3, page 47, line 32, at end insert—

<( ) In section 88 (fixed penalty notices for leaving litter)—

(a) in subsection (1), in paragraph (a)—

(i) for the words "officer of a litter authority" substitute "person or a constable", and

(ii) the words from "in" to the end of paragraph (b) are repealed,

(b) in subsection (5A), for the words "to the litter authority in whose area the offence was committed" substitute—

"(a) where the notice is given by an officer of a litter authority authorised as mentioned in paragraph (a) of the definition of "authorised person" in subsection (10) below, to that litter authority;

(b) where the notice is given by an officer of Loch Lomond and The Trossachs National Park Authority authorised as mentioned in paragraph (b) of that definition, to that Authority.",

(c) in subsection (6)—

(i) the words from "a litter" to the end become paragraph (a) of that subsection, and

(ii) after that paragraph insert—

"(b) Loch Lomond and The Trossachs National Park Authority, shall accrue to that Authority.",

(d) in subsection (8), in paragraph (a)(ii), for the words from "the" where it first occurs to "committed" substitute "a proper officer",

(e) after subsection (8) insert—

"(8A) In subsection (8) above, "proper officer" means—

(a) in a case where a notice under this section is given as mentioned in paragraph (a) of subsection (5A) above, the officer who has, as respects the litter authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration);

(b) in a case where a notice is given as mentioned in paragraph (b) of that subsection, the proper officer for that Authority appointed under paragraph 12(3) of schedule 2 to the National Parks (Scotland) Act 2000.

(8B) If an authorised person proposes to give a person a notice under this section, the authorised person may require the person to give him his name and address.

(8C) A person commits an offence if he fails to give his name and address when required to do so under subsection (8B) above.

(8D) A person who commits an offence under subsection (8C) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale.",

(f) in subsection (10)—

(i) for the definition of "authorised officer" substitute—

""authorised person" means—

(a) an officer of a litter authority who is authorised in writing by the authority for the purpose of issuing notices under this section in relation to an offence under section 87 above committed in the area of the authority;

(b) an officer of Loch Lomond and The Trossachs National Park Authority who is authorised in writing by the Authority for the purpose of issuing notices under this section in relation to an offence under section 87 above committed in the area designated as the National Park for which the Authority is established; or

(c) such other persons as may be specified by order made by the Scottish Ministers.", and

(ii) the definition of "proper officer" is repealed, and

(g) after subsection (10) insert—

"(10A) The Scottish Ministers may by order make such modifications of this section as they consider necessary or expedient in connection with the specification of a person by an order under paragraph (c) of the definition of "authorised person" in subsection (10) above.

(10B) An order under subsection (10A) above may include—

(a) provision applying any provision of this section to such a person with such modifications as may be specified in the order;

(b) provision for any such provision not to apply in relation to such a person.".>

Paul Wheelhouse

76 In schedule 3, page 50, line 12, at end insert—

<( ) section 69 (execution of works by local authority),>

Paul Wheelhouse

77 In schedule 3, page 50, line 20, at end insert—

<( ) In section 30Y (introductory), in subsection (1) (meaning of "abandonment" in relation to a mine), in paragraph (b)—

(a) the word "or" immediately following sub-paragraph (i) is repealed, and

(b) after sub-paragraph (ii) insert "or

(iii) any disclaimer by notice signed by the Queen's and Lord Treasurer's Remembrancer under section 1013 of the Companies Act 2006 (Crown disclaimer of property vesting as *bona vacantia*).".>

Paul Wheelhouse

78 In schedule 3, page 51, line 8, at end insert—

<( ) In section 104 (orders and regulations)—

(a) in subsection (1), the following words are repealed—

(i) "(except sections 63 and 65(6))", and

(ii) "regulations made by virtue of section 18 of this Act or", and

(b) in subsection (2), the following words are repealed—

(i) "regulations shall be made by virtue of section 18 of this Act and no", and

(ii) "regulations or".>

Paul Wheelhouse

79 In schedule 3, page 51, line 12, at end insert—

<*Scottish Board of Health Act 1919*

In the Scottish Board of Health Act 1919, in section 4 (transfer of powers and duties to and from the Board), paragraph (d) of subsection (1) is repealed.>

Paul Wheelhouse

80 In schedule 3, page 51, line 18, leave out <paragraph 18 is> and insert <paragraphs 10, 14 and 18 are>

Paul Wheelhouse

81 In schedule 3, page 51, line 25, at end insert—

<*Water Act 1989*

In the Water Act 1989, in Schedule 23 (control of water pollution in Scotland), paragraphs 2 and 3 are repealed.

Planning (Consequential Provisions) Act 1990

In the Planning (Consequential Provisions) Act 1990, in Schedule 2 (consequential amendments), paragraph 31(1) is repealed.>

Paul Wheelhouse

82 In schedule 3, page 51, line 27, at end insert—

<( ) in section 79 (statutory nuisances and inspections therefor), in subsection (10), the words from "Part I" to "under", where it third occurs, are repealed,>

Paul Wheelhouse

83 In schedule 3, page 51, line 27, at end insert—

<( ) in section 80 (summary proceedings for statutory nuisances)—

(i) in paragraph (a) of subsection (9), the words "or 65" are repealed,

(ii) paragraph (b) of that subsection, and the word "or" immediately preceding it, are repealed,

(iii) paragraph (c) of that subsection, and the word "or" immediately preceding it, are repealed, and

(iv) subsection (10) is repealed,>

Paul Wheelhouse

84 In schedule 3, page 51, line 31, at end insert—

<( ) paragraph 2 is repealed,>

Paul Wheelhouse

85 In schedule 3, page 51, line 33, at end insert—

<( ) in Schedule 16 (repeals), in Part 1 (enactments relating to processes), the entry relating to 1990 c.43 (Environmental Protection Act 1990) is repealed.>

Paul Wheelhouse

86 In schedule 3, page 52, line 16, at end insert—

<*Clean Air Act 1993*

In the Clean Air Act 1993, in section 42 (colliery spoilbanks)—

(a) in subsection (2), for the words "or quarry" substitute ", or the operator of a quarry,", and

(b) in subsection (6), for the words from "mine" to the end substitute—

""mine" is to be construed in accordance with section 180 of the Mines and Quarries Act 1954;

"operator", in relation to a quarry, has the meaning given by regulation 2(1) of the Quarries Regulations 1999 (S.I. 1999/2024);

"owner", in relation to a mine, is to be construed in accordance with section 181(1) and (4) of the Mines and Quarries Act 1954;

"quarry" is to be construed in accordance with regulation 3 of the Quarries Regulations 1999.".>

Paul Wheelhouse

87 In schedule 3, page 52, line 29, at end insert—

<( ) In section 21 (transfer of functions to SEPA)—

(a) in subsection (1)—

(i) paragraph (a)(i), (iii) and (iv) are repealed,

(ii) in paragraph (a)(ii), the words from "Part III" to "and" are repealed,

(iii) paragraphs (c), (d), (f) and (h) are repealed, and

(b) in subsection (2), paragraph (b) is repealed.>

Paul Wheelhouse

88 In schedule 3, page 52, line 31, at end insert—

<( ) In section 56 (interpretation of Part 1), in subsection (1), in the definition of "disposal authority", paragraph (b) is repealed.>

Paul Wheelhouse

89 In schedule 3, page 52, line 31, at end insert—

<( ) In section 91 (interpretation of Part 4), in subsection (1), in the definition of "action plan", for "84(2)(b)" substitute "84(2)".>

Paul Wheelhouse

90 In schedule 3, page 52, line 31, at end insert—

<( ) In section 110 (offences)—

(a) in subsection (1), after "to" insert "assault, hinder or",

(b) in subsection (4)—

(i) in paragraph (a), after "of" where it second occurs insert "assaulting, hindering or",

(ii) in sub-paragraph (i) of that paragraph, after "maximum" insert "or to imprisonment for a term not exceeding 12 months, or to both",

(iii) in paragraph (b), for the words "level 5 on the standard scale" substitute "the prescribed sum within the meaning of section 225(8) of the Criminal Procedure (Scotland) Act 1995 or to imprisonment for a term not exceeding 12 months, or to both", and

(c) after subsection (5) insert—

"(5A) A person may be convicted of the offence under subsection (1) above of hindering or obstructing even though it is—

(a) effected by means other than physical means, or

(b) effected by action directed only at any vehicle, apparatus, equipment or other thing used or to be used by an authorised person.

(5B) Subsection (5C) applies where, in the trial of a person ("the accused") charged in summary proceedings with an offence under subsection (1) above, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under subsection (2) above.

(5C) The court may acquit the accused of the charge and, instead, find the accused guilty of an offence under subsection (2) above.".>

Paul Wheelhouse

91 In schedule 3, page 52, line 33, at end insert—

<( ) In Schedule 11 (air quality: supplemental provisions)—

(a) in paragraph 1(1)(b), the words "or 84" are repealed, and

(b) in paragraph 4(2)(b), the words "or 84" are repealed.>

Paul Wheelhouse

92 In schedule 3, page 53, line 3, at end insert—

<( ) paragraph 1 is repealed,>

Paul Wheelhouse

93 In schedule 3, page 53, line 8, at end insert—

<( ) paragraph 93 is repealed,>

Paul Wheelhouse

94 In schedule 3, page 53, line 9, at end insert—

<( ) In Schedule 23 (transitional and transitory provisions and savings), the following paragraphs are repealed—

(a) paragraph 4,

(c) paragraph 6,

(d) paragraph 8, and

(e) paragraph 18.>

Paul Wheelhouse

95 In schedule 3, page 53, leave out lines 10 to 20

Paul Wheelhouse

96 In schedule 3, page 53, line 20, at end insert—

<The amendments made by paragraph 25 to subsection (4) of section 110 of the Environment Act 1995 do not affect the penalty for an offence under that section committed before the coming into force of those amendments.>

Paul Wheelhouse

110* In schedule 3, page 53, line 20, at end insert—

<Criminal Procedure (Scotland) Act 1995

(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 277 (transcript of police interview sufficient evidence)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert "; or

(c) a person authorised by the Scottish Environment Protection Agency under section 108 of the Environment Protection Act 1995 and an accused person.", and

(b) after subsection (4) add—

"(5) Subsection (1) is without prejudice to section 108(12) of the Environment Act 1995.".

(3) In section 280 (routine evidence)—

(a) after subsection (3), insert—

"(3A) For the purposes of any criminal proceedings, a report purporting to be signed by a person authorised by the Scottish Environment Protection Agency for the purpose of this subsection is sufficient evidence of any fact or conclusion as to fact contained in the report and of the authority of the signatory.", and

(b) in subsection (6)—

(i) after "(1)", where it first occurs, insert ", (3A)", and

(ii) in paragraph (b), after "subsection", where it second occurs, insert "(3A) or".

(4) In Schedule 9 (certificates as to proof of certain routine matters)—

(a) in the table, omit the entry relating to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 Regulation 40, and

(b) at the end of the table insert the following entries—

"The Water Environment (Controlled Activities) (Scotland) Regulations 2011		

(S.S.I. 2011/209) Regulation 44	A person authorised to do so by the Scottish Environment Protection Agency	That the person has analysed a sample identified in the certificate (by label or otherwise) and that the sample is of a nature and composition specified in the certificate.
Regulations made by virtue of section 10 of the Regulatory Reform (Scotland) Act 2013 (asp 00)	A person authorised to do so by a regulator (within the meaning of paragraph 3(1) of schedule 2 to that Act)	That the person has analysed a sample identified in the certificate (by label or otherwise) and that the sample is of a nature and composition specified in the certificate. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person held or, as the case may be, did not hold a permit (within the meaning of paragraph 33 of schedule 2 to that Act) granted by such a regulator and, where the person held such a permit, any condition to which the permit is subject. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person held or, as the case may be, did not hold registration (within the meaning of paragraph 33 of schedule 2 to that Act) granted by such a regulator and, where the person held such registration— (a) any condition to which the registration is subject; (b) whether the

		registration subsisted on the date specified in the certificate. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person had given notification (within the meaning of paragraph 33 of schedule 2 to that Act) to such a regulator and, where the person gave such notification, whether the notification subsisted on the date specified in the certificate. In relation to a permit or registration (in each case within the meaning of paragraph 33 of schedule 2 to that Act) a description of any variation, transfer, surrender, suspension or revocation of the permit or registration. In relation to a person specified in the certificate that, on a date so specified, such regulator served on the person a notice mentioned in paragraph 18 of schedule 2 to that Act. That such a regulator has, in pursuance of paragraph 4(3)(d) of schedule 2 to that Act, made general binding rules as mentioned in that paragraph, or has, in pursuance of paragraph 11 of that schedule, made standard rules as mentioned in that paragraph; and the

		content of those general binding rules or standard rules.”.>

Paul Wheelhouse

97 In schedule 3, page 53, line 24, at end insert—

<*Planning (Consequential Provisions) (Scotland) Act 1997*

In the Planning (Consequential Provisions) (Scotland) Act 1997, in Schedule 2 (consequential amendments), paragraph 23(1) is repealed.>

Paul Wheelhouse

98 In schedule 3, page 53, line 33, at end insert—

<*Pollution Prevention and Control Act 1999*

In the Pollution Prevention and Control Act 1999, in Schedule 3 (repeals), in the third column of the entry relating to the Environmental Protection Act 1990, the words “In section 79(10), the words “under Part I or”” are repealed.>

Paul Wheelhouse

112 In schedule 3, page 55, line 17, at end insert—

<*Natural Heritage (Scotland) Act 1991*

(1) The Natural Heritage (Scotland) Act 1991 is amended as follows.

(2) In section 7 (powers of entry), after subsection (11) add—

“(12) In subsection (1) above, “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.”.

(3) In Schedule 1 (constitution and proceedings of Scottish Natural Heritage), after paragraph 17(2) add—

“(3) In sub-paragraph (1) above, “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.”.>

Section 44

Fergus Ewing

99 In section 44, page 31, line 10, leave out <12 or section 15> and insert <7B, 7E, 12 or 15>

Alison Johnstone
Supported by: Jenny Marra

8 In section 44, page 31, line 14, leave out <, 4>

Regulatory Reform (Scotland) Bill

1st Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the first day of Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Regulatory functions: consultation
113, 114, 115, 117

Regulators and regulatory functions
9, 10, 11, 12, 13

Sustainable economic growth and sustainable development
1, 2, 3, 4, 5, 6, 7, 8

Notes on amendments in this group
Amendment 3 pre-empts amendment 4
Amendment 6 pre-empts amendment 7

Primary authorities
14, 99

Regulations for protecting and improving the environment
116, 15, 16, 17

SEPA's powers of enforcement
18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

Environmental regulation: court powers on publicity orders
118

Commission of offences: vicarious and corporate liability
100, 119, 47, 48, 49, 50, 108

Significant environmental harm: offence
101, 102, 103, 104, 105, 106, 107

Offences relating to supply of carrier bags: fixed penalty notices
51

Contaminated land and special sites
52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

Powers of entry etc. under section 108 of the Environment Act 1995 and related offences
64, 90, 95, 96

Smoke control areas: fuels and fireplaces
65

Leave to proceed for applications relating to marine licence applications
111

Planning authorities' functions: fees and charges
120, 121, 122, 123, 124

Street traders' licences: food businesses
66, 109, 68

Minor and technical modifications of enactments
69, 70, 71, 72, 73, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, 93, 94, 110, 97, 98, 112

Offences in relation to controlled waste and litter: fixed penalty notices
74, 75

ECONOMY, ENERGY AND TOURISM COMMITTEE

EXTRACT FROM THE MINUTES

34th Meeting, 2013 (Session 4)

Wednesday 4 December 2013

Present:
Christian Allard
Chic Brodie
Alison Johnstone
Hanzala Malik
Dennis Robertson (Deputy Convener)
Marco Biagi
Murdo Fraser (Convener)
Mike MacKenzie
Margaret McDougall

Also present: Fergus Ewing, Minister for Energy, Enterprise & Tourism; Paul Wheelhouse, Minister for Environment and Climate Change; Derek Mackay, Minister for Local Government; Claudia Beamish; Alex Fergusson and Jenny Marra.

In attendance: Sandra Reid, Better Regulation Policy, Scottish Government; Stuart Foubister, Scottish Government Legal Directorate ; George Burgess, Head of Environmental Quality Division, Scottish Government and Ian Black, Senior Planner, Scottish Government.

Regulatory Reform (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 118, 100, 47, 48, 49, 50, 101, 102, 103, 104, 105, 106, 107, 108, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 111, 66, 109, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 110, 97, 98, 112 and 99.

The following amendments were agreed to (by division)—
51 (For 8, Against 1, Abstentions 0).

The following amendments were disagreed to (by division)—
1 (For 3, Against 6, Abstentions 0)
2 (For 3, Against 6, Abstentions 0)
3 (For 3, Against 6, Abstentions 0)
4 (For 3, Against 6, Abstentions 0)
114 (For 3, Against 6, Abstentions 0)
115 (For 3, Against 6, Abstentions 0)
117 (For 3, Against 6, Abstentions 0)
6 (For 3, Against 6, Abstentions 0)
7 (For 3, Against 6, Abstentions 0)

120 (For 4, Against 5, Abstentions 0)
121 (For 3, Against 6, Abstentions 0)
122 (For 3, Against 6, Abstentions 0)
123 (For 3, Against 6, Abstentions 0)
124 (For 3, Against 6, Abstentions 0).

The following amendments were moved and, no member having objected, withdrawn: 113 and 116.

The following amendments were not moved: 5, 119 and 8.

The following provisions were agreed to without amendment: sections 3, 6, 7, 8, 9, 10, 11, 21, 22, 23, 24, 25, 26, 27, 33, 35, 36, 37, 39, 41, 43, 45, 46, 47, 48 and the Long Title.

The following provisions were agreed to as amended: section 1, schedule 1, sections 2, 4, 5, schedule 2, sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 28, 29, 30, 31, 32, 34, 40, 42, schedule 3 and section 44.

The Committee completed Stage 2 consideration of the Bill.

Scottish Parliament

Economy, Energy and Tourism Committee

Wednesday 4 December 2013

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

Regulatory Reform (Scotland) Bill: Stage 2

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

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

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

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

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

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

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

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

Section 1—Power as respects consistency in regulatory functions

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

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

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

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

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

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

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

I move amendment 113.

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

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

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

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

"such persons"

as are

"likely ... to be affected by ... proposed regulations"

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

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

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

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

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

Amendment 113, by agreement, withdrawn.

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

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

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

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

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

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

I move amendment 9.

Amendment 9 agreed to.

Section 1, as amended, agreed to.

Schedule 1—Regulators for the purposes of Part 1

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

Schedule 1, as amended, agreed to.

Section 2—Regulations under section 1: further provision

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

Section 2, as amended, agreed to.

Section 3 agreed to.

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

The Convener: Amendment 1, in the name of Alison Johnstone, is grouped with amendments 2 to 8. I point out that, because of pre-emption, if amendment 3 is agreed to I cannot call amendment 4, and that if amendment 6 is agreed to I cannot call amendment 7.

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

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

09:45

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

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

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

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

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

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

I hope that the minister will respond to those arguments, which are not about whether a definition of sustainable economic growth is required but about whether a sustainable economic growth duty and related provisions are needed at all. Regulators are successfully working in non-legislative ways on consistency. Scotland is not an overregulated business dystopia, as some people would portray it, and the section 4 economic duty risks decision making that values economic considerations over social and environmental priorities.

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

I move amendment 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and this is the crucial part—

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

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

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

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

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

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

10:00

Mike MacKenzie: Just to clarify my point, I want to make it clear that businesses accept that there has to be regulation. However, they are seeking better regulation that, instead of being a blunt hammer, fulfils its purpose effectively and is more precise and helpful.

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

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

Chic Brodie: Can I comment, convener?

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

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

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

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

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

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

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

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

(b) achieving sustainable economic growth."

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

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

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

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

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

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

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

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

Moreover, Scottish Natural Heritage has stated:

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

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

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

and that

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

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

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

In conclusion, Presiding Officer—

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

Chic Brodie: Not yet.

The Convener: No, not yet.

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

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

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

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

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

Mike MacKenzie: Will the member take an intervention?

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

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

At stage 1, we had the opportunity to meet a senior officer who had decades of experience of environmental health and trading standards. It was his view that the inclusion of the duty in the bill would create a conflict with the responsibility to protect public health and safety, and he felt that the duty could be removed from the bill. He gave the example of a case in which a major pub-owning company has several local pubs that are perhaps serving customers short measures. They could be said to be contributing to economic growth, and the regulator would have to weigh up whether it should regulate or whether that is okay because it is contributing to the economy.

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

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

"we do not believe it is appropriate for the Government to require regulators to contribute to achieving sustainable economic growth. The aim of regulators should be to pursue their primary purpose."

Trisha McAuley of Consumer Futures warned that the new duty

"might override regulators' core functions"

as it

"skews regulation towards one aspect of the work of regulators, possibly at the expense of protecting some of their core functions."—[*Official Report*, *Economy, Energy and Tourism Committee*, 12 June 2013; c 2984, 3003.]

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

"it is not clear how such a duty would interact with the current duty that SEPA, and other bodies, have to achieve sustainable development."

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

"There exists a grave risk here that it will prove impossible to reconcile duties for sustainable development, which balance economic, social and environmental development concerns, with a growth duty which clearly gives added weight to economic concerns alone."

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

"Many are concerned that it will leave their decisions open to a range of challenges when they give priority to ensuring public safety or that of the environment."

Dave Watson of Unison cautioned of the unintended consequence

"that regulators will be concerned about how companies—particularly big companies with deep legal pockets—will make use of this provision to the detriment of the public."—[*Official Report*, *Economy, Energy and Tourism Committee*, 12 June 2013; c 2985.]

Andrew Fraser of North Ayrshire Council told the committee that, as currently drafted,

"the duty will end up as a lawyers' charter and will be argued over."—[*Official Report, Economy, Energy and Tourism Committee*, 5 June 2013; c 2955.]

10:15

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

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

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

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

"Regardless of how this government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability."

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

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

Chic Brodie: Will the member take an intervention?

Alison Johnstone: Yes.

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

Can she give us any real evidence for what she says? We have heard from witnesses on both sides of the argument. Where is her evidence that the regulators will not look at all aspects of their role, including this duty, in order to meet the purpose that has been set?

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

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

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

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

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

Alison Johnstone: I am pressing the amendment.

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 1 disagreed to.

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

Amendment 2 moved—[Alison Johnstone].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 2 disagreed to.

Section 4, as amended, agreed to.

Section 5—Code of practice

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

Section 5, as amended, agreed to.

Section 6—Code of practice: procedure

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

Amendment 3 moved—[Alison Johnstone].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 3 disagreed to.

Amendment 4 moved—[Alison Johnstone].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 4 disagreed to.

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

Amendment 114 moved—[Chic Brodie].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 114 disagreed to.

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

Amendment 115 is also in the name of Jenny Marra.

Amendment 115 moved—[Hanzala Malik].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

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

Amendment 115 disagreed to.

Section 6 agreed to.

Section 7—Power to modify schedule 1

Amendment 5 not moved.

Section 7 agreed to.

After section 7

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

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

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

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

I reassure the committee that, in due course, the proposals that emerge will be subject to public consultation before being implemented through secondary legislation.

I move amendment 14.

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

I invite the minister to wind up.

Fergus Ewing: I agree with you, convener.

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

Amendment 14 agreed to.

Sections 8 to 10 agreed to.

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

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

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

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

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

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

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

I move amendment 116.

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

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

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

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

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

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

I sympathise entirely with the thinking behind amendment 116. As I have already explained, the provisions in paragraph 11 of schedule 2 already allow SEPA to consider whether an applicant for a permit or registration is a fit and proper person, and my amendments will ensure that the fit-and-proper-person test can be considered through the lifetime of a permit or registration and on transfer.

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

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

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

10:30

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

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

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

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

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

Amendment 116, by agreement, withdrawn.

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

Schedule 2, as amended, agreed to.

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

Amendment 117 moved—[Hanzala Malik].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 117 disagreed to.

Section 11 agreed to.

Section 12—Fixed monetary penalties

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

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

Following the bill's introduction, we have continued to engage with stakeholders on how the new enforcement measures will work in practice. Part of that process has involved detailed discussions with the Crown Office and Procurator Fiscal Service on how the bill will interface with the criminal justice system. Those discussions have highlighted an opportunity to improve consistency in the bill's references to criminal proceedings. That matters because the new monetary penalties cannot be used when criminal proceedings have been taken.

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

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

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

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

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

Amendment 43 is a minor technical amendment.

I move amendment 18.

Amendment 18 agreed to.

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

Section 12, as amended, agreed to.

Section 13—Fixed monetary penalties: procedure

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

Section 13, as amended, agreed to.

Section 14—Fixed monetary penalties: criminal proceedings and conviction

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

Section 14, as amended, agreed to.

Section 15—Variable monetary penalties

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

Section 15, as amended, agreed to.

Section 16—Variable monetary penalties: procedure

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

Section 16, as amended, agreed to.

Section 17—Variable monetary penalties: criminal proceedings and conviction

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

Section 17, as amended, agreed to.

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

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

Section 18, as amended, agreed to.

Section 19—Enforcement undertakings

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

Section 19, as amended, agreed to.

Section 20—Combination of sanctions

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

Section 20, as amended, agreed to.

Sections 21 to 27 agreed to.

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

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

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

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

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

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

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

I move amendment 118.

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

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

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

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

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

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

Alex Fergusson: Yes, I shall press the amendment.

Amendment 118 agreed to.

Section 28, as amended, agreed to.

After section 28

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

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

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

10:45

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

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

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

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

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

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

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

Paul Wheelhouse: It was my fault entirely.

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

I move amendment 100.

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

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

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

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

Obviously, there is a cost attached to that for professional advice and other resources; in some cases, that cost could be quite substantial. This is given added impetus by the proposed removal of the non-natural person restriction in section 29(1)(b). Because of that, vicarious liability would again be applicable to many farming families across Scotland and their associated food and drink and tourism businesses. As I mentioned when speaking to amendment 18, those businesses are often marginally viable but they are hugely important to the rural economy. Any regulatory burden must be justified and must be as targeted and proportionate—a word that we should not lose sight of—as possible.

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

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

Amendment 100 agreed to.

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

Amendment 119 not moved.

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

Section 29, as amended, agreed to.

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

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

Section 30, as amended, agreed to.

Section 31—Significant environmental harm: offence

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

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

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

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

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

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

I move amendment 101.

Amendment 101 agreed to.

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

Section 31, as amended, agreed to.

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

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

Section 32, as amended, agreed to.

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

10:55

Meeting suspended.

11:01

On resuming—

After section 32

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

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

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

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

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

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

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

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

Members: No.

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

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

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

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

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

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

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

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

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

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

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

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 51 agreed to.

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

Section 33 agreed to.

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

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

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

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

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

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

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

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

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

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

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

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

Members: No.

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

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

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

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

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

The Convener: Thank you for that clarification.

Amendment 52 agreed to.

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

Section 34, as amended, agreed to.

After section 34

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

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

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

11:15

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

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

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

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

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

Under section 110 of the Environment Act 1995 it is already an offence to obstruct "authorised persons"—mainly SEPA staff—in the performance of their powers and duties. The amendments expand the offence to include assault and hindrance and provide for hindering and obstructing to include both direct and indirect acts.

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

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

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

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

Amendment 64 agreed to.

Sections 35 to 37 agreed to.

After section 37

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

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

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

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

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

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

I move amendment 65.

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

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

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

Amendment 65 agreed to.

Section 38—General purpose of SEPA

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

Amendment 6 moved—[Alison Johnstone].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 6 disagreed to.

Amendment 7 moved—[Alison Johnstone].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 7 disagreed to.

Section 39 agreed to.

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

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

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

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

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

I move amendment 111.

Amendment 111 agreed to.

Section 40, as amended, agreed to.

Section 41—Planning authorities' functions: charges and fees

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

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

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

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

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

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

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

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

it proposes

"to vary the fee or charge".

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

These three amendments will not drastically alter the function of section 41; instead, they will strengthen the proposal by adding safeguards that are not currently present, ensure that planning authorities are not unfairly penalised and allow parliamentary scrutiny of changes. They will also add transparency and openness to the legislation, which is something that I hope all committee members would support.

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

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

while Unison said that scrutiny of the process was

"the role of democratically elected councillors"

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

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

I move amendment 120.

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

Margaret McDougall: Well—

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

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

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

11:30

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

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

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

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

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

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

The high-level group on planning performance has already identified a set of 15 performance markers that reflect key areas of essential good performance and service quality across the planning service. The markers have been considered by COSLA and welcomed by the committee as a qualitative and quantitative method of assessing a planning authority's performance, and they are the aspects of good performance and service quality that we expect to be implemented across the country.

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

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

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

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

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

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

Margaret McDougall: I will press my amendments.

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

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

David Cooper said:

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

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

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

Chic Brodie: No, we do not.

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

I will press my amendments.

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

Members: No.

The Convener: There will be a division.

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

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

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

Amendment 120 disagreed to.

Amendment 121 moved—[Margaret McDougall].

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

Members: No.

The Convener: There will be a division.

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

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

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

Amendment 121 disagreed to.

Amendment 122 moved—[Margaret McDougall].

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

Members: No.

The Convener: There will be a division.

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

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

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

Amendment 122 disagreed to.

Amendment 123 moved—[Margaret McDougall].

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

Members: No.

The Convener: There will be a division.

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

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

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

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

Amendment 123 disagreed to.

Amendment 124 moved—[Margaret McDougall].

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

Members: No.

The Convener: There will be a division.

For

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

Against

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

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

Amendment 124 disagreed to.

Section 40 agreed to.

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

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

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

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

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

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

I move amendment 66.

Amendment 66 agreed to.

Amendments 109 and 68 agreed to.

Section 42, as amended, agreed to.

Section 43 agreed to.

Schedule 3—Minor and consequential modifications

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

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

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

Amendment 69 agreed to.

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

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

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

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

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

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

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

I move amendment 74.

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

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

Amendment 74 agreed to.

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

Schedule 3, as amended, agreed to.

Section 44—Subordinate legislation

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

Amendment 8 not moved.

Section 44, as amended, agreed to.

Sections 45 to 48 agreed to.

Long title agreed to.

11:45

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

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

Meeting closed at 11:47.

Regulatory Reform (Scotland) Bill

[AS AMENDED AT STAGE 2]

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Regulatory Reform (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to enable provision to be made for the purpose of promoting regulatory consistency; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

PART 1

REGULATORY FUNCTIONS

Regulations to encourage or improve regulatory consistency

1 Power as respects consistency in regulatory functions

(1) The Scottish Ministers may by regulations make any provision which they consider will encourage or improve consistency in the exercise by regulators of regulatory functions.

(2) Regulations under subsection (1)—

(a) must specify the regulators to which they apply,

(b) may specify regulatory functions in respect of which they are, or are not, to apply,

(c) may prescribe the forms, procedure or other arrangements in respect of which a regulator is to impose, set, secure compliance with or enforce a regulatory requirement (including the manner in which and extent to which fees may be charged or costs recovered),

(d) may require a regulator to co-operate, or co-ordinate activity, with other regulators or the Scottish Ministers (including providing information to the Scottish Ministers).

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

(a) the regulators to which the regulations would apply,

(b) such persons or bodies as appear to the Scottish Ministers to represent the interests of persons substantially affected by the proposed regulations,

(c) such other persons or bodies as the Scottish Ministers consider appropriate.

(4) For the purposes of subsection (1), "consistency" includes consistency—

(a) in the way in which particular regulators, their employees or their agents impose, set, secure compliance with or enforce a regulatory requirement,

(b) in the way in which different regulators, or the employees or agents of different regulators, impose, set, secure compliance with or enforce a regulatory requirement.

(5) In this Part—

"regulator" means a person, body or office-holder listed, or of a description listed, in schedule 1,

"regulatory functions" means—

(a) functions conferred by or under any enactment of—

(i) imposing requirements, restrictions or conditions in relation to an activity,

(ii) setting standards or outcomes in relation to an activity, or

(iii) giving guidance in relation to an activity, or

(b) functions which relate to the securing of compliance with, or enforcement of, requirements, restrictions, conditions, standards, outcomes or guidance which by or under any enactment relate to an activity,

but does not include any such functions exercisable by a planning authority,

"regulatory requirement" means a requirement, restriction, condition, standard or outcome (whether contained in guidance or otherwise)—

(a) which is to be complied with, met, attained or achieved by a person, body or office-holder whether by or under an enactment (including this Act) or otherwise, and

(b) in respect of which a regulator has regulatory functions.

(6) In the definition of "regulatory functions" in subsection (5), "activity" includes—

(a) providing goods and services, and

(b) employing or offering employment to any person.

2 Regulations under section 1: further provision

(1) Regulations under section 1 ("the regulations") may include provision requiring a regulator—

(a) to secure compliance with or enforce an existing regulatory requirement,

(b) to impose, set, secure compliance with or enforce any other regulatory requirement which the regulator proposes to, or may, impose or set.

(2) Subject to subsection (3), the regulations may also include provision—

(a) amending a regulatory requirement,

(b) for a regulatory requirement to cease to have effect (by means of repealing or revoking an enactment containing the requirement or otherwise),

(c) creating a regulatory requirement,

(d) requiring a regulator to create, amend or remove a regulatory requirement,

(e) where a regulator is required to act as mentioned in paragraph (d), imposing conditions in relation to that requirement.

(3) The regulations may not include provision that would—

(a) amend a regulatory requirement which, by or under an enactment (a "mandatory enactment")—

(i) must be complied with, met, attained or achieved, and

(ii) a regulator is required to impose or set,

(b) repeal or revoke a mandatory enactment.

(4) But the regulations may include provision such as is mentioned in subsection (3) if the regulations otherwise make provision having an equivalent effect to the mandatory enactment.

(5) A provision in the regulations requiring a regulator to impose or set a regulatory requirement is not a mandatory enactment for the purposes of subsection (3) (unless such provision is included by virtue of subsection (4)).

(6) Where the regulations include provision such as is mentioned in subsection (2), they may also include provision preventing a regulator from imposing or setting a regulatory requirement—

(a) that amends, replaces or revokes a regulatory requirement amended or created by the regulations,

(b) that has an equivalent effect to a regulatory requirement which ceases to have effect by virtue of the regulations.

(7) Where the regulations make provision that would (but for this subsection) apply to a regulator, the Scottish Ministers may, if they consider it necessary or expedient, direct that, for a period no longer than that mentioned in subsection (8)—

(a) the provision is not to apply to the regulator, or

(b) the provision is to apply to the regulator—

(i) with such modifications as may be specified in the direction,

(ii) subject to such conditions as may be so specified.

(8) The period is that beginning with the day on which the direction is given and ending 6 months later.

(8A) The Scottish Ministers must publish (in such manner as they consider appropriate) any direction given under subsection (7).

(9) Where the regulations include provision such as is mentioned in subsection (1)(b), such provision does not affect any requirement for the regulator to consult before imposing or setting the regulatory requirement mentioned in that subsection.

(10) This section is without prejudice to the generality of the power to make regulations under section 1.

Compliance and enforcement

3 Regulations under section 1: compliance and enforcement

(1) A regulator to which regulations under section 1 apply must comply with the regulations except to the extent that—

(a) the regulator lacks the powers necessary to comply, or

(b) the regulations impose on the regulator a requirement that conflicts with any other obligation imposed on the regulator by or under an enactment.

(2) Where a regulator fails to comply with the regulations, the Scottish Ministers may—

(a) declare the regulator to have so failed, and

(b) direct the regulator to take such steps to remedy the failure as are specified in the direction within such reasonable period as may be so specified.

(3) Where a regulator fails to take some or all of the steps specified in a direction under subsection (2)(b), the Scottish Ministers may—

(a) take the steps,

(b) arrange for any other person to take the steps, or

(c) apply to the Court of Session for an order requiring the regulator to take the steps.

(4) The Scottish Ministers may recover from a regulator the costs incurred by the Scottish Ministers in relation to—

(a) taking steps under paragraph (a) of subsection (3),

(b) arranging for another person to take steps under paragraph (b) of that subsection (including costs incurred by that other person which the Scottish Ministers have to bear),

(c) an application relating to the regulator under paragraph (c) of that subsection up to the time of making the application.

(5) The Scottish Ministers may recover the costs mentioned in subsection (4) as a civil debt.

Exercise of regulatory functions: economic duty and code of practice

4 Regulators' duty in respect of sustainable economic growth

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

(2) The Scottish Ministers may give guidance to regulators with respect to the carrying out of the duty imposed by subsection (1).

(3) Regulators must have regard to guidance given under subsection (2).

(3A) The Scottish Ministers must publish (in such manner as they consider appropriate) any such guidance.

(4) Subsection (1) does not apply to a regulator to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect as that mentioned in that subsection.

5 Code of practice

(1) The Scottish Ministers may issue and from time to time revise a code of practice in relation to the exercise of regulatory functions by a regulator.

(1A) The Scottish Ministers must publish (in such manner as they consider appropriate) any code of practice issued under subsection (1).

(2) A code of practice issued under subsection (1) applies only to—

(a) such regulators as may be specified in the code, and

(b) such regulatory functions as may be so specified.

(3) A copy of a code of practice issued under subsection (1) must be issued to the regulators to whom it applies.

(4) A regulator to whom a code of practice issued under subsection (1) applies must, from the date a copy is issued to the regulator, have regard to the code—

(a) in determining any general policy or principles by reference to which the regulator exercises any regulatory functions to which the code applies, and

(b) in exercising any such regulatory functions.

(5) References in this section to a code of practice issued under subsection (1) include references to such a code as revised from time to time under that subsection.

6 Code of practice: procedure

(1) Where the Scottish Ministers propose to issue or revise a code of practice under section 5, they must prepare a draft of the code (or revised code).

(2) In preparing the draft, the Scottish Ministers must seek to secure that it is consistent with the principles in subsection (3).

(3) The principles are—

(a) that regulatory functions should be—

(i) exercised in a way that is transparent, accountable, proportionate and consistent, and

(ii) targeted only at cases in which action is needed, and

(b) that regulatory functions should be exercised in a way that contributes to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of such functions to do so.

(4) The Scottish Ministers must consult the following about the draft—

(a) persons appearing to them to be representative of regulators in respect of which the code or revised code would apply,

(b) such other persons as they consider appropriate.

(5) If the Scottish Ministers decide to proceed with the draft (either in its original form or with modifications) they must lay the draft before the Scottish Parliament.

(6) Where the draft so laid is approved by resolution of the Parliament, the Scottish Ministers may issue the code (or revised code).

Power to modify list of regulators

7 Power to modify schedule 1

(1) The Scottish Ministers may by order modify schedule 1 so as to—

(a) add—

(i) a person, body or office-holder which has regulatory functions to the list of persons, bodies and office-holders for the time being listed there, or

(ii) a description of a person, body or office-holder having regulatory functions to that list,

(b) remove—

(i) a person, body or office-holder from that list, or

(ii) a description of a person, body or office-holder from that list,

(c) amend an entry on that list.

(2) An order under subsection (1) may, in relation to a person, body or office-holder or a description of a person, body or office-holder—

(a) specify that a function is or is not to be a regulatory function for the purposes of section 1, 4 or 5,

(b) specify the extent to which a function is or is not to be a regulatory function for such purposes.

PART 1A

PRIMARY AUTHORITIES

7A Scope of Part 1A

(1) This Part applies where—

(a) a person carries on an activity in the area of two or more local authorities, and

(b) each of those authorities has the same relevant function in relation to that activity.

(2) In this Part (other than section 7E), "the regulated person" means the person referred to in subsection (1)(a).

7B Meaning of "relevant function"

(1) In this Part, "relevant function", in relation to a local authority, means a regulatory function—

(a) exercised by that authority, and

(b) specified for the purposes of this Part by order made by the Scottish Ministers.

(2) In subsection (1), "regulatory function" has the same meaning as in section 1(5).

7C Nomination of primary authorities

(1) For the purposes of this Part, the Scottish Ministers may nominate a local authority to be the "primary authority" for the exercise of the relevant function in relation to the regulated person.

(2) The Scottish Ministers may delegate their function under subsection (1) to another person.

(3) Sections 7F and 7G apply in any case where a primary authority is nominated under this section in relation to the regulated person.

7D Nomination of primary authorities: conditions and registers

(1) The Scottish Ministers may nominate a local authority under section 7C(1) in relation to the regulated person only if—

(a) the Scottish Ministers consider the authority suitable for nomination, and

(b) the authority and the regulated person have agreed in writing to the nomination.

(2) The Scottish Ministers may in particular consider as suitable for nomination under subsection (1)—

(a) the local authority in whose area the regulated person principally carries out the activity in relation to which the relevant function is exercised, or

(b) the local authority in whose area the regulated person administers the carrying out of that activity.

(3) The Scottish Ministers may at any time revoke a nomination under section 7C(1) if they consider that—

(a) the authority is no longer suitable for nomination, or

(b) it is appropriate to do so for any other reason.

(4) Subsection (2) applies in relation to a revocation of a nomination as it applies in relation to a nomination.

(5) The Scottish Ministers must maintain or cause to be maintained a register of nominations.

(6) Subsections (1) to (5) apply in relation to a person to whom the function under section 7C(1) is delegated as they apply in relation to the Scottish Ministers.

7E Primary authorities: power to make further provision

(1) The Scottish Ministers may by order make further provision about the exercise of relevant functions by primary authorities in relation to persons (in this section, "regulated persons").

(2) The provision that may be made under subsection (1) includes provision—

(a) requiring a local authority other than the primary authority (an "enforcing authority") to notify the primary authority before taking any enforcement action against a regulated person pursuant to the relevant function,

(b) prescribing the circumstances in which—

(i) the enforcing authority may not take any enforcement action against a regulated person,

(ii) the primary authority may direct the enforcing authority not to take any enforcement action against a regulated person,

(iii) the enforcing authority must notify the primary authority that it has taken enforcement action against a regulated person,

(c) specifying time periods for the purposes of paragraph (b),

(d) prescribing the circumstances in which provision made by virtue of paragraphs (a) to (c) does not apply including, in particular, circumstances—

(i) where the enforcement action is required urgently to avoid a significant risk of serious harm to human health, the environment (including the health of animals or plants) or the financial interests of consumers,

(ii) where the application of provision made by virtue of those paragraphs would be wholly disproportionate,

(e) requiring an enforcing authority to notify the primary authority, as soon as reasonably practicable, of any enforcement action it takes against a regulated person in circumstances prescribed under paragraph (d).

(3) In subsection (2), "enforcement action" means any action—

(a) which relates to securing compliance with or enforcement of any requirement, restriction, condition, standard, outcome or guidance in the event of breach (or putative breach) of the requirement, restriction, condition, standard, outcome or (as the case may be) guidance,

(b) taken with a view to or in connection with—

(i) the imposition of any sanction (criminal or otherwise) in respect of an act or omission, or

(ii) the pursuit of any remedy conferred by an enactment in respect of an act or omission.

(4) Where a relevant function consists of or includes a function of inspection, an order under subsection (1) may make provision for or about an inspection plan including, in particular, provision for or in connection with—

(a) prescribing the circumstances in which a primary authority may make, revise or withdraw an inspection plan,

(b) specifying the matters that a primary authority must take into account in preparing an inspection plan,

(c) specifying the matters that must be included in an inspection plan,

(d) prescribing the circumstances in which a primary authority must consult a regulated person in relation to the carrying out of the function of inspection,

(e) prescribing the arrangements for notifying a local authority about the making, revising or withdrawal of an inspection plan,

(f) specifying the duties of a local authority in relation to an inspection plan,

(g) prescribing the circumstances in which a local authority must notify a primary authority before carrying out the function of inspection.

(5) An "inspection plan" is a plan made by a primary authority containing recommendations as to how a local authority with the function of inspection should exercise that function in relation to a regulated person.

(6) Before making an order under subsection (1), the Scottish Ministers must consult—

(a) any primary authority to which the order would apply,

(b) such persons or bodies as appear to the Scottish Ministers to represent the interests of persons substantially affected by the proposed order, and

(c) such other persons or bodies as the Scottish Ministers consider appropriate.

7F Advice and guidance

(1) The primary authority has the function of giving advice and guidance to—

(a) the regulated person in relation to the relevant function,

(b) other local authorities having the relevant function as to how they should exercise that function in relation to the regulated person.

(2) The primary authority may make arrangements with the regulated person as to how the authority will exercise its function under subsection (1).

7G Power to charge

The primary authority may charge the regulated person such fees as it considers represent the costs reasonably incurred by it in exercising functions as the primary authority under or by virtue of this Part in relation to the regulated person.

7H Guidance

(1) The Scottish Ministers may issue guidance to local authorities about the operation of this Part including, in particular, guidance about—

(a) inspection plans for or about which provision is made under an order under section 7E(1),

(b) arrangements under section 7F(2),

(c) the charging of fees under section 7G.

(2) A local authority must have regard to any guidance issued to it under this section.

(3) Before issuing guidance under this section, the Scottish Ministers must consult such persons as they consider appropriate.

(4) The Scottish Ministers must publish (in such manner as they consider appropriate) any guidance issued under this section.

(5) The Scottish Ministers may at any time vary or revoke any guidance issued under this section.

PART 2

ENVIRONMENTAL REGULATION

CHAPTER 1

REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

8 General purpose: protecting and improving the environment

(1) The purpose of this Chapter is to enable provision to be made for or in connection with protecting and improving the environment, including (without prejudice to that generality)—

(a) regulating environmental activities,

(b) implementing EU obligations, and international obligations, relating to protecting and improving the environment.

(2) In subsection (1), "international obligations" means any international obligations of the United Kingdom other than obligations to observe and implement EU obligations.

9 Meaning of "environmental activities" and "protecting and improving the environment"

(1) Expressions used in section 8 have the following meanings for the purposes of this Chapter—

"environmental activities" means—

(a) activities that are capable of causing, or liable to cause, environmental harm, and

(b) activities connected with such activities,

"protecting and improving the environment" includes, in particular—

(a) preventing deterioration (or further deterioration) of, and protecting and enhancing, the status of ecosystems, and

(b) promoting the sustainable use of natural resources based on the long-term protection of available natural resources.

(2) In subsection (1)—

"activities" means activities of any nature whether industrial, commercial or otherwise and whether carried on in particular premises or otherwise; and includes (with or without other activities) the production, treatment, keeping, depositing or disposal of any substance,

"environmental harm" means—

(a) harm to the health of human beings or other living organisms,

(b) harm to the quality of the environment, including—

(i) harm to the quality of the environment taken as a whole,

(ii) harm to the quality of air, water or land, and

(iii) other impairment of, or interference with, ecosystems,

(c) offence to the senses of human beings,

(d) damage to property, or

(e) impairment of, or interference with, amenities or other legitimate uses of the environment.

(3) In schedule 2 (introduced by section 10), "regulated activities" means any environmental activities in respect of which regulations under that section make provision.

10 Regulations relating to protecting and improving the environment

(1) The Scottish Ministers may by regulations make provision for any of the purposes specified in Part 1 of schedule 2.

(2) Part 2 of that schedule has effect for supplementing Part 1 of the schedule.

(3) In accordance with section 8, the provision that may be made by regulations under this section is provision for or in connection with protecting and improving the environment, including any of the matters mentioned in paragraph (a) or (b) of that section.

11 Regulations relating to protecting and improving the environment: consultation

(1) Before making any regulations under section 10, the Scottish Ministers must consult—

(a) any regulator on whom the proposed regulations would confer functions, and

(b) such other persons as they think fit, including such persons appearing to them to be representative of the interests of local government, industry, agriculture, fisheries or small businesses as they consider appropriate.

(2) Consultation undertaken before the coming into force of this section is as effective compliance with subsection (1) as if undertaken after its coming into force.

(3) In subsection (1), "regulator" is to be construed in accordance with paragraph 3(1) of schedule 2.

CHAPTER 2

SEPA'S POWERS OF ENFORCEMENT

Fixed monetary penalties

12 Fixed monetary penalties

(1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a fixed monetary penalty on a person in relation to a relevant offence.

(2) Provision under subsection (1) must provide that a fixed monetary penalty—

(a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates,

(b) is to be imposed by notice, and

(c) may not be imposed on a person in relation to an offence constituted by an act or omission if a fixed monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.

(3) For the purposes of this Chapter, a "fixed monetary penalty" is a requirement to pay to SEPA a penalty of an amount specified in an order made under subsection (1).

(4) The maximum amount of such penalty that may be so specified in relation to a particular offence is an amount equivalent to level 4 on the standard scale.

(5) In this section, "the standard scale" has the meaning given by section 225(1) of the Criminal Procedure (Scotland) Act 1995.

13 Fixed monetary penalties: procedure

(1) Provision under section 12—

(a) must secure the results in subsection (2) ("the mandatory results"),

(b) may secure the result in subsection (3) ("the optional result").

(2) The mandatory results are that—

(a) where SEPA proposes to impose a fixed monetary penalty on a person, it must serve on the person a notice of what is proposed (a "notice of intent") which complies with subsection (4),

(b) except where the person has discharged liability by virtue of provision made under subsection (3), the person may make written representations to SEPA in relation to the proposed imposition of the fixed monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates),

(c) SEPA must, after the end of the period for making representations, decide whether to impose the fixed monetary penalty,

(d) SEPA must, in so deciding, have regard to any representations,

(e) where SEPA decides to impose the fixed monetary penalty, the notice imposing it ("the final notice") complies with subsection (5), and

(f) the person on whom a fixed monetary penalty is imposed may appeal against the decision to impose it.

(3) The optional result is that the notice of intent also offers the person the opportunity to discharge the person's liability for the fixed monetary penalty by payment of a sum specified in the notice of intent (which sum must be less than or equal to the amount of the penalty).

(4) To comply with this subsection the notice of intent must include information as to—

(a) the grounds for the proposal to impose the fixed monetary penalty,

(b) the right to make written representations,

(c) the period within which representations may be made,

(d) where provision is made under subsection (3)—

(i) how payment to discharge the liability for the fixed monetary payment may be made,

(ii) the period within which liability for the fixed monetary penalty may be discharged, and

(iii) the effect of payment of the sum referred to in subsection (3).

(5) To comply with this subsection the final notice must include information as to—

(a) the grounds for imposing the penalty,

(b) how payment may be made,

(c) the period within which payment must be made,

(d) any early payment discounts or late payment penalties,

(e) rights of appeal, and

(f) the consequences of non-payment.

(6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—

(a) include the grounds that—

(i) the decision was based on an error of fact,

(ii) the decision was wrong in law, and

(iii) the decision was unreasonable, but

(b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 23(1).

14 Fixed monetary penalties: criminal proceedings and conviction

(1) Provision under section 12 must secure that in a case where a notice of intent referred to in section 13(2)(a) in respect of an offence constituted by an act or omission is served on a person—

(a) no criminal proceedings may be commenced against the person in respect of that offence constituted by that act or omission—

(i) before the end of any period in which the person may discharge liability for the fixed monetary penalty pursuant to section 13(3), or

(ii) if the person so discharges liability, and

(b) the period as mentioned in subsection (2) is not to be counted in calculating any period within which criminal proceedings in respect of that offence constituted by that act or omission must be commenced.

(2) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.

(3) Provision under section 12 must also secure that, in a case where a fixed monetary penalty is imposed on a person in respect of an offence constituted by an act or omission, no criminal proceedings may be commenced against the person in respect of that offence constituted by that act or omission.

(4) The references in subsections (1)(a) and (3) to criminal proceedings being commenced are to be read as if they included references to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.

Variable monetary penalties

15 Variable monetary penalties

(1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a variable monetary penalty on a person in relation to a relevant offence.

(2) Provision under subsection (1) must provide that a variable monetary penalty—

(a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates,

(b) is to be imposed by notice, and

(c) may not be imposed on a person in relation to an offence constituted by an act or omission if a variable monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.

(3) For the purposes of this Chapter, a "variable monetary penalty" is, subject to subsection (4), a requirement to pay SEPA a penalty of such amount as SEPA may in each case determine.

(4) SEPA may not in any case impose a variable monetary penalty that exceeds the maximum amount specified in an order made under subsection (1) in relation to that case.

(5) The maximum amount that may be so specified is—

(a) in the case mentioned in subsection (6), the maximum amount of the fine that may be imposed on summary conviction in such a case,

(b) in any other case, £40,000.

(6) The case is one where the offence in respect of which the variable monetary penalty is imposed—

(a) is triable summarily (whether or not it is also triable on indictment), and

(b) is punishable on summary conviction by a fine (whether or not it is also punishable by a term of imprisonment).

(7) The Scottish Ministers may by order substitute another sum for the one for the time being mentioned in subsection (5)(b).

16 Variable monetary penalties: procedure

(1) Provision under section 15 must secure the results in subsection (2).

(2) The results are that—

(a) where SEPA proposes to impose a variable monetary penalty on a person, it must serve on the person a notice (a "notice of intent") which complies with subsection (3),

(b) the person may make written representations to SEPA in relation to the proposed imposition of the variable monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates),

(c) SEPA must, after the end of the period for making such representations, decide whether to impose a variable monetary penalty and, if so, the amount of the penalty,

(d) SEPA must, in so deciding, have regard to any representations,

(e) where SEPA decides to impose a variable monetary penalty, the notice imposing it (the "final notice") complies with subsection (4), and

(f) the person on whom a variable monetary penalty is imposed may appeal against the decision as to the imposition or amount of the penalty.

(3) To comply with this subsection the notice of intent must include information as to—

(a) the grounds for the proposal to impose the variable monetary penalty,

(b) the right to make written representations, and

(c) the period within which representations may be made.

(4) To comply with this subsection the final notice must include information as to—

(a) the grounds for imposing the penalty,

(b) how payment may be made,

(c) the period within which the payment must be made,

(d) any early payment discounts or late payment penalties,

(e) rights of appeal, and

(f) the consequences of non-payment.

(5) Provision to secure the result in subsection (2)(c) must include provision for—

(a) the person on whom the notice of intent is served to be able to offer an undertaking as to action to be taken by that person, within such period as may be specified in the undertaking, for all or any of the following purposes—

(i) to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,

(ii) to benefit the environment to the extent that the commission of the offence has harmed the environment,

(iii) to secure that no financial benefit arising from the commission of the offence accrues to the person,

(b) SEPA to be able to accept or reject such an undertaking, and

(c) SEPA to take any undertaking so accepted into account in its decision.

(6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—

(a) include the grounds that—

(i) the decision was based on an error of fact,

(ii) the decision was wrong in law,

(iii) the amount of the penalty is unreasonable, and

(iv) the decision was unreasonable for any other reason, but

(b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 23(1).

17 Variable monetary penalties: criminal proceedings and conviction

(1) Provision under section 15 must secure the result in subsection (2) in a case where—

(a) either—

(i) a variable monetary penalty is imposed on a person, or

(ii) an undertaking referred to in section 16(5) is accepted from a person, or

(b) both such a penalty is imposed on, and such an undertaking is accepted from, a person.

(2) The result is that no criminal proceedings may be commenced against the person for an offence constituted by an act or omission if the variable monetary penalty or, as the case may be, the undertaking related to that offence constituted by that act or omission.

(3) Provision under section 15 must provide that the period mentioned in subsection (4) is not to be counted in calculating any period within which criminal proceedings in respect of an act or omission in relation to which a notice of intent under section 16(2)(a) is served must be commenced.

(4) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.

(5) The reference in subsection (2) to criminal proceedings being commenced is to be read as if it included a reference to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.

Non-compliance penalties

18 Undertakings under section 16: non-compliance penalties

(1) Provision under section 15 may include provision for a person to pay a monetary penalty (in this Part, a "non-compliance penalty") to SEPA if the person fails to comply with an undertaking referred to in section 16(5) which is accepted from the person.

(2) Where such provision is included, it may also—

(a) specify the amount of the non-compliance penalty,

(b) provide for the amount to be calculated by reference to criteria specified by order by the Scottish Ministers,

(c) provide for the amount to be determined by SEPA (subject to any maximum amount set out in the provision),

(d) provide for the amount to be determined in any other way.

(2A) Where provision is included as mentioned in subsection (1), it must provide that the maximum amount of the non-compliance penalty that may be imposed in any case is not to exceed the maximum amount of the variable monetary penalty to which the non-compliance penalty relates in such a case.

(3) Where provision is included as mentioned in subsection (1), it must secure that—

(a) the non-compliance penalty is imposed by notice served by SEPA, and

(b) the person on whom it is imposed may appeal against the notice.

(4) Provision pursuant to subsection (3)(b) must secure that the grounds on which a person may appeal against a notice referred to in that subsection include that—

(a) the decision to serve the notice was based on an error of fact,

(b) the decision was wrong in law,

(c) the decision was unreasonable for any reason (including, in a case where the amount of the non-compliance penalty was determined by SEPA, that the amount is unreasonable).

Enforcement undertakings

19 Enforcement undertakings

(1) The Scottish Ministers may by order make provision—

(a) for or about enabling SEPA to accept an enforcement undertaking from a person in a case where SEPA has reasonable grounds to suspect that the person has committed a relevant offence, and

(b) for the acceptance of the undertaking to have the consequences in subsection (4).

(2) For the purposes of this Chapter, an "enforcement undertaking" is an undertaking to take action of a type mentioned in subsection (3) and specified in the undertaking within such period as may be so specified.

(3) The types of action are—

(a) action to secure that the offence does not continue or recur,

(b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,

(c) action of a description specified by order by the Scottish Ministers.

(4) The consequences are that, unless SEPA has certified under subsection (5)(g) that the person from whom the enforcement undertaking is accepted has not complied with the undertaking or any part of it—

(a) no criminal proceedings may be commenced against the person from whom the enforcement undertaking is accepted in respect of an offence constituted by an act or omission if the undertaking relates to that offence constituted by that act or omission,

(b) SEPA may not impose on the person a fixed monetary penalty which it would otherwise have power to impose by virtue of section 12 in respect of the act or omission, and

(c) SEPA may not impose on the person a variable monetary penalty which it would otherwise have power to impose by virtue of section 15 in respect of the act or omission.

(5) An order under this section may in particular include provision—

(a) as to the procedure for entering into an enforcement undertaking,

(b) as to the terms of an enforcement undertaking,

(c) as to publication of an enforcement undertaking by SEPA,

(d) as to variation of an enforcement undertaking,

(e) as to circumstances in which a person may be regarded as having complied with an enforcement undertaking,

(f) as to monitoring by SEPA of compliance with an enforcement undertaking,

(g) as to certification by SEPA that an enforcement undertaking or any part of it has not been complied with,

(h) for appeals against such certification,

(i) in a case where a person has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking, for that person to be regarded as not having complied with it,

(j) in a case where a person has complied partly but not fully with an enforcement undertaking, for that partial compliance to be taken into account in the imposition of any criminal or other sanction on the person,

(k) for the purpose of enabling criminal proceedings in respect of an act or omission in relation to which SEPA has accepted an enforcement undertaking to be commenced against a person who has not complied with the undertaking or any part of it, for the period mentioned in subsection (6) not to be counted in calculating any period within which such proceedings must be commenced.

(6) The period is that beginning with the day on which the enforcement undertaking is accepted and ending with—

(a) the day on which SEPA certifies, under provision made in pursuance of subsection (5)(g), that the undertaking or any part of it has not been complied with, or

(b) where an appeal against such a certification is taken, the day on which the appeal is finally determined.

(6A) The reference in subsection (4)(a) to criminal proceedings being commenced is to be read as if it included a reference to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.

(7) References in this section to taking action specified in an enforcement undertaking include references to refraining from taking such action.

Operation of penalties and cost recovery

20 Combination of sanctions

(1) Provision may not be made by order under section 12 and section 15 conferring powers on SEPA in relation to the same offence unless it secures that—

(a) SEPA may not serve a notice of intent referred to in section 13(2)(a) on a person in relation to an act or omission where a variable monetary penalty has been imposed on that person in relation to the act or omission, and

(b) SEPA may not serve a notice of intent referred to in section 16(2)(a) on a person in relation to any act or omission where—

(i) a fixed monetary penalty has been imposed on the person in relation to the act or omission, or

(ii) the person has discharged liability for a fixed monetary penalty in relation to that act or omission pursuant to section 13(3).

(2) Provision under section 12 must secure that in a case where a notice of intent referred to in section 13(2)(a) is served on a person—

(a) SEPA may not, before the end of any period in which the person may discharge liability to the fixed monetary penalty pursuant to section 13(3), impose a variable monetary penalty on the person in respect of the act or omission to which the notice relates, and

(b) SEPA may not, if the person so discharges liability, impose a variable monetary penalty on the person in respect of that act or omission.

(3) Provision under section 12 must also secure that in a case where a fixed monetary penalty is imposed on a person, SEPA may not impose a variable monetary penalty on the person in respect of the act or omission giving rise to the penalty.

(4) Provision under section 12 must also secure the result that a fixed monetary penalty in respect of an offence constituted by an act or omission may not be imposed on a person if, in respect of that offence as constituted by that act or omission—

(a) criminal proceedings have been commenced against the person,

(b) the person has been given a warning by the procurator fiscal,

(c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),

(d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal),

(da) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or

(e) a work order has been made against the person under section 303ZA of that Act (work orders).

(5) Provision under section 15 must also secure the result that a variable monetary penalty in respect of an offence constituted by an act or omission may not be imposed on a person if, in respect of that offence as constituted by that act or omission—

(a) criminal proceedings have been commenced against the person,

(b) the person has been given a warning by a procurator fiscal,

(c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),

(d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal),

(da) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or

(e) a work order has been made against the person under section 303ZA of that Act (work orders).

21 Monetary penalties

(1) An order under this Chapter which confers power on SEPA to require a person to pay a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty may include provision for—

(a) early payment discounts,

(b) the payment of interest or other financial penalties for late payment of the penalty (such interest or other financial penalties not in total to exceed the amount of the penalty),

(c) enforcement of the penalty.

(2) Where such provision is included, it may also provide for—

(a) SEPA to recover the penalty, and any interest or other financial penalty for late payment, as a civil debt,

(b) the penalty, and any interest or other financial penalty for late payment, to be recoverable as if it were payable under an extract registered decree arbitral bearing a warrant for execution issued by a sheriff of any sheriffdom.

22 Costs recovery

(1) Provision under section 15 may include provision for SEPA to require a person on whom a variable monetary penalty is imposed to pay the costs incurred by SEPA in relation to the imposition of the penalty up to the time of its imposition.

(2) Where such provision is included, it must secure that—

(a) a requirement to pay the costs is imposed by notice,

(b) the notice specifies the amount required to be paid,

(c) SEPA may be required to provide a detailed breakdown of the amount,

(d) the person required to pay costs may appeal against—

(i) the decision of SEPA to impose the requirement,

(ii) the decision of SEPA as to the amount of the costs (including that some or all of the costs were unnecessarily incurred),

(e) SEPA is required to publish guidance about how it will exercise the power conferred by the provision.

(3) In subsection (1), the references to costs include in particular—

(a) investigation costs,

(b) administration costs,

(c) costs of obtaining expert advice (including legal advice).

(4) Subsections (1)(b) and (c) and (2) of section 21 apply to costs required to be paid by virtue of subsection (1) of this section as they apply to a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty.

Guidance

23 Guidance as to use of enforcement measures

(1) The Lord Advocate may issue, and from time to time revise, guidance to SEPA on the exercise of its functions relating to enforcement measures.

(2) SEPA must comply with such guidance or revised guidance in exercising those functions.

(3) In this section, an "enforcement measure" means a fixed monetary penalty, variable monetary penalty or enforcement undertaking (and any references in this Chapter to the imposition of an enforcement measure include acceptance of an enforcement undertaking).

(4) Where power is conferred on SEPA by virtue of this Chapter to impose an enforcement measure in relation to an offence, the provision conferring the power must secure the results in subsection (5).

(5) The results are that—

(a) SEPA must publish guidance about—

(i) how the offence is enforced,

(ii) the sanctions (including criminal sanctions) to which a person who commits the offence may be liable,

(iii) the action which SEPA may take to enforce the offence, whether by virtue of this Chapter or otherwise,

(iv) the circumstances in which SEPA is likely to take any such action,

(v) SEPA's use of the enforcement measure,

(b) in the case of guidance relating to a fixed monetary penalty or variable monetary penalty, the guidance must contain the relevant information, and

(c) SEPA must have regard to the guidance in exercising its functions.

(6) In the case of guidance relating to a fixed monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed,

(b) the circumstances in which it may not be imposed,

(c) the amount of the penalty,

(d) how liability for the penalty may be discharged and the effect of discharge, and

(e) rights to make representations and rights of appeal.

(7) In the case of guidance relating to a variable monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed,

(b) the circumstances in which it may not be imposed,

(c) the matters likely to be taken into account by SEPA in determining the amount of the penalty (including, where relevant, any discounts for voluntary reporting of non-compliance), and

(d) rights to make representations and rights of appeal.

(8) SEPA may from time to time revise guidance published by it by virtue of subsection (5).

(9) The references in subsections (5) to (7) to guidance include references to any revised guidance under subsection (8).

(10) Before publishing any guidance or revised guidance by virtue of this section, SEPA must consult—

(a) the Lord Advocate, and

(b) such other persons as it considers appropriate.

Publication of enforcement action

24 Publication of enforcement action

(1) Subsection (2) applies where the Scottish Ministers make provision by order under—

(a) section 12 as to the imposition by SEPA of a fixed monetary penalty,

(b) section 15 as to the imposition by SEPA of a variable monetary penalty, or

(c) section 19 as to the acceptance by SEPA of an enforcement undertaking.

(2) The order may require SEPA to publish such information as may be specified in the order as regards cases in which it has done what the order permits it to do.

Interpretation of Chapter 2

25 Interpretation of Chapter 2

In this Chapter—

"early payment discounts" means early payment discounts included in an order under this Chapter by virtue of section 21(1);

"enforcement undertaking" has the meaning given in section 19;

"fixed monetary penalty" has the meaning given in section 12;

"late payment penalties" means a requirement to pay interest or other financial penalties for late payment of a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty included in an order under this Chapter by virtue of section 21(1);

"non-compliance penalty" has the meaning given in section 18(1);

"variable monetary penalty" has the meaning given in section 15.

CHAPTER 3

COURT POWERS

Compensation orders

26 Compensation orders against persons convicted of relevant offences

(1) Where a person is convicted of a relevant offence, subsection (1) of section 249 of the Criminal Procedure (Scotland) Act 1995 (compensation order against convicted person) has effect in relation to the conviction subject to the modification in subsection (2).

(2) The modification is that the reference to payment of compensation in favour of the victim for any loss or damage caused directly or indirectly to the victim is to be read as if it included a reference to payment of compensation to a relevant person for costs incurred or to be incurred by the relevant person in preventing, reducing, remediating or mitigating the effects of—

(a) any harm to the environment resulting directly or indirectly from the offence,

(b) any other harm, loss, damage or adverse impacts so resulting from the offence.

(3) In subsection (2), the reference to costs does not include any costs which the relevant person has already recovered by virtue of—

(a) regulations under section 10 made in pursuance of paragraph 18(1) or 20 of schedule 2, or

(b) any other enactment.

(4) Where a compensation order (within the meaning of subsection (1) of section 249 of the 1995 Act) is made in respect of costs mentioned in subsection (2), that section has effect as if—

(a) the reference in subsection (8)(a) to the prescribed sum were, in relation to those costs, a reference to £50,000, and

(b) subsection (8A) were omitted.

(5) The Scottish Ministers may by order substitute a different sum of money for the one for the time being specified in subsection (4)(a).

(6) In this section—

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995,

"relevant person" means—

(a) SEPA,

(b) a local authority, or

(c) an owner or occupier of land—

(i) to which the harm, loss or damage mentioned in subsection (2) was caused, or

(ii) on which there was an adverse impact as mentioned in that subsection,

"owner", in relation to any land in Scotland, means a person (other than a creditor in a heritable security not in possession of the security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive the rents of the land, and includes a trustee, factor, guardian or curator; and in the case of public or municipal land includes the persons to whom the management of the land is entrusted.

Fines

27 Fines for relevant offences: court to consider financial benefits

(1) Subsection (2) applies where—

(a) a person is convicted by a court of a relevant offence, and

(b) the court proposes to impose a fine in respect of the offence.

(2) In determining the amount of the fine, the court must in particular have regard to any financial benefit which has accrued or is likely to accrue to the person in consequence of the offence.

Publicity orders

28 Power to order conviction etc. for offence to be publicised

(1) This section applies where a person is convicted by a court of a relevant offence.

(2) The court may, instead of or in addition to dealing with the person in any other way, make an order (a "publicity order") requiring the person to publicise in a specified manner—

(a) the fact that the person has been convicted of the relevant offence,

(b) specified particulars of the offence,

(c) specified particulars of any other sentence passed by the court in respect of the offence.

(3) A publicity order is to be taken to be a sentence for the purposes of any appeal.

(4) The court may make a publicity order—

(a) at its own instance, or

(b) on the motion of the prosecutor.

(4A) In deciding on the terms of a publicity order that it proposes to make, the court must have regard to any representations made by the prosecutor or by or on behalf of the person.

(5) A publicity order—

(a) must specify a period within which the requirement to publicise the matters mentioned in paragraphs (a) to (c) of subsection (2) are to be complied with, and

(b) may require the convicted person to supply SEPA, within a specified period, with evidence that that requirement has been complied with.

(6) In subsections (2) and (5), "specified", in relation to a publicity order, means specified in the order.

(7) A person who fails to comply with a publicity order commits an offence.

(8) A person who commits an offence under subsection (7) is liable—

(a) on summary conviction, to a fine not exceeding £40,000,

(b) on conviction on indictment, to a fine.

28A Corporate offending

(1) Subsection (2) applies where—

(a) an offence under section 28(7) is committed by a relevant organisation, and

(b) the commission of the offence involves the connivance or consent, or is attributable to the neglect, of a responsible official of the relevant organisation.

(2) The responsible official (as well as the relevant organisation) commits the offence.

(3) In this section—

"a relevant organisation" means—

(a) a company,

(b) a limited liability partnership,

(c) a partnership (other than a limited liability partnership), or

(d) another body or association,

"a responsible official" means—

(a) in the case of a company, a director, secretary, manager or similar officer of the company,

(b) in the case of a limited liability partnership, a member of the partnership,

(c) in the case of a partnership (other than a limited liability partnership), a partner of the partnership, or

(d) in the case of another body or association, a person who is concerned in the management or control of its affairs,

and in each case includes a person purporting to act in a capacity mentioned in any of paragraphs (a) to (d) of this definition.

CHAPTER 4

MISCELLANEOUS

Vicarious liability

29 Vicarious liability for certain offences by employees and agents

(1) Subsection (2) applies where a person ("A") commits a relevant offence while acting as the employee or agent of another person ("B").

(2) B also commits the relevant offence and is liable to be proceeded against and punished accordingly.

(3) Where B is charged with a relevant offence by virtue of subsection (2), it is a defence for B to show—

(a) that B did not know that the relevant offence was being committed by A,

(b) that no reasonable person could have suspected that the relevant offence was being committed by A, and

(c) that B took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against B in respect of the relevant offence whether or not proceedings are also taken against A in respect of that offence.

30 Liability where activity carried out by arrangement with another

(1) Subsection (2) applies where, in the course of carrying on a regulated activity—

(a) a person ("A") commits a relevant offence,

(b) at the time the offence is committed, A is carrying on the regulated activity for another person ("B"), and

(c) B manages or controls the carrying on of the regulated activity.

(2) B also commits the relevant offence and is liable to be proceeded against and punished accordingly.

(3) Where B is charged with a relevant offence by virtue of subsection (2), it is a defence for B to show—

(a) that B did not know that the relevant offence was being committed by A,

(b) that no reasonable person could have suspected that the relevant offence was being committed by A, and

(c) that B took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against B in respect of the relevant offence whether or not proceedings are also taken against A in respect of that offence.

(5) For the purposes of subsection (1)(b), A is carrying on a regulated activity for B whether A is carrying on the activity—

(a) by arrangement between A and B, or

(b) by arrangement with, or as employee or agent of, any other person ("C") with whom B has an arrangement under which C is to carry on the regulated activity.

(6) For the purposes of this section, "regulated activity"—

(a) has the meaning given in section 9(3), and

(b) includes activities specified in an order made by the Scottish Ministers for the purposes of this section.

(7) An order under subsection (6) may specify only activities that are environmental activities within the meaning of section 9.

Offence relating to significant environmental harm

31 Significant environmental harm: offence

(1) It is an offence for a person to—

(a) act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or

(b) fail to act, or permit another person not to act, in a way such that (in either case) the failure to act causes or is likely to cause significant environmental harm.

(2) But no offence is committed under subsection (1) by a person who permits another person to act or not to act as mentioned in that subsection, if the permission was given by or under an enactment conferring power on the person to authorise the act, or failure to act, that caused or (as the case may be) was likely to cause such harm (however such authorisation may be expressed).

(3A) A person who acts, fails to act or permits another person to act or not to act as mentioned (in each case) in subsection (1) commits an offence under that subsection whether or not the person—

(a) intended the acts or failures to act to cause, or be likely to cause, significant environmental harm, or

(b) knew that, or was reckless or careless as to whether, the acts or failures to act would cause or be likely to cause such harm.

(4) For the purposes of subsection (1), a person acts in a way that is likely to cause significant environmental harm, or fails to act in a way such that the failure is likely to cause such harm if, at the time of so acting or failing to act, such harm may reasonably have been considered likely to occur even if it did not (for whatever reason) in fact occur.

(5) It is a defence for a person charged with an offence under subsection (1) to show that—

(a) the acts or failures alleged to constitute the offence were necessary in order to avoid, prevent or reduce an imminent risk of serious adverse effects on human health,

(b) the person took all such steps as were reasonably practicable in the circumstances to minimise any environmental harm, and

(c) particulars about the acts or failures were given to SEPA as soon as practicable after the acts or failures took place.

(6) It is a defence for a person charged with an offence under subsection (1) to show that the acts or failures alleged to constitute the offence were authorised by or otherwise carried out in accordance with—

(a) regulations made under section 10,

(b) an authorisation given under such regulations, or

(c) an enactment specified in an order made by the Scottish Ministers for the purposes of this section.

(7) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction to—

(i) a fine not exceeding £40,000,

(ii) imprisonment for a term not exceeding 12 months, or

(iii) both,

(b) on conviction on indictment to—

(i) a fine,

(ii) imprisonment for a term not exceeding 5 years, or

(iii) both.

(8) In this section, "environmental harm" has the same meaning as in section 9(2).

(9) For the purposes of this section, environmental harm is "significant" if—

(a) it has or may have serious adverse effects, whether locally, nationally or on a wider scale, or

(b) it is caused or may be caused to an area designated in an order by the Scottish Ministers for the purposes of this section.

(10) An order under subsection (9) may make different provision for—

(a) different areas, or

(b) different types of significant environmental harm in relation to different areas.

32 Power of court to order offence to be remedied

(1) This section applies where—

(a) a court convicts a person of an offence under section 31(1),

(b) it appears to the court that it is within the power of the person to remedy or mitigate the significant environmental harm to which the conviction relates.

(2) The court may, in addition to or instead of dealing with the person in any other way, order the person to take such steps as may be specified in the order to remedy or mitigate the harm.

(3) An order under subsection (2) (a "remediation order") is to be taken to be a sentence for the purposes of any appeal.

(4) A remediation order must specify a period ("the compliance period") within which the steps mentioned in that subsection are to be taken.

(5) On an application by the person convicted of the offence, the court may, on more than one occasion—

(a) extend the compliance period within which those steps are to be taken,

(b) vary the steps specified in a remediation order.

(6) An application under subsection (5) must be made before the end of the compliance period.

(7) A person who fails to comply with a remediation order commits an offence.

(8) A person who commits an offence under subsection (7) is liable—

(a) on summary conviction to—

(i) a fine not exceeding £40,000,

(ii) imprisonment for a term not exceeding 12 months, or

(iii) both,

(b) on conviction on indictment to—

(i) a fine,

(ii) imprisonment for a term not exceeding 5 years, or

(iii) both.

32A Corporate offending

(1) Subsection (2) applies where—

(a) an offence under section 31(1) or 32(7) is committed by a relevant organisation, and

(b) the commission of the offence involves the connivance or consent, or is attributable to the neglect, of a responsible official of the relevant organisation.

(2) The responsible official (as well as the relevant organisation) commits the offence.

(3) In this section—

"a relevant organisation" means—

(a) a company,

(b) a limited liability partnership,

(c) a partnership (other than a limited liability partnership), or

(d) another body or association,

"a responsible official" means—

(a) in the case of a company, a director, secretary, manager or similar officer of the company,

(b) in the case of a limited liability partnership, a member of the partnership,

(c) in the case of a partnership (other than a limited liability partnership), a partner of the partnership, or

(d) in the case of another body or association, a person who is concerned in the management or control of its affairs,

and in each case includes a person purporting to act in a capacity mentioned in any of paragraphs (a) to (d) of this definition.

Offences relating to supply of carrier bags: fixed penalty notices

32B Offences relating to supply of carrier bags: fixed penalty notices

(1) The Climate Change (Scotland) Act 2009 is amended as follows.

(2) After section 88 insert—

"*Carrier bag offences: fixed penalty notices*

88A Offences relating to supply of carrier bags: fixed penalty notices

(1) A person authorised for the purpose of this section by an enforcement authority may give a person a fixed penalty notice if the person so authorised has reason to believe that the person to whom the notice is given has committed a relevant offence.

(2) In subsection (1), "relevant offence" means an offence provided for in regulations made under section 88.

(3) The Scottish Ministers may by regulations make further provision about fixed penalty notices under subsection (1).

(4) Subject to section 89, the regulations may in particular include provision about—

(a) the enforcement authority in relation to the regulations; and

(b) the functions of that authority in relation to fixed penalty notices.

(5) Schedule 1A makes further provision about fixed penalties.".

(3) After schedule 1 insert—

"SCHEDULE 1A

(introduced by section 88A(5))

FIXED PENALTIES

Preliminary

1 In this schedule, unless the context otherwise requires—

"enforcement authority" means the enforcement authority provided for in the regulations;

"notice" means a fixed penalty notice given under section 88A(1);

"the offence" means the offence to which the notice relates;

"prescribed" means prescribed by the regulations;

"the regulations" means regulations under section 88A(3).

Content of fixed penalty notice

2 (1) A notice must give reasonable particulars of the circumstances alleged to constitute the offence.

(2) A notice must also contain the following information—

(a) the amount of the fixed penalty;

(b) the payment deadline;

(c) the discounted amount and the discounted payment deadline;

(d) the name of—

(i) the enforcement authority to which payment should be made; or

(ii) a person acting on behalf of the enforcement authority to whom payment should be made;

(e) the address at which payment should be made; and

(f) the method by which payment should be made.

(3) A notice given to a person must state that—

(a) any liability to conviction of the offence is discharged if the person makes payment of—

(i) the fixed penalty before the payment deadline; or

(ii) the discounted amount before the discounted payment deadline;

(b) the payment of a fixed penalty is not a conviction nor may it be recorded as such;

(c) no proceedings may be commenced against the person in respect of the offence unless the payment deadline has passed and the discounted amount or fixed penalty has not been paid;

(d) the person has the right to make representations as mentioned in paragraph 8.

Period in which notice can be given

3 A notice may not be given after such time relating to the offence as may be prescribed.

Amount of penalty

4 (1) The amount of the fixed penalty, and the discounted amount, are such amounts as may be prescribed.

(2) The maximum amount of the fixed penalty that may be prescribed is an amount equal to level 2 on the standard scale (within the meaning of section 225(1) of the Criminal Procedure (Scotland) Act 1995).

(3) The discounted amount prescribed must be less than the maximum amount of the fixed penalty.

Deadlines for payment

5 (1) The payment deadline is the first working day occurring at least 28 days after the day on which the notice is given.

(2) But the enforcement authority may extend the payment deadline in any particular case after the notice is given if it considers it appropriate to do so.

(3) The discounted payment deadline is the first working day occurring at least 14 days after the day on which notice is given.

(4) But the enforcement authority may extend the discounted payment deadline in any particular case after the notice is given if it considers it appropriate to do so.

(5) On extending the payment deadline under sub-paragraph (2), or the discounted payment deadline under sub-paragraph (4), the enforcement authority must notify the recipient of the notice.

(6) In this paragraph, "working day" means any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

Method of payment

6 The fixed penalty (and the discounted payment amount) is payable—

(a) to the enforcement authority or the person acting on its behalf specified in the notice;

(b) at the address specified in the notice; and

(c) by the method specified in the notice.

Restriction on proceedings and effect of payment

7 (1) The earliest date that proceedings for the offence may be commenced is the day after the payment deadline.

(2) But no such proceedings may be commenced against a person if—

(a) the person makes payment of the discounted amount on or before the discounted payment deadline (or that deadline as extended under paragraph 5(4)); or

(b) the person makes payment of the fixed penalty on or before the payment deadline (or that deadline as extended under paragraph 5(2)).

(3) In proceedings for the offence, a certificate which—

(a) purports to be signed by or on behalf of a person having responsibility for the financial affairs of the enforcement authority; and

(b) states that payment of an amount specified in the certificate was, or was not, received by a date so specified,

is sufficient evidence of the facts stated.

(4) Where the enforcement authority is a local authority, the reference to a person having responsibility for the financial affairs of the enforcement authority in sub-paragraph (3)(a) is to be read as a reference to the person who has, as respects the local authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration).

Withdrawal of fixed penalty notice

8 (1) A recipient of a notice may make representations to the enforcement authority as to why the notice ought not to have been given.

(2) If, having considered any representations under sub-paragraph (1), the enforcement authority considers that the notice ought not to have been given, it may give to the person a notice withdrawing the notice.

(3) Where a notice under sub-paragraph (2) is given—

(a) the enforcement authority must repay any amount which has been paid in pursuance of the fixed penalty notice; and

(b) no proceedings may be commenced against the person for the offence.

Effect of prosecution on fixed penalty notice

9 Where proceedings for an offence in respect of which a notice has been given are commenced, the notice is to be treated as withdrawn.

General and supplemental

10 The regulations may make provision about—

(a) the application by enforcement authorities of payments received under this schedule;

(b) the keeping of accounts, and the preparation and publication of statements of account, in relation to such payments.

11 (1) The regulations may prescribe—

(a) the form of notices including notices under paragraph 8(2);

(b) the circumstances in which notices may not be given; and

(c) the method by which fixed penalties may be paid.

(2) The regulations may modify sub-paragraphs (1) and (3) of paragraph 5 so as to substitute a different deadline for the deadline for the time being specified there.

12 The enforcement authority must have regard to any guidance given by the Scottish Ministers to it in relation to the functions conferred on it by the regulations.".

Publicity and remediation orders: appeals by prosecutor

33 Orders under sections 28 and 32: prosecutor's right of appeal

(1) The Criminal Procedure (Scotland) Act 1995 is amended in accordance with this section.

(2) In section 108 (Lord Advocate's rights of appeal against disposal)—

(a) in subsection (1), after paragraph (ca) insert—

"(cb) a decision under section 28(2) of the Regulatory Reform (Scotland) Act 2013 not to make a publicity order;

(cc) a decision under section 32(2) of that Act not to make a remediation order;",

(b) in subsection (2)(b)(ii), for the words "or (ca)" substitute ", (ca), (cb) or (cc)".

(3) In section 175 (right of appeal from summary proceedings)—

(a) in subsection (4), after paragraph (ca) insert—

"(cb) a decision under section 28(2) of the Regulatory Reform (Scotland) Act 2013 not to make a publicity order;

(cc) a decision under section 32(2) of that Act not to make a remediation order;",

(b) in subsection (4A)(b)(ii), for "or (ca)" substitute ", (ca), (cb) or (cc)".

Contaminated land and special sites

34 Contaminated land and special sites

(1) The Environmental Protection Act 1990 is amended as follows.

(1A) In section 78F (determination of appropriate person to bear responsibility for remediation), after subsection (5) insert—

"(5A) But where the contaminated land is owned or occupied by the Crown by virtue of its having vested as *bona vacantia* in the Crown, or its having fallen to the Crown as *ultimus haeres*, the Crown is not an appropriate person under subsection (4) or (5) for the purposes of this Part.".

(2) After section 78Q insert—

"**78QA Land no longer considered to be contaminated**

(1) Subsection (2) applies where—

(a) a local authority has given notice under section 78B above that land in its area has been identified as contaminated land;

(aa) the land is not designated as a special site by virtue of section 78C(7) or 78D(6) above; and

(b) the local authority is satisfied that the land is no longer contaminated land.

(2) The local authority may give notice (a "non-contamination notice") that the land is no longer contaminated land to—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the local authority to be in occupation of the land;

(d) each person who appears to the authority to be an appropriate person.

(3) Where a non-contamination notice is given in respect of land—

(a) the notice mentioned in subsection (1) above ceases to have effect (and accordingly the land is no longer identified as contaminated land for the purposes of this Part);

(b) no remediation notice may be served in respect of the land;

(c) any remediation notice in force in respect of the land at the time the non-contamination notice is given ceases to have effect (except to the extent that the non-contamination notice provides otherwise); and

(d) no proceedings may be begun against a person for an offence under section 78M(1) above in respect of such a remediation notice except in relation to a provision of the notice which continues to have effect by virtue of paragraph (c) above.

(3A) A non-contamination notice shall not prevent the land, or any of the land, to which the notice relates being identified as contaminated land on a subsequent occasion.

(3B) Where land, or any of the land, to which a non-contamination notice relates is subsequently identified as contaminated land, or is subsequently designated as a special site by virtue of section 78C(7) or 78D(6), subsection (3)(b) above does not prevent a remediation notice being served in respect of the land.

(4) Where a local authority gives a non-contamination notice, it must keep (in such form as it thinks fit) a record of—

(a) details of the land to which the notice relates;

(b) its reasons for giving the notice; and

(c) the date of—

(i) the notice mentioned in subsection (1) above;

(ii) service of the non-contamination notice.

(5) Subsection (8) of section 78R below applies to records kept under subsection (4) above as it applies to registers maintained by enforcing authorities under that section; and for that purpose, the reference to entries is to be read as if it were a reference to information in such records.

(6) In performing its function under subsection (2) above, a local authority must have regard to any guidance issued by the Scottish Ministers in accordance with section 78YA below.

(7) In this section, references to land in respect of which a non-contamination notice is given include references to part of that land.".

(3) After section 78T insert—

"78TA Registers: removal of information about land designated as special site

(1) Subsection (2) applies where a local authority has entered in a register maintained under section 78R above particulars of or relating to notices mentioned in paragraph (e) or (f) of subsection (1) of that section.

(2) The local authority may remove the particulars from the register.

(3) Particulars may be removed under subsection (2) above only if—

(a) the Scottish Environment Protection Agency has given the local authority a notice under section 78Q(4) above that the land to which the notices relate is no longer land which is required to be designated as a special site; and

(b) the date specified in the notice given under that section has passed.

(4) Where a local authority removes particulars from a register under subsection (2) above, it must keep (in such form as it thinks fit) a record of—

(a) the particulars that have been removed,

(b) its reasons for removing them, and

(c) the date on which the particulars—

(i) were originally entered in the register, and

(ii) were removed.

(5) Subsection (8) of section 78R above applies to records kept under subsection (4) above as it applies to registers maintained by enforcing authorities under that section; and for that purpose, the reference to entries is to be read as if it were a reference to information in such records.

(6) In performing its functions under subsection (4) above, a local authority must have regard to any guidance issued by the Scottish Ministers in accordance with section 78YA below.

(7) Where a local authority removes particulars from a register under subsection (2) above, it must give notice of such removal to—

(a) the Scottish Environment Protection Agency,

(b) any person who is the owner of land designated as a special site by a notice to which the particulars relate,

(c) any person who appears to the local authority to be in occupation of the whole or any part of that land,

(ca) each person—

(i) who appears to the Scottish Environment Protection Agency to be an appropriate person in relation to that land, and

(ii) in respect of whom details have been given by the Scottish Environment Protection Agency to the local authority sufficient to enable notice of such removal to be given; and

(d) each person who appears to the local authority to be an appropriate person in relation to that land.

78TB Effect of removal of information from register

(1) Where a local authority removes particulars from a register under section 78TA(2) above—

(b) any remediation notice relating to the land ceases to have effect, and

(c) no proceedings may be begun against a person for an offence under section 78M(1) above in respect of any remediation notice relating to the land.

(2) In subsection (1), "the land" means land designated as a special site by a notice to which the particulars mentioned in that subsection relate.".

(3A) In section 78X (supplementary provisions), in subsection (4), after paragraph (f) insert—

"(g) in relation to property and rights that have vested as *bona vacantia* in the Crown, or that have fallen to the Crown as *ultimus haeres*, the Queen's and Lord Treasurer's Remembrancer.".

(4) In section 78YA (supplementary provisions with respect to guidance by the Scottish Ministers), in subsection (4A), after "draft" where it second occurs insert ", and a draft of any guidance referred to in section 78QA(6) or section 78TA(6) above,".

Amendment of powers under section 108 of Environment Act 1995

34A Amendment of powers under section 108 of Environment Act 1995

(1) The Environment Act 1995 is amended as follows.

(2) In section 108 (powers of enforcing authorities and persons authorised by them)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (b) is repealed,

(ii) after paragraph (c) insert—

"(d) of determining whether any of the following offences are being or have been committed—

(i) an offence under section 110 of this Act;

(ii) an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 (offences relating to significant environmental harm);

(iii) an offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (statutory offences: art and part and aiding or abetting) as it applies in relation to an offence mentioned in sub-paragraph (i) or (ii) above;

(iv) an attempt, conspiracy or incitement to commit an offence mentioned in sub-paragraph (i) or (ii) above; or

(e) in a case only where the person is authorised by SEPA, of determining whether, and if so to what extent, any financial benefit has accrued or is likely to accrue to a person in connection with an offence mentioned in subsection (1A) below which the authorised person reasonably believes is being or has been committed.",

(b) after subsection (1) insert—

"(1A) The offence is a relevant offence (within the meaning of section 39 of the Regulatory Reform (Scotland) Act 2013) for the purpose of provision made under section 16, or of section 27, of that Act).",

(c) in subsection (4)—

(i) in paragraph (h), after sub-paragraph (iii) insert—

"(iv) to ensure that it is available for use as evidence in any proceedings for an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013;",

(ii) in paragraph (j), the words from "to answer" to the end become sub-paragraph (i) of that paragraph, and after that sub-paragraph insert "; and

(ii) without prejudice to the generality of paragraph (c) above, to attend at such place and at such reasonable time as the authorised person may specify to answer those questions and sign such a declaration;",

(iii) after paragraph (j) insert—

"(ja) in a case only where he is authorised under subsection (1) or (2) above by SEPA, and without prejudice to the generality of paragraphs (c) and (j) above, to require any person whom he has reasonable cause to believe to be able to give any information relevant to an examination or investigation under paragraph (c) above, to provide the person's name, address and date of birth;",

(iv) after paragraph (k) insert—

"(ka) as regards any premises which by virtue of an authorisation from SEPA he has power to enter, to search the premises and seize and remove any documents found in or on the premises which he has reasonable cause to believe—

(i) may be required as evidence for the purpose of proceedings relating to an offence under any of the pollution control enactments, or under section 31(1) of the Regulatory Reform (Scotland) Act 2013, which he reasonably believes is being or has been committed; or

(ii) may assist in determining whether, and if so to what extent, any financial benefit has accrued or is likely to accrue as mentioned in subsection (1)(e) above;",

(d) in subsection (5), after "with" insert ", or whether an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 is being, or has been, committed,",

(e) in subsection (6), paragraph (a) and the word "and" immediately following it are repealed,

(f) after subsection (7) insert—

"(7A) An authorised person may not exercise the power in subsection (4)(ka) above to seize and remove documents except under the authority of a warrant by virtue of Schedule 18 to this Act.

(7B) Section 108A applies where documents are removed under that power.

(7C) Subsections (7D) and (7E) apply where a document removed under that power contains information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.

(7D) The information may not be used—

(a) in evidence for the purpose of proceedings mentioned in paragraph (ka)(i) of subsection (4) above against a person who would be entitled to make such a claim in relation to the document; or

(b) to determine whether any financial benefit has accrued or is likely to accrue as mentioned in subsection (1)(e) above.

(7E) The document must be returned to the premises from which it was removed, or to the person who had possession or control of it immediately before it was removed, as soon as reasonably practicable after the information is identified as information described in subsection (7C) above (but the authorised person may retain, or take copies of, any other information contained in the document).",

(g) in subsection (12), at the end add ", except in a case where the proceedings relate to—

(a) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements and declarations), or

(b) another offence where in giving evidence the person makes a statement inconsistent with the answer.",

(h) in subsection (15)—

(i) after the definition of "authorised person" insert—

""document" includes any thing in which information of any description is recorded (by any means) and any part of such a thing;",

(ii) in the definition of "pollution control functions", paragraph (a) is repealed.

(3) After section 108, insert—

"**108A Procedure where documents removed**

(1) An authorised person (within the meaning of subsection (15) of section 108 of this Act) who removes any documents under the power in subsection (4)(ka) of that section shall, if requested to do so by a person mentioned in subsection (2) below, provide that person with a record of what the authorised person removed.

(2) The persons are—

(a) a person who was the occupier of any premises from which the documents were removed at the time of their removal;

(b) a person who had possession or control of the documents immediately before they were removed.

(3) The authorised person shall provide the record within a reasonable time of the request for it.

(4) A person who had possession or control of documents immediately before they were removed may apply to SEPA—

(a) for access to the documents; or

(b) for a copy of them.

(5) SEPA shall—

(a) allow the applicant supervised access to the documents for the purpose of copying them or information contained in them; or

(b) copy the documents or information contained in them (or cause the documents or information to be copied) and provide the applicant with such copies within a reasonable time of the application.

(6) But SEPA need not comply with subsection (5) above where it has reasonable grounds for believing that to do so might prejudice—

(a) any investigation for a purpose mentioned in paragraph (a), (d) or (e) of subsection (1) of section 108 of this Act; or

(b) any criminal proceedings which may be brought as a result of any such investigation.

(7) In subsection (5) above, "supervised access" means access under the supervision of a person approved by SEPA.

(8) A person who claims that an authorised person or SEPA has failed to comply with the requirements of subsection (1), (3) or (5) above may apply to the sheriff for an order under subsection (10) below.

(9) An application under subsection (8) above—

(a) relating to a failure to comply with the requirements of subsection (1) or (3) above may be made only by a person who is entitled to make a request under subsection (1) above;

(b) relating to a failure to comply with subsection (5) above may be made only by a person who had possession or control of the documents immediately before they were removed.

(10) The sheriff may, if satisfied that the authorised person or SEPA has failed to comply with the requirements of subsection (1), (3) or (5) above, order the person, or as the case may SEPA, to comply with the requirements within such time and in such manner as may be specified in the order.".

(4) In Schedule 18 (supplemental provisions with respect to powers of entry)—

(a) in paragraph 2—

(i) after sub-paragraph (1) insert—

"(1A) If it is shown to the satisfaction of the sheriff or a justice of the peace, on sworn information in writing, that there are reasonable grounds for the exercise in relation to any documents of a power in section 108(4)(ka) of this Act, the sheriff or justice of the peace may by warrant authorise SEPA to designate a person who shall be authorised to exercise the power in relation to the documents in accordance with the warrant and, if need be, by force.",

(ii) for sub-paragraph (3) substitute—

"(3) A warrant under this Schedule in respect of the power in section 108(6) of this Act to enter any premises used for residential purposes shall not be issued unless the sheriff or justice of the peace is satisfied that such entry is necessary for any purpose for which the power is proposed to be exercised.",

(iii) after sub-paragraph (4) add—

"(5) A sheriff may grant a warrant under this Schedule in relation to premises situated in an area of Scotland even though the area is outside the territorial jurisdiction of that sheriff; and any such warrant may, without being backed or endorsed by another sheriff, be executed throughout Scotland in the same way as it may be executed within the sheriffdom of the sheriff who granted it.",

(b) in paragraph 3—

(i) after "shall" insert ", if so required,",

(ii) the words "designation and other" are repealed.

Authorisations relating to waste management: offences by partnerships

35 Carriers of controlled waste: offences by partnerships affecting registration

In section 3(5) of the Control of Pollution (Amendment) Act 1989 (restrictions on powers under section 2)—

(a) after paragraph (a), insert—

"(aa) a partnership has been convicted of a prescribed offence committed at a time when the applicant or registered carrier was a member of that partnership;",

(b) the word "or" immediately following paragraph (b) is repealed,

(c) after paragraph (b), insert—

"(ba) where the applicant or registered carrier is a partnership, a person who is a member of that partnership—

(i) has been convicted of a prescribed offence;

(ii) was a member of another partnership at a time when a prescribed offence of which that other partnership has been convicted was committed; or

(iii) was a director, manager, secretary, or other similar officer of a body corporate at a time when a prescribed offence of which that body corporate has been convicted was committed; or",

(d) in paragraph (c)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (i), insert—

"(ia) was a member of a partnership at a time when a prescribed offence of which that partnership has been convicted was committed; or",

(iii) in sub-paragraph (ii), for the word "for" substitute "of".

36 Waste management licences: offences by partnerships

In section 74(7) of the Environmental Protection Act 1990 (meaning of "fit and proper person")—

(a) after paragraph (a), insert—

"(aa) a partnership has been convicted of a relevant offence committed when the holder or, as the case may be, proposed holder of the licence was a member of that partnership;",

(b) the word "or" immediately following paragraph (b) is repealed,

(c) after paragraph (b), insert—

"(ba) where the holder or, as the case may be, proposed holder of the licence is a partnership, a person who is a member of that partnership—

(i) has been convicted of a relevant offence;

(ii) was a member of another partnership at a time when a relevant offence of which that other partnership has been convicted was committed; or

(iii) was a director, manager, secretary, or other similar officer of a body corporate at a time when a relevant offence of which that body corporate has been convicted was committed; or",

(d) in paragraph (c)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (i), insert—

"(ia) was a member of a partnership at a time when a relevant offence of which that partnership has been convicted was committed; or",

(iii) in sub-paragraph (ii), for the word "for" substitute "of".

Air quality assessments

37 Duty of local authorities in relation to air quality assessments etc.

In section 84 of the Environment Act 1995 (duties of local authorities in relation to designated areas)—

(a) subsection (1) is repealed,

(b) in subsection (2), for the words from the beginning to "to" where it fourth occurs, substitute "Where an order under section 83 above comes into operation, the local authority which made the order shall".

Smoke control areas: fuels and fireplaces

37A Smoke control areas: authorised fuels and exempt fireplaces

(1) The Clean Air Act 1993 is amended as follows.

(2) In section 20 (offence of emitting smoke in smoke control area where emission caused by use of fuel other than authorised fuel)—

(a) after subsection (5) insert—

"(5A) In this Part, "authorised fuel" means a fuel included in a list of authorised fuels kept by the Scottish Ministers for the purposes of this Part.

(5B) The Scottish Ministers must—

(a) publish the list of authorised fuels; and

(b) publish a revised copy of the list as soon as is reasonably practicable after any change is made to it.

(5C) The list must be published in such manner as the Scottish Ministers consider appropriate.",

(b) in subsection (6), for "In" substitute "Except as provided in subsection (5A), in".

(3) In section 21 (power by order to exempt certain fireplaces)—

(a) the existing text becomes subsection (5); and for the word "The" at the beginning of that subsection substitute "Except where subsection (1) applies, the".

(b) before that subsection insert—

"(1) For the purposes of this Part, the Scottish Ministers may exempt any class or description of fireplace from the provisions of section 20 (prohibition of smoke emissions in smoke control areas) if they are satisfied that such fireplaces can be used for burning fuel other than authorised fuels without producing any smoke or a substantial quantity of smoke.

(2) An exemption under subsection (1) may be made subject to such conditions as the Scottish Ministers consider appropriate.

(3) The Scottish Ministers must—

(a) publish a list of those classes or descriptions of fireplace that are exempt under subsection (1), including details of any conditions to which an exemption is subject; and

(b) publish a revised copy of the list as soon as is reasonably practicable after any change is made to the classes or descriptions of fireplace that are so exempt or to the conditions to which an exemption is subject.

(4) The list must be published in such manner as the Scottish Ministers consider appropriate.".

(4) In the title of section 21, the words "by order" are repealed.

(5) In section 29 (interpretation of Part 3), in the definition of "authorised fuel", for "20(6)" substitute "20".

CHAPTER 5

GENERAL PURPOSE OF SEPA

38 General purpose of SEPA

After section 20 of the Environment Act 1995, insert—

"20A General purpose of SEPA

(1) SEPA is to carry out the functions conferred on it by or under this Act or any other enactment for the purpose of protecting and improving the environment (including managing natural resources in a sustainable way).

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

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

(b) achieving sustainable economic growth.

(3) In subsection (1), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

CHAPTER 6

INTERPRETATION OF PART 2

39 Meaning of "relevant offence" and "SEPA" in Part 2

In this Part—

"relevant offence" means an offence specified in an order made by the Scottish Ministers for the purposes of this Part,

"SEPA" means the Scottish Environment Protection Agency.

PART 3

MISCELLANEOUS

Marine licensing decisions

40 Marine licence applications, etc.: proceedings to question validity of decisions

(1) The Marine (Scotland) Act 2010 is amended as follows.

(2) In section 38 (appeals against licensing decisions), after subsection (3) add—

"(4) The duty in subsection (1) does not apply in relation to a decision under section 29 to which section 63A applies.".

(3) After section 63, insert—

"*Proceedings for questioning certain decisions under sections 28 and 29*

63A Proceedings for questioning certain decisions under sections 28 and 29

(1) If a person is aggrieved by a decision of the Scottish Ministers to which this section applies, and wishes to question the validity of the decision on either of the grounds mentioned in subsection (2), the person (the "aggrieved person") may make an application to the Inner House of the Court of Session under this section.

(2) The grounds are that—

(a) the decision is not within the powers of the Scottish Ministers under this Part,

(b) one or more of the relevant requirements have not been complied with in relation to the decision.

(3) This section applies to—

(a) a decision to cause, or not to cause, an inquiry to be held under section 28(1) in connection with the Scottish Ministers' determination of an application for a marine licence to carry on an activity in respect of which a generating station application must also be made, and

(b) a decision under section 29 in relation to an application for a marine licence to carry on such an activity.

(4) An application under this section must be made within the period of 6 weeks beginning with the date on which the decision to which the application relates is taken.

(5) On an application under this section, the Inner House of the Court of Session—

(a) may suspend the decision until the final determination of the proceedings,

(b) may quash the decision either in whole or in part if satisfied that—

(i) the decision in question is not within the powers of the Scottish Ministers under this Part, or

(ii) the interests of the aggrieved person have been substantially prejudiced by failure to comply with any of the relevant requirements in relation to the decision.

(6) In this section—

"generating station application" means an application for consent under section 36 of the Electricity Act 1989 (consent for the construction etc. of generating stations);

"the relevant requirements" in relation to a decision to which this section applies, means the requirements of this Act, or of any order or regulations made under this Part, which are applicable to that decision.

63B Applications under section 63A: requirement for leave

(1) No proceedings may be taken in respect of an application under section 63A(1) unless the Inner House of the Court of Session has granted leave for the application to proceed.

(2) The Court may grant leave under subsection (1) for an application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and

(b) the application has a real prospect of success.

(3) The Court may grant leave under subsection (1) for an application to proceed—

(a) subject to such conditions as the Court thinks fit, or

(b) only on such of the grounds specified in the application as the Court thinks fit.

(4) An application under section 63A(1) may be made even though the Court has not granted leave for the application to proceed.".

Planning authorities' functions: charges and fees

41 Planning authorities' functions: charges and fees

In section 252 of the Town and Country Planning (Scotland) Act 1997 (fees for planning applications, etc.)—

(a) in subsection (1A), after paragraph (d) insert—

"(da) make provision for the charge or fee payable to different planning authorities to be of different amounts,",

(b) after subsection (1A) insert—

"(1AA) Provision such as mentioned in subsection (1A)(da) may be made in respect of a planning authority where the Scottish Ministers are satisfied that the functions of the authority are not being, or have not been, performed satisfactorily.

(1AB) The power to make provision such as is mentioned in subsection (1A)(da) is without prejudice to the generality of the power in section 275(2A).", and

(c) subsections (5) and (6) are repealed.

Street traders' licences

42 Application for street trader's licence: food businesses

In section 39 of the Civic Government (Scotland) Act 1982 (street traders' licences)—

(a) in subsection (4)—

(i) for "the food " substitute "a food",

(ii) after "1990)" insert "mentioned in subsection (4A)",

(b) after subsection (4) insert—

"(4A) A food authority referred to in subsection (4) is a food authority in Scotland which, in respect of the activity mentioned in that subsection—

(a) has registered the establishment that carries out or intends to carry out the activity for the purposes of Article 6.2 of Regulation EC No. 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, or

(b) where no such food authority has registered the establishment for those purposes, a food authority which is—

(i) the licensing authority to which the application mentioned in subsection (4) in respect of the activity is made, or

(ii) another licensing authority to which an application for a street trader's licence in respect of the activity is or has been made.".

PART 4

GENERAL

43 Consequential modifications and repeals

Schedule 3 makes minor modifications of enactments (including repealing enactments that are spent) and modifications consequential on the provisions of this Act.

44 Subordinate legislation

(1) Any power of the Scottish Ministers to make an order or regulations under this Act includes power to make—

(a) different provision for different purposes,

(b) incidental, supplemental, consequential, transitional, transitory or saving provision.

(2) The power to make regulations under section 1 includes power to modify any enactment (including this Act other than that section and sections 2, 3 and 7).

(3) The following orders are subject to the affirmative procedure—

(a) an order under section 7B, 7E, 12 or 15,

(b) an order under section 7 that contains provision such as is mentioned in subsection (1)(a) of that section,

(c) an order under that section that specifies under subsection (2) of that section—

(i) that a function is to be a regulatory function for the purposes of section 1, 4 or 5,

(ii) the extent to which a function is to be a regulatory function for such purposes,

(d) an order under section 45(1) which contains provisions that add to, replace or omit any part of the text of an Act.

(4) The following regulations are subject to the affirmative procedure—

(a) regulations under section 1,

(b) regulations under section 10 which contain provisions that add to, replace or omit any part of the text of an Act.

(5) All other orders and regulations under this Act are subject to the negative procedure.

(6) This section does not apply to an order under—

(a) section 47(2),

(b) paragraph 29 of schedule 2.

45 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment (including this Act), instrument or document.

46 Crown application

(1) No contravention by the Crown of any provision made by or under this Act makes the Crown criminally liable.

(2) But the Court of Session may, on the application of the Scottish Ministers or any public body or office-holder having responsibility for enforcing the provision, declare unlawful any act or omission of the Crown which constitutes such a contravention.

(3) Despite subsection (1), any provision made by or under the provisions of this Act applies to persons in the public service of the Crown as it applies to other persons.

47 Commencement

(1) This Part (other than section 43) comes into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

48 Short title

The short title of this Act is the Regulatory Reform (Scotland) Act 2013.

SCHEDULE 1
(introduced by section 1(5))

REGULATORS FOR THE PURPOSES OF PART 1

Accountant in Bankruptcy

Food Standards Agency

Healthcare Improvement Scotland

Local authorities

Scottish Charity Regulator

Scottish Environment Protection Agency

Scottish Fire and Rescue Service

Scottish Housing Regulator

Scottish Natural Heritage

Social Care and Social Work Improvement Scotland

VisitScotland

SCHEDULE 2
(introduced by section 10)

PARTICULAR PURPOSES FOR WHICH PROVISION MAY BE MADE UNDER SECTION 10

PART 1

LIST OF PURPOSES

Environmental activities

1 (1) Further defining environmental activities.

(2) Modifying the definition of any of those activities.

(3) Specifying other activities as environmental activities.

Emissions

2 (1) Establishing standards, objectives or requirements in relation to emissions.

(2) In relation to emissions, authorising the making of plans for—

(a) the setting of overall limits,

(b) the allocation of quotas, or

(c) the progressive improvement of standards or objectives.

(3) Authorising the making of schemes for the trading or other transfer of quotas so allocated.

Regulators

3 (1) Determining the authorities (whether SEPA or any other public or local authority or the Scottish Ministers) by whom functions conferred by the regulations for or in connection with regulating regulated activities are to be exercisable (such authorities being referred to in this schedule as "regulators").

(2) Specifying any other purposes for which any such functions are to be exercisable.

(3) Enabling the Scottish Ministers to give directions (whether general or specific) with which regulators are to comply, or guidance to which regulators are to have regard, in exercising functions under the regulations, including—

(a) directions providing for any functions exercisable by one regulator to be exercisable instead by another,

(b) directions given for the purpose of the implementation of any obligations of the United Kingdom under the EU Treaties or under any international obligations to which the United Kingdom is a party,

(c) directions relating to the exercise of any function in a particular case or description of case,

(d) directions providing for any matter to which the directions relate to be determined, in such manner (if any) as the directions may specify, by a person other than the Scottish Ministers.

Regulation of activities

4 (1) Prohibiting persons from carrying on, or from causing or permitting others to carry on, any regulated activity.

(2) Prohibiting persons from carrying on any regulated activity except so far as it is—

(a) authorised by or under the regulations, and

(b) carried on in accordance with the regulations.

(3) Enabling the carrying on of regulated activities to be authorised by providing that they are to be carried on—

(a) in accordance with a permit granted by a regulator under the regulations (a "permit"),

(b) subject to a requirement to register the carrying on of the activity with a regulator ("registration"),

(c) subject to a requirement to notify a regulator that the activity is being, or is proposed to be, carried on ("notification"),

(d) subject to compliance with rules specified in or made under the regulations ("general binding rules").

(4) Enabling the carrying on of regulated activities to be authorised by means of a permit, registration or notification whether or not the carrying on of those activities is also subject to general binding rules.

(5) Specifying a procedure under which the regulators may determine general binding rules.

(6) Treating as authorised the carrying on of regulated activities which are subject to general binding rules.

(7) Specifying the subsistence of an authorisation to carry on regulated activities which are subject to general binding rules.

Permits

5 (1) Prescribing the form and content of applications for permits.

(2) Regulating the procedure to be followed in connection with—

(a) applications for permits,

(b) the determination of such applications, and

(c) the grant of permits.

6 (1) Prescribing the form and content of permits.

(2) Authorising permits to be granted subject to conditions imposed by regulators.

(3) Securing that permits have effect subject to specified conditions.

(4) Requiring persons carrying on regulated activities authorised by way of a permit to submit to regulators, in respect of specified periods and at specified intervals, such information as may be specified relating to the carrying on of the activities and compliance with any conditions subject to which the permit was granted.

7 (1) Requiring permits, or the conditions to which permits are subject, to be reviewed by regulators (whether periodically or in specified circumstances).

(2) Authorising or requiring the variation of permits or such conditions by regulators (whether on applications made by holders of permits or otherwise).

(3) Regulating the making of changes in the carrying on of the activities to which permits relate.

8 (1) Regulating the transfer and surrender of permits.

(2) Authorising the suspension of permits by regulators.

(3) Authorising the revocation of permits by regulators.

(4) Authorising the imposition by regulators of requirements with respect to the taking of preventive or remedial action (by holders of permits or other persons) in connection with the surrender and revocation of permits.

9 (1) Authorising, or authorising the Scottish Ministers to make schemes for, the charging by the Scottish Ministers or public or local authorities of fees or other charges in respect of—

(a) the testing or analysis of substances in cases mentioned in sub-paragraph (2),

(b) the validating of, or of the results of, any testing or analysis of substances in such cases, or

(c) assessing how the environment might be affected by the release into it of any substances in such cases.

(2) The cases are those where the testing, analysis, validating or assessing is in any way in anticipation of, or otherwise in connection with, the making of applications for the grant of permits or is carried out in pursuance of conditions to which any permit is subject.

Registration

10 (1) Prescribing the form and content of—

(a) applications for registration,

(b) registration.

(2) Regulating the procedure for registration including—

(a) the procedure to be followed in connection with—

(i) applications for registration,

(ii) the determination of such applications, and

(iii) the grant of registration, and

(b) variation, transfer, surrender, suspension and revocation of registrations.

(3) Authorising registration to be granted subject to conditions imposed by regulators.

(4) Securing that registrations have effect subject to specified conditions.

(5) Specifying restrictions or other requirements in connection with registration, including—

(a) circumstances in which registration may be refused,

(b) the subsistence of registration.

Provisions common to permits and registration

11 (1) Enabling the granting of permits, or the registration of activities, authorising the carrying on of—

(a) one or more regulated activities,

(b) a regulated activity at one or more than one place.

(2) Securing that permits and registrations have effect subject to standard rules specified in or made under the regulations in respect of permits and registrations.

(3) Specifying a procedure under which regulators may determine such rules.

(4) Specifying restrictions or other requirements in connection with—

(a) applications for permits or registration,

(b) the grant of permits (including provisions for restricting the grant of permits to those who are fit and proper persons within the meaning of the regulations),

(c) the registration of regulated activities (including provision for restricting registration to the carrying on of such activities by those who are fit and proper persons within the meaning of the regulations).

(5) Specifying the circumstances in which persons or descriptions of persons may be deemed—

(a) to have control over activities the carrying on of which is authorised by grant of a permit or by registration (including complying with any conditions or requirements of the permit or registration),

(b) to be carrying on a regulated activity for the purposes of notices that may be served by regulators under paragraph 18,

(c) to be authorised to carry on a regulated activity without having applied for a permit or registration, or having given notification, in respect of that activity.

(6) Enabling the granting of a permit to, or registration of the carrying on of regulated activities by, more than one person.

(7) Enabling permits and registrations—

(a) to be varied, transferred, surrendered, suspended or revoked wholly or in part,

(aa) to be varied, suspended or revoked as mentioned in paragraph (a) in consequence of the person to whom the permit was granted or (as the case may be) who is authorised to carry on the regulated activities to which the registration relates ceasing to be a fit and proper person within the meaning of the regulations,

(b) to be consolidated.

(8) Providing for the transfer of a permit or registration to be refused if the person to whom it is proposed to be transferred is not a fit and proper person within the meaning of the regulations.

Notification of regulated activities

12 (1) Prescribing the form and content of notifications and otherwise regulating the procedure for notifying the carrying on or proposed carrying on of regulated activities.

(2) Specifying restrictions or other requirements in connection with notifications, including—

(a) the subsistence of a notification,

(b) the subsistence of an authorisation to carry on a regulated activity in respect of which the notification is given.

Charging schemes

13 (1) Authorising, or authorising regulators to make, vary and revoke schemes for the charging by regulators of fees or other charges—

(a) in respect of, or in respect of applications for—

(i) the grant of a permit,

(ii) the variation of a permit or the conditions to which it is subject,

(iii) the transfer, surrender or revocation of a permit,

(iv) registration,

(v) the variation, transfer, surrender or revocation of registration,

(b) in respect of the subsistence of a permit or registration,

(c) in respect of consolidation of permits and registrations,

(d) in respect of notifications,

(e) in respect of other specified matters.

(2) Regulating the procedure for making, varying and revoking such schemes.

Information, publicity and consultation

14 Enabling persons of any specified description (whether or not they are holders of permits or carrying on activities that are subject to registration, a requirement of notification or general binding rules) to be required—

(a) to provide such information in such manner as is specified in the regulations,

(b) to compile information—

(i) on emissions,

(ii) on energy consumption and on the efficiency with which energy is used,

(iii) on waste and on the origins and destinations of waste.

15 Securing that—

(a) publicity is given to specified matters,

(b) regulators maintain registers of specified matters (but excepting information which under the regulations is, or is determined to be, commercially confidential and subject to any other exceptions specified in the regulations) which are open to public inspection,

(c) regulators publish, in a manner specified in the regulations, such registers,

(d) copies of entries in such registers, or of specified documents, may be obtained by members of the public.

16 Requiring or authorising regulators to carry out consultation in connection with the exercise of any of their functions (including consultation on any guidance they propose to issue in connection with the exercise of those functions), and providing for them to take into account representations made to them on consultation.

Enforcement and offences

17 (1) Conferring functions on regulators with respect to compliance with, and enforcement of, the regulations.

(2) Conferring power on regulators—

(a) to arrange for preventive or remedial action to be taken at the expense of persons carrying on regulated activities,

(b) to require such persons to provide such financial security as the regulators making the arrangements consider appropriate pending the taking of the preventative or remedial action.

(3) Authorising regulators to appoint suitable persons to exercise the functions mentioned in sub-paragraph (1) and the powers in sub-paragraph (2); and conferring powers (such as those specified in section 108(4) of the Environment Act 1995 (powers of entry, etc.)) on persons so appointed.

(4) Regulating the procedure under which regulators may make arrangements, or impose requirements, such as are mentioned in sub-paragraph (2).

18 (1) Authorising regulators to serve on any persons carrying on regulated activities (whether or not the carrying on of those activities is authorised by or under the regulations) notices, including notices requiring such persons—

(a) to notify the regulated activities being carried on by them,

(b) to take preventative or remedial action at their own expense, including such action in respect of contraventions (actual or potential) of authorisations, or conditions of authorisations, relating to the regulated activities,

(c) to provide such financial security as the regulators serving the notices consider appropriate pending the taking of preventative or remedial action required by virtue of paragraph (b),

(d) to take steps to remove imminent risks of serious adverse impacts on the environment (whether or not arising from any contraventions such as are mentioned in paragraph (b)),

(e) to stop the carrying on of regulated activities (whether or not the notice also requires the person to take such preventative or remedial action as may be specified in the notice).

(2) Authorising regulators, where such notices are not complied with by persons on whom they are served—

(a) to take, or arrange for the taking of, preventative or remedial action at the expense of those persons,

(b) to impose monetary penalties on those persons.

(3) Authorising regulators who serve such notices to require the persons on whom the notice is served to pay the cost incurred by the regulators in relation to the service of the notice up to the time of its service.

(4) Providing for the enforcement of such notices by civil proceedings.

(5) Specifying a procedure under which monetary penalties such as are mentioned in sub-paragraph (2)(b) may be imposed.

(6) Authorising regulators, where they are required by virtue of such a procedure to serve a notice, to require the person on whom the notice is served to pay the costs incurred by the regulators in relation to the service of the notice up to the time of its service.

(7) Providing for the enforcement of such notices by civil proceedings.

19 Creating offences and dealing with matters relating to such offences, including—

(a) the provision of defences, and

(b) evidentiary matters.

20 Enabling, where a person has been convicted of an offence under the regulations, a court dealing with that person for the offence to order the taking of remedial action (in addition to or instead of imposing any punishment).

Appeals

21 (1) Conferring rights of appeal in respect of decisions made, notices served or other things done (or omitted to be done) under the regulations.

(2) Making provision for (or for the determination of) matters relating to the making, considering and determination of such appeals (including provision for or in connection with the holding of inquiries or hearings).

General

22 (1) Making provision which, subject to any modifications that the Scottish Ministers consider appropriate, corresponds or is similar to—

(a) any provision made by or under, or capable of being made under, Part 2 of the Environmental Protection Act 1990, or

(b) any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with an EU obligation relating to protecting and improving the environment.

(2) Making provision about the application of the regulations to the Crown.

PART 2

SUPPLEMENTARY PROVISIONS

Particular types of regulated activity

23 The regulations may provide for specified provisions of the regulations to have effect in relation only to—

(a) specified regulated activities,

(b) the carrying on of regulated activities in specified circumstances, or

(c) the carrying on of regulated activities by specified persons or descriptions of persons.

Emissions trading scheme

24 (1) The regulations may authorise the inclusion in a trading scheme of—

(a) provision for penalties in respect of contraventions of provisions of the scheme,

(b) provision for the amount of any penalty under the scheme to be such as may be set out in, or calculated in accordance with—

(i) the scheme, or

(ii) the regulations (including regulations made after the scheme).

(2) In this paragraph, "trading scheme" means a scheme of the kind mentioned in paragraph 2(3).

General binding rules

25 (1) General binding rules may—

(a) impose conditions or requirements,

(b) prescribe standards or objectives to be complied with or achieved, and

(c) require standards or objectives specified in or under other enactments to be complied with or achieved.

(2) Before determining any general binding rules in accordance with a procedure specified under paragraph 4(5), a regulator must—

(a) publish a draft of the proposed rules,

(b) publicise the opportunity to make representations about the proposed rules under sub-paragraph (3) in such manner as the regulator thinks fit,

(c) make copies of the proposed rules available for public inspection for such period, which must be at least 28 days, as the regulator may determine.

(3) Any person who wishes to make representation about the proposed rules to the regulator may do so within the period determined under sub-paragraph (2)(c).

(4) The regulator must, in determining the rules, have regard to any representations on the proposed rules received by the regulator within that period.

Determination of matters by regulators

26 The regulations may make provision for anything which, by virtue of paragraphs 5 to 12, could be provided for by the regulations to be determined under the regulations by regulators.

Determination of rules and imposition of conditions

27 The regulations may provide—

(a) for regulators to have regard to any specified general principles, and to any directions or guidance given under the regulations—

(i) in determining any general binding rules,

(ii) in imposing any conditions as mentioned in paragraph 6(2) or 10(3),

(iii) in setting any standard rules they may make by virtue of paragraph 11(2),

(b) for such guidance to include the sanctioning of reliance by a regulator on any arrangements referred to in the guidance to operate to secure a particular result as an alternative to imposing any such conditions,

(c) for such conditions to be imposed by reference to agreements between or among persons authorised to carry on regulated activities as to the carrying on by them of the activities.

Charging schemes

28 The regulations may—

(a) require any such scheme as is mentioned in paragraph 9 or 13 to be so framed that the fees and charges payable under the scheme—

(i) are determined in the light of any specified general principles and any directions or guidance given under the regulations,

(ii) are sufficient, taking one year with another, to cover such expenditure (whether or not incurred by the regulator to whom they are so payable) as is specified,

(b) authorise any such scheme to make different provision for different cases (and specify particular kinds of such cases).

Fit and proper persons

28A The regulations may make provision that the conditions subject to which a registration or permit has effect include a condition that the person authorised to carry on the regulated activities to which the registration relates, or to whom the permit is granted, must remain a fit and proper person within the meaning of the regulations.

Power to specify EU instruments for the purposes of paragraph 22

29 The Scottish Ministers may, for the purposes of paragraph 22(1)(b), by order specify an EU instrument as one that is or contains an EU obligation mentioned in that paragraph.

Offences

30 (1) The regulations may provide for any such offence as is mentioned in paragraph 19 to be triable—

(a) only summarily,

(b) either summarily or on indictment.

(2) The regulations may provide for such an offence to be punishable—

(a) on summary conviction by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 12 months),

(ii) a fine not exceeding such amount as is specified (which must not exceed £40,000), or

(iii) both,

(b) on conviction on indictment by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 5 years),

(ii) a fine, or

(iii) both.

(3) The regulations may provide for continuing offences and for any such offences to be punishable by a daily or other periodic fine of such amount as is specified (in addition to any punishment provided for in pursuance of sub-paragraph (2)).

(4) The Scottish Ministers may by order substitute for the sum for the time being specified in sub-paragraph (2)(a)(ii) such other sum as appears to them to be justified by a change in the value of money appearing to them to have taken place since the last occasion on which the sum was fixed.

(5) An order under sub-paragraph (4) is not to affect the punishment for an offence committed before that order comes into force.

Service of notices

31 The regulations may make provision for or in connection with the service of any notice or other document required under the regulations to be served on or given to any person.

Powers exercisable in the regulations

32 The regulations may—

(a) modify any enactment, instrument or document,

(b) in making different provision for different purposes, make different provision for different cases, persons, circumstances or areas,

(c) contain provision for the delegation of functions,

(d) impose requirements in relation to any standards or other matters set out in such documents as may be specified in the regulations.

Interpretation

33 In this schedule—

"authorise", in relation to regulated activities, means authorise the carrying on of the activities in accordance with a permit, subject to registration, subject to notification or subject to compliance with general binding rules; and related expressions are to be construed accordingly,

"functions" includes powers and duties,

"general binding rules" means rules specified in or made under the regulations in pursuance of paragraph 4(3)(d),

"notification" means notification of the carrying on of, or of a proposal to carry on, a regulated activity in accordance with any provision made in the regulations in pursuance of paragraph 4(3)(c),

"permit" means a permit granted under any provision made in the regulations in pursuance of paragraph 4(3)(a),

"registration" means registration under any provision made in the regulations in pursuance of paragraph 4(3)(b),

"the regulations" means regulations under section 10,

"regulated activities" has the meaning given in section 9(3),

"regulators" has the meaning given in paragraph 3(1),

"specified" means specified in the regulations.

SCHEDULE 3
(introduced by section 43)

MINOR AND CONSEQUENTIAL MODIFICATIONS

PART 1

REGULATION OF ENVIRONMENTAL ACTIVITIES, ETC.

Sewerage (Scotland) Act 1968

Z1(1) The Sewerage (Scotland) Act 1968 is amended as follows.

(2) In section 29A (priority substances etc.), in subsection (3)—

(a) the word "or" immediately following paragraph (a) is repealed, and

(b) for paragraph (b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013, or

(c) any directive concerning the same subject-matter as the directive mentioned in subsection (1).".

(3) In section 38H (Controlled Activities Regulations), for subsection (3)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

Prevention of Oil Pollution Act 1971

1 In section 11A of the Prevention of Oil Pollution Act 1971 (certain provisions not to apply where discharge or escape authorised under certain enactments), in subsection (1), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

Environmental Protection Act 1990

2 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 35 (waste management licences: general), in subsection (11A), after "1999" insert "or by an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

(2A) In section 46 (receptacles for household waste), in subsection (4)—

(a) the word "and" immediately following paragraph (d) is repealed,

(b) after paragraph (e) add—

"(f) the removal of the receptacles placed for the purpose of facilitating the emptying of them; and

(g) the time when the receptacles must be placed for that purpose and removed.".

(2B) In section 47 (receptacles for commercial or industrial waste), in subsection (4)—

(a) the word "and" immediately following paragraph (d) is repealed,

(b) after paragraph (e) add—

"(f) the removal of the receptacles placed for the purpose of facilitating the emptying of them; and

(g) the time when the receptacles must be placed for that purpose and removed.".

(3) In section 79 (statutory nuisances and inspections therefor), in subsection (10), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

Clean Air Act 1993

3 (1) The Clean Air Act 1993 is amended as follows.

(2) In section 31 (regulations about sulphur content of oil fuel for furnaces or engines), in subsection (4)—

(a) in paragraph (a)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (ii) insert "; or

(iii) part of an activity subject to regulation by the Scottish Environment Protection Agency under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013;",

(b) in paragraph (b), after "sub-paragraph (ii)" insert "or (iii)".

(3) In section 33 (cable burning), in subsection (1), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(4) In section 35 (obtaining information), in subsection (3), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(5) In section 36 (notices requiring information about air pollution), in subsection (2A) after "1999" insert "or to an activity subject to regulation by the Scottish Environment Protection Agency under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

(6) In section 41A (relation to Pollution Prevention and Control Act 1999)—

(a) in subsection (1), after "activities)" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013",

(b) in subsection (2)—

(i) in paragraph (a), after "permit" insert "or authorisation",

(ii) in paragraph (b), after "permit" insert "or authorisation",

(c) in subsection (3)—

(i) the words from "permit" to the end of the subsection become paragraph (a) of that subsection,

(ii) after that paragraph insert "; and

(b) "authorisation" means an authorisation under regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013, and the reference to an appeal is to an appeal under those regulations.".

(7) In the title to section 41A, after "1999" insert "and Regulatory Reform (Scotland) Act 2013".

Environment Act 1995

4 (1) The Environment Act 1995 is amended as follows.

(2) In section 56 (interpretation of Part 1), in the definition of "environmental licence" in relation to SEPA, after paragraph (aa) insert—

"(ab) an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013,".

(3) In section 108 (powers of enforcing authorities and persons authorised by them), in subsection (15), in paragraph (n) of the defintion of "pollution control functions" in relation to SEPA, after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(4) In section 114 (power of the Scottish Ministers to delegate functions of determining, or to refer matters involved in, appeals), in subsection (2)(a)(viii), after "Scotland" insert "or under section 10 of the Regulatory Reform (Scotland) Act 2013".

Merchant Shipping Act 1995

5 In section 136A of the Merchant Shipping Act 1995 (discharges etc. authorised under other enactments), after "1999" insert "or an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

Pollution Prevention and Control Act 1999

6 In the Pollution Prevention and Control Act 1999, in section 1 (general purpose of section 2 and definitions)—

(a) paragraph (a) is repealed,

(b) in paragraph (b), the words ", otherwise in pursuance of that Directive," are repealed.

Water Environment and Water Services (Scotland) Act 2003

7 (1) The Water Environment and Water Services (Scotland) Act 2003 is amended as follows.

(2) In section 2 (the general duties), in subsection (8), in the defintion of "the relevant enactments", after "Part" insert ", Part 2 of the Regulatory Reform (Scotland) Act 2013".

(3) Section 20 (regulation of controlled activities) is repealed.

(4) Section 21 (controlled activities regulations: procedure) is repealed.

(5) In section 22 (remedial and restoration measures)—

(a) in subsection (2)(a), the words "(as defined in section 20(6))" are repealed,

(b) after subsection (3) insert—

"(4) In subsection (2)(a), "pollution" in relation to the water environment means the direct or indirect introduction, as a result of human activity, of substances or heat into the water environment, or any part of it, which may give rise to any harm; and "harm" means—

(a) harm to the health of human beings or other living organisms,

(b) harm to the quality of the water environment, including—

(i) harm to the quality of the water environment taken as a whole,

(ii) other impairment of, or interference with the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems,

(c) offence to the senses of human beings,

(d) damage to property, or

(e) impairment of, or interference with, amenities or other legitimate uses of the water environment.".

(6) In section 23 (fixing of charges for water services)—

(a) in paragraph (a) of subsection (4), the words "(as defined in section 20(6))" are repealed,

(b) after that subsection insert—

"(5) In subsection (4)(a), "abstraction" means the doing of anything by which any water is removed or diverted by mechanical means, pipe or any engineering structure or works from any part of the water environment, whether temporarily or permanently, including anything by which the water is so removed or diverted for the purpose of being transferred to another part of the water environment, and includes—

(a) the construction or extension of any well, borehole, water intake or other work by which water may be abstracted,

(b) the installation or modification of any machinery or apparatus by which additional quantities of water may be abstracted by means of a well, borehole, water intake or other work.".

(7) In section 28 (interpretation of Part 1), the definition of "controlled activity" is repealed.

(8) In section 36 (orders and regulations)—

(a) in each of subsections (3), (5) and (6) the word "20," is repealed,

(b) in subsection (4), paragraph (b) and the "or" immediately preceding it are repealed.

(9) In schedule 1 (matters to be included in river basin management plans), in paragraph 10(b), for the words "schedule 2" substitute "paragraph 3(1) of schedule 2 to the Regulatory Reform (Scotland) Act 2013".

(10) Schedule 2 (controlled activities regulations: particular purposes) is repealed.

Water Services etc. (Scotland) Act 2005

9 In section 25 of the Water Services etc. (Scotland) Act 2005 (sewerage nuisance: code of practice), in subsection (9), after "(c.24)" insert "or by an authorisation under regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013".

Water Resources (Scotland) Act 2013

10A(1) The Water Resources (Scotland) Act 2013 is amended as follows.

(2) In section 5 (qualifying abstraction), in subsection (2), for the words from "20(3)(b)" to the end of the subsection substitute "23(5) of the 2003 Act.".

(3) In section 21 (Controlled Activities Regulations), for subsection (5)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

(4) In section 50 (Controlled Activities Regulations), for subsection (5)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

PART 2

ENFORCEMENT OF REGULATIONS ON ENVIRONMENTAL ACTIVITIES, ETC.

Environmental Protection Act 1990

11 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 33A (fixed penalty notices for contraventions of section 33(1)(a) and (c): Scotland)—

(a) in subsection (1), in paragraph (a)—

(i) for the words "officer of a local authority" substitute "person or a constable", and

(ii) the words from "in" to the end of paragraph (b) are repealed,

(b) in subsection (4), paragraph (b) and the word "or" immediately preceding it are repealed,

(c) after subsection (8) insert—

"(8A) If an authorised person proposes to give a person a notice under this section, the authorised person may require the person to give him his name and address.

(8B) A person commits an offence if he fails to give his name and address when required to do so under subsection (8A) above.

(8C) A person who commits an offence under subsection (8B) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale.",

(d) in subsection (11), in paragraph (a), for the words from "the" where it first occurs to "committed" substitute "a proper officer",

(e) after subsection (11) insert—

"(11A) In subsection (11) above, "proper officer" means—

(a) in a case where a notice under this section is given by an officer of a local authority authorised as mentioned in paragraph (a) of the definition of "authorised person" in subsection (13) below, the officer who has, as respects the authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration);

(b) in a case where a notice under this section is given by an officer of Loch Lomond and The Trossachs National Park Authority authorised as mentioned in paragraph (b) of that definition, the proper officer for that Authority appointed under paragraph 12(3) of schedule 2 to the National Parks (Scotland) Act 2000.",

(f) in subsection (12)—

(i) after "payable", where it second occurs, insert—

"(a) in a case such as is mentioned in paragraph (a) of subsection (11A) above,", and

(ii) at the end insert—

"(b) in a case such as is mentioned in paragraph (b) of that subsection, to Loch Lomond and The Trossachs National Park Authority; and as respects the sums received by that Authority, those sums shall accrue to that Authority.",

(g) in subsection (13)—

(i) for the definition of "authorised officer" substitute—

""authorised person" means—

(a) an officer of a local authority who is authorised in writing by the authority for the purpose of issuing notices under this section in relation to a relevant offence committed in the area of the authority;

(b) an officer of Loch Lomond and The Trossachs National Park Authority who is authorised in writing by the Authority for the purpose of issuing notices under this section in relation to a relevant offence committed in the area designated as the National Park for which the Authority is established; or

(c) such other persons as may be specified by order made by the Scottish Ministers.", and

(ii) the definition of "proper officer" is repealed, and

(h) after subsection (13) insert—

"(13A) The Scottish Ministers may by order make such modifications of this section as they consider necessary or expedient in connection with the specification of a person by an order under paragraph (c) of the definition of "authorised person" in subsection (13) above.

(13B) An order under subsection (13A) above may include provision—

(a) applying any provision of this section to such a person with such modifications as may be specified in the order;

(b) for any such provision not to apply in relation to such a person.".

(3) In section 59 (power to require removal of waste unlawfully deposited), after subsection (8B) insert—

"(8C) An authority may not recover costs under subsection (8) above if a compensation order has been made under section 249 of the Criminal Procedure (Scotland) Act 1995 in favour of the authority in respect of any part of those costs.

(8D) Subsection (8C) does not apply if the compensation order is set aside on appeal.".

(4) In section 88 (fixed penalty notices for leaving litter)—

(a) in subsection (1), in paragraph (a)—

(i) for the words "officer of a litter authority" substitute "person or a constable", and

(ii) the words from "in" to the end of paragraph (b) are repealed,

(b) in subsection (5A), for the words "to the litter authority in whose area the offence was committed" substitute—

"(a) where the notice is given by an officer of a litter authority authorised as mentioned in paragraph (a) of the definition of "authorised person" in subsection (10) below, to that litter authority;

(b) where the notice is given by an officer of Loch Lomond and The Trossachs National Park Authority authorised as mentioned in paragraph (b) of that definition, to that Authority.",

(c) in subsection (6)—

(i) the words from "a litter" to the end become paragraph (a) of that subsection, and

(ii) after that paragraph insert—

"(b) Loch Lomond and The Trossachs National Park Authority, shall accrue to that Authority.",

(d) in subsection (8), in paragraph (a)(ii), for the words from "the" where it first occurs to "committed" substitute "a proper officer",

(e) after subsection (8) insert—

"(8A) In subsection (8) above, "proper officer" means—

(a) in a case where a notice under this section is given as mentioned in paragraph (a) of subsection (5A) above, the officer who has, as respects the litter authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration);

(b) in a case where a notice is given as mentioned in paragraph (b) of that subsection, the proper officer for that Authority appointed under paragraph 12(3) of schedule 2 to the National Parks (Scotland) Act 2000.

(8B) If an authorised person proposes to give a person a notice under this section, the authorised person may require the person to give him his name and address.

(8C) A person commits an offence if he fails to give his name and address when required to do so under subsection (8B) above.

(8D) A person who commits an offence under subsection (8C) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale.",

(f) in subsection (10)—

(i) for the definition of "authorised officer" substitute—

""authorised person" means—

(a) an officer of a litter authority who is authorised in writing by the authority for the purpose of issuing notices under this section in relation to an offence under section 87 above committed in the area of the authority;

(b) an officer of Loch Lomond and The Trossachs National Park Authority who is authorised in writing by the Authority for the purpose of issuing notices under this section in relation to an offence under section 87 above committed in the area designated as the National Park for which the Authority is established; or

(c) such other persons as may be specified by order made by the Scottish Ministers.", and

(ii) the definition of "proper officer" is repealed, and

(g) after subsection (10) insert—

"(10A) The Scottish Ministers may by order make such modifications of this section as they consider necessary or expedient in connection with the specification of a person by an order under paragraph (c) of the definition of "authorised person" in subsection (10) above.

(10B) An order under subsection (10A) above may include—

(a) provision applying any provision of this section to such a person with such modifications as may be specified in the order;

(b) provision for any such provision not to apply in relation to such a person.".

Criminal Procedure (Scotland) Act 1995

12 In section 249 of the Criminal Procedure (Scotland) Act 1995 (compensation order against convicted person), after subsection (10) add—

"(11) This section is subject to section 26 of the Regulatory Reform (Scotland) Act 2013.".

Reservoirs (Scotland) Act 2011

13 (1) The Reservoirs (Scotland) Act 2011 is amended as follows.

(2) Sections 78 to 81 (enforcement undertakings, fixed monetary penalties, fixed monetary penalties: procedure and fixed monetary penalties: criminal proceedings and conviction, etc.) are repealed.

(3) In section 82 (further enforcement measures)—

(a) in subsection (4)—

(i) for the word "any" substitute "either",

(ii) paragraph (a) is repealed,

(b) in subsection (5), the definition of "variable monetary penalty" is repealed.

(4) In section 83 (further enforcement measure: procedure), subsections (6)(b) and (7)(c) are repealed.

(5) In section 84 (further enforcement measures: criminal proceedings and conviction), subsection (3)(b) is repealed.

(6) In section 86 (consultation in relation to certain orders), in subsection (1), paragraphs (b) and (c) are repealed.

(7) In the title of section 86, the words ", 78(1), 79(1)" are omitted.

(8) In section 87 (guidance as to use of stop notices, etc.), paragraphs (b) and (c) are repealed,

(9) In the title of section 87, the words ", fixed monetary penalties" are omitted.

(10) In section 89 (guidance: appeals), the words ", 78, 80," are repealed.

(11) In section 90 (publication of enforcement action)—

(a) in subsection (2), paragraph (b) is repealed,

(b) in subsection (3) the words ", fixed monetary penalty" are repealed.

(12) In section 114 (orders and regulations), in subsection (4)(f), the words ", 78(1), 79(1)" are repealed.

(13) In the schedule (index of defined expressions), the entries in the first column relating to "enforcement undertaking" and "fixed monetary penalty", and the corresponding interpretation provisions in the second column, are repealed.

PART 3

PURPOSES OF SEPA

Environment Act 1995

14 (1) The Environment Act 1995 is amended as follows.

(2) In section 31 (guidance on sustainable development and other aims and objectives), after subsection (2) insert—

"(2A) The Scottish Ministers may give guidance to SEPA with respect to the carrying out of its duties under section 20A.".

(3) In the title to section 31, after "on" insert "SEPA's general purpose and on".

(4) Section 32 (general environmental and recreational duties) is repealed.

(5) In section 33 (general duties with respect to pollution)—

(a) subsections (1), (4) and (5) are repealed,

(b) in subsection (2)—

(i) for "shall" substitute "may",

(ii) in paragraph (a), the words "pollution control" are repealed,

(iii) in paragraph (b), the words "pollution of" are repealed,

(iv) for "such pollution" substitute "the general state of the environment".

(6) The title to section 33 becomes "**General duties as respects the state of the environment and effects of pollution**".

(7) Section 34 (general duties with respect to water) is repealed.

(8) Section 36 (codes of practice with respect to environmental and recreational duties) is repealed.

(9) In section 39 (general duty of the new Agencies to have regard to the costs and benefits in exercising powers)—

(a) in subsection (1), for "Each new" substitute "The",

(b) in subsection (2), for "a new" substitute "the".

(10) In the title to section 39, for the words "new Agencies" substitute "Agency".

(11) In section 81 (functions of the new Agencies), in subsection (2)—

(a) the word "means" is repealed,

(b) at the beginning of paragraph (a) insert "means",

(c) in paragraph (b), for the words from "the functions" to the end of the paragraph, substitute "has the same meaning as in section 108(15) below in relation to SEPA".

Water Industry (Scotland) Act 2002

15 In schedule 7 to the Water Industry (Scotland) Act 2002 (modifications of other enactments), paragraph 24(2) is repealed.

PART 4

CONTROL OF POLLUTION ACT 1974

16 (1) The Control of Pollution Act 1974 is amended as follows.

(2) The following provisions are repealed—

(a) section 30B (classification of quality waters),

(b) section 30C (water quality objectives),

(c) section 30D (general duties to achieve and maintain objectives, etc.),

(d) section 30E (consultation and collaboration),

(e) section 31B (nitrate sensitive areas),

(f) section 31C (registering of agreement),

(g) section 41 (registers),

(h) section 42A (exclusion from registers of information affecting national security),

(i) section 42B (exclusion from registers of certain confidential information),

(j) section 43 (control of discharges into sewers),

(k) section 44 (provisions supplementary to section 43),

(l) section 45 (early variation of conditions of discharges),

(m) section 52 (charges in respect of certain discharges in England and Wales),

(n) section 57 (periodical inspections by local authorities),

(o) sections 63 to 67 (noise abatement zones),

(oa) section 69 (execution of works by local authority),

(p) in section 87 (miscellaneous provisions relating to legal proceedings), subsection (3),

(q) section 88 (civil liability for contravention of section 3(3)),

(r) section 90 (establishment charges and interest in respect of certain expenses of authorities),

(s) section 101 (disposal of waste etc. by Atomic Energy Authority),

(t) Schedule 1 (noise abatement zones), and

(u) Schedule 1A (orders designating nitrate sensitive areas: Scotland).

(2A) In section 30Y (introductory), in subsection (1) (meaning of "abandonment" in relation to a mine), in paragraph (b)—

(a) the word "or" immediately following sub-paragraph (i) is repealed, and

(b) after sub-paragraph (ii) insert "or

(iii) any disclaimer by notice signed by the Queen's and Lord Treasurer's Remembrancer under section 1013 of the Companies Act 2006 (Crown disclaimer of property vesting as *bona vacantia*).".

(3) In section 51 (codes of good agricultural practice), in subsection (2), the words from "but" to the end of the subsection are repealed.

(4) In section 55A (regulations under Part 2), the words "and sections 43 to 45" are repealed.

(5) In section 56 (interpretation etc. of Part 2)—

(a) in subsection (1)—

(i) in the definition of "coastal waters", "controlled waters", "ground waters", "inland waters" and "relevant territorial waters", for the words from the beginning to "meanings" substitute ""controlled waters" has the meaning",

(ii) the definitions of "effluent", "micro-organism", "operations", "sewage effluent", "substance" and "trade effluent" are repealed,

(b) subsections (3), (5) and (6) are repealed.

(6) In section 73 (interpretation and other supplementary provisions)—

(a) in subsection (1), the definitions of the following expression are repealed—

(i) "noise abatement order" and "noise abatement zone",

(ii) "noise level register",

(iii) "noise reduction notice", and

(iv) "person responsible",

(b) in subsection (2), for the words "sections 62 to 67" in both places where they occur, substitute "section 62".

(7) In section 74 (penalties)—

(a) in subsection (1), in paragraph (a), the words "in the case of a first offence against this Part of this Act," are repealed,

(b) the words from "; and" immediately following that paragraph to the end of the section are repealed.

(7A) In section 104 (orders and regulations)—

(a) in subsection (1), the following words are repealed—

(i) "(except sections 63 and 65(6))", and

(ii) "regulations made by virtue of section 18 of this Act or", and

(b) in subsection (2), the following words are repealed—

(i) "regulations shall be made by virtue of section 18 of this Act and no", and

(ii) "regulations or".

(8) In section 105 (interpretation etc. – general), in subsection (1), the definition of "trade effluent" is repealed.

PART 5

MISCELLANEOUS ENACTMENTS

Scottish Board of Health Act 1919

16A In the Scottish Board of Health Act 1919, in section 4 (transfer of powers and duties to and from the Board), paragraph (d) of subsection (1) is repealed.

Local Government (Scotland) Act 1973

17 In the Local Government (Scotland) Act 1973, in Schedule 27 (adaptation and amendment of enactments), paragraphs 146 to 148 are repealed.

Local Government, Planning and Land Act 1980

18 In the Local Government, Planning and Land Act 1980, in Schedule 2 (relaxation of controls over functions relating to clean air and pollution), paragraphs 10, 14 and 18 are repealed.

Litter Act 1983

19 In the Litter Act 1983—

(a) in section 4 (consultation and proposals for abatement of litter), subsections (4), (4ZA), (4A) and (5) are repealed,

(b) in section 9 (orders), subsection (3) is repealed,

(c) in section 13 (short title, commencement and extent), in subsection (4), the words "4(4)," are repealed.

Water Act 1989

19A In the Water Act 1989, in Schedule 23 (control of water pollution in Scotland), paragraphs 2 and 3 are repealed.

Planning (Consequential Provisions) Act 1990

19B In the Planning (Consequential Provisions) Act 1990, in Schedule 2 (consequential amendments), paragraph 31(1) is repealed.

Environmental Protection Act 1990

20 In the Environmental Protection Act 1990—

(za) in section 79 (statutory nuisances and inspections therefor), in subsection (10), the words from "Part I" to "under", where it third occurs, are repealed,

(zb) in section 80 (summary proceedings for statutory nuisances)—

(i) in paragraph (a) of subsection (9), the words "or 65" are repealed,

(ii) paragraph (b) of that subsection, and the word "or" immediately preceding it, are repealed,

(iii) paragraph (c) of that subsection, and the word "or" immediately preceding it, are repealed, and

(iv) subsection (10) is repealed,

(a) section 84 (termination of Public Health Act controls over offensive trades, etc.) is repealed,

(b) section 145 (penalties for offences of polluting controlled waters, etc.) is repealed,

(c) in Schedule 15 (consequential and minor amendments of enactments)—

(zi) paragraph 2 is repealed,

(i) in paragraph 15, sub-paragraphs (2) and (4) are repealed,

(ii) paragraph 17 is repealed.

(d) in Schedule 16 (repeals), in Part 1 (enactments relating to processes), the entry relating to 1990 c.43 (Environmental Protection Act 1990) is repealed.

Natural Heritage (Scotland) Act 1991

21 (1) Section 24 of the Natural Heritage (Scotland) Act 1991 (rights of entry and inspection under Parts 2 and 3) is amended as follows.

(2) In subsection (1)—

(a) in the opening words, the words "SEPA or" are repealed,

(b) in paragraph (a)—

(i) the words "SEPA or" are repealed,

(ii) the words "II or" are repealed,

(c) in paragraph (c)—

(i) for the words "either of these Parts" substitute "Part III",

(ii) for the words "one of these Parts" substitute "that Part".

(3) In subsection (9), the words "SEPA or", in both places where they occur, are repealed.

(4) In the title to section 24, for the words "Parts II and III" substitute "Part III".

Agricultural Holdings (Scotland) Act 1991

22 In section 26 of the Agricultural Holdings (Scotland) Act 1991 (certificates of bad husbandry), subsection (2) is repealed.

Clean Air Act 1993

22A In the Clean Air Act 1993, in section 42 (colliery spoilbanks)—

(a) in subsection (2), for the words "or quarry" substitute ", or the operator of a quarry,", and

(b) in subsection (6), for the words from "mine" to the end substitute—

""mine" is to be construed in accordance with section 180 of the Mines and Quarries Act 1954;

"operator", in relation to a quarry, has the meaning given by regulation 2(1) of the Quarries Regulations 1999 (S.I. 1999/2024);

"owner", in relation to a mine, is to be construed in accordance with section 181(1) and (4) of the Mines and Quarries Act 1954;

"quarry" is to be construed in accordance with regulation 3 of the Quarries Regulations 1999.".

Radioactive Substances Act 1993

23 In the Radioactive Substances Act 1993, in Schedule 3 (enactments other than local enactments to which section 40 applies)—

(a) paragraph 11 is repealed,

(b) in paragraph 16—

(i) the words ", 30B, 30D, 41 to 42B" are repealed,

(ii) for "(3)" substitute "(2)".

Local Government etc. (Scotland) Act 1994

24 In the Local Government etc. (Scotland) Act 1994, in Schedule 13 (minor and consequential amendments), sub-paragraphs (3), (5) and (10) of paragraph 95 are repealed.

Environment Act 1995

25 (1) The Environment Act 1995 is amended as follows.

(1A) In section 21 (transfer of functions to SEPA)—

(a) in subsection (1)—

(i) paragraph (a)(i), (iii) and (iv) are repealed,

(ii) in paragraph (a)(ii), the words from "Part III" to "and" are repealed,

(iii) paragraphs (c), (d), (f) and (h) are repealed, and

(b) in subsection (2), paragraph (b) is repealed.

(2) Section 23 (functions of the staff commission established under section 12 of the Local Government etc. (Scotland) Act 1994) is repealed.

(2A) In section 56 (interpretation of Part 1), in subsection (1), in the definition of "disposal authority", paragraph (b) is repealed.

(2B) In section 91 (interpretation of Part 4), in subsection (1), in the definition of "action plan", for "84(2)(b)" substitute "84(2)".

(2C) In section 110 (offences)—

(a) in subsection (1), after "to" insert "assault, hinder or",

(b) in subsection (4)—

(i) in paragraph (a), after "of" where it second occurs insert "assaulting, hindering or",

(ii) in sub-paragraph (i) of that paragraph, after "maximum" insert "or to imprisonment for a term not exceeding 12 months, or to both",

(iii) in paragraph (b), for the words "level 5 on the standard scale" substitute "the prescribed sum within the meaning of section 225(8) of the Criminal Procedure (Scotland) Act 1995 or to imprisonment for a term not exceeding 12 months, or to both", and

(c) after subsection (5) insert—

"(5A) A person may be convicted of the offence under subsection (1) above of hindering or obstructing even though it is—

(a) effected by means other than physical means, or

(b) effected by action directed only at any vehicle, apparatus, equipment or other thing used or to be used by an authorised person.

(5B) Subsection (5C) applies where, in the trial of a person ("the accused") charged in summary proceedings with an offence under subsection (1) above, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under subsection (2) above.

(5C) The court may acquit the accused of the charge and, instead, find the accused guilty of an offence under subsection (2) above.".

(3) In section 114 (power of the Scottish Ministers to delegate functions relating to appeals), subsections (2)(a)(i) and (3)(b) are repealed.

(3A) In Schedule 11 (air quality: supplemental provisions)—

(a) in paragraph 1(1)(b), the words "or 84" are repealed, and

(b) in paragraph 4(2)(b), the words "or 84" are repealed.

(4) In schedule 20 (delegation of appellate functions of the Scottish Ministers), paragraph 4(3)(a) is repealed.

(5) In Schedule 22 (minor and consequential amendments)—

(za) paragraph 1 is repealed,

(a) in paragraph 29—

(i) in sub-paragraph (2), for the words from "section 30C(1)" to the end of that sub-paragraph, substitute "section 51",

(ii) sub-paragraphs (4)(b) to (e), (5), (6), (8), (9)(a) and (b), (10) to (15), (17) to (22), (25), (26), (29) and (30) are repealed,

(aa) paragraph 93 is repealed,

(b) in paragraph 96, sub-paragraphs (2) to (5), (7) and (8) are repealed.

(7) In Schedule 23 (transitional and transitory provisions and savings), the following paragraphs are repealed—

(a) paragraph 4,

(c) paragraph 6,

(d) paragraph 8, and

(e) paragraph 18.

25A The amendments made by paragraph 25 to subsection (4) of section 110 of the Environment Act 1995 do not affect the penalty for an offence under that section committed before the coming into force of those amendments.

Criminal Procedure (Scotland) Act 1995

25B(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 277 (transcript of police interview sufficient evidence)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert "; or

(c) a person authorised by the Scottish Environment Protection Agency under section 108 of the Environment Protection Act 1995 and an accused person.", and

(b) after subsection (4) add—

"(5) Subsection (1) is without prejudice to section 108(12) of the Environment Act 1995.".

(3) In section 280 (routine evidence)—

(a) after subsection (3), insert—

"(3A) For the purposes of any criminal proceedings, a report purporting to be signed by a person authorised by the Scottish Environment Protection Agency for the purpose of this subsection is sufficient evidence of any fact or conclusion as to fact contained in the report and of the authority of the signatory.", and

(b) in subsection (6)—

(i) after "(1)", where it first occurs, insert ", (3A)", and

(ii) in paragraph (b), after "subsection", where it second occurs, insert "(3A) or".

(4) In Schedule 9 (certificates as to proof of certain routine matters)—

(a) in the table, omit the entry relating to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 Regulation 40, and

(b) at the end of the table insert the following entries—

"The Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209)		
Regulation 44	A person authorised to do so by the Scottish Environment Protection Agency	That the person has analysed a sample identified in the certificate (by label or otherwise) and that the sample is of a nature and composition specified in the certificate.
Regulations made by virtue of section 10 of the Regulatory Reform (Scotland) Act 2013 (asp 00)	A person authorised to do so by a regulator (within the meaning of paragraph 3(1) of schedule 2 to that Act)	That the person has analysed a sample identified in the certificate (by label or otherwise) and that the sample is of a nature and composition specified in the certificate.
		In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person held or, as the case may be, did not hold a permit (within the meaning of paragraph 33 of schedule 2 to that Act) granted by such a regulator and, where the

			person held such a permit, any condition to which the permit is subject. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person held or, as the case may be, did not hold registration (within the meaning of paragraph 33 of schedule 2 to that Act) granted by such a regulator and, where the person held such registration— (a) any condition to which the registration is subject; (b) whether the registration subsisted on the date specified in the certificate. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person had given notification (within the meaning of paragraph 33 of schedule 2 to that Act) to such a regulator and, where the person gave such notification, whether the notification subsisted on the date specified in the certificate. In relation to a permit or registration (in each case within the meaning of paragraph 33 of schedule 2 to that Act) a description of any variation, transfer, surrender, suspension or

		revocation of the permit or registration. In relation to a person specified in the certificate that, on a date so specified, such regulator served on the person a notice mentioned in paragraph 18 of schedule 2 to that Act. That such a regulator has, in pursuance of paragraph 4(3)(d) of schedule 2 to that Act, made general binding rules as mentioned in that paragraph, or has, in pursuance of paragraph 11 of that schedule, made standard rules as mentioned in that paragraph; and the content of those general binding rules or standard rules.”.

Town and Country Planning (Scotland) Act 1997

26 In the Town and Country Planning (Scotland) Act 1997, in section 275 (regulations and orders), the subsection numbered “(2A)” inserted by section 54(16)(a) of the Planning etc. (Scotland) Act 2006 is renumbered as “(2B)”.

Planning (Consequential Provisions) (Scotland) Act 1997

26A In the Planning (Consequential Provisions) (Scotland) Act 1997, in Schedule 2 (consequential amendments), paragraph 23(1) is repealed.

Crime and Punishment (Scotland) Act 1997

27 In the Crime and Punishment (Scotland) Act 1997, in section 30 (routine evidence)—

(a) in subsection (1), for the words “subsections (2) and (3)” substitute “subsection (3)”,

(b) subsection (2) is repealed.

City of Edinburgh (Guided Busways) Order Confirmation Act 1998

28 In the City of Edinburgh (Guided Busways) Order Confirmation Act 1998, in section 29 (connection of drains, etc, with streams, etc.) of the Order contained in the Schedule confirmed by section 1 of that Act, subsection (4) is repealed.

Pollution Prevention and Control Act 1999

28A In the Pollution Prevention and Control Act 1999, in Schedule 3 (repeals), in the third column of the entry relating to the Environmental Protection Act 1990, the words "In section 79(10), the words "under Part I or"" are repealed.

Antisocial Behaviour etc. (Scotland) Act 2004

29 In the Antisocial Behaviour etc. (Scotland) Act 2004, in schedule 2 (penalties for certain environmental offences), paragraph 2 is repealed.

Forth Crossing Act 2011

30 In section 70 of the Forth Crossing Act 2011 (control of noise: Control of Pollution Act 1974), subsection (3) is repealed.

PART 6

MODIFICATIONS OF REFERENCES TO "ENACTMENT" ETC.

Control of Pollution Act 1974

31 (1) The Control of Pollution Act 1974 is amended as follows.

(2) In section 73 (interpretation and other supplementary provisions), after subsection (3) insert—

"(3A) In the definition of "statutory undertakers" in subsection (1), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 85 (appeals to Crown Court or Court of Session against decisions of magistrates' court or sheriff), after subsection (3) add—

"(4) In subsection (2), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 105 (interpretation etc. – general), in subsection (2)(b), after "private" add "or by or under any Act of the Scottish Parliament".

Environmental Protection Act 1990

32 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 33 (prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste), after subsection (10) add—

"(11) In subsection (4)(c) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 57 (powers of the Scottish Ministers to require waste to be accepted, treated, disposed of or delivered), after subsection (7) insert—

"(7A) In subsection (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 63 (waste other than controlled waste), after subsection (4) add—

"(5) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(5) In section 73 (appeals and other provisions relating to legal proceedings and civil liability), after subsection (9) add—

"(10) In subsection (2) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(6) In section 78X (supplementary provisions), after subsection (4) insert—

"(4A) In subsection (4)(f)(i) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(7) In section 79 (statutory nuisances and inspections therefor), after subsection (6A) insert—

"(6B) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(8) In section 98 (definitions for Part 6), after subsection (6), insert—

"(6A) In subsection (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(9) In section 140 (power to prohibit or restrict the importation, use, supply or storage of injurious substances or articles), in subsection (11), before the definition of "the environment" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(10) In Schedule 4 (abandoned shopping and luggage trolleys), after paragraph 1(2) add—

"(3) In sub-paragraph (2)(d) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Natural Heritage (Scotland) Act 1991

32A(1) The Natural Heritage (Scotland) Act 1991 is amended as follows.

(2) In section 7 (powers of entry), after subsection (11) add—

"(12) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In Schedule 1 (constitution and proceedings of Scottish Natural Heritage), after paragraph 17(2) add—

"(3) In sub-paragraph (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Radioactive Substances Act 1993

33 (1) The Radioactive Substances Act 1993 is amended as follows.

(2) In section 40 (radioactivity to be disregarded for purposes of certain statutory provisions), in subsection (3)—

(a) in the definition of "statutory provision", in paragraph (a), after "Act" insert "or Act of the Scottish Parliament",

(b) in the definition of "local enactment"—

(i) after paragraph (a) insert—

"(aa) an Act of the Scottish Parliament the Bill for which was a private Bill for the purposes of the standing orders of the Scottish Parliament,",

(ii) in paragraph (b), after "by", where it second occurs, insert "the Scottish Parliament,".

(3) In section 46 (effect of Act on other rights and duties), in paragraph (b)—

(a) the words from "any", where it second occurs, to the end of that paragraph become sub-paragraph (i) of that paragraph,

(b) after that sub-paragraph insert—

"(ii) any Act of the Scottish Parliament, or".

Environment Act 1995

34 (1) The Environment Act 1995 is amended as follows.

(2) In section 27 (power of SEPA to obtain information about land), after subsection (3) add—

"(4) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 30 (records held by SEPA), after subsection (3) add—

"(4) In subsection (3) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 37 (incidental general functions), after subsection (8) insert—

"(8A) In subsection (8) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(5) In section 38 (delegation of functions by Ministers etc. to new Agencies), in subsection (10) after the definition of "eligible function" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(6) In section 40 (ministerial directions to the new Agencies), after subsection (8) add—

"(9) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(7) In section 43 (incidental power of the new Agencies to impose charges)—

(a) the existing text becomes subsection (1) of that section,

(b) after that subsection add—

"(2) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(8) In section 53 (inquiries and other hearings), after subsection (3) add—

"(4) In subsections (1) and (3) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(9) In section 87 (regulations for the purposes of Part 4), after subsection (9) add—

"(10) In subsection (5)(c) above, "enactment" includes an enactment comprised in an Act of the Scottish Parliament.".

(10) In section 108 (powers of enforcing authorities and persons authorised by them), in subsection (15)—

(a) in the definition of "pollution control enactments" at the end add "(including any enactments comprised in, or in instruments made under, an Act of the Scottish Parliament relating to those functions).",

(b) in the definition of "pollution control functions" in relation to the Scottish Ministers, after "instrument" insert "(including any enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament)".

(11) In section 113 (disclosure of information), in subsection (5), after the definition of "new Agency" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(12) In section 122 (directions), after subsection (5) insert—

"(6) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(13) In Schedule 6 (the Scottish Environment Protection Agency), in paragraph 15, after sub-paragraph (2) add—

"(3) In sub-paragraph (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(14) In Schedule 11 (air quality: supplemental provisions), in paragraph 5, after sub-paragraph (6) add—

"(7) In the definition of "fixed penalty offence" in sub-paragraph (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Flood Risk Management (Scotland) Act 2009

35 Section 78 of the Flood Risk Management (Scotland) Act 2009 (SEPA's power to obtain information about land) is repealed.

Regulatory Reform (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to enable provision to be made for the purpose of promoting regulatory consistency; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

Introduced by: John Swinney
Supported by: Paul Wheelhouse, Fergus Ewing
On: 27 March 2013
Bill type: Government Bill

REGULATORY REFORM (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Regulatory Reform (Scotland) Bill (introduced in the Scottish Parliament on 27 March 2013) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – OVERVIEW

4. The Bill is in five Parts:

- Part 1 – Regulatory functions
- Part 1A – Primary authorities
- Part 2 – Environmental regulation
- Part 3 – Miscellaneous, including marine licensing; planning authorities' functions: charges and fees; and street traders' licences
- Part 4 – General provisions

Part 1 – Regulatory functions

5. This Part makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.

Part 1A – Primary authorities

6. This Part makes provision for the Scottish Ministers to nominate a local authority as a primary authority in respect of an activity carried on by a person (a "regulated person), where the regulated person carries on the activity in the area of two or more local authorities, and each of those authorities has the same regulatory function in respect of the regulated person.

Part 2 – Environmental regulation

7. This Part is divided into 6 Chapters.

8. Chapter 1 provides that the Scottish Ministers may make provision for or in connection with protecting and improving the environment, including provision regulating environmental activities and provision implementing EU obligations relating to protecting and improving the environment. It introduces schedule 2.

9. Chapter 2 provides that the Scottish Ministers may by order make provision:

- for or about the imposition by SEPA of fixed monetary penalties and variable monetary penalties,
- to enable SEPA to accept an enforcement undertaking from a person who SEPA reasonably suspects has committed a 'relevant offence' (as defined in section 39), and make provision for penalties where such undertakings are not complied with.

10. It also provides that the Lord Advocate may issue guidance to SEPA on the exercise of its functions relating to such penalties and undertakings.

11. Chapter 3 provides that the courts may make compensation orders in relation to persons convicted of a relevant offence; that they have to consider the financial benefit that has accrued to an offender when determining the amount of the fine to impose in respect of a relevant offence; and that they may require offenders convicted of a relevant offence to publicise information about the offence (a 'publicity order').

12. It also provides that if an organisation fails to comply with a publicity order, and the commission of the offence is attributable to the connivance, consent or negligence of a responsible official of the organisation, the official also commits the offence.

13. Chapter 4 makes miscellaneous provision. In particular, it provides:

- for the vicarious criminal liability of employers or principals for environmental offences committed by their employees or agents,
- for an offence of acting, or failing to act in a way that causes or is likely to cause significant environmental harm (or permitting another to act or not to act in a way that causes or is likely to cause such harm),
- for the courts to have power to order persons convicted of an offence to remedy or mitigate the harm (a 'remediation order'),

- for an enforcement authority to issue a fixed penalty notice for offences in regulations made under section 88 of the Climate Change (Scotland) Act 2009 (offences relating to the supply of carrier bags),
- for the prosecutor to have a right of appeal against a decision of the court not to make a publicity order or a remediation order,
- for a local authority to be able—
    - to issue a notice that land identified as contaminated under the provisions of Part 2A of the Environmental Protection Act 1990 is no longer contaminated, and
    - to remove an entry for a special site from the contaminated land register maintained under that Part, and for the effect of the removal of such an entry,
- for the amendment of powers of enforcing authorities and persons authorised by them under section 108 of the Environment Act 1995,
- that waste carrier regulations may authorise a registration authority to refuse an application for registration as a waste carrier, or authorise revocation of a registration, where—
    - the applicant or carrier is a member of a partnership convicted of an offence, or
    - the applicant or carrier is a partnership, and a member of the partnership has been convicted of an offence;
- that where the holder of a waste management licence must be a 'fit and proper' person to hold the licence, and for that purpose that neither the holder nor a relevant person must have been convicted of an offence, that a relevant person is—
    - a partnership of which the holder is a member, or
    - where the holder is a partnership, a member of the partnership, and
- for the Scottish Ministers to be able to authorise the use of certain fuels and fireplaces in a smoke control area declared by a local authority under Part III of the Clean Air Act 1993, by publishing a list of such fuels and fireplaces.

14. Chapter 5 provides that SEPA must carry out the functions conferred on it by or under the Bill or any other enactment for the purpose of protecting and improving the environment, and in doing so must, so far as it is consistent with that purpose, contribute to-

- improving the health and well-being of the people in Scotland, and
- achieving sustainable economic growth.

15. Chapter 6 defines terms for the purposes of Part 2.

Part 3 – Miscellaneous

16. This Part makes provision for a statutory right of appeal in relation to marine licensing decisions; about charges and fees payable to planning authorities; and in relation to applications for street traders' licences for mobile food businesses.

Part 4 – General

17. This Part contains general provisions, including the delegation of a power to the Scottish Ministers to make by order such consequential provision as they consider necessary or expedient.

Schedule 1

18. This schedule lists regulators for the purposes of Part 1.

Schedule 2

19. This schedule sets out the purposes for which regulations under section 10 may be made.

Schedule 3

20. This schedule makes minor and consequential modifications of other enactments.

THE BILL – SECTION BY SECTION

PART 1 – REGULATORY FUNCTIONS

21. This Part makes provision to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles.

Regulations to encourage or improve regulatory consistency

Section 1: Power as respects consistency in regulatory functions

22. This section enables the Scottish Ministers to make regulations containing provision that they consider will (when taken together and when read with other powers under this Part) encourage or improve consistency in the exercise of regulatory functions by one or more regulators in schedule 1 (a "listed regulator"). The regulations may, for example, set out the procedures to be followed by a listed regulator in carrying out a function. They may also require listed regulators to co-operate or co-ordinate activity with each other. In terms of section 44(4), any such regulations are subject to the affirmative procedure.

Section 2: Regulations under section 1: further provision

23. This section makes clear that the regulations may require a listed regulator to impose, set, secure compliance with or enforce a requirement, restriction, condition, standard or outcome (a

"regulatory requirement"), including imposing or setting a new regulatory requirement(to the extent that a regulator has the power to impose or set it).

24. The regulations can also amend or remove a regulatory requirement that was imposed or set at the discretion of a listed regulator. However, if an enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be modified or removed if the regulations otherwise make provision having an equivalent effect.

25. The Scottish Ministers may direct that any provision of the regulations is, for a temporary period of up to 6 months, not to apply to a particular regulator or is to apply with modifications. This enables adjustments to be made quickly to take account of unforeseen circumstances. If any such adjustment needs to remain in place for a longer period, the regulations can be amended. Any direction given must be published.

Compliance and enforcement

Section 3: Regulations under section 1: compliance and enforcement

26. This section provides that a listed regulator must comply with regulations under section 1 to the extent that it is able to do so. If a regulator fails to comply, it may be directed to take steps to remedy the breach, failing which the Scottish Ministers may do so or may arrange for another person to do so (and recover the costs as a civil debt).

Exercise of regulatory functions: economic duty and code of practice

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

27. This section places a duty on a listed regulator to exercise its regulatory functions in a way that contributes to sustainable economic growth. In carrying out the duty, listed regulators must have regard to relevant guidance given to them by the Scottish Ministers. This guidance must be published.

Section 5: Code of practice on regulatory functions

28. This section makes provision for the Scottish Ministers to issue a code of practice in relation to the exercise of regulatory functions by specified regulators in schedule 1. Each regulator must have regard to the code, which must be published, in exercising its regulatory functions and also in determining any general policy or principles adopted in relation to the exercise of those functions.

Section 6: Code of practice: procedure

29. This section sets out the procedure to be followed in relation to issuing the code (or a revised code). In preparing a draft, the Scottish Ministers must seek to ensure that it is consistent with the principles of better regulation and also the principle that regulatory functions should, where possible, be carried out in a way that contributes to achieving sustainable economic growth. Ministers cannot issue the code unless a draft has been laid before and approved by the Parliament.

Power to modify list of regulators

Section 7: Power to modify schedule 1

30. This section enables the Scottish Ministers, by order, to amend the list of regulators in schedule 1 and to specify a function (or the extent to which a function) of any such regulator is (or is not) a regulatory function for the purposes of section 1, 4 or, as the case may be, 5. In terms of section 44, an order under this section is subject to the negative procedure, unless it adds a regulator to the list or adds (or extends) a regulatory function of a regulator on the list (for the purposes of sections 1, 4 or 5), in which case it is subject to the affirmative procedure.

PART 1A – PRIMARY AUTHORITIES

31. This Part makes provisions whereby businesses operating in several local authority areas can form a statutory partnership with one local authority, which then provides advice relating to the regulatory functions of local authorities.

Sections 7A-H

32. These sections make provision for primary authorities relating to regulatory functions of local authorities. They enable the Scottish Ministers to nominate a local authority to be the primary authority for a person where an activity is carried out in two or more local authorities.

33. The provisions in section 7D set out that suitable nominations may be the local authority for the area where the regulated person principally carries out the activity or where the activity is administered, and that a register of nominations must be maintained. A primary authority has the function of giving advice and guidance, and section 7E confers powers on the Scottish Ministers to make further provisions in respect of enforcement and inspection. Section 7G provides that the primary authority may charge fees representing the costs reasonably incurred in exercising primary authority functions. Section 7H sets out that the Scottish Ministers may issue guidance to local authorities about the operation of primary authorities and this must be published.

PART 2 – ENVIRONMENTAL REGULATION

CHAPTER 1 - REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

34. This Chapter confers powers on the Scottish Ministers to make, by regulations, provision for the purpose of protecting and improving the environment (the "general purpose").

Section 8: General purpose: protecting and improving the environment

35. This section sets out the general purpose, and specifies that the purpose extends to provision regulating environmental activities, and provision implementing EU obligations (such as the Industrial Emissions Directive (Directive 2010/75/EU) or other international obligations (such as the Convention on Wetlands of International Importance).

Section 9: Meaning of "environmental activities" and "protecting and improving the environment"

36. This section defines terms used in Chapter 1. In particular, it defines—

- "environmental activities" (see section 8) to cover activities which are capable of causing or liable to cause environmental harm, and
- "environmental harm" to cover a wide range of matters, including harm to the quality of the environment such as might be caused by (for example) polluting activities.

37. In this context, "activities" is also defined, so that it covers a broad range of matters including the production, treatment, keeping, depositing or disposal of substances. The effect is that the Bill enables the regulation under section 10 of a wide range of matters relating to environmental activities, and the prevention of environmental harm. Regulations under section 10 may make further provision in respect of environmental activities, including specifying other activities as environmental activities (see paragraph 1 of Part 1 of schedule 2).

Section 10: Regulations relating to protecting and improving the environment

38. Section 10 of the Bill enables the Scottish Ministers to make provision by regulations for any of the purposes specified in Part 1 of schedule 2 (as described below). Subsection (3) sets out that the provision that may be made is provision for and in connection with the matters specified in section 9.

39. Regulations under section 10 are subject to negative procedure, unless they add to, replace or omit of the text of an Act (see section 44).

40. The power is in broadly similar terms to the powers in section 2 of, and Schedule 1 to, the Pollution Prevention and Control Act 1999 (which are not repealed), and the powers in respect of controlled activities in section 20 of and schedule 2 to the Water Environment and Water Services Act 2003 (which are repealed: see schedule 3). The 1999 Act has, and will continue to have, UK extent so that provision may be made under that Act in respect of both reserved and devolved matters where a single UK wide measure is considered appropriate.

41. The power in section 10 might, for example, be used to consolidate in one instrument environmental protection measures made under different enactments including those currently in the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (SSI 2011/209) and the Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/36).

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

42. Subsection (1) requires the Scottish Ministers, before making regulations relating to protecting and improving the environment, to consult certain regulators and such other persons as they think fit. Subsection (2) has the effect that such consultation can be undertaken prior to the coming into force of this section.

CHAPTER 2 - SEPA'S POWERS OF ENFORCEMENT

43. This Chapter enables provision to be made that will confer additional enforcement powers on SEPA.

44. The additional enforcement powers are similar to those in Part 3 of the Regulatory Enforcement and Sanctions Act 2008, sections 46 to 50 of the Marine (Scotland) Act 2010 and sections 78 to 90 of the Reservoirs (Scotland) Act 2011. The effect of any conferral of powers under this Chapter will be to help ensure that SEPA will be able to operate in a consistent manner when discharging a full range of regulatory functions.

45. The additional powers, if conferred, would complement the similar powers under the Marine (Scotland) Act 2010 exercisable in respect of the marine environment. The similar powers in the Reservoirs (Scotland) Act 2011 in respect of 'civil sanctions' are repealed (see Schedule 3 to the Bill). That repeal can be commenced in a co-ordinated manner should the powers in this Chapter be conferred on SEPA.

Fixed monetary penalties

Section 12: Fixed monetary penalties

46. This section enables the Scottish Ministers to make provision by order for SEPA to impose fixed monetary penalties on persons who SEPA is satisfied, on the balance of probabilities, have committed a relevant offence. In terms of Section 44(3), any such order is subject to the affirmative procedure.

47. A fixed monetary penalty may not be imposed more than once in relation to the same offence constituted by the same act or omission. A penalty may however be imposed in relation to a different offence constituted by the same act or omission.

48. Relevant offences are those prescribed by order under section 39. For the purposes of imposing fixed penalty notices, these might include offences involving breach of a requirement for dry cleaners to report to SEPA quantities of solvent used and the total emission value per kilogram of fabric cleaned – information which SEPA requires to report to the European Commission. The amount of the fixed monetary penalty may be specified in the order, but may not in any event exceed level 4 on the standard scale of fines for offences triable summarily as provided by section 225 of the Criminal Procedure (Scotland) Act 1995 (currently £2,500 – see section 225(2)).

Section 13: Fixed monetary penalties: procedure

49. This section provides that any order about fixed monetary penalties that may be made under section 12 must secure the mandatory results specified in subsection (2) as read with subsection (6), and may secure the optional result specified in subsection (3). It has the effect that a notice of intent to impose a monetary penalty and a final notice must contain the information specified in subsections (4) and (5) respectively.

50. The mandatory results include that SEPA must issue a notice of intent prior to issuing a fixed monetary penalty, must provide an opportunity for a person served with such a notice to make written representations to SEPA, that SEPA is required to take any such representations into account before imposing a final notice, and that a person on whom a penalty is imposed may appeal against such imposition (see subsection (6)).

51. The optional result is that the notice of intent may offer the person an opportunity to discharge their liability to the monetary penalty by paying a sum that is less than or equal to the penalty that would otherwise apply. This would allow early payment of the amount of a fine to be made by a person at their discretion (possibly at a discount) without the delay and expense of proceeding to a final penalty notice, and is a common feature applied to systems with fixed and variable penalties.

Section 14: Fixed monetary penalties: criminal proceedings and conviction

52. This section has the effect that an order by the Scottish Ministers made under section 12 about fixed monetary penalties must secure the results specified in subsections (1) and (3).

53. Subsection (1) provides that where a notice of intent is served in respect of an offence constituted by an act or omission (see section 12(2)(a)) no criminal proceedings may be commenced for the offence in the period during which liability to the penalty may be discharged, or if the liability is discharged.

54. Subsection (1) as read with subsection (2) also has the effect that an order under section 12 must provide that the period between the date a notice of intent is served and the final day on which written representations may be made to SEPA in respect of that notice is not to be counted in calculating any period in which criminal proceedings may be brought for the offence to which the notice relates.

55. Subsection (3) provides that where a fixed monetary penalty is imposed in respect of such an offence no criminal proceedings may be commenced against the person on whom the penalty is imposed in respect of the offence constituted by that act or omission.

56. Subsection (4) provides for references in this section to "criminal proceedings" to be read as including the alternative disposals specified in that subsection.

Variable monetary penalties

Section 15: Variable monetary penalties

57. This section enables the Scottish Ministers to make provision by order for the imposition by SEPA of variable monetary penalties on persons who SEPA is satisfied, on the balance of probabilities, have committed a relevant offence. In terms of Section 44(3), any order made under this section is subject to the affirmative procedure.

58. A variable monetary penalty may not be imposed more than once in relation to the same offence constituted by the same act or omission. A penalty may however be imposed in relation to a different offence constituted by the same act or omission.

59. Relevant offences are those prescribed by order under section 39. For the purposes of imposing variable penalty notices these might include offences involving failure to comply with a general binding rule provided for in regulations made under section 10 and schedule 2, carrying waste without a registration, or carrying out minor engineering activities in water without appropriate authorisation.

60. The Scottish Ministers may specify the amount of the variable monetary penalty that can be imposed by SEPA, subject to a cap equivalent to the amount of the fine that could be imposed on summary conviction in the case specified in subsections (5)(a) and (6), or to the amount of £40,000 in any other case (except where the figure of £40,000 has been increased by an order made by the Scottish Ministers under subsection (7)).

Section 16: Variable monetary penalties: procedure

61. This section has the effect that any order made by the Scottish Ministers under section 15 about variable monetary penalties must secure the mandatory results specified in subsection (2) as read with subsections (5) and (6), and that a notice of intent and final notice must contain the information specified in subsections (3) and (4) respectively.

62. The mandatory results include the service of a notice of intent on any person on whom SEPA proposes to impose a variable monetary penalty, providing for a period within which a person served with such a notice may make representations to SEPA.

63. Subsection 2(c) as read with subsection (5) has the effect that the order must also permit an opportunity for the person to offer an undertaking as to action the person will take to restore the position as far as possible to what it would have been had the offence not been committed, to benefit the environment to the extent that commission of the offence has harmed the environment, and/or secure no financial benefit accrues to the person. SEPA must be able to accept or reject such an undertaking, and must take any undertaking that it decides to accept into account when deciding whether to impose a variable monetary penalty.

64. The order must provide a right of appeal against the imposition of the variable monetary penalty, including on the grounds set out in subsection (6).

Section 17: Variable monetary penalties: criminal proceedings and conviction

65. This section requires the Scottish Ministers, if they make an order under section 15 about variable monetary penalties, to include provision about the interaction between variable monetary penalties, undertakings accepted under section 16(5) and criminal proceedings, so as to avoid a person being sanctioned twice in relation to the same offence constituted by the same act or omission, and to extend the time available to commence criminal proceedings if a variable monetary penalty is not served and an undertaking is not accepted.

66. Subsection (5) provides for references in this section to "criminal proceedings" to be read as including the alternative disposals specified in that subsection.

Non-compliance penalties

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

67. This section enables the Scottish Ministers, if making an order under section 15 about variable monetary penalties, to include provision for a non-compliance penalty to be issued where an undertaking has been accepted by SEPA in response to a notice of intent to issue a variable monetary penalty (see section 16(2)(c) and (5)), but the undertaking has not been complied with.

68. Such provision may specify the amount of the non-compliance penalty, set criteria by which it should be calculated, empower SEPA to determine the amount (subject to any maximum amount set out in such provision) or provide for the amount to be determined in some other way. Subsection (2A) has the effect that the maximum amount of the non-compliance penalty may not exceed the maximum amount of the variable monetary penalty in the particular case.

69. If provision for non-compliance penalties is included in an order under section 15, the order must provide a right of appeal against the imposition of such a penalty on the grounds specified in subsection (4).

Enforcement undertakings

Section 19: Enforcement undertakings

70. This section enables the Scottish Ministers to make provision by order for enforcement undertakings. In terms of section 44(5), any such order is subject to the negative procedure.

71. An enforcement undertaking is a voluntary undertaking offered to SEPA by a person in a case where SEPA has reasonable grounds to suspect that the person has committed a relevant offence. The person may offer, and SEPA may accept, an undertaking to take certain actions, or to refrain from doing so (see subsection (7)). Relevant offences are those prescribed by order under section 39.

72. The action offered would be action to secure that the offence does not continue or recur, to secure that the position is, as far possible, restored to what it would have been if the offence had not been committed, or any other action that may be specified by the Scottish Ministers in the order.

73. An order providing for enforcement undertakings must provide that, once SEPA accepts an undertaking, criminal proceedings may not be commenced against that person for the offence constituted by the act or omission in respect of which the undertaking is accepted (nor may a fixed or variable monetary penalty be imposed on them in respect of the act or omission). If a person fails to comply (even in part) with an enforcement undertaking, then the person may be

prosecuted for the original offence or SEPA may impose a fixed or variable monetary penalty, and time limits for commencing criminal offences may be extended in those circumstances.

74. The order may include provision for SEPA to certify that an undertaking has not been complied with, and may stipulate the circumstances in which a person is to be regarded as having complied with such an undertaking. It may also provide that where a person has given inaccurate, misleading or incomplete information in relation to an undertaking then that person may be regarded as not having complied with it. The order is not required to set out a right of appeal against the terms of the enforcement undertaking since it is offered voluntarily, but the order may provide that there is a right of appeal against certification from SEPA that the undertaking has not been complied with. In addition, the Scottish Ministers may also provide in the order for the procedure for entering into an enforcement undertaking, the terms of such undertaking, publication of or monitoring of compliance with such an undertaking by SEPA, and variation of such an undertaking.

75. Subsection (6A) provides for references in this section to "criminal proceedings" to be read as including the alternative disposals specified in that subsection.

Operation of penalties and cost recovery

Section 20: Combination of sanctions

76. This section requires the Scottish Ministers, where they confer upon SEPA a power to issue a fixed or variable monetary penalty, to ensure that it is not possible to serve both a fixed and a variable monetary penalty in relation to the same offence constituted by the same act or omission.

77. The Scottish Ministers must also provide that a fixed or variable monetary penalty may not be issued where there has already been a prosecution or where a person has been given a warning, been sent a conditional offer, or accepted a compensation offer or a combined offer by the procurator fiscal, or a work order has been made against them.

Section 21: Monetary penalties

78. This section provides that orders made by the Scottish Ministers in relation to fixed monetary penalties, variable monetary penalties and non-compliance penalties may include provision for early payment discounts, interest or other penalties for late payments, enforcement of the penalty and recovery of the monetary penalty as if it were a civil debt. It also allows the order to facilitate recovery of such penalties by treating them as if they were payable under a civil court decree.

Section 22: Costs recovery

79. This section allows the Scottish Ministers to include in an order made under section 15 (variable monetary penalties) provision enabling SEPA to recover its investigation costs, administration costs and costs of obtaining expert advice (including legal advice) from a person who has been issued with a variable monetary penalty. Such provision, if made, must provide for SEPA to serve notice of the amount it is seeking to recover. It must also provide that the

person required to pay SEPA's costs may appeal against the decision to impose the cost recovery notice, and against the amount of the costs sought. Provision must also require SEPA to publish guidance about how it will exercise its power to recover such costs. The provisions of section 21 relating to interest, late payment penalties and recovery as a civil debt are applied to costs recoverable under this section.

Guidance

Section 23: Guidance as to use of enforcement measures

80. This section provides that the Lord Advocate may issue and revise guidance to SEPA in relation to the exercise of its functions relating to enforcement measures as defined in subsection (3) (fixed monetary penalties, variable monetary penalties or enforcement undertakings), and that SEPA must comply with such guidance.

81. It also provides that, where this Chapter of the Bill or any provision made under it confers powers upon SEPA to use any enforcement measures, any such provision must also require SEPA to publish guidance on specified matters relating to those measures. Any such provision must ensure that guidance published by SEPA includes specified information in relation to fixed and variable monetary penalties.

82. SEPA may revise guidance published by it from time to time and publish that revised guidance, and must consult the Lord Advocate and other appropriate persons before publishing any guidance or revised guidance.

Publication of enforcement action

Section 24: Publication of enforcement action

83. This section provides that an order made by the Scottish Ministers for the imposition of a fixed or variable monetary penalty by SEPA and the acceptance of an enforcement undertaking may also provide for SEPA to publish specified information on the cases where the procedures in those orders are applied.

Interpretation of Chapter 2

Section 25: Interpretation of Chapter 2

84. This section provides definitions for expressions used in Chapter 2.

CHAPTER 3 - COURT POWERS

Compensation orders

Section 26: Compensation orders against persons convicted of relevant offences

85. This section sets out provision for compensation orders. It provides that section 249 of the Criminal Procedure (Scotland) Act 1995, which makes general provision for compensation orders to be made by the courts, in addition allows the court to make a compensation order requiring compensation to be paid by a person convicted of a relevant offence. Compensation of

up to £50,000 in respect of costs incurred in preventing, reducing or remediating, or mitigating the effects of, any harm to the environment or any other harm, loss, damage or adverse impact resulting from that offence may be paid to SEPA, a local authority or an owner or occupier of land to which harm or adverse impact occurred.

86. The Scottish Ministers may by order change the maximum amount of compensation that may be the subject of such a compensation order. In terms of section 44(5), any such order is subject to the negative procedure.

Fines

Section 27: Fines for relevant offences: court to consider financial benefits

87. This section requires the criminal courts to have regard to any financial benefit which has accrued or is likely to accrue to a person convicted of a relevant offence in consequence of that offence in determining the amount of any fine.

Publicity orders

Section 28: Power to order conviction etc. for offence to be publicised

88. This section makes provision for the court to make a publicity order where a person is convicted of a relevant offence. Section 39 defines "relevant offence" for that purpose.

89. This is an additional sentencing option for the criminal courts to use where appropriate after having regard to any representations from the prosecutor or the convicted person. A publicity order may be made alongside or in place of other sentences that may be imposed for a relevant offence. The publicity order would require a person convicted of a relevant offence to publicise, in a manner specified in the order, the fact that the person has been convicted of the offence, the details of the offence and any other sentence passed by the court, including a fine or compensation order. A publicity order must set out the period within which the publicity requirements must be complied with, and may require the convicted person to supply SEPA with evidence that those requirements have been met.

90. This section also makes it an offence, punishable on summary conviction to a fine not exceeding £40,000 and on conviction on indictment to an unlimited fine, to fail to comply with a publicity order.

Section 28A: Corporate offending

91. Section 28A has the effect that where a relevant organisation as specified in subsection (3) commits the offence of failing to comply with a publicity order, and the commission of the offence is attributable to the connivance, consent or negligence of a responsible official of the organisation (see subsection (3)), the official also commits the offence.

CHAPTER 4 - MISCELLANEOUS

Vicarious liability

Section 29: Vicarious liability for certain offences by employees or agents

92. This section provides that, where a relevant office is committed by an employee or agent of a person (which will include bodies corporate, limited liability partnerships, Scottish partnerships and trusts) the person is also guilty of the offence. A relevant offence is one prescribed under section 39 of the Bill.

93. It is a defence for the person to show that the person did not know the relevant offence was being committed, that no reasonable person could have suspected that the offence was being committed, and that the person took all reasonable precautions and exercised all due diligence to prevent the offence from being committed.

94. Proceedings may be taken against the employer or principal even if they are not taken against the employee or agent.

Section 30: Liability where activity carried out by arrangement with another

95. This section provides that where a person is carrying on a regulated activity, for another person (which will include bodies corporate, limited liability partnerships, Scottish partnerships and trusts) and they commit a relevant offence in the course of that activity, that person for whom the activity is carried out is also guilty of the offence. A relevant offence is one prescribed under section 39 of the Bill.

96. A person carries on a regulated activity for another person whether the person is doing so by arrangement between the persons, or by arrangement through a third party.

97. It is a defence for the person to show that the person did not know the relevant offence was being committed, that no reasonable person could have suspected that the offence was being committed, and that the person took all reasonable precautions and exercised all due diligence to prevent the offence from being committed.

98. Proceedings may be taken against the person even if they are not taken against the other person.

99. In this section "regulated activity" has the same meaning as in section 9(3), and includes activities specified in an order made under subsection (6)(b). Subsection (7) has the effect that only "environmental activities" within the meaning of section 9 may be specified for that purpose. In terms of section 44(5), any such order is subject to the negative procedure.

Offence relating to significant environmental harm

Section 31: Significant environmental harm: offence

100. This section provides for it to be an offence for any person to-

- act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or
- fail to act, or permit another person not to act, in a way such that the failure causes or is likely to cause such harm.

101. Environmental harm has the same meaning as in section 9(2), and subsection (9) of this section has the effect that the harm is 'significant' if it has serious adverse effects whether locally, nationally or on a wider scale, or it is caused to an area designated by an order made by the Scottish Ministers. Different areas may be designated for different purposes and different types of harm. In terms of section 44(5), any such order is subject to the negative procedure.

102. No offence is committed where permission is or was given by or under an enactment conferring power to authorise the act or failure (for example where the action is covered by a permit issued by SEPA).

103. A defence is available where the acts or failures constituting the offence were necessary to avoid, prevent or reduce an imminent risk of serious adverse effects on human health, provided that the person took such steps as were reasonably practicable to minimise harm to the environment and adverse effects on human health and particulars were given to SEPA as soon as practicable after the incident.

104. A defence is also available where the acts or failures constituting the offence were authorised by, or carried out in accordance with, regulations under section 10, an authorisation given under those regulations, or an authorisation specified under an order made by the Scottish Ministers for this purpose.

105. The penalties applicable to the offence are

- on summary conviction a fine not exceeding £40,000, or imprisonment for up to 12 months, or both, and
- on conviction on indictment, an unlimited fine, or imprisonment, or both.

Section 32: Power of court to order offence to be remedied

106. This section creates a new power for the criminal courts to order a person convicted of the significant environmental harm offence in section 31 to remediate or mitigate the harm to which the conviction relates, where that person has the power to do so, in addition to or instead of any other sentence. This is referred to as a 'remediation order'.

107. Failure to comply with a remediation order will be an offence punishable on summary conviction with a fine not exceeding £40,000, imprisonment for a term not exceeding 12 months, or both and, on conviction on indictment, with an unlimited fine, imprisonment for a term not exceeding five years, or both.

Section 32A: Corporate offending

108. Section 32A has the effect that where a relevant organisation as specified in subsection (3) commits the significant environmental harm offence or the offence of failing to comply with a remediation order, and the commission of the offence is attributable to the connivance, consent or negligence of a responsible official of the organisation (see subsection (3)), the official also commits the offence.

Offences relating to supply of carrier bags: fixed penalty notices

Section 32B: Offences relating to supply of carrier bags: fixed penalty notices

109. Section 32B amends the Climate Change (Scotland) Act 2009 (the "2009 Act") by inserting a new section 88A and schedule 1A into the 2009 Act.

Inserted section 88A – Offences relating to supply of carrier bags: fixed penalty notices

110. Section 88A of the 2009 Act has the effect that a person authorised by an enforcement authority for the purposes of that section may give a person a fixed penalty notice for a relevant offence, if the person so authorised has reason to believe that the person given the notice has committed the offence.

111. Section 88A(2) provides that a relevant offence is an offence provided for in regulations made under section 88 of the 2009 Act (charges for supply of carrier bags). Section 89 of the 2009 Act has the effect that an enforcement authority for the purpose of regulations made under section 88 of that Act may be any of SEPA, a local authority, or such other person or body as the Scottish Ministers consider appropriate.

112. Section 88A(3) and (4) enable the Scottish Ministers by regulations to make further provision about fixed penalties. Section 96 of the 2009 Act has the effect that any such regulations are subject to the affirmative procedure.

Inserted schedule 1A – Fixed penalties

113. Schedule 1A of the 2009 Act makes further provision about fixed penalties. It has the effect that regulations made under section 88A(3) may provide that a fixed penalty notice may not be given after such time relating to the offence as may be prescribed, provide that the amount of the fixed penalty and of a discounted amount for early payment are such amounts as may be prescribed (limited to level 2 on the standard scale (currently £500)), and provide for the forms of notices and other procedural matters.

114. Payment of a fixed penalty is not a conviction and any liability to conviction for the alleged offence is discharged by payment.

Publicity and remediation orders: appeals by prosecutor

Section 33: Orders under section 28 and 32: prosecutor's right of appeal

115. This section amends the Criminal Procedure (Scotland) Act 1995 to allow the Lord Advocate, or the prosecutor in summary proceedings, to appeal against any decision of a court not to make a publicity order or remediation order.

Contaminated land and special sites

Section 34: Contaminated land and special sites

116. Section 34 amends Part 2A (contaminated land) of the Environmental Protection Act 1990 (the "1990 Act").

117. Subsection (1A) inserts a new subsection (5A) into section 78F of the 1990 Act, with the effect that, where the Crown owns or occupies contaminated land by virtue of the land vesting in the Crown as *bona vacantia* or falling to the Crown as *ultimus haeres*, then the Crown will not be an "appropriate person" for the purposes of determining the person to bear responsibility for remediation of that land under Part 2A.

118. Subsection (2) inserts new sections 78QA, 78TA and 78TB into the 1990 Act.

Inserted section 78QA – Land no longer considered to be contaminated

119. Inserted section 78QA enables a local authority, if satisfied that land which is not designated as a special site is no longer contaminated land, to issue a non-contamination notice to SEPA, the owner, and occupier and any "appropriate person" (as defined by section 78A(9) of the 1990 Act to mean any person who is determined to bear responsibility for anything which is to be done by way of remediation in any particular case).

120. A non-contamination notice has the effect that the land is no longer subject to the contaminated land regime in the 1990 Act and, in particular, that any remediation notice requiring action in respect of the site (for which see section 78E (duty of enforcing authority to require remediation etc.) of the 1990 Act) ceases to have effect unless the non-contamination notice provides otherwise. Land that is the subject of a non-contamination notice may subsequently be identified as contaminated land, and, if so, a remediation notice may then be served in respect of the land.

Inserted section 78TA – Registers: removal of information about land designated as special site

121. Section 78R (registers) of the 1990 Act requires an enforcing authority for the purposes of Part 2A of that Act (the local authority or, in the case of a special site, SEPA) to maintain a register of matters relating to contaminated land ("the register"), including notices under sections 78C (identification and designation of special sites) and 78D (referral of special site decisions to the Scottish Ministers) of that Act relating to the designation of special sites.

122. Land is required to be designated under section 78C of the 1990 Act if it is land of a description prescribed for the purposes of that section, and for those purposes the Scottish

Ministers may have regard to the matters specified in section 78C(10) of that Act. Those matters include whether it appears that the land is likely to be in such a condition, by reason of substances in, under or on the land that serious harm might be caused, or serious pollution of the water environment might be caused.

123. Inserted section 78TA provides for an enforcing authority to be able to remove a notice relating to a special site from the register if it considers that the land no longer requires to be designated as such a site but only where SEPA has given notice to the authority that the special site designation is no longer required. If the enforcing authority removes a notice from the register then it must give notice to affected persons in the same manner as in inserted section 78QA.

Inserted section 78TB – Effect of removal of information from register

124. Inserted section 78TB provides for the effect of removal from the register, in particular that the designation of the land as a special site is terminated.

125. Subsection (3A) inserts a new paragraph (g) into subsection (4) of section 78X (supplementary provisions) of the 1990 Act. It provides for the Queen's and Lord Treasurer's Remembrancer ("QLTR") to be the person acting in a relevant capacity for the purposes of that section in respect of property and rights that have vested in the Crown as *bona vacantia* or fallen to the Crown as *ultimus haeres*. This effect is that the QLTR shall not be personally liable under Part 2A of the 1990 Act to bear the whole or any part of the cost of remediating land so vested, or that so falls, that is contaminated land.

126. Subsection (4) makes consequential amendments to section 78YA (supplementary provisions with respect to guidance by the Scottish Ministers) of the 1990 Act.

Amendment of powers under section 108 of Environment Act 1995

Section 34A: Amendment of powers under section 108 of Environment Act 1995

127. Section 34A amends sections 108 of and Schedule 18 to the Environment Act 1995 (the "1995 Act"), and inserts a new section 108A into that Act.

Subsection (2)

128. Paragraph (a) of subsection (2) modifies subsection (1) of section 108 of the 1995 Act, which provides for persons authorised by an enforcing authority (as defined in subsection (15) of that section) to exercise the powers in subsection (4) of that section for pollution control purposes. Paragraph (b) of subsection (1) inserts a new subsection (1A) into that section.

129. The effect of paragraphs (a) and (b) is that the scope of subsection (1) of section 108 is extended to include determining whether offences have been committed under section 110 (offences) of the 1995 Act, section 31 of this Bill (significant environmental harm), and section 293(2) (art and part and aiding and abetting offences) of the Criminal Procedure (Scotland) Act 1995. The scope is also extended - where SEPA is the enforcing authority - so that the powers in subsection (4) of section 108 may be exercised for the purpose of determining whether financial

benefit has accrued to a person in connection with a relevant offence, for the purposes of provision made under section 16 of this Bill in connection with variable monetary penalties, or for the purpose of the determination of the amount of a fine by a court in accordance with section 27 of this Bill. Relevant offence has the same meaning for that purpose as it does in section 39 of this Bill.

130. Paragraph (c) of subsection (2) modifies subsection (4) of section 108 of the 1995 Act. The effect is that-

- The power in paragraph (h) of that subsection to take possession of and detain an article or any substance which appears to have caused, or be likely to cause, pollution of the environment or harm to human health is available where it is necessary to ensure that the article or substance is available as evidence in proceedings for an offence under section 31 of this Act (significant environmental harm),
- The power in paragraph (j) of that subsection to require a person, where there is reasonable cause to believe the person is able to give relevant information, to answer such questions as the person authorised by the enforcing authority thinks fit to ask and sign a declaration in that respect, includes requiring the person to attend at such place and at such reasonable time as the authorised person may specify to answer those questions and sign the declaration,
- A new paragraph (ja) is inserted into that subsection which, in the case of a person authorised by SEPA, enables the authorised person to require a person who appears able to give information relevant to an investigation to provide the authorised person with their name, address and date of birth, and
- A new paragraph (ka) is inserted into that subsection which, in the case of a person authorised by SEPA, enables the authorised person to search premises and seize and remove documents which the person reasonably believes may be required for the purpose of proceedings under a pollution control enactment or under section 31 (significant environmental harm) of this Bill (paragraph (h) of subsection (2) inserts a definition of "document" into subsection (15) of that section, with the effect that it includes electronic media).

131. Paragraph (d) of subsection (2) modifies subsection (5) of section 108 of the 1995 Act, with the effect that the powers in subsection (5) in respect of experimental borings and monitoring may be exercised for the purpose of determining whether an offence has been committed under section 31 (significant environmental harm) of this Bill.

132. Paragraph (e) of subsection (2) modifies subsection (6) of section 108 of the 1995 Act, with the effect that the powers under subsection (6) to enter premises are exercisable without seven days' notice of the proposed entry being given to the occupier of the premises.

133. Paragraph (f) of subsection (2) inserts new subsections (7A) to (7E) into section 108 of the 1995 Act. They have the effect that the powers to seize documents in new section 108(4)(ka) of that Act may not be exercised except under the authority of a warrant granted under Schedule 18 to that Act. They also make provision in respect of documents in respect of which a claim to confidentiality of communications could be maintained in legal proceedings, with the effect that information in the documents may not be used against persons with such a claim, and that the

document must be returned to the premises or such persons (subject to a right to retain or copy any other information in the document).

134. Paragraph (g) of subsection (2) amends subsection (12) of section 108 of the 1995 Act, with the effect that answers given in response to a requirement under section 108(4)(j) of that Act may be used in proceedings relating to false statements or declarations or where an inconsistent statement is given in connection with another offence.

Subsection (3) – Inserted section 108A – Procedure where documents removed

135. Subsection (3) inserts new section 108A into the 1995 Act.

136. Section 108A of the 1995 Act provides for authorised persons who remove any document in exercise of the new power in section 108(4)(ka) of that Act to provide a record of what was removed to specified persons on a request by such a person.

137. The specified persons, as set out in subsection (2) of section 108A, are the occupier of the premises from which the document was removed, and any person who had possession or control of the document before it was removed.

138. Subsections (4) and (5) of section 108A provide for SEPA to allow a person who had possession or control of a document to apply for, and be given, supervised access to the document and to copy it. Subsection (6) of that section specifies that SEPA does not require to give such access or to allow such copies if doing so might prejudice an investigation or any criminal proceedings.

139. A person who believes that SEPA has failed to comply with a requirement under section 108A may apply to the sheriff for an order under subsection (10) of that section, which provides for the sheriff to order SEPA to so comply.

Subsection (4)

140. Subsection (4) makes consequential amendments to Schedule 18 to the 1995 Act.

141. Subsection (4) also has the effect that a warrant granted by a sheriff under that Schedule may be made in relation to premises in an area outside the territorial jurisdiction of the sheriff, and may be exercised throughout Scotland in the same way as it may be exercised within the sheriffdom of the sheriff who granted it.

Authorisations relating to waste management: offences by partnerships

Section 35: Carriers of controlled waste: offences by partnerships affecting registration

142. It is an offence under the Control of Pollution (Amendment) Act 1989 to transport controlled waste without being registered for that purpose. An application may be refused or a registration revoked where the applicant, the holder or a "relevant person" has been convicted of an offence. Section 35 amends the 1989 Act so that the relevant person includes a partnership

where the applicant or holder is a member of the partnership, and includes a member of a partnership where the applicant or holder is the partnership.

Section 36: Waste management licences: offences by partnerships

143. A waste regulation authority for the purpose of Part 2 (waste on land) of the Environmental Protection Act 1990 may, when granting, revoking, suspending or transferring a waste management licence, be required to determine whether an applicant or holder is a "fit and proper" person to hold a licence (section 35(1) of that Act sets out that a waste management licence is a licence authorising the treatment, keeping or disposal of waste on land, or the treatment or disposal of waste by means of mobile plant).

144. The authority may for that purpose require to have regard to whether the applicant, the holder or another "relevant person" has been convicted of an offence. Section 36 amends the 1990 Act so that "relevant person" includes a partnership where the applicant or holder is a member of the partnership, and includes a member of a partnership where the applicant or holder is the partnership.

Air quality assessments

Section 37: Duty of local authorities in relation to air quality assessments, etc.

145. Section 82 of the Environment Act 1995 requires a local authority to conduct an air quality review of the air within the area of the authority. The authority must designate as an air quality management area any part of the area of the authority where it appears, as a result of such a review, that an air quality standard or objective is not being achieved (or is not likely to be achieved). Section 84 of that Act requires an authority to undertake and report on a further assessment of air quality in an air quality management area.

146. This section repeals section 84 of the Environment Act 1995, with the effect that an authority no longer requires to undertake such a further air quality assessment.

Smoke control areas: fuels and fireplaces

Section 37A: Smoke control areas: authorised fuels and exempt fireplaces

147. Section 37A amends sections 20, 21 and 29 of the Clean Air Act 1993 (the "1993 Act").

Subsection (2)

148. Subsection (2) amends section 20 of the 1993 Act, which provides that the occupier of a building or a person possessing a boiler or plant commits an offence where smoke is emitted from a chimney in a smoke control area declared by a local authority under Part III of that Act. It is a defence in proceedings for the offence to show that the emission of smoke was not caused by the use of a fuel other than an authorised fuel.

149. Section 20(6) of the 1993 Act enables the Scottish Ministers by regulations to declare that a fuel is an authorised fuel.

150. The amendments made to section 20 of the 1993 Act have the effect that the Scottish Ministers may, in addition, authorise a fuel for the purposes of that section by including the fuel in a list of fuels kept by them for that purpose. The Scottish Ministers must publish the list (and any revised list) as soon as is reasonably practicable, in such manner as they consider appropriate.

Subsection (3)

151. Subsection (3) amends section 21 of the 1993 Act, which provides for the Scottish Ministers to exempt by order any class of fireplace from the provisions of section 20 of that Act, if they are satisfied that such fireplaces can be used for burning fuels other than authorised fuels without producing any smoke or any substantial quantity of smoke.

152. The amendments made to section 21 of the 1993 Act have the effect that the Scottish Ministers may exempt any class or description of fireplace for that purpose by including the fireplace in a list of fireplaces kept and published in the same manner as the list produced for the purposes of section 20 of the 1993 Act as that section is amended by subsection (2).

Subsection (5)

153. Subsection (5) makes consequential amendments to section 29 of the 1993 Act.

CHAPTER 5 - GENERAL PURPOSE OF SEPA

Section 38: General purpose of SEPA

154. This section inserts a section 20A into the Environment Act 1995. Inserted section 20A provides, for the first time, a general purpose for SEPA.

155. SEPA must carry out any functions conferred on it by an enactment (as defined in inserted section 20A(3)) for the purpose of protecting and improving the environment, contributing, so far as is consistent with such functions, to improving the health and well-being of people in Scotland and achieving sustainable economic growth (see also section 4 which provides for a duty relating to sustainable economic growth for other regulators).

156. This section should be read together with the modifications in paragraph 14 of Part 3 of schedule 3 to the Bill. In particular, that paragraph inserts a new subsection (2A) into section 31 of the 1995 Act. Section 31 of that Act as amended will enable the Scottish Ministers to give guidance to SEPA with respect to the carrying out of its duties under inserted section 20A.

CHAPTER 6 – INTERPRETATION OF PART

Section 39: Meaning of "relevant offence" and "SEPA" in this Part

157. Section 39 defines terms for the purposes of Part 1 and, in particular, defines "relevant offence" so that it means an offence specified in an order made by the Scottish Ministers.

158. The term "relevant offence" applies, in particular, for the purposes of sections 12, 15, 19, 26 to 29 and 30 of the Bill.

159. The power in this section may be combined with the power in section 44 to enable different offences to be specified for the purposes of any of those sections (if desired).

PART 3 – MISCELLANEOUS

Marine licensing decisions

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

160. Section 40 concerns challenges to certain marine licensing decisions made by the Scottish Ministers under section 29 of the Marine (Scotland) Act 2010 ("the 2010 Act") and a decision to hold or not hold an inquiry in connection with their determination of applications for such licences under section 28. An applicant is currently able to challenge a decision regarding an application for a marine licence on the legality or on the merits in the sheriff court under the Marine Licensing Appeals (Scotland) Regulations 2011, which were made under section 38 of the 2010 Act. At present, all other persons or bodies who have standing may challenge the legality of a decision by the Scottish Ministers by means of an application for judicial review made to the Outer House of the Court of Session.

161. This section amends the 2010 Act by inserting new sections 63A and 63B. These provide for a statutory appeal to be made to the Court of Session by any person or body who is aggrieved by the decision of the Scottish Ministers. The statutory appeal will only apply to Ministers' decisions taken under sections 28 and 29 of the 2010 Act regarding marine licence applications which relate to activities where ministerial consent under section 36 of the Electricity Act 1989 is also required, i.e., for offshore electricity generating systems with a capacity of no less than 1 megawatt. Section 40 also consequentially amends section 38 of the 2010 Act to exclude from its scope appeals against decisions to which section 63A applies.

162. Any such application under section 63A of the 2010 Act must be made within six weeks of the date on which the decision to which the appeal relates is taken.

163. Section 63A(5) provides that the Court of Session may suspend a decision of the Scottish Ministers on an application for a marine licence until the final determination of the appeal proceedings. If satisfied that the Scottish Ministers have either acted outwith their powers under the 2010 Act, or have failed to comply with those legislative requirements as defined in section 63A(6), the Court may nullify the decision (or part of it). Under section 63B, the permission of the Court is needed before proceeding, which can only be given if the applicant can demonstrate sufficient interest and real prospect of success.

Planning authorities' functions: charges and fees

Section 41: Planning authorities' functions: charges and fees

164. Section 41 inserts new provision into section 252 of the Town and Country Planning (Scotland) Act 1997. The new provision in subsection (1A) enables Scottish Ministers to make

regulations for the charge or fee payable to different planning authorities to be of different amounts. This can only be done under the new provision where Scottish Ministers have determined that the functions of an authority are not being performed satisfactorily. The new subsection (1AB) ensures that the flexibility to set different fees for different authorities for reasons unconnected with performance is preserved.

165. Section 41 also removes subsections (5) and (6) so that all regulations made under section 252 are subject to negative parliamentary procedure.

Street traders' licenses

Section 42: Application for street trader's licence: food business

166. This section amends section 39(4) of the Civic Government (Scotland) Act 1982 to make it clear that the certificate to be produced for the purposes of a street trader's licence application for a mobile food business is to be from a food authority that has registered that establishment (rather than the food authority for the area in which the application for the licence is made). This means that if a mobile food business wishes to trade in more than one local authority area in Scotland it can, for each street trader's licence application, produce a certificate from the same registering food authority. Where a business based outwith Scotland is not registered with a food authority in Scotland, the certificate should be produced by the food authority to which the application is being made, or another food authority in Scotland to which a previous application has been made.

PART 4 - GENERAL

Sections 43 to 48

167. Section 43 introduces schedule 3, which provides for minor modifications of enactments, repeal of spent provisions, and consequential modifications.

168. Section 44 makes provision in respect of subordinate legislation that may be made under the Bill, including Parliamentary scrutiny of that legislation. It provides that any power to make an order or regulations under the Bill includes a power to make different provision for different purposes, and to make incidental, supplemental, consequential, transitional, transitory or savings provision. It also provides that a power to make regulations under section 1 includes a power to modify any enactment (including the Bill itself, except for sections 1 to 3 and 7).

169. Section 45 provides for the Scottish Ministers to make by order incidental, supplemental, consequential, transitional, transitory or savings provision. Such an order may modify any enactment, instrument or document. Section 44 provides that an order under this section is subject to negative procedure, unless it adds to, replaces or omits any part of the text of an Act in which case it is subject to affirmative procedure.

170. Sections 46 to 48 provide for Crown application, commencement, and the short title. A commencement order under section 47 is not subject to any parliamentary procedure.

SCHEDULE 1: REGULATORS FOR THE PURPOSES OF PART 1

171. This schedule lists regulators for the purposes of Part 1. The Scottish Ministers may by order modify this list (see section 7).

SCHEDULE 2: PARTICULAR PURPOSES FOR WHICH PROVISION MAY BE MADE UNDER SECTION 10

172. In this schedule, an environmental activity which is prohibited or authorised under regulations is described as a "regulated activity" (see section 9).

173. Schedule 2 is in two Parts. Part 1 provides for particular purposes for which provision may be made by regulations under section 10 (see paragraphs 1 to 22 of the schedule). Part 2 supplements Part 1 and provides, amongst other things, for charging schemes and for the maximum penalties that may be imposed in respect of offences created by the regulations.

174. Paragraph 1 enables the regulations to further define, expand on, or amend the definition of environmental activities, or to specify additional environmental activities.

175. Paragraph 2 enables the regulations to establish emission standards and requirements, to authorise making of plans for emission limits and quotas, and to authorise the making of emissions quota trading or transfer schemes (see also paragraph 24 of the schedule).

176. Paragraph 3 enables the regulations to specify the authorities on whom regulatory functions are conferred (defined as "regulators"), and enables the Scottish Ministers to give guidance and directions to regulators.

177. Paragraph 4 enables the regulations—

- to prohibit the carrying out of a regulated activity,
- to prohibit the carrying out of a regulated activity unless authorised by or under regulations, or
- to authorise the carrying out of a regulated activity in accordance with a permit, or subject to requirement to register or to notify the activity, or subject to compliance with "general binding rules" (see also paragraph 25 in that respect).

178. General binding rules may be made in regulations, or by a regulator under regulations (see also paragraph 25 of the schedule).

179. Paragraphs 5, 6, 7, 8, 10, 11 and 12 enable the regulations to specify the procedures relating to authorisation of regulated activities by permits, registration, and notifications. The effect of these paragraphs is to allow for detailed procedural provisions to be included in the regulations governing how an application for the permit or registration may be made and how to notify the carrying on of a regulated activity, how that application will be assessed and how a permit or registration may be granted. They also provide a framework for the extent to which the regulations may allow requirements to be imposed in permits and registrations, as well as

allowing regulations to provide mechanisms for transfer, variation, and consolidation, and for suspension and revocation of permits (together with a requirement to take associated preventative or remedial action). These provisions also enable the regulations to specify when registration may be refused and when a registration or notification may lapse.

180. There are supplementary provisions at paragraphs 23, 26 and 27. Paragraph 23 allows for regulations to provide that specified provisions of the regulations have effect in relation only to specified regulated activities, circumstances or specified persons. Paragraph 26 allows regulations to make provision for anything in paragraphs 5 to 12 which could be provided for determination by the regulators to be provided for in regulations. Paragraph 27 allows regulations to provide for regulators to have regard to specified principles and to any directions or guidance in determining rules and imposing conditions.

181. Paragraph 11 also allows provision to be made in connection with permits or registrations for multiple activities or for activities across multiple sites or for multiple persons to be granted a permit or registration. It allows 'standard rules' provision to be made, and provides the basis for the fit and proper person test to be applied before an authorisation is given to a person or before an authorisation is transferred, and to allow an authorisation to be varied, suspended or revoked if the operator has ceased to be a fit and proper person. Paragraph 11 also provides a basis for certain persons or descriptions of person to be treated as carrying on regulated activities or as authorised to carry them on.

182. Paragraphs 9 and 13 enable the regulations to provide for charging (see also paragraph 28 of the schedule). Paragraph 9 enables the regulations to authorise, or authorise the Scottish Ministers to make, specific provision in respect of charging for testing and analysis of substances, and assessing the effect on the environment of release of such substances prior to grant of a permit. Paragraph 13 enables charges to be authorised under the regulations, and the making etc. of charging schemes by regulators.

183. Paragraphs 14 to 16 enable the regulations to secure that publicity is given to specified matters, and that public registers are maintained by regulators in respect of such matters. They enable persons to be required to provide information and/or compile information on emissions, energy consumption and energy efficiency, and waste. They also enable the regulations to require or authorise regulators to carry out consultation in connection with the exercise of any of their functions.

184. Paragraph 17 enables the regulations to confer functions on regulators with respect to compliance with, and enforcement of, the regulations. This includes conferring a power to arrange for preventative or remedial action to be taken at the expense of the persons carrying on a regulated activity. It also provides for the conferring of powers on regulators to appoint persons to exercise functions and powers of that type, and to confer further powers on persons so appointed (such as a power similar to the power of entry in section 108(4) of the Environment Act 1995).

185. Paragraph 18 enables the regulations to authorise regulators to serve notices on persons carrying on regulated activities, including notices requiring a person—

- to notify the carrying on by the person of a regulated activity requiring notification by a person of the carrying on of regulated activities,
- to take preventative or remedial action in respect of regulatory contraventions,
- to provide financial security pending the taking of preventative or remedial action,
- to take steps to remove imminent risks of serious adverse impacts on the environment, and
- to stop the carrying on of regulated activities.

186. It also enables the regulations to provide that regulators may require any person served with such notice to pay the costs incurred up to the date of service of the notice, and enables regulators to impose monetary penalties for failure to comply with any such notice. It enables the regulations to provide for enforcement of notices by civil proceedings. Paragraph 31 enables the regulations to make provision for or in connection with the service of any notice or other document.

187. Paragraph 19 enables the regulations to create offences and provide for defences and evidentiary matters. Paragraph 30 provides more detail and allows offences to be triable summarily only or on indictment. It also provides the punishments for the offences that may be set out in the regulations.

188. Paragraph 20 enables regulations to provide for a court to be able to order remedial action where a person has been convicted of an offence.

189. Paragraph 21 enables the regulations to provide for rights of appeal for various matters, and for the determination of such appeals.

190. Paragraph 22 enables the regulations to make provision that corresponds, or is similar, to provision that is made (or is capable of being made) under Part 2 of the Environmental Protection Act 1990 or under the European Communities Act 1972. This will enable regulations made under section 10 to include provision that might otherwise require to be made under the 1990 or 1972 Acts, such as the designation of a Scottish public body such as SEPA as the competent authority for the purpose of functions in or under an EU instrument. Paragraph 29 allows the Scottish Ministers by order to specify an EU instrument as one that is or contains an EU obligation relating to protecting and improving the environment.

191. Paragraph 28A allows the regulations to provide that it may be an ongoing condition of an authorisation that an operator remains a fit and proper person within the meaning of the regulations.

SCHEDULE 3: MINOR AND CONSEQUENTIAL MODIFICATIONS

192. Schedule 3 has six Parts.

193. Part 1 makes minor and consequential modifications related to the measures authorised by or under regulations made under section 10 - in particular, where other enactments require to be modified to refer to environmental activities. For example, reference is made to section 108 of the Environment Act 1995 which requires to refer to the regulator's functions under regulations made under section 10 in order that authorised persons may exercise statutory powers in relation to compliance and enforcement functions for regulated activities.

194. Part 2 contains amendments consequential on the new enforcement measures in Chapter 2 of Part 2 of the Bill. In particular, existing provision in the Reservoirs (Scotland) Act 2011 allowing for civil enforcement measures is modified.

195. Part 3 contains minor and consequential amendments consequential on the measures in Part 2 of the Bill. In particular, it repeals sections 32 (general environmental and recreational duties) and 34 (general duties with respect to water) of the Environment Act 1995.

196. Part 4 repeals a number of provisions that are either spent or not needed. These include provisions in the Control of Pollution Act 1974 (since superseded by the Water Environment and Water Services (Scotland) Act 2003 and the Environmental Protection Act 1990), and provisions on the establishment of noise abatement zones and nitrate sensitive areas that have never been used in Scotland.

197. Part 5 contains a number of miscellaneous minor amendments. These include repeals of spent provisions, generally connected with amendments in the preceding Parts of the schedule. It also includes repeals of provisions in the Litter Act 1983 that have never been brought into force. These provisions also modify the offences set out in section 110 of the Environment Act 1995 and extend the provisions of the Criminal Procedure (Scotland) Act 1995 as regards transcripts of interviews and scientific etc. reports to SEPA.

198. Part 6 modifies certain pre-devolution environmental enactments to provide for references to an "enactment" to include as appropriate a reference to an enactment comprised in, or made under, an Act of the Scottish Parliament. The effect is that references in the modified enactments no longer apply only to enactments comprised in, or made under, an Act of Parliament.

REGULATORY REFORM (SCOTLAND) BILL

SUPPLEMENTARY FINANCIAL MEMORANDUM

INTRODUCTION

1. This document relates to the Regulatory Reform (Scotland) Bill (introduced in the Scottish Parliament on 27 March 2013) as amended at Stage 2. It has been prepared by the Scottish Government to satisfy Rule 9.7.8B of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

2. This Memorandum supplements the original Financial Memorandum to explain significant financial cost implications resulting from Stage 2 amendments to the Bill.

PART 1 – REGULATORY FUNCTIONS

3. This section relates to the provisions contained in Part 1 of the Bill to further improve regulatory consistency, to require regulatory functions to be exercised in a way that contributes to sustainable economic growth and to encourage regulators to adopt practices that are consistent with regulatory principles. Stage 2 amendments introduced a statutory requirement to publish any directions, guidance and Code of Practice issued.

Costs on the Scottish Administration

4. Consultation and publication costs are included in the original Financial Memorandum and it is not anticipated that the additional publication requirements would increase these significantly.

Costs on local authorities

5. There are no supplementary costs.

Costs on other bodies, individuals and businesses

6. There are no supplementary costs.

PART 1A – PRIMARY AUTHORITIES

7. This Part makes provisions whereby a business operating in several local authority areas can form a statutory partnership with one local authority (primary authority), which then provides robust and reliable advice relating to the regulatory functions of local authorities.

Costs on the Scottish Administration

8. The Bill introduces powers which enable the Scottish Ministers to nominate an authority as the primary authority in relation to a regulated person in Scotland. Costs to the Scottish Administration relate to the development of a primary authority scheme and the subsequent operation of this.

9. It is anticipated that the development of the primary authority scheme would require 0.25 x B2 and 0.25 x C2 staff at a one-off cost of £30,000. This would be supported by a 0.5 of a post funded within COSLA to help coordinate the development and delivery of the Bill's regulatory functions. The total cost of this post is included in paragraph 6 of the original Financial Memorandum (£70,000 per annum plus associated travel and subsistence costs). Developing proposals for the scheme, associated secondary legislation and guidance would also incur consultation, analysis and publication costs which are estimated at around £15,000. The estimated cost to the Scottish Administration, excluding costs already included in the Financial Memorandum, is £45,000, which will be met from existing resources.

10. Functions regarding nomination of primary authorities and the maintenance of a register of nominations can be delegated to another person. Until the scope and detail of the scheme is fully established it is not possible to estimate or anticipate these operational costs. A full assessment of the costs and impact will be carried out in developing the scope and detail of the primary authority scheme in Scotland.

Costs on local authorities

11. The powers impose no additional costs on local authorities at this stage. There may be resource implications for local authorities entering into primary authority arrangements and the impact of any such costs and benefits will be considered during the development of the scheme and any associated legislation. The provisions enable local authorities to charge fees which represent the costs reasonably incurred in exercising primary authority functions. The scheme should therefore in overall terms be cost-neutral.

Costs on other bodies, individuals and businesses

12. The Bill provisions impose no obligatory costs on other bodies, individuals or businesses at this stage. There would be cost implications for businesses which voluntarily enter into these arrangements as primary authorities can - and will be expected to - charge fees for primary authority functions provided. However, the detailed scope and operation of the primary authority scheme are still to be developed and the associated costs will be fully considered as part of the scheme's development and the introduction of associated secondary legislation.

PART 2 – ENVIRONMENTAL REGULATION

SECTION 32B – OFFENCES RELATING TO SUPPLY OF CARRIER BAGS: FIXED PENALTY NOTICES

Costs on the Scottish Administration

13. The measure enabling fixed penalties for carrier bag charging offences is designed to provide a proportionate and direct enforcement option and, by reducing the number of cases referred to courts, will generate considerable savings.

14. While it is difficult to estimate the likely cost of criminal enforcement action in such cases, Audit Scotland's 2011 report, 'An overview of Scotland's criminal justice system' estimated the costs of processing a summary case through the sheriff courts at around £2,100 (including legal aid; the costs of witnesses; and court running costs). Local authority enforcement costs would be additional to this figure. Civil fixed penalty action would therefore prevent such costs being incurred.

Costs on local authorities

15. It is anticipated that the measure will lead to considerably lower administration costs for local authorities, although the level of such savings cannot be quantified at present.

Costs on other bodies, individuals and businesses

16. Providing a more proportionate enforcement option will help ensure retailer compliance with carrier bag charging as local authorities will be more likely to take necessary enforcement action. This will create a level playing field, as responsible businesses will not be put at a disadvantage if competitors chose not to comply in the belief that no enforcement action would be taken. Where a business is served with a fixed penalty notice, it will have the option of paying the fine at a considerably lower cost than going to court.

SECTION 37A - SMOKE CONTROL AREAS: AUTHORISED FUELS AND EXEMPT FIREPLACES

Costs on the Scottish Administration

17. Fuels and fireplaces to be used in smoke control areas currently have to be approved by a statutory instrument made under the Clean Air Act 1993. The costs for this, in terms of staff costs in development of the regulations, are negligible. The Bill will enable the maintenance of this lists of fireplaces and fuels to be done administratively, which will immediately make granting approval considerably easier, quicker and simpler. Changing to an administrative procedure will mean that an approval can be granted soon after a fuel or fireplace passes the test. The savings are expected to reduce the staff time spent managing this process. The testing process itself, undertaken jointly across the UK administrations, remains unchanged.

Costs on local authorities

18. Delays currently lead to confusion amongst local authorities regarding the status of products which have passed the tests but not yet been approved for use. The results in staff

spending time finding the correct lists and fielding numerous calls from manufacturers and members of the public. Evidence from the Scottish Pollution Co-ordination and Control Committee (which includes representatives from Scottish local authorities) suggests that having an accurate, current list of approved fireplaces and fuels available to all electronically will reduce the need for local authority staff to handle these enquiries.

Costs on other bodies, individuals and businesses

19. The Bill will have significant benefits for business. Manufacturers and suppliers, often SMEs, will no longer face delays waiting for approval to market and sell their products after these products have passed the necessary tests. The Bill will also create a level playing field across the UK by rectifying the current anomaly where authorisations can be made at different times in different parts of the UK.

SECTION 32A – CORPORATE OFFENDING

Costs on the Scottish Administration

20. This section makes various amendments in relation to "vicarious liability", such as extending the offences in sections 29 and 30 of the Bill to apply to all persons, including, for example, trusts and unincorporated associations and allowing directors of a company and similar office holders to be prosecuted for offences under sections 28, 31 and 32 of the Bill. The primary purpose of these amendments is to ensure that those who benefit from offending behaviour can be held accountable for regulatory breaches.

21. The corporate liability provisions are common provisions which already apply to most of SEPA's main offences and the provisions in the Bill are modelled on sections 19 and 45 of the Water Resources (Scotland) Act 2013. The provisions are not expected to increase costs for SEPA.

22. The number of cases referred to court is expected to be small and will not lead to significant additional costs for the Crown Office and Procurator Fiscal Service or the Scottish Court Service. Any costs arising will be met from existing budgets.

Costs on local authorities

23. It is not anticipated that there will be any additional costs on local authorities arising from these amendments.

Costs on other bodies, individuals and businesses

24. It is not anticipated that there will be any additional costs on other bodies, individuals and businesses arising from these amendments.

SECTION 34A – AMENDMENT OF POWERS UNDER SECTION 108 OF ENVIRONMENT ACT 1995

Costs on the Scottish Administration

25. The amendments to section 108 of the Environment Act 1995 will both grant SEPA additional investigatory powers (for example the power to take original documents and records) and amend existing powers (such as removing the requirement for seven days' notice for bringing heavy plant onto sites or entering residential property). It is not anticipated that these additional and amended powers will lead to additional costs for SEPA and, by streamlining enforcement processes, modest administrative savings may be generated.

26. The amendment to section 110 of the Environment Act 1995, relating to the assault or hindrance of a SEPA officer, may lead to additional cases being referred to the courts. The number of cases referred is expected to be small and will not lead to significant additional costs for the Crown Office and Procurator Fiscal Service or the Scottish Court Service. Any costs arising will be met from existing budgets.

Costs on local authorities

27. It is not anticipated that there will be any additional costs on local authorities arising from these amendments.

Costs on other bodies, individuals and businesses

28. It is not anticipated that there will be any additional costs on other bodies, individuals and businesses.

SCHEDULE 3 – PART 2 – ENFORCEMENT OF REGULATIONS ON ENVIRONMENTAL ACTIVITIES ETC.

Costs on the Scottish Administration

29. The litter and flytipping amendments to the Environmental Protection Act 1990 extend the organisations who can issue fixed penalties, initially to Loch Lomond & The Trossachs National Park Authority; and require alleged offenders to provide their name and address.

30. While there will be some initial cost to Loch Lomond & The Trossachs National Park Authority in preparation for and delivery of enforcement action, it will be able to decide what resources to allocate to this activity and can expect the costs to be offset by reduced clean-up costs. The amendment allows the Scottish Ministers to appoint other authorities to issue fixed penalties in the future. The exact arrangements would be considered on a case-by-case basis in consultation with the organisations concerned.

31. Closing the gap in legislation to require alleged offenders to provide their name and address to litter authorities would not create additional costs.

Costs on local authorities

32. This amendment is not expected to have a cost implication for local authorities.

Costs on other bodies, individuals and businesses

33. Reducing litter and flytipping can be expected to have a positive effect on visitor numbers and therefore businesses in the National Park.

SUMMARY OF COSTS

34. The table below summarises the additional costs that arise as a direct result of stage 2 amendments to the Bill:

	Scottish Government	Local authorities	Other bodies, individuals and businesses
Costs arising as a direct result of the Bill	Staffing and administration costs of £45,000 This comprises costs: Part 1A Primary Authorities £45,000 Part 2 Environmental Regulation £0	The provisions within Part 1A enable local authorities to charge fees which represent the costs reasonably incurred. The scheme should, therefore, in overall terms be cost-neutral. The carrier bag and smoke control area amendments are anticipated to lead to administrative efficiencies and savings for local authorities	Part 1A – Regulatory functions - There will be no obligatory additional costs on businesses, although where a primary authority partnership is entered into businesses may be charged for services delivered. *Part 2 – Environmental regulation –* The smoke control and litter amendments are anticipated to have a positive effect on businesses. The carrier bag amendment will ensure a level playing field for business and allow businesses to pay fines at a considerably lower cost than going to court.

REGULATORY REFORM (SCOTLAND) BILL [AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Supplementary Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Regulatory Reform (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 7B(1)(b) – Power as respects specification of "relevant functions" for the purposes of Part 1A (Primary Authorities)

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary procedure: **affirmative**

2. Part 1A of the Bill (sections 7A to 7H) which makes provision for primary authorities was introduced at Stage 2.

3. Section 7A provides that Part 1A applies where a person carries on an activity in the area of two or more local authorities and each of those authorities has the same "relevant function" in relation to that activity. Section 7B confers a power on the Scottish Ministers to specify by order any regulatory function (as defined in section 1(5) of the Bill) exercised by a local authority which constitutes a "relevant function" for these purposes.

Reason for taking power

4. Local authorities exercise a very wide range of regulatory functions, and it is neither appropriate nor practicable to limit the scope of the primary authority measures to functions specified on the face of the Bill. The objective of ensuring better regulation is best served by conferring a power on Ministers to specify in delegated legislation the functions in respect of which primary authorities may be nominated.

Reason for choice of procedure

5. The choice of functions in respect of which primary authorities may be nominated impacts on all local authorities and provides flexibility to enable primary authority to be developed to deliver consistent regulation which meets the needs of local communities, business and local authorities. It is therefore appropriate for the order specifying the functions to be subject to the higher level of scrutiny that the affirmative procedure will provide.

Section 7E(1) – Power as respects further provision about exercise of relevant functions by primary authorities for the purposes of Part 1A

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary procedure: **affirmative**

6. Section 7E confers a power on the Scottish Ministers to make further provision about the exercise of relevant functions for the purposes of Part 1A by primary authorities, including, for example, requiring a local authority to notify the primary authority before taking enforcement action, or specifying the circumstances where an enforcing authority may not take enforcement action against a regulated person.

Reason for taking power

7. Local authorities have many regulatory functions, and many of those functions operate in a complex regulatory framework (both legal and administrative). It will be necessary for the Scottish Ministers to put in place measures that will support the operation of primary authority functions within such a framework. Implementing measures of that kind will vary considerably, and are likely to need to be adjusted from time to time, so that they are best left to delegated powers.

Reason for choice of procedure

8. The measures that may be put in place under the proposed power include matters of considerable significance to both regulators and regulated persons, such as whether or when enforcement action can be taken for regulatory breaches. It is therefore appropriate for orders to be subject to the higher level of scrutiny that the affirmative procedure will provide.

Section 12 – Fixed Monetary Penalties

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary procedure: **affirmative**

9. Sections 12 to 14 of the Bill were amended at stage 2.

10. Those sections provide for, and make provision in respect of, the power of the Scottish Ministers to make by order provision for or about the imposition by SEPA of a fixed monetary penalty on a person in relation to a relevant offence (see section 39 of the Bill for the meaning of "relevant offence"). The effect of the changes in respect of any fixed penalty that might be imposed is that more than one fixed penalty may be imposed, or criminal proceedings might be taken, in respect of further offences committed by reason of the same act or omission (where for example the offence is of an ongoing nature). Where a fixed penalty has been imposed upon a person in relation to an offence constituted by an act or omission no criminal proceedings may be commenced against a person for an offence constituted by that act or omission (and that if the person is prosecuted at a later date for that offence constituted by that act or omission then the period between service of notice of intent and the deadline for receiving representations is not counted for any period within which criminal proceedings should be commenced). The changes also clarify what is meant by "criminal proceedings" for that purpose.

Reason for taking power

11. The reason for taking the powers remains the same as the reason set out at paragraph 44 of the Delegated Powers Memorandum on the Bill as introduced (the "DPM").

Reason for choice of procedure

12. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 45 of the DPM.

Section 15 – Variable Monetary Penalties

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary procedure: **affirmative**

13. Sections 15 to 17 of the Bill were amended at stage 2.

14. Those sections make the same provision for variable monetary penalties as is made by sections 12 to 14 for fixed monetary penalties, and the changes made at stage 2 in respect of variable penalties have the same purpose and effect as the changes made for fixed penalties.

Reason for taking power

15. The reason for taking the powers remains the same as the reason set out at paragraph 51 of the DPM.

Reasons for choice of procedure

16. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 52 of the DPM.

Section 18(2)(b) - Undertakings under section 16: non-compliance penalties

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary Procedure: **negative procedure**

17. Section 18 allows for provision to be made for a non-compliance penalty notice to be issued if any undertaking pursuant to section 16(5) is not complied with.

18. The Bill enables the Scottish Ministers to provide, by negative procedure order under section 18(2)(b), for the amount of a non-compliance penalty to be calculated by reference to criteria specified in the order. The Bill as introduced did not set a limit on the amount of a non-compliance penalty.

19. Paragraphs 87 and 88 of the Delegated Powers and Law Reform Committee's Report set out that the Committee "would be content that, if a suitable maximum is specified in the Bill, the negative procedure could be applied to the exercise of the power by order to provide for the more detailed criteria by which a non-compliance penalty is calculated".

20. Section 18 was therefore amended at Stage 2 to insert subsection (2A) which introduces a maximum amount of any such non-compliance penalty, linked to the maximum amount of the variable monetary penalty applicable to the particular case. This ensures consistency with provision made in respect of variable monetary penalties in section 15.

Reason for Taking the Power

21. The reason for taking the power in section 18(2)(b) remains the same as the reason set out at paragraph 55 of the DPM.

22. The amendment requested by the Delegated Powers and Law Reform Committee has been made.

Reason for Choice of Procedure

23. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 56 of the DPM.

Section 19(1) – Enforcement Undertakings

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary procedure: **negative procedure**

24. An order under section 19(1) may provide that the acceptance of an enforcement undertaking is to have certain consequences for subsequent enforcement measures and proceedings that may be taken against that person. Section 19(4) was amended at Stage 2 so that the consequences include that (unless the person fails to comply with the undertaking) no criminal proceedings may be

commenced against the person from whom the enforcement undertaking is accepted in respect of an offence constituted by an act or omission if the undertaking relates to that offence constituted by that act or omission.

25. Section 19 was also amended at Stage 2 to include alternative forms of disposal by the procurator fiscal.

Reason for taking power

26. The reason for taking the powers remains the same as the reason set out at paragraph 59 of the DPM.

Reason for choice of procedure

27. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 60 of the DPM.

Section 30(6) – Liability where activity carried out by arrangement with another

Power conferred on: **the Scottish Ministers**
Power exercisable by: **order made by Scottish statutory instrument**
Parliamentary procedure: **negative procedure**

28. Section 30(6) enables Ministers to extend the scope of the offence in section 30 (which provides that where a person (A) commits an offence and A is at that time carrying on a regulated activity for another person (B) then B is also guilty of the offence) so that it applies to activities other than "environmental activities" that are "regulated activities" (both as defined in section 9(3)).

29. Paragraph 94 of the DPLRC Report observed that the power is framed more widely, to enable an order to specify any activities as "regulated activities" for the purposes of section 30, beyond "environmental activities" as defined in section 9. The Scottish Government undertook to consider lodging an amendment at Stage 2 to ensure that only "environmental activities" within the meaning of section 9(1) can be specified.

30. This section was therefore amended at Stage 2 by the insertion of subsection (7) with the effect that the new offence may apply to any environmental activity as defined in section 9 of the Bill whether or not regulations have been made under section 10 in respect of that activity, but may not apply to any other type of activity.

Reason for taking power

31. The reason for taking the powers remains the same as the reason set out at paragraph 68 of the DPM.

Reason for choice of procedure

32. The amendments made at stage 2 do not impact on the choice of procedure set out at paragraph 69 of the DPM.

Section 32B Inserting section 88A(3) of the Climate Change (Scotland) Act 2009 – Offences relating to supply of carrier bags: fixed penalty notices

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations made by Scottish statutory instrument**
Parliamentary procedure: **affirmative procedure**

33. Section 88 of the Climate Change (Scotland) Act 2009 ("the 2009 Act") enables the Scottish Ministers by affirmative procedure regulations to make provision requiring suppliers for goods to make a minimum charge for a single use carrier bag. Regulations made under that section are generally subject to affirmative procedure (see section 96(4) of the 2009 Act).

34. The first regulations made under section 88 of the 2009 Act are however subject to 'super-affirmative' procedure, and a draft of the first proposed regulations was laid before the Scottish Parliament on 12 September 2013 for pre-laying scrutiny in accordance with section 97 of the 2009 Act. It is intended that the final draft will be laid for approval by the Parliament early in 2014. The Regulations will provide for it to be an offence for a person to fail to apply the minimum charge.

35. The Scottish Government consulted on carrier bag charging in June 2012, and it was proposed that local authorities could impose a fixed penalty as an alternative to criminal proceedings under the Regulations (as is the case under the equivalent powers in the UK Climate Change Act 2008). The policy objective was to enable 'light touch' enforcement in appropriate cases. None of the responses to the consultation commented adversely on this proposal.

36. The enabling provision in section 88 of the 2009 Act does not however include a power to make provision for fixed penalty notices. New section 32B, which inserts section 88A of the 2009 Act, was therefore inserted into that Act at stage 2, with the effect that where Regulations under section 88 of the 2009 Act provide for offences then the enforcement authority may issue a fixed penalty notice to a person they have reason to believe has committed such an offence.

37. Section 88A(3) of the 2009 Act enables the Scottish Ministers to make further provision about fixed penalties. This power is subject to affirmative procedure by virtue of section 96(4) of the 2009 Act.

38. Section 88A(5) of the 2009 Act introduces schedule 1A to that Act which makes further provision about fixed penalties, including provision as regards matters that may be prescribed under section 88 of that Act (and so subject to affirmative procedure as set out above).

39. Paragraph 1 of schedule 1A defines "prescribed" to mean prescribed by Regulations made under section 88 of the 2009 Act. Paragraph 3 provides that a fixed penalty notice may not be given after such time as may be prescribed. Paragraph 4(1) provides that the amount of the

penalty and the discounted amount are such amounts as may be prescribed (subject to the maximums in paragraph 4(2) and (3)). Paragraph 11 provides that the regulations may prescribe forms of notices, the circumstances in which a notice may not be given, and methods of payment.

Reason for taking power

40. Fixed monetary penalties, as may be provided for in regulations under section 88A, are intended as a proportionate enforcement option to be available to enforcement authorities in the relation to a failure to charge for carrier bags. Schedule 1A contains procedural safeguards but the detailed processes and procedures regarding the issue of fixed monetary penalties by those authorised to do so by enforcement authorities is a relatively technical matter appropriate for subordinate legislation. Further, it is desirable to have flexibility to amend or refine the exact processes for issuing a fixed penalty and to amend the level of fixed monetary penalties over time as monetary values change (within the limits prescribed in paragraph 4 of Schedule 1A) without having to amend primary legislation.

Reason for choice of procedure

41. The giving of a fixed penalty as an alternative to prosecution, and the amount of such a penalty, raises significant policy issues. It is therefore appropriate for regulations making provision to the effect to be subject to affirmative procedure.

Schedule 3 para 11(2)(g) and (h) Amending section 33A of the Environmental Protection Act 1990 (fixed penalty notices for contraventions of section 33(1)(a) and (c))
Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish Statutory Instrument
Parliamentary Procedure: negative procedure

42. The Bill amends the provisions of section 33A of the Environmental Protection Act 1990 (fixed penalty notices for contraventions of section 33(1)(a) and (c)). The amendments arise from the Scottish Government's National Litter Strategy that has been consulted upon over the summer. Enforcement has a key role in deterring flytipping and the amendments extend the ability to issue fixed penalties to Loch Lomond & the Trossachs National Park which has long-running flytipping issues.

43. The amendment at Schedule 3 para 11(2)(g) provides a power that allows the Scottish Ministers to add other authorities by a negative procedure order to the definition of "authorised person".

44. The amendment at Schedule 3 para 11(2)(h) inserts new subsections (13A) and (13B), which allow the Scottish Ministers to modify by order, as they consider necessary or expedient, the provisions of section 33A in connection with the specification of an "authorised person" under the power described in the preceding paragraph. The order can also provide for provisions not to apply to such an authorised person.

Reason for taking powers

45. The power gives the flexibility to Scottish Ministers to add other authorities to the definition of "authorised person" in the future and to adapt the other procedural provisions in the section accordingly. This allows Ministers to adapt to evolving circumstances in relation to flytipping issues without the need for primary legislation.

Reason for choice of procedure

46. The negative procedure is considered appropriate for adding to the authorities within the definition of "authorised person" in the future. This will largely be an administrative decision for the Ministers looking at the circumstances of each case and the appropriateness and need for an authority to have access to these powers. On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

47. The negative procedure is considered appropriate for modifying the provisions of the section in connection with an order specifying an "authorised person". On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

Schedule 3 para 11(4)(f) and (g) Amending section 88 of the Environmental Protection Act 1990 (fixed penalty notices for leaving litter)
Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish Statutory Instrument
Parliamentary Procedure: negative

48. The Bill amends the provisions of section 88 of the Environmental Protection Act 1990. The amendments arise from the Scottish Government's National Litter Strategy that has been consulted upon over the summer. Enforcement has a key role to play in deterring littering and the amendments extend the ability to issue fixed penalties to Loch Lomond & the Trossachs National Park which has long-running litter issues. The amendments are analogous to those made to section 33A in relation to fly-tipping, as described above.

Reason for taking power

49. The power gives the flexibility to Scottish Ministers to add other authorities to the definition of "authorised person" in the future and to adapt the other procedural provisions in the section accordingly. This allows Ministers to adapt to evolving circumstances in relation to litter issues without the need for primary legislation.

Reason for choice of procedure

50. The negative procedure is considered appropriate for adding to the authorities within the definition of "authorised person" in the future. This will largely be an administrative decision for the Ministers looking at the circumstances of each case and the appropriateness and need for an authority to have access to these powers. On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

51. The negative procedure is considered appropriate for modifying the provisions of the section in connection with an order specifying an "authorised person". On balance it is not felt to be an appropriate use of Parliamentary time to use the affirmative procedure.

PROVISIONS CONFERRING OTHER DELEGATED POWERS INTRODUCED AT STAGE 2

Section 37A – Smoke control areas: authorised fuels and exempt fireplaces

Power conferred on: **the Scottish Ministers**
Power exercisable by: **list made by the Scottish Ministers**
Parliamentary procedure: **none**

52. Section 20 of the Clean Air Act 1993 (the "1993 Act") provides for it be an offence where a building or chimney emits smoke in a smoke control area, although it is a defence to show the smoke was emitted by an authorised fuel. Section 20(6) of that Act enables the Scottish Ministers to declare, by regulations subject to negative procedure, that a fuel is an authorised fuel.

53. Section 21 of the 1993 Act enables Ministers, by order subject to negative procedure, to exempt any class of fireplace from the provisions of section 20 of that Act, if satisfied that such fireplaces can be used for burning fuel other than authorised fuels without producing any smoke or a substantial quantity of smoke.

54. The Smoke Control Areas (Exempt Fireplaces) (Scotland) Order 2010 (SSI 2010/272), for example, list 236 fireplaces, stoves and boilers that may be used in a smoke control area.

Reason for taking power

55. The proposed changes will allow the Scottish Ministers to exempt any class or description of fireplace from the provisions of section 20 by publishing a list of authorised fuels or of such fireplaces, instead of requiring such fuels and fireplaces to be exempted by order or regulations.

56. This is a technical matter that is more appropriate for an administrative process that will reduce delays in approval of products for the exempted list. It does not raise any risk of harm to human health or the environment as fuels or fireplaces will be added to the list on passing the same technical tests as apply where fuels or fireplaces are approved by statutory instrument.

57. Further, it is desirable to have flexibility to amend and update the list of fireplaces without having to do so by order.

Reason for choice of procedure

58. The administrative process will deliver transparency and legal certainty given the requirements to publish the list or lists under sections 21(3) and (4) of the 1993 Act as inserted by the Bill. It is not therefore considered that parliamentary oversight is required or appropriate for that reason, and because of the highly technical nature of the lists proposed to be published.

The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

2nd Report, 2014 (Session 4)

Regulatory Reform (Scotland) Bill as amended at stage 2

Published by the Scottish Parliament on 8 January 2014

The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
(a) any—
(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
(ii) [deleted]
(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
(c) general questions relating to powers to make subordinate legislation;
(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson

Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt

The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

2nd Report, 2014 (Session 4)

Regulatory Reform (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meeting on 7 January 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Regulatory Reform (Scotland) Bill as amended at Stage 2 ("the Bill")[1]. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Regulatory Reform (Scotland) Bill is a Government Bill which was introduced on 27 March 2013. The Bill takes forward the 2011 Scottish Government commitment to improve the way regulations are applied in practice across Scotland, and to take forward the Government's Better Regulation agenda. The primary purpose is described in the Delegated Powers Memorandum as "to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment."

3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill ("the SDPM"[2]).

4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its 40th report of 2013.

[1] Regulatory Reform (Scotland) Bill as amended at Stage 2 available at: http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26as4-stage2-amend.pdf

[2] Regulatory Reform (Scotland) Bill Supplementary Delegated Powers Memorandum available at: http://www.scottish.parliament.uk/S4_Bills/Reg_Reform_SDPM.pdf

DELEGATED POWERS PROVISIONS

5. The Committee considered each of the new or substantially amended delegated powers provisions in the Bill after Stage 2.

6. **After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the new delegated powers provisions listed below and that it is content with the Parliamentary procedure to which they are subject:**

- Section 7B- meaning of "relevant function"
- Section 7E- Primary authorities: power to make further provision
- Section 7H- Guidance
- Section 32B – Offences relating to supply of carrier bags: fixed penalty notices
- Section 32B(3) (inserting new paragraph 12 of Schedule 1A to the Climate Change (Scotland) Act 2009) – Offences relating to supply of carrier bags: fixed penalty notices
- Paragraph 11(2) of Schedule 3 (amending section 33A(13) and inserting 33A(13A) and (13B) of the Environmental Protection Act 1990 - Minor and consequential modifications
- Paragraph 11(4) of Schedule 3 (amending section 88(10) and inserting 88(10A) and (10B) of the Environmental Protection Act 1990 - Minor and consequential modifications

7. **After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the substantially amended delegated powers provisions listed below:**

- Section 1(5) – Power as respects consistency in regulatory functions
- Schedule 1 (introduced by section 1(5))– Regulators for the purposes of the powers in Part 1
- Section 2(8A) – Regulations under section 1: further provision
- Section 4(3A) – Regulators' duty in respect of sustainable economic growth
- Section 5(1A) – Code of practice
- Paragraphs 11(7), 11(8) and 28A of Schedule 2 (introduced by section 10)
- Sections 12 to 14 - Fixed monetary penalties

- Sections 15 to 17 – Variable monetary penalties
- Section 18(2A) – Undertakings under section 16: non-compliance penalties
- Section 19(4) and (6A) – Enforcement Undertakings
- Section 30(7) – Liability where activity carried out by arrangement with another
- Section 37A(2) –Smoke control areas : authorised fuels
- Section 37A(3) –Smoke control areas : exempt fireplaces

8. **The Committee therefore reports that it is content with the provisions in the Bill which have been amended at Stage 2 to insert or substantially alter provisions conferring powers to make subordinate legislation.**

Rùnaire a' Chaibineit airson Cùisean Dùthchail agus na h- Àrainneachd
Cabinet Secretary for Rural Affairs and the Environment
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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Rob Gibson MSP
Convenor
Rural Affairs, Climate Change and Environment Committee
Scottish Parliament
Holyrood
Edinburgh
EH99 1SP

04 December 2013

Dear Rob

As part of its consideration of the environmental aspects of the Regulatory Reform (Scotland) Bill, the Committee has expressed interest in the Environmental Crime Taskforce's work. I am writing to provide you with a copy of the report which has now been published.

In publishing the work of the Taskforce's report, I wish to commend the partnership (SEPA, SNH, Police Scotland, COSLA, the Crown Office and Scottish Government officials) for their work. Created as a short-life working group, the Taskforce has created an effective and productive partnership, and one of its recommendations is that it should have an on-going role. Along with its other recommendations, I am pleased to accept this report and look forward to further progress in this important area.

As the attached report sets out to date the Taskforce's work has:

- Defined environmental crime to provide a focus for collaboration and co-ordinated activity. In particular, it has set in place arrangements that have supported:-
  - integrated partnership working.
  - information sharing.
  - future policy and legislative change.
- Increased understanding of issues
- Opportunities for partners to work together at national and local level.
- Increased capacity and capability in support of financial investigation.
- Secured the first ever confiscation orders under the Proceeds of Crime Act.

Next Steps

As noted above, the Taskforce has identified the value of its existence as an effective place for discussion and driving issues forward, and will continue to meet to deliver further progress. Through this process:

- SEPA resources will be co-located with Police Scotland Intelligence to help tackle serious organised crime aspects of environmental crime:-
- SEPA and Police Scotland will deliver improvements in the way they share information and intelligence.
- Joint SEPA – Police Scotland Problem Profile in relation to Environmental Crime. This will identify priority areas for joint working. As part of this, an Operational Steering Group will be created to support prioritisation and practical action.
- Support for the development of a 'Fly Tipping Database' to help support intelligence led action.

The Taskforce's work has also led to proposal for new legislation. Following endorsement by the RACCE Committee in your Stage 1 Report on the Regulatory Reform Bill, these have been introduced as Stage 2 amendments to the Bill that will:-

- Enhance powers of entry.
- Introduce powers to seize documents.
- Reduction in the notice period to bring heavy plant or machinery onto a site.

Moving forward, and widening out the Partnership of "interest and action", a conference will be held in 2014 to deliver.???

International Recognition

The existence and work of Scotland's Environmental Crime Taskforce has gained international interest. Earlier this month, members of the Taskforce made a presentation on their work to Interpol's Environmental Compliance and Enforcement Committee in Nairobi.

Richard Lochhead

RICHARD LOCHHEAD

Report on the outcomes of the

Environmental Crime Task Force 2013

1. Background

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

1.2 In November 2011, the Environmental Crime Summit in Edinburgh sought to increase awareness of these issues; at this event Richard Lochhead, Cabinet Secretary for Rural Affairs and the Environment, announced the creation of an Environmental Crime Task Force (ECTF).

2. The Environmental Crime Task Force (ECTF)

2.1 The ECTF is a group tasked with supporting delivery of the Scottish Government's commitment to tackling environmental crime. Its creation recognises that criminal activities have a significant impact on Scotland's environment, economy and communities, and that the most effective way to tackle environmental crime is by partnership working between all relevant stakeholders. Details of the membership of the ECTF are outlined in Appendix 1.

2.2 ECTF Remit

2.2.1 The primary remit of the ECTF is to support the delivery of the Scottish Government's commitment to tackle environmental crime by undertaking 4 streams of work, namely to:

- Define environmental crime;
- Identify opportunities and priorities for preventing, tackling and deterring environmental crime in Scotland;
- Improve co-ordination between all stakeholders in the fight against environmental crime; and,
- Make proposals for legislation, research and other measures to tackle environmental crime.

2.2.2 The ECTF was tasked by the Cabinet Secretary to report back on progress by July 2013. This report completes that action and outlines progress against the above remit.

3. Defining Environmental Crime

3.1 For the purposes of this group, the ECTF defined Environmental Crime as:

"***an act or omission which directly or indirectly damages the environment (or has the potential to damage the environment) and which constitutes a breach of criminal law***."

4. Identifying Opportunities and Priorities for Preventing, Tackling and Deterring Environmental Crime in Scotland.

4.1. The ECTF acknowledges that it has adopted a broad definition of environmental crime. This broad definition is deliberate, and is intended to allow for a broader application of efforts to tackle both established and newly emerging forms of environmental crime. The members of the ECTF have identified a number of priority issues of concern, including large-scale deliberate acts of environmental degradation, littering and large-scale fly-tipping. The main issue of concern identified by the group is serious waste crime, often involving organised crime groups.

4.2 The infiltration of the regulated waste sector by Serious Organised Crime Groups (SOCG) is recognised by ECTF partners as a key issue; and it is our view that SOCG are attracted to waste crime because of a perception that such activity is low risk, but will result in high financial reward. The nature and scale of this infiltration is not yet fully understood, but it is clear that criminal groups are seeking opportunities for involvement in landfill, scrap yard operations and waste management.

4.3 Environmental criminals do not comply with environmental law and actively hide or adapt their behaviours to circumvent the regulatory framework. There is strong evidence in support of the assessment that a number of individuals with links to Scottish SOCG have business concerns within the waste industry. These present opportunities for money laundering, tax evasion and other criminal conduct. Partnership work between SEPA and others has identified the growing impact of waste crime in illegal waste operations, particularly surrounding illegal landfill activities.

4.4 Waste criminals undercut legitimate operators and gain unfair competitive advantage by avoiding costs such as landfill tax and VAT payments, infrastructure establishment, third-party disposal fees, and meeting adequate financial provision and producer responsibility compliance charges. Failure to provide proper infrastructure and financial provision, in particular, leaves the Scottish Government, SEPA and local authorities to potentially shoulder any resultant costs associated with the restoration of damaged environments, or managing abandoned sites.

4.5 The impact of criminal involvement in the waste industry has a further distorting influence on legitimate operations which operate at a relatively higher cost basis. Anecdotal evidence suggests that, as a consequence, there is a resistance across the legitimate industry to embrace changing practices in waste prevention, treatment and recovery, and to improve resource efficiency by investing in activities higher up the waste hierarchy, when criminals are still able to avoid legitimate working costs and undercut competitors. The result is a loss of potential jobs, capital investment, new technology implementation and revenue.

5. Improving Co-Ordination between Stakeholders in Tackling Environmental Crime

5.1 The ECTF has started to tackle the drivers of waste crime activity and has developed a number of key work streams which seek to integrate partnership working, facilitate information sharing and develop and shape policy and legislative change.

5.2 The Use of the Proceeds of Crime Act and Financial Investigation with respect to Environmental Crime.

5.2.1 The Proceeds of Crime Act 2002 (POCA) introduced powers for law enforcers to restrain assets at the beginning of criminal investigations and following conviction to

confiscate assets obtained through unlawful conduct. The power to confiscate property obtained through criminal activity, in addition to conviction and sentencing, is widely recognised as being an effective deterrent to criminal activity.

5.2.2 ECTF partners have developed and agreed, and are now implementing, a POCA strategy with the primary objective of establishing and mainstreaming the financial investigation of environmental crimes. Successful implementation of this strategy will better align the financial investigation of environmental crime, with work being undertaken across Scotland as part of the serious organised crime strategy *Letting Our Communities Flourish* (*http://www.scotland.gov.uk/Resource/Doc/274127/0081989.pdf*), to disrupt the criminal activities of organised crime groups.

5.2.3 The ECTF POCA strategy aims to establish a capacity and capability within ECTF partners for the financial investigation of environmental crime, and is focussed on five key work streams:

- Establishing structures of engagement between SEPA and partner agencies; and agreeing a process map to facilitate asset confiscation investigations;
- Identifying suitable environmental crime cases for confiscation investigation;
- Raising awareness of environmental crime with internal and external stakeholders;
- Exploring the use of civil recovery and taxation to recover criminal assets from environmental criminals; and
- The use of financial investigation reports to assist sentencing considerations.

5.2.4 SEPA, COPFS and Police Scotland have all made significant resource investment since December 2012 in building capacity and capability in support of financial investigation, including the recruitment by SEPA of two full-time financial investigators. This resource commitment has resulted in a number of key successes and achievements, namely;

- the establishment of a framework for ECTF partners to co-ordinate capacity, enhance communication and maximise intelligence in support of POCA and financial investigations;
- to actively publicise the use of POCA and financial investigation as a new aspect of our toolkit to tackle environmental crime;
- to develop an early-stage identification process within SEPA to ensure that POCA is considered for all cases that are being reported to the Procurator Fiscal;
- POCA considered in over 20 SEPA cases reported; and
- in May 2013 obtained the first-ever confiscation order agreed for an environmental crime in Scotland for £41,131.

5.3 Tackling SOCG Involvement in the Waste Industry

5.3.1 The scale and extent of SOCG involvement in the waste industry is the most significant intelligence gap in our understanding of this issue and it is central to the development and implementation of effective interventions.

5.3.2 The exploitation of the waste industry by SOCG has been observed through joint-agency collaboration by the Police, COPFS and SEPA and interlinked investigation and intelligence exchange has already led to the significant disruption of organised crime.

5.3.3 ECTF partners have worked together to examine current practices in terms of intelligence gathering and development, information sharing, joint coordination, resource implications, operational planning, joint objectives and delivery mechanisms. In order to make the best use of resources and opportunities for taking forward effective interventions, the ECTF acknowledges that intelligence and data held independently by Police Scotland and SEPA should be considered collectively.

5.3.4 The following actions are agreed as part of this work stream:

- agreement that an Information Sharing Protocol (ISP) will be developed between Police Scotland, SEPA and other ECTF partners;

- agreement that SEPA resource will be co-located with Police Scotland Intelligence resources in support of tackling serious organised crime;

- agreement that SEPA and Police Scotland will seek to improve information and intelligence sharing in respect of SOCG involvement in the waste industry;

- agreement that Police Scotland and SEPA will develop a joint Problem Profile in relation to environmental crime; and with specific reference to SOCG infiltration of the waste industry;

- agreement that a joint organisational Operational Steering Group with clear focus towards Environmental Crime will be established. This group will deliver recommendations for tactical action and prioritisation to Police Scotland and SEPA tasking forums;

- continue to undertake joint operational action against environmental criminals.

5.4 Multi-agency Approach to Significant Large Scale Deliberate Acts of Environmental Degradation

5.4.1 The ECTF has agreed that the adoption of a multi-agency approach to tackle significant large scale deliberate acts of environmental degradation should be a priority area. It recognises that there are synergies between this work, primarily the domain of SEPA in the past, and work undertaken around joint organised crime investigations developed throughout the year by other organisations, including Police Scotland and COPFS.

5.4.2 The following actions have been identified as part of this work-stream:

- the ECTF has endorsed the existing multi-agency approach currently being used to tackle SOCG in the waste industry and encourages its adoption to counter those involved in significant large-scale acts of environmental degradation.

5.5 Litter and Fly-tipping

5.5.1 The ECTF recognises that the Scottish Government wants fresh action and solutions to tackle litter and fly-tipping to help deliver on its commitment to a zero waste society. The ECTF recognises the importance of avoiding duplication in work already undertaken by local authorities, Zero Waste Scotland, SEPA and Keep Scotland Beautiful to combat litter and fly-tipping in Scotland.

5.5.2 The following actions have been identified as part of this work-stream:

- the ECTF acknowledges and supports the work of the KSB *Clean Up Scotland Campaign* and the current Scottish Government consultation on litter and fly-tipping. The group will revisit and consider the further development of intervention activities and partnership engagement following publication of its findings;

- agreement that the ECTF will support intelligence development, analysis and targeting of offenders engaging in these activities;

- the ECTF will support the development of a "fit-for-purpose" fly-tipping database and the work of the Scottish Flytipping Forum by providing project management, design and implementation advice and assistance.

5.6 Wildlife Crime Partners

5.6.1 The ECTF recognises that there are opportunities for mutual benefit in sharing intelligence, guidance and best practice in respect of roles and responsibility in combating wildlife crime. There already exists, under the Partnership Against Wildlife Crime Scotland (PAWS), a strategy to combat wildlife crime in Scotland. An early decision of the ECTF was to seek synergies with the work of PAWS, and to avoid duplication.

5.6.2 The following actions have been identified as part of this work-stream:

- agreement that a workshop is conducted between relevant partners to explore further opportunities in this area;

- agreement that training and awareness packages relating to environmental crime are developed and delivered to appropriate partners;

- agreement that there should be liaison and subsequent exchange of intelligence between SEPA and National Wildlife Crime Unit (incorporated within the ISP mentioned in section 5.3.4).

6. Proposals for Legislation, Research and Other Measures to Tackle Environmental Crime

6.1 The ECTF has explored opportunities to influence and direct new policy and legislative change to tackle environmental crime.

6.2 The Regulatory Reform (Scotland) Bill

6.2.1 The Regulatory Reform (Scotland) Bill introduces a new regime for environmental regulation which includes a new enforcement framework which will strengthen SEPA's ability to impose penalties upon environmental criminals. It is proposed that this improved toolkit will allow SEPA to impose fixed and variable monetary penalties, publicise the criminal activities of non-compliant operators, as well as to recover the costs incurred throughout investigation and enforcement processes. A central tenet of the proposals also includes powers to restrict the grant of permits or registration to those who are not considered "fit-and-proper persons".

6.2.2 Factors such as operator competence and financial standing are likely to form part of this new "fit-and-proper person" test. The ECTF has focussed on providing direction on legislative change in respect of criminal aspects and, in particular, the need to provide a requirement to reveal all criminal offences as part of an operator "fit-and-proper person" test. This will help to fulfil the Scottish Government's policy around disruption of serious organised crime. Following a series of workshops and meetings with the Scottish Government Regulatory Reform Bill (RRB) team, detailed proposals on the structuring of an effective 'fit-and-proper person' test and processes are being incorporated into the legislative provisions.

6.2.3 The ECTF has also undertaken scoping work to identify further areas and opportunities where it is considered the bill could be developed to help tackle environmental crime. In support of partnership investigations into environmental crime, a series of workshops have been held in respect of developing a number of proposals concerning powers of entry, specifically in regard to amendments to Section 108 of the Environment Act 1995, for incorporation into the new Bill.

6.2.4 The following actions have been delivered as part of this work-stream:

- the ECTF has proposed amendments to the Regulatory Reform Bill in relation to expanding the effectiveness of SEPA's enforcement toolkit to tackling environmental crime. Recent investigatory experience has identified the potential for more efficient ways of working. Measures proposed include amended powers of entry, powers to seize documents, and a reduction in the notice period required to bring heavy plant and/or machinery onto a site.

6.3 International Environmental Crime

6.3.1 The ECTF is a key supporter of proposals made by SEPA for their bid for European Life+ funding to undertake project-based work on developing our understanding of waste crime and developing intervention activities with partners across the European Union.

6.3.2 Interpol recognises that pollution-based crime, including waste crime, is a serious and growing international problem and has commented:

"*Environmental crime is not restricted by borders, and can affect a nation's economy, security and even its existence. A significant proportion of both wildlife and pollution crime is carried out by organized criminal networks, drawn by the low risk and high profit nature of these types of crime. Indeed, environmental crime often occurs hand in hand with other offences such as passport fraud, corruption, money laundering and murder*"
(www.interpol.int/Crime-areas/Environmental-crime)

6.3.3 In response, Interpol has formed an Environmental Compliance and Enforcement Committee to design and develop strategies to enhance the effectiveness and efficiency of national and international responses to environmental compliance and enforcement. The ECTF will work with Interpol to identify effective solutions in tackling international environmental crime through intelligence sharing and the identification of best practice approaches.

6.3.4 ECTF partners have been involved in developing the Terms of Reference for the Interpol Environmental Compliance and Enforcement Committee. The committee will have its first meeting in Nairobi in November 2013 and the ECTF will be represented at this forum. The work of the ECTF is of particular interest to Interpol, as they are encouraging countries to establish National Environmental Security Task Forces as an effective way to fight environmental crime. The work undertaken in Scotland is seen as an example of best practice in this area.

6.3.5 The ECTF will also be represented at Interpol's Pollution Crime Group at this event. This group will meet to discuss current projects and plan future activities to help tackle threats from environmental crime within the ECTF's field of influence. The working group will be invited to present recommendations for the consideration of the Environmental Compliance and Enforcement Committee.

6.3.6 The following actions have been delivered as part of this work-stream:

- the ECTF Chair has been invited to present to the Environmental Compliance and Enforcement Committee conference in Nairobi in November 2013 on the work of the ECTF;

- an ECTF representative is to propose a project for Interpol's Pollution Crime Group on the involvement of serious organised criminality in the waste industry.

7. Recommendations on the future of the ECTF

7.1 Following a review of the work undertaken to date there is a consensus between partners that the work of the ECTF has been valuable and has had an impact on enhancing partners' capacity and capability to tackle environmental crime. Understanding of environmental crime has improved, and the ECTF has supported practical action against environmental criminals. There is also a consensus that there are further opportunities for more work in this area.

7.2 The following recommendations are offered for consideration:

- That the ECTF continues subject to annual review and report;

- the ECTF should build upon the achievements already delivered from the agreed remit, and with a primary focus upon serious waste crime;

- that the membership of the ECTF should be reviewed;

- that the ECTF should build on the financial investigatory capability already established and explore opportunities for submitting bids for funding from POCA receipts, to help sustain and develop further capacity in this area;

- that the ECTF explore ways of measuring success with respect to tackling Environmental Crime;

- that an Environmental Crime Conference is developed and held in 2014, in which the vision of the ECTF in tackling serious waste crime, and particularly involving organised crime, is promoted to appropriate stakeholders;

- that a wider communication strategy be developed which raises awareness of environmental crime as a threat to the Scottish environment, its economy and communities; and the role of the ECTF and partners in tackling this crime when and wherever it is found.

Appendix 1

The original membership of the ECTF was as follows:

- Crown Office and Procurator Fiscal Service (COPFS)
- Scottish Government (with representation from Environmental Quality Division and Police Division)
- Scottish Natural Heritage
- Police Scotland
- Scottish Environment Protection Agency (SEPA)
- Society of Local Authority Chief Executives and Senior Managers (UK) (SOLACE)

Note - The ECTF was unable to secure attendance from SOLACE and COSLA were subsequently invited, and attended the most recent meeting in May 2013.

External presentations were also provided by:

- Professor Mark Poustie from Strathclyde University who spoke on issues surrounding environmental law, enforcement and the courts;
- Mr John Burns, the Environment Agency (EA) national campaign and enforcement manager on the Illegal Waste Sites Taskforce on his role in leading this project;
- Mr Vic Deans, senior accredited financial investigator within the EA, who presented on the key role played by financial investigation in tackling illegal waste crime;
- Mr Derek Robertson and Mr Peter Duncan from Keep Scotland Beautiful who spoke on the development of the 'Clean Up Scotland' campaign.

Minister for Energy, Enterprise and Tourism
Fergus Ewing MSP

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The Scottish Government
Riaghaltas na h-Alba

LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND

Murdo Fraser MSP
Convener
Economy, Energy and Tourism Committee
Scottish Parliament

eet@scottish.parliament.uk

13th January 2014

Dear Murdo,

REGULATORY REFORM (SCOTLAND) BILL

I thought it would be helpful to provide information about the Scottish Government amendments proposed for stage 3 next week.

I would be grateful if your clerks could pass on the attached table to the Rural Affairs, Climate Change and Environment and Delegated Powers and Law Reform Committees who are also likely to have an interest, and the Presiding Officer and SPICe for information.

Yours Sincerely

FERGUS EWING

REGULATORY REFORM (SCOTLAND) BILL
SUMMARY OF STAGE 3 GOVERNMENT AMENDMENTS

Amendment	Description
Section 10 Regulations relating to protecting and improving the environment	Amendment 2 is a minor technical amendment to the text of Bill as introduced to ensure correct cross-referencing.
Section 19 Enforcement undertakings	Amendment 3 is a minor technical amendment to the text of Bill as introduced to correct a reference in Section 19 to how SEPA can certify non-compliance with an enforcement undertaking.
Before Section 39 Annual report on operation of Part 2	Amendment 4 requires the Scottish Ministers to lay an annual report, as soon as practicable after the end of each calendar year, before the Scottish Parliament on the operation of Part 2 of the Regulatory Reform (Scotland) Act. This provision has been agreed in principle with the Delegated Powers and Law Reform Committee following recommendations made in their Stage 1 report.
Section 40 Marine licence applications	Amendments 5, 6 and 7 will change the wording of the provisions to refer to "permission" rather than "leave" to ensure alignment with terminology used in the Courts Reform (Scotland) Bill for similar procedures. Amendment 8 removes section 63B(4) to provide clarity that the new appeals process does not require a separate application for permission before or after the main application.
Long Title	This amendment will ensure the long title of the Bill includes a reference to primary authorities. Part 1A of the Bill was introduced during Stage 2 to create a broad legal framework for a Primary Authority Partnership scheme in relation to the devolved regulatory responsibilities of Local Authorities in Scotland.

Regulatory Reform (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 48	Schedules 1 to 3
Long Title	

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 4

Alison Johnstone

15 In section 4, page 4, line 25, leave out <economic growth> and insert <development>

Alison Johnstone

16 Leave out section 4

Section 6

Alison Johnstone

17 In section 6, page 5, line 22, leave out from <and> to end of line 25

Alison Johnstone

18 In section 6, page 5, line 24, leave out <economic growth> and insert <development>

Section 7

Alison Johnstone

19 In section 7, page 6, line 12, leave out <, 4>

Section 10

Paul Wheelhouse

2 In section 10, page 11, line 3, after second <of> insert <subsection (1) of>

Section 19

Paul Wheelhouse

3 In section 19, page 17, line 24, after <under> insert <provision made in pursuance of>

Section 32B

Murdo Fraser

1 Leave out section 32B

Section 38

Alison Johnstone

20 In section 38, page 43, line 31, leave out from second <and> to end of line 32

Alison Johnstone

21 In section 38, page 43, line 32, leave out <economic growth> and insert <development>

Before section 39

Paul Wheelhouse

4 Before section 39, insert—

<Annual report on operation of Part 2

The Scottish Ministers must, as soon as practicable after the end of each calendar year, lay before the Scottish Parliament a report on the operation of this Part.>

Section 40

Fergus Ewing

5 In section 40, page 45, line 15, leave out <leave> and insert <permission>

Fergus Ewing

6 In section 40, page 45, line 17, leave out <leave> and insert <permission>

Fergus Ewing

7 In section 40, page 45, line 22, leave out <leave> and insert <permission>

Fergus Ewing

8 In section 40, page 45, leave out lines 27 and 28

Section 41

Margaret McDougall

10 In section 41, page 45, line 40, at end insert—

<(1AAA)Before making provision such as mentioned in subsection (1A)(da), the Scottish Ministers must prepare and publish guidance setting out the principles to which they must have regard in determining whether the functions of a planning authority are not being, or have not been, performed satisfactorily.

(1AAB)Before preparing and publishing guidance under subsection (1AAA), the Scottish Ministers must consult—

(a) each planning authority,

(b) such other persons as appear to the Scottish Ministers to have a significant interest in such guidance, and

lay the guidance before the Scottish Parliament.>

Margaret McDougall

11 In section 41, page 45, line 40, at end insert—

<( ) Before making provision such as mentioned in subsection (1A)(da) such that the charge or fee payable to a planning authority is lower than that payable to another planning authority, the Scottish Ministers must take all reasonable steps to support the planning authority to improve the performance of its functions.>

Margaret McDougall

12 In section 41, page 45, line 40, at end insert—

<( ) Where the Scottish Ministers make provision such as mentioned in subsection (1A)(da) such that the charge or fee payable to a planning authority is lower than that payable to another planning authority, they must ensure that the lower charge or fee is not set—

(a) at a level, or

(b) for a period,

that will adversely affect the performance of, or as the case may be the range of services offered by, the planning authority.>

Margaret McDougall

13 In section 41, page 45, line 40, at end insert—

<( ) Before making provision such as mentioned in subsection (1A)(da) such that the charge or fee payable to a planning authority is lower than that payable to another planning authority, the Scottish Ministers must lay before the Scottish Parliament a statement setting out—

(a) the percentage variation by which, and

(b) the period for which,

they propose to vary the fee or charge.>

Margaret McDougall

14 Leave out section 41

Section 44

Alison Johnstone

22 In section 44, page 47, line 4, leave out <, 4>

Long Title

Fergus Ewing

9 In the long title, page 1, line 2, after <consistency;> insert <to make provision in relation to primary authorities;>

Regulatory Reform (Scotland) Bill

Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the day of Stage 3 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Sustainable economic growth and sustainable development
15, 16, 17, 18, 19, 20, 21, 22

Notes on amendments in this group
Amendment 17 pre-empts amendment 18
Amendment 20 pre-empts amendment 21

Group 2: Minor and technical amendments
2, 3, 9

Group 3: Offences relating to supply of carrier bags: fixed penalty notices
1

Debate to end no later than 35 minutes after proceedings begin

Group 4: Report to the Parliament on operation of Part 2
4

Group 5: Applications to review marine licensing decisions: permission to proceed
5, 6, 7, 8

Group 6: Planning authorities' functions: charges and fees
10, 11, 12, 13, 14

Debate to end no later than 50 minutes after proceedings begin

Amendments in debating order

Group 1: Sustainable economic growth and sustainable development

Alison Johnstone

15 In section 4, page 4, line 25, leave out <economic growth> and insert <development>

Alison Johnstone

16 Leave out section 4

Alison Johnstone

17 In section 6, page 5, line 22, leave out from <and> to end of line 25

Alison Johnstone

18 In section 6, page 5, line 24, leave out <economic growth> and insert <development>

Alison Johnstone

19 In section 7, page 6, line 12, leave out <, 4>

Alison Johnstone

20 In section 38, page 43, line 31, leave out from second <and> to end of line 32

Alison Johnstone

21 In section 38, page 43, line 32, leave out <economic growth> and insert <development>

Alison Johnstone

22 In section 44, page 47, line 4, leave out <, 4>

Group 2: Minor and technical amendments

Paul Wheelhouse

2 In section 10, page 11, line 3, after second <of> insert <subsection (1) of>

Paul Wheelhouse

3 In section 19, page 17, line 24, after <under> insert <provision made in pursuance of>

Fergus Ewing

9 In the long title, page 1, line 2, after <consistency;> insert <to make provision in relation to primary authorities;>

EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 3, No. 68 Session 4

Meeting of the Parliament

Thursday 16 January 2014

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-08768—That the Parliament agrees that, during stage 3 of the Regulatory Reform (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 3: 35 minutes
Groups 4 to 6: 50 minutes.

The motion was agreed to.

Regulatory Reform (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 2, 3, 4, 5, 6, 7, 8 and 9.

The following amendments were disagreed to (by division)—
15 (For 26, Against 71, Abstentions 0)
16 (For 28, Against 71, Abstentions 0)
17 (For 28, Against 71, Abstentions 0)
18 (For 28, Against 71, Abstentions 0)
1 (For 12, Against 87, Abstentions 0)
20 (For 28, Against 71, Abstentions 0)
21 (For 28, Against 71, Abstentions 0)
10 (For 39, Against 60, Abstentions 0)
11 (For 27, Against 72, Abstentions 0)
12 (For 26, Against 72, Abstentions 0)
13 (For 27, Against 71, Abstentions 0)
14 (For 27, Against 71, Abstentions 0).

The following amendments were not moved: 19 and 22.

The Deputy Presiding Officer extended the time-limits under Rule 9.8.4A(c).

Regulatory Reform (Scotland) Bill - Stage 3: The Minister for Environment and Climate Change (Paul Wheelhouse) moved S4M-08745—That the Parliament agrees that the Regulatory Reform (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 93, Against 2, Abstentions 1).

14:00

On resuming—

Business Motion

The Deputy Presiding Officer (Elaine Smith): The first item of business this afternoon is consideration of business motion S4M-08768, in the name of Joe FitzPatrick, on behalf of the Parliamentary Bureau, setting out a timetable for the stage 3 consideration of the Regulatory Reform (Scotland) Bill.

Motion moved,

That the Parliament agrees that, during stage 3 of the Regulatory Reform (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 3: 35 minutes

Groups 4 to 6: 50 minutes.—[*Joe FitzPatrick*].

Motion agreed to.

Regulatory Reform (Scotland) Bill: Stage 3

14:00

The Deputy Presiding Officer (Elaine Smith): The next item of business is stage 3 proceedings on the Regulatory Reform (Scotland) Bill. In dealing with the amendments members should have the bill as amended at stage 2, SP bill 26A; the marshalled list of amendments, SP bill 26A-ML; and the groupings, SP bill 26A-G. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period for voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate.

Members who wish to speak in the debate on any group of amendments should press their request to speak button as soon as possible after I call the group.

Members should refer to the marshalled list of amendments.

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

The Deputy Presiding Officer: Amendment 15, in the name of Alison Johnstone, is grouped with amendments 16 to 22. Due to pre-emptions, if amendment 17 is agreed to, I cannot call amendment 18, and if amendment 20 is agreed to, I cannot call amendment 21.

Alison Johnstone (Lothian) (Green): The subject of my amendments has formed a substantial part of the debate around the bill. The phrase "sustainable economic growth" has never previously appeared in primary legislation so I hope that the Government welcomes the scrutiny here.

The amendments in this group are in two sets. My preferred set of amendments—16, 17 and 20—would remove from the bill the section 4 duty on regulators and references to sustainable economic growth in the regulators' code of practice and the Scottish Environment Protection Agency's purpose. Amendments 19 and 22 are related to those changes but consequential.

Why do I believe that the section 4 duty should be removed and the references to sustainable economic growth deleted? Sustainable economic growth is the Government's stated purpose and it has every right to promote its policy priorities, but I fail to see the link that the minister claims exists between the proposed duty and delivering the policy intention of regulatory consistency.

No one denies that Scotland is a good place in which to do business. The Scottish Trades Union Congress made the point in its evidence to the Economy, Energy and Tourism Committee that we are not living in an overly regulated world. Scottish regulators are willingly engaged with the regulatory review group and good progress is being made on consistency in non-legislative ways.

We have heard no practical examples from the Government of how the duty will work. In fact, many of the regulators told us that they had no objection to the duty because they were already contributing to the Government's purpose. If that is the case, why must we add unnecessary complications, with legislation that is not needed, and new duties, when collaborative initiatives are already working?

The other set of amendments—15, 18 and 21—do not delete sections or paragraphs but replace the bill's references to "sustainable economic growth" in the regulators' duty, the code of practice and SEPA's purpose with the phrase "sustainable development". Those are not my preferred amendments but I have lodged them in the hope that, should members wish to retain the section 4 duty, they will be able to support referring to a concept in law that explicitly balances social, environmental and economic considerations.

The concept of sustainable development is well recognised, which addresses the concerns of many bodies—including the Law Society of Scotland—that any new concept in law will be open to the courts to define and may cause confusion about what should and should not be considered in any decision making. Additional concerns were raised at stage 2 that sustainable development does not, in practice, balance its three pillars, but rather focuses on the environmental aspect. However, I suggest that that is more a result of the concept being applied in areas in which the environment has previously been overlooked.

No one wants regulators to act inefficiently or in overly complicated ways, but they are generally doing a very good job, and the regulatory review group reports that it is making good progress on consistency in non-legislative ways. Of course, there are always improvements to be made, especially in supporting small businesses, but the rest of the bill will provide the Government with other powers in relation to national standards and consistency, and I fail to see how the section 4 duty and other references to contributing to "sustainable economic growth" will connect with a policy objective of regulatory consistency.

I move amendment 15.

Gavin Brown (Lothian) (Con): On this particular issue, the Scottish Government has called it right. The scrutiny has been useful in that it tightens up some of the guidance in the code of practice that will follow, but on the principal issue I support what the Government is doing, which is something that my party has approved of for quite some time.

I disagree in principle with the arguments against the provision. By placing a duty on regulators, the bill raises the profile of the issue, provides a vision and creates a change in culture. It also protects the primary role of each regulator by giving a clear exception where there is a conflict, as under section 4(1). It does not override the regulators' primary duties, but it rightly places on them a new duty that must be taken into consideration.

The arguments about the definition have been countered by the Government, which has made it clear that there will be a full definition both in guidance and in a code of practice. I was comforted too by the idea that the Economy, Energy and Tourism Committee will have oversight and involvement.

I note in passing that the Office of the Scottish Charity Regulator stated in its written submission to the Economy, Energy and Tourism Committee that it

"already reports on sustainable economic growth as required by Section 31(1) ... of the Public Services (Scotland) Act 2010."

The reference should be to section 32 of the Public Services Reform (Scotland) Act 2010, but, nevertheless, the fact that OSCR was able to overcome the definitional challenges in that respect leads me to believe that we will be able to do the same with this bill. On that basis, the Conservatives will not support Alison Johnstone's amendments.

Malcolm Chisholm (Edinburgh Northern and Leith) (Lab): I am told that there has been some progress on the matter since we discussed it at stage 1, so I will be interested to hear what the minister has to say. When I read the reports on the bill by the Economy, Energy and Tourism Committee and the Rural Affairs, Climate Change and Environment Committee, I was struck by the range of bodies that were expressing concerns about the definition. Some of those were environmental groups, as we might have expected, but a much broader range of bodies, such as the STUC, expressed concerns, and even some business organisations were sceptical about the definition.

I am genuinely puzzled as to why the phrase, which we know is central to the Government's purpose, should be introduced into legislation for the first time. I recall one academic saying in evidence that the definition was ambiguous and that some people might even take it to mean growth that was economically sustainable, which I do not think is the intention of the Government's wording.

The ambiguity around the definition leads to a lack of clarity. I will be interested to hear the minister's response, but I believe that supporting Alison Johnstone's second set of amendments on the concept of sustainable development would be a much more sensible and consistent approach, because the concept already exists in legislation—for example, I remember that there were debates about the concept during the passage of what became the Planning etc (Scotland) Act 2006. The idea of balancing economic and environmental considerations is established, and the concept of sustainable development is well established in law.

As I indicated, I think that there has been progress on the issue, so I will listen with an open mind, but I am still concerned about the definition and I am struck by the wide range of bodies giving evidence. I remember the Rural Affairs, Climate Change and Environment Committee saying that there should be a definition in the text of the bill and, given the ambiguity of the term in question, I would be interested in hearing an explanation of why that suggestion has not been taken up.

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): I am grateful to members for contributing to the debate as they have contributed to debating the issue at stages 1 and 2. I understand that the amendments in this group are identical word for word to ones that were previously submitted. We have debated the matter before, but I am grateful for the contributions that members have made.

Sustainable economic growth is an essential component of the Scottish Government's purpose. We are determined to promote in all Scottish regulators a broad and deep alignment to it. The sustainable economic growth duty in the bill provides an important line of sight to the Government's purpose. It will complement existing duties, increase transparency, encourage greater regulatory consistency and encourage more engagement and joined-up working.

Many regulators already contribute to sustainable economic growth in their day-to-day activities, as has already been mentioned. The wording of the duty seeks to build on that to support and empower regulators to contribute to the Government's purpose, making them more accountable for the decisions that they make.

The Scottish Government and regulators in Scotland value sustainable economic growth and

the protection of the environment. Those need not be mutually exclusive. The duty does not prioritise sustainable economic growth over other regulatory objectives. Regulators need to determine an appropriate balance between regulatory and economic objectives, and the code of practice will help them do that. The duty is underpinned by the code of practice, which will build on and encourage best practice and support regulators who deliver the duty in contributing to achieving sustainable economic growth.

Regulators have signalled that they already act in that way. The duty will support and build on that, helping to protect our people and our environment and helping business to flourish and create jobs.

We are firmly committed to promoting sustainable economic growth and to the current provisions in the bill. Sustainable development is an integral part of sustainable economic growth and, therefore, the Scottish Government does not support the amendments in the group.

Alison Johnstone: Gavin Brown stated that the Government's proposal would highlight economic growth. It is fair to say that economic growth already has a very high profile and regulators currently contribute to sustainable economic growth. There is no need to include it in the bill.

I disagree with Gavin Brown that the bill will clarify matters in cases of conflict. It is my view and that of others—including Scottish Environment LINK, the STUC and Consumer Focus Scotland—that the bill introduces a conflict that does not currently exist. The Rural Affairs, Climate Change and Environment Committee believes that the duty would confuse regulators, and Scottish Environment LINK has said:

"We fear the greatest risk remains the unintended consequences of this move on our legal system, amounting to a 'lawyers' charter' instead of assisting with practical decision making and streamlining regulation."

I welcome the fact that ministers have already removed the duty from the planning system. It is fair to say that there are well-documented instances in which the economy has trumped the environment when it comes to planning, and I am concerned that the duty will make it more difficult to implement truly balanced regulation.

As Malcolm Chisholm mentioned, the Scottish Government's proposal has united some incredibly diverse groups in concern and opposition. Those include Oxfam, the Law Society of Scotland, the STUC, Scottish Environment LINK and the Association of Salmon Fishery Boards to name but a few.

The fundamental question is not about definitions, because we understand the general thrust of what is meant by sustainable economic growth, but whether it is right to place such an economic duty on regulators in the first place. Regulators help to stop the tiny minority of people who cheat or deceive and who thereby gain economic advantage over businesses that play by the rules. That is how they help our economy to operate smoothly. They enable a fair, competitive environment in which business can develop, and they should be allowed to focus entirely on that main purpose. I will press amendment 15.

The Deputy Presiding Officer: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division. As it is the first division of the stage, the Parliament is now suspended for five minutes.

14:14

Meeting suspended.

14:19

On resuming—

The Deputy Presiding Officer: We move to the division on amendment 15.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)

Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 26, Against 71, Abstentions 0.

Amendment 15 disagreed to.

Amendment 16 moved—[Alison Johnstone].

The Deputy Presiding Officer: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)

Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 28, Against 71, Abstentions 0.

Amendment 16 disagreed to.

Section 6—Code of practice: procedure

The Deputy Presiding Officer: I remind members that, if amendment 17 is agreed to, amendment 18 will be pre-empted.

Amendment 17 moved—[Alison Johnstone].

The Deputy Presiding Officer: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)

McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 28, Against 71, Abstentions 0.

Amendment 17 disagreed to.

Amendment 18 moved—[Alison Johnstone].

The Deputy Presiding Officer: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
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Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)

White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 28, Against 71, Abstentions 0.

Amendment 18 disagreed to.

Section 7—Power to modify schedule 1

Amendment 19 not moved.

Section 10—Regulations relating to protecting and improving the environment

The Deputy Presiding Officer: Group 2 consists of minor and technical amendments. Amendment 2, in the name of Paul Wheelhouse, is grouped with amendments 3 and 9.

The Minister for Environment and Climate Change (Paul Wheelhouse): Amendment 2 is a minor technical amendment, correcting a referencing error in the text of the bill as introduced.

Amendment 3 is needed because SEPA will certify non-compliance with an enforcement undertaking under regulations to be made using the new powers in section 19 of the bill, rather than directly under that section.

During stage 2, new provisions were agreed, providing a broad legal framework for primary authority in Scotland. Primary authority will deliver improved consistency of regulation and will reduce duplication. Amendment 9 includes a reference to "primary authorities" in the long title of the bill to ensure that it fully reflects the contents.

I move amendment 2.

The Deputy Presiding Officer: I offer Fergus Ewing the opportunity to speak to amendment 9, if he so wishes.

Fergus Ewing: No.

Amendment 2 agreed to.

Section 19—Enforcement undertakings

Amendment 3 moved—[Paul Wheelhouse]—and agreed to.

Section 32B—Offences relating to supply of carrier bags: fixed penalty notices

The Deputy Presiding Officer: Group 3 is on offences relating to the supply of carrier bags—fixed penalty notices. Amendment 1, in the name of Murdo Fraser, is the only amendment in the group.

Murdo Fraser (Mid Scotland and Fife) (Con): At stage 2, the Scottish Government lodged an amendment that brought in section 32B. That new section amends the Climate Change (Scotland) Act 2009 to allow for the provision of fixed-penalty notices for contraventions and non-compliance with forthcoming carrier bag regulations. Amendment 1 seeks to delete section 32B, and therefore to reverse the decision taken at stage 2.

I have two reasons for opposing the provisions. The first relates to the substantive issue. On a point of principle, the Scottish Conservatives do not support the proposed plastic bag tax. There are good, detailed arguments against the measures set out in the briefing for the debate that was provided by the Scottish Retail Consortium. [*Interruption*.]

The Deputy Presiding Officer: Mr Fraser, I will stop you for a moment. Can I have some order, please? If members wish to contribute to the debate, could they please press their request-to-speak buttons? They will then be called to contribute.

Murdo Fraser: I have always believed that we should introduce legislation or taxes to change behaviour only as a last resort. I do not believe that such an approach is necessary in this case.

Already, a voluntary approach by many retailers has substantially reduced the volume of plastic bags being issued. The British Retail Consortium has noted that there has been a 50 per cent reduction in carrier bag use in England through voluntary action agreed with the UK Government.

There are different views on how effective a carrier bag charge might be and how beneficial it might be to the environment. The issue was last considered in detail by the Parliament back in 2005, when the then Environment and Rural Development Committee considered Mike Pringle's member's bill on the issue. The committee unanimously came to the view that this was not the right way to proceed. Among the members of that committee were one Rob Gibson of the Scottish National Party and, even more interestingly, one Richard Lochhead, who is now enjoying a position as Cabinet Secretary for Rural Affairs and the Environment.

Rob Gibson (Caithness, Sutherland and Ross) (SNP): Will the member take an intervention?

Murdo Fraser: Oh, yes, please, Mr Gibson.

Rob Gibson: The member should be honest with the Parliament and say that the reason why that committee refused to recommend the proposals at the time was to do with the measures being ultra vires for the Scottish Parliament.

Murdo Fraser: That is a very interesting intervention from Mr Gibson. I took great care to read the committee report in detail. A whole range of very compelling arguments were made against

the proposals at the time. For example, the Environment and Rural Development Committee said that there were

"a number of unintended consequences that appear likely to be connected with achieving a large reduction in plastic bag use by means of the proposed levy."

The committee also heard evidence that a tax on plastic bags might mean an increase in other waste, with no overall decline in CO_2 emissions. I am not clear what has led Mr Lochhead, Mr Gibson and all their colleagues on the SNP benches to change their views on the matter since 2005. No doubt, the minister will enlighten us when he comes to speak.

14:30

Leaving aside the substantive issue, I think that the second and perhaps more serious concern relates to the procedure that the Scottish Government has followed. As members know, I convene the Economy, Energy and Tourism Committee, which spent a lot of time taking evidence at stage 1 on the general principles of the bill. The Rural Affairs, Climate Change and Environment Committee did a further piece of work as a secondary committee, in looking at part 2 of the bill, which deals with SEPA. However, neither committee had the opportunity to take evidence at stage 1 on the proposal for a carrier bag tax, because it was only at the very last moment in the stage 1 debate that the minister indicated that a stage 2 amendment would be lodged to introduce the tax.

Although the Scottish Government has consulted on the proposal, there has been no opportunity for proper parliamentary scrutiny. When we are dealing with an important matter that will have a wide impact—the introduction of a new tax—it should be open to a committee of the Parliament to give that measure full scrutiny, but that has not happened in this case. It is deeply ironic that in a bill that is about improving regulation, a measure has been introduced that has not been properly scrutinised.

For those two reasons, I believe that the measure should be removed from the bill. It is open to the Government to bring back the measure in primary legislation at a future date for proper scrutiny if it wishes to do so, but it should not be in the bill.

I move amendment 1.

Paul Wheelhouse: After Murdo Fraser's speech, we can be clear about one thing: that the Tories support a bedroom tax but apparently not a plastic bag tax, even though it should be said that the UK Government is proposing a similar charging structure in the rest of the UK in 2015.

Murdo Fraser: And it is wrong.

Members: Oh!

The Deputy Presiding Officer: Order.

Paul Wheelhouse: Amendment 1 would remove the powers to provide for modest fixed monetary penalties as part of the enforcement of the carrier bag charging offences that are proposed from 20 October. We will work closely with Scottish retailers to help them to understand their responsibilities. Coupled with a pragmatic approach from local authorities, we do not expect a significant number of cases in which enforcement action will be necessary. However, we want to ensure that local authorities have an option that provides a realistic threat of enforcement action without the need for court action and which avoids costs for all sides. Amendment 1 would remove that proportionate and cost-efficient enforcement option. The Scottish Government therefore cannot accept it.

As I explained to the Economy, Energy and Tourism Committee, which Murdo Fraser convenes, in last year's consultation on carrier bag charging, we proposed enforcement through civil penalties. No consultee objected to that. However, in preparing the proposed regulations in the summer, it emerged that the enabling powers did not allow for that. We therefore introduced the fixed-penalty provisions at stage 2, following discussion with the Convention of Scottish Local Authorities and retailer representatives. COSLA strongly supports the fixed-penalty option on efficiency grounds. The Scottish Grocers Federation supported the fixed-penalty provisions in its recent representations on the carrier bag charging regulations. Although it would prefer no new penalties, it favoured civil sanctions over criminal penalties and said:

"This would give local authorities (or other 'enforcement authorities') access to a more proportionate and effective enforcement option than would otherwise exist."

As Murdo Fraser said, the Scottish Retail Consortium opposes fixed penalties as a matter of principle. However, we believe that fixed penalties can provide a helpful alternative to court action for this type of offence and will help to ensure a level playing field for businesses that comply with the legislation.

Section 32B sets out a fixed-penalty regime in some detail and addresses most of the points that the Scottish Retail Consortium asked to be included. In particular, I highlight that enforcement authorities will need to take account of guidance, which will help to ensure a consistent and proportionate approach to enforcement; that anyone who receives a fixed-penalty notice can make representations to the enforcing authority if they disagree and believe it to be unfair; and that

anyone who wants to force the enforcement authority to decide whether to take the matter to court can do so by simply not paying the penalty.

We note the SRC's suggestion that the fines should go to a consolidated fund. Its proposed amendment would allow ministers to prescribe how any funds that are raised were to be applied, but dialogue with stakeholders would be needed before a decision is made on whether and how to exercise that power.

We also note the SRC's suggestion that the provisions should be in scope of the primary authority provisions in the bill. Obviously, such a move would require consultation, but this might indeed be the sort of area in which a primary authority approach would be helpful. There is already a requirement in primary legislation for enforcement authorities to take account of guidance. Section 32B includes a similar requirement for action on fixed penalties.

Murdo Fraser mentioned the Environment and Rural Development Committee and Richard Lochhead's and Rob Gibson's membership of it. Our carrier bag charging proposals will reduce bag use and prevent a highly visible, damaging and expensive component of litter and marine litter.

Unlike the environmental levy that was proposed in 2005, our proposed charge will cover all single-use bags and not just plastic bags, which will prevent switching to materials that have a higher carbon impact, in particular paper. The issue was a major reason why the Environmental Levy on Plastic Bags (Scotland) Bill was rejected.

We looked in detail at the economic impacts, to ensure that regulations were designed to minimise negative effects. The world has moved on since 2005—unlike the Tories, perhaps—and globally there is a greater appetite to tackle the issue, not least in the European Union, which is putting forward a requirement for member states to tackle single-use plastic bags. I understand that that might upset Murdo Fraser and his colleagues, and I remind him that even the United Kingdom Government is proposing a charge on plastic bags in England for 2015.

Murdo Fraser: Some people are consistent on issues, unlike the environment minister and his party—that is the difference between me and the environment minister.

I listened with great care to the minister, but I struggled to hear a single word of explanation for why the measure was introduced in such a way. If this is such a good idea and was thought of so long ago, why was it dropped into the bill at the last minute? Why was it not included in the bill that was introduced, so that committees of the Parliament would have the opportunity to scrutinise it fully at stage 1?

I appeal to the minister, who I know is a reasonable man. There is still the opportunity for him to change his mind. We can have a debate about the substance of the issue on another occasion. This is a matter of process and respect for the Parliament. Even at this late stage, let the minister support amendment 1. Let him take section 32B out of the bill and bring the measure back in a different piece of proposed legislation, so that we can show the Parliament respect and allow for proper parliamentary scrutiny. I press amendment 1.

The Deputy Presiding Officer: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Johnstone, Alex (North East Scotland) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Richard (North East Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and

Lauderdale) (SNP)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDonald, Mark (Aberdeen Donside) (SNP)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Smith, Drew (Glasgow) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 12, Against 87, Abstentions 0.

Amendment 1 disagreed to.

Section 38—General purpose of SEPA

The Deputy Presiding Officer: I remind members that if amendment 20 is agreed to, I cannot call amendment 21, which will be pre-empted.

Amendment 20 moved—[Alison Johnstone].

The Deputy Presiding Officer: The question is, that amendment 20 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)

Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 28, Against 71, Abstentions 0.

Amendment 20 disagreed to.

Amendment 21 moved—[Alison Johnstone].

The Deputy Presiding Officer: The question is, that amendment 21 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 28, Against 71, Abstentions 0.

Amendment 21 disagreed to.

Before section 39

The Deputy Presiding Officer: Group 4 is on a report to the Parliament on operation of part 2. Amendment 4, in the name of Paul Wheelhouse, is the only amendment in the group.

Paul Wheelhouse: The content of amendment 4 was agreed following correspondence with the Parliament's Delegated Powers and Law Reform Committee on points that were raised in its stage 1 report on the bill. Specifically, the committee expressed concerns about the scrutiny of the use of the environmental regulation powers in part 2 of the bill, which it rightly identified as an important part of the bill.

The amendment requires ministers to lay an annual report before the Scottish Parliament on the operation of part 2 of the act. Such reports will give the Parliament and the Government the opportunity to scrutinise the operation of that part of the act and, in particular, the operation of the environmental regulation powers, with a view to ensuring effective parliamentary scrutiny of the exercise of those powers. The amendment is a proportionate, targeted, consistent, transparent and accountable response to the committee's concerns.

I move amendment 4.

Nigel Don (Angus North and Mearns) (SNP): As convener of the Delegated Powers and Law Reform Committee, I thank the minister for his comments and for lodging the amendment. That reflects the good working between our committee and the Government, which I hope will continue.

Amendment 4 agreed to.

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

The Deputy Presiding Officer: Group 5 is on applications to review marine licensing decisions: permission to proceed. Amendment 5, in the name of Fergus Ewing, is grouped with amendments 6 to 8.

Fergus Ewing: Amendments 5 to 7 change the terminology in proposed section 63B of the Marine (Scotland) Act 2010 to align with the intended terminology in the upcoming courts reform (Scotland) bill by changing references to "leave" to references to "permission".

Amendment 8 removes what we consider, on reflection, to be an ambiguous provision on the interaction between the application for a review of marine licensing decisions and the court's decision on whether to grant permission for the application to proceed. Currently, proposed section 63B(4) of the Marine (Scotland) Act 2010 suggests that there may be a separate need for the applicant to apply for permission for the section 63A application to proceed before the court can make its decision. That is not the process that is envisaged. There is no need for a separate application for permission. The court will have sufficient information to make its decision for permission on the basis of the section 63 application. Amendment 7 therefore simply removes proposed section 63B(4) of the Marine (Scotland) Act 2010.

I move amendment 5.

Amendment 5 agreed to.

Amendments 6 to 8 moved—[Fergus Ewing]—and agreed to.

Section 41—Planning authorities' functions: charges and fees

The Deputy Presiding Officer: Group 6 is on planning authorities' functions—charges and fees. Amendment 10, in the name of Margaret McDougall, is grouped with amendments 11 to 14.

14:45

Margaret McDougall (West Scotland) (Lab): These amendments aim to deal with the issues that were raised in evidence sessions about the idea to link planning fees to performance. The questions on the proposals on planning fees were among the most frequently answered of all the consultation questions, and many concerns were raised.

The amendments that I have lodged seek either to remove section 41 entirely or to add in certain safeguards to the process.

Amendment 10 seeks to ensure that the

"Scottish Ministers must prepare and publish guidance setting out the principles to which they must have regard in

determining whether the functions of a planning authority are not being, or have not been, performed satisfactorily"

and that they must outline that guidance to the Parliament. Nowhere are the definitions of "satisfactory" or "non-satisfactory" performance set out. The concept could be very subjective, but amendment 10 would ensure that the process is rigorous.

I welcome the fact that Derek Mackay confirmed at stage 2 that the Scottish Government would provide assistance to improve the performance of a planning authority before resources are removed. However, I still feel that that should be a statutory requirement listed in the bill and that all reasonable steps should be taken before the ministers are allowed to place sanctions on a planning authority. Amendment 11 would add that approach to the bill.

Amendment 11 seeks to ensure that a planning authority is not adversely affected by the provisions, either in its performance or the range of services offered. If the provisions are genuinely meant to improve and incentivise planning authorities, it makes no sense to penalise a planning authority to such an extent that it further affects its performance. That could result in it being penalised further as a result of something that might be no fault of its own and could introduce unnecessary financial uncertainty around its funding.

Amendment 12 is self-explanatory. It states that the level and period for which the lower fees are put in place would not

"adversely affect the performance of, or, as the case may be, the range of services offered by the planning authority."

Amendment 13 asks that before making any changes

"the Scottish Ministers must lay before the Scottish Parliament a statement setting out ... the percentage variation by which, and the period for which, they propose to vary the fee or charge."

That would ensure that power cannot be misused, and it would offer safeguards that I feel are not currently explicitly set out in the bill. It would also allow for parliamentary scrutiny of the changes, which would provide additional safeguards that are not currently in the bill.

These four amendments would not drastically alter the function of section 41 but would strengthen the proposal by adding safeguards that are not currently present. They would ensure that planning authorities are not unfairly penalised and they would allow parliamentary scrutiny of the changes. They would also add more transparency and openness to the bill. I hope that that is something that we can all support.

Failing section 41 being amended, my amendment 14 seeks to remove it from the bill in its entirety. As COSLA stated in a letter to the committee, the proposed changes represent

"fundamentally too much Ministerial interference in the operations of specific council services."

It is the job of the democratically elected councillors, not central Government, to scrutinise the process. The Scottish Government is demonstrating, through the bill, a worrying trend towards centralisation. We should not be taking functions away from local councils but extending them through more devolution.

The amendments are also supported by Scottish Environment LINK. I am grateful for its support.

If the rest of my amendments fall, removing section 41 will be the only sensible option, as the section will potentially give the Scottish ministers too much control over the planning process. No safeguards exist in the bill itself. There is nothing to ensure that all reasonable steps will be taken to improve the performance of the planning authority, and there is no function in the bill to provide proper parliamentary scrutiny of any proposed variation in fees. COSLA has made it clear that it does not support the current approach, for the reasons that I have already given.

I move amendment 10.

The Deputy Presiding Officer: I have received two requests to speak. I intend to call the members, as long as they are brief. I call Murdo Fraser, to be followed by Malcolm Chisholm.

Murdo Fraser: I commend Margaret McDougall for her dogged pursuit of this issue throughout stages 1 and 2.

We debated the issue fully at stage 1 in committee when we took evidence and when we prepared our report. We heard from COSLA and other stakeholders about the concern over the right to reduce fees in the event of poor performance. As in the debate on the first group of amendments, I think that ministers have overall struck the right balance on this issue. I think that adopting a carrot-and-stick approach is the right thing to do with higher planning fees, with the opportunity to reduce them in the event of poor performance. For that reason, we will not support amendment 14, which seeks to take out section 41 in its entirety.

Amendment 10, which seeks a requirement for consultation prior to guidance being issued, is a reasonable one. I note what Margaret McDougall said about the lack of definition of "satisfactory performance". We will support amendment 10.

Amendment 11 seems to me to put too broad an obligation on the Scottish ministers, and amendments 12 and 13 seem to me to propose an operation that is too bureaucratic.

We will therefore support amendment 10 but, unfortunately, we will not support amendments 11 to 14.

The Deputy Presiding Officer: Before Malcolm Chisholm speaks, I indicate that, as we are nearing the agreed time limit, I am prepared to exercise my power under rule 9.8.4A of standing orders to allow the debate on this group to continue beyond the time limit in order to avoid the debate being unreasonably curtailed. However, we are still tight for time.

Malcolm Chisholm: I think that we can all understand the theoretical reasons for section 41, but we can also understand that it could have one or two negative consequences. First, if an authority is penalised, the service may well get worse. What is equally worrying is that the prospect of penalty may mean that an authority emphasises speed at the expense of the quality of the process of scrutinising the planning application. I am worried about those possible negative consequences.

I think that Margaret McDougall's amendments address some of the concerns. It is certainly surprising that there is such an unconstrained power in section 41, with no regulations or criteria attached to it. Margaret McDougall has very sensibly said that we must have criteria and an assurance that the Scottish Government will take every possible action before imposing a penalty, and that we must not have negative consequences as a result of the penalty. I therefore think that it would be reasonable for everyone to support amendments 10 to 13, even if they do not support amendment 14.

The Deputy Presiding Officer: I now call the minister, who on this occasion is Derek Mackay.

The Minister for Local Government and Planning (Derek Mackay): The work by the Government on planning has been proportionate and positive, and it has focused on encouragement, incentivisation, new investment, support and replicating best practice. The Scottish Government is convinced that section 41 is necessary to incentivise performance improvement. Corporate council attention is one of the things that we need to improve in order to achieve a better planning service.

Section 41 will improve behaviour and outcomes, and there should be no loss of income if planning authorities step up to the plate as I believe they will. The high-level group on planning performance has already identified a set of 15 performance markers that reflect key areas of essential good performance and service quality across the planning service. The performance markers have been considered by COSLA and were welcomed by the Economy, Energy and Tourism Committee as a qualitative and quantitative method of assessing a planning authority's performance. They are the aspects of good performance and service quality that I expect to see implemented consistently across Scotland. Too often, performance has been far too variable.

The detailed practical arrangements for the use of section 41 provisions are being taken forward with our COSLA partners through the high-level group. Setting working arrangements and processes is an explicit part of the group's remit. I have committed to informing the Economy, Energy and Tourism Committee of the outcome of the discussions. We consider that working in partnership with COSLA, Heads of Planning Scotland, the Society of Local Authority Chief Executives and Senior Managers Scotland, the Society of Local Authority Lawyers and Administrators in Scotland and the Royal Town Planning Institute through the high-level group to agree the detailed practical arrangements is the best way forward.

In the meantime, the Scottish Government continues to work closely with planning authorities to help them improve. For example, we recently provided each authority with written feedback on their second planning performance framework reports, bringing a particularly sharp focus to the agreed performance markers. Through our planning reform next steps programme and action plan, we are working with our local government partners to establish and roll out good practice on a range of aspects that will improve the quality of the planning service.

In addition to that comprehensive action plan, and to properly establish a link between performance and fees in moving towards full cost recovery, it is only right that we can guarantee improved performance—as the old adage says, "You get what you pay for". Therefore, for that and a number of other reasons, the Scottish Government does not support Margaret McDougall's amendments.

Margaret McDougall: It is disappointing that the Government will not accept my amendments. It seems to me that it made its mind up at an early stage of the bill's passage. Despite what COSLA and now Scottish Environment LINK have said, the Government will not listen to any arguments. The fact that the minister has just mentioned incentivising by removing funding through fees says more about the Government than it does about the bill. I press my amendment.

The Deputy Presiding Officer: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 39, Against 60, Abstentions 0.

Amendment 10 disagreed to.

Amendment 11 moved—[Margaret McDougall].

The Deputy Presiding Officer: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)

McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 27, Against 72, Abstentions 0.

Amendment 11 disagreed to.

Amendment 12 moved—[Margaret McDougall].

The Deputy Presiding Officer: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)

Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 26, Against 72, Abstentions 0.

Amendment 12 disagreed to.

Amendment 13 moved—[Margaret McDougall].

The Deputy Presiding Officer: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)

Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 27, Against 71, Abstentions 0.

Amendment 13 disagreed to.

Amendment 14 moved—[Margaret McDougall].

15:00

The Deputy Presiding Officer: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Richard (North East Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Smith, Drew (Glasgow) (Lab)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)

Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 27, Against 71, Abstentions 0.

Amendment 14 disagreed to.

Section 44—Subordinate legislation

Amendment 22 not moved.

Long Title

Amendment 9 moved—[Fergus Ewing]—and agreed to.

The Deputy Presiding Officer: That ends consideration of amendments.

Regulatory Reform (Scotland) Bill

The Deputy Presiding Officer (Elaine Smith): The next item of business is a debate on motion S4M-08745, in the name of Fergus Ewing, on the Regulatory Reform (Scotland) Bill.

Before I invite the minister to open the debate, I ask the cabinet secretary to signify crown consent to the bill.

The Cabinet Secretary for Finance, Employment and Sustainable Growth (John Swinney): For the purposes of rule 9.11 of the standing orders, I advise Parliament that Her Majesty, having been informed of the purport of the Regulatory Reform (Scotland) Bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of Parliament for the purposes of the bill.

The Deputy Presiding Officer: Many thanks. I call Paul Wheelhouse to speak to and move the motion in Fergus Ewing's name. Minister—technically you have 10 minutes, but we are incredibly tight for time, so shorter would be better.

15:03

The Minister for Environment and Climate Change (Paul Wheelhouse): I would like to begin the formal stage 3 debate by thanking the members and clerks of the committees that were involved for their careful consideration of the Regulatory Reform (Scotland) Bill. I also thank the external stakeholders who have taken the time to engage in the bill process and have shared their knowledge and views during scrutiny.

As members will, I am sure, highlight, regulation is essential in order to protect our people and environment and to help businesses to flourish and to create jobs. The critical issue is how we best deliver those necessary outcomes. Regulatory reform is a cross-Government agenda that makes a key contribution to the Scottish Government's purpose of increasing sustainable economic growth, as expressed in the Government's economic strategy. I am pleased to be at a point where we have a bill that will truly make a difference to Scotland, and will bring benefits to our environment, businesses and communities.

In contrast to the approach in other jurisdictions, where deregulation may be an objective, the purpose of the bill is to streamline regulation and make it more effective. The bill deals with four distinct but connected themes. Part 1 of the bill will help to reduce unnecessary burdens on business. Business has provided examples of growth being constrained by inconsistent application of regulation across Scotland through different forms,

different fees and, in some cases, different timescales. The bill includes provisions to define and implement national standards and systems, and will introduce a duty on regulators to contribute to the achievement of sustainable economic growth through their mainstream regulatory activity.

Regulators will be required to take account of sustainable economic growth where appropriate, and be more accountable for decisions. I will at this point quote section 4(1), which states:

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

I make that point because regulators will be supported in that by a new statutory code of practice that will be consulted on shortly.

It is right to place on regulators the duty to contribute to sustainable economic growth alongside existing or balancing duties. As is made clear in section 4(1) and, specifically in respect of the Scottish Environment Protection Agency, in section 38, the bill does not prioritise sustainable economic growth over other regulatory objectives. There is no conflict; instead, there are potential opportunities. The move will ensure greater transparency, and will provide a line of sight to the Scottish Government's purpose, which is essential if we are to have consistent delivery across all regulators.

The Scottish Government's economic strategy includes a commitment to better regulation in recognition of the fact that, although regulatory outcomes in themselves contribute to sustainable economic growth, how regulators carry out their work in practice, and how they interact with those whom they regulate—and vice versa—can also make a significant contribution to supporting business, and hence contribute further to sustainable economic growth. Good regulators seek to understand those whom they regulate by, for example, taking economic and business factors appropriately into account when they carry out their regulatory activities.

Part 2 of the bill will support SEPA's transformation programme and improve the application of environmental regulations in practice across Scotland. The bill will introduce the first statutory purpose for SEPA that is focused not just on the environment, but on health and wellbeing and sustainable economic growth in support of the Government's purpose, which is a simplified and integrated framework for environmental regulation to help to unwind complexity, and to give SEPA and the criminal courts new enforcement tools that will have real teeth. Such measures will allow SEPA to target its activity where risk and potential benefits are greatest.

The way that SEPA works with business and other stakeholders can make a direct contribution to a favourable business environment. I realise that there has been much debate about the point, but I must stress that a good environment is integral to a good economy. As the First Minister said at the world forum on natural capital in November,

"Natural capital is one of the ways in which we can tell whether our economic growth is truly sustainable. You can't do that if you're only thinking about taxation, spending and GDP on a year to year basis, without considering the resources and assets which underpin our prosperity and promote our wellbeing."

Indeed, only this week we had a very constructive discussion at the Scottish biodiversity committee about the natural capital assets index, which of course is a valuable addition to our efforts to go beyond gross domestic product as a measure of success, and to augment the national performance framework.

Equally, the health of Scotland's communities and environment contribute to, are interlinked with and are dependent on the achievement of sustainable economic growth. Economic growth that exceeds the limits of our environment or which damages social and community cohesion is ultimately unsustainable. There are initiatives such as the development of a circular economy that can deliver growth while reducing our resource take.

Part 3 of the bill further demonstrates the value of achieving the balance in helping to improve the performance of planning authorities by establishing a legislative link between planning fees and performance. On the one hand, we want to be sure that increased funding leads to improved planning performance by authorities; on the other, we recognise planning's contribution to protecting and enhancing Scotland's natural and built environment to ensure that Scotland's people can enjoy a better quality of life.

By speeding up the process of resolving legal challenges, part 3 will also potentially reduce delays to offshore marine energy projects and will, as a result, help Scotland to achieve its 2020 renewables targets and help to promote growth in that vital industry. The Scottish Government is committed not only to maintaining a business environment that supports sustainable economic growth, but to enhancing Scotland's natural and built environment as an asset for growth.

During parliamentary scrutiny of the bill, we have faced some questions about transparency and accountability. Following amendments at stage 2 and 3, all directions, guidance and codes will be published and, thanks to an amendment that has just been agreed to, Parliament will also have the opportunity to consider an annual report on the operation of part 2 of the bill. That welcome

parliamentary input will add value to the Scottish Government's better regulation programmes and will help to ensure that future regulation can be proportionate, consistent, transparent, accountable and targeted.

As well as working closely in partnership with our stakeholders on delivery of better regulation, we are also sharing knowledge and experience across the United Kingdom and the devolved Administrations. Through that partnership approach, we can drive best practice here in Scotland, where our views and experiences can inform others and help to shape future agendas—for example, in Brussels, where so many regulations are set.

Presiding Officer, I hope that, in bringing my speech to a close, I have helped with the time for debate. This Government is fully committed to developing better regulation to support sustainable economic growth and to improve protection of our precious environment. The bill will make a vital contribution and its success will depend on on-going partnership working and stakeholder engagement.

I move,

That the Parliament agrees that the Regulatory Reform (Scotland) Bill be passed.

The Deputy Presiding Officer: Thank you, minister. Your brevity is helpful, but we are still incredibly tight for time across the whole afternoon. Jenny Marra has a maximum of seven minutes.

15:10

Jenny Marra (North East Scotland) (Lab): It was with a sceptical eye that Labour viewed the bill at stage 1—to my mind, with good reason. We must always resist the slow creep of centralisation, in particular through framework legislation such as this bill, unless we are absolutely certain that centralisation is the best option. So, at stage 1, when we examined the central component of this bill—namely the new powers for Scottish ministers over regulations and the bodies that fulfil regulatory functions—we made it clear that we could not vote in favour of the bill unless we were satisfied first, that there was proper scrutiny to complement the Scottish Government's new functions; secondly, that those new functions did not adversely impact on the ability of local authorities to adapt and adjust to local circumstances; and, thirdly, that the duty called "sustainable economic growth" would not have unintended consequences for regulators that would result in their prioritising one consideration over all other essential functions.

I turn first to our third concern. Today, Labour voted again for Alison Johnstone's amendments seeking either to remove any reference to sustainable economic growth from the bill or to change that duty to sustainable development. As I said in relation to the debates on the issue during stage 1 and stage 2, we did so because of the wealth of evidence that was given to the committee that pointed towards legal difficulties with the Government's proposed duty—in particular the evidence that was given by Professor Andrea Ross of the University of Dundee, which bears repeating. She wrote:

"Regardless of how this government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability."

The provision on sustainable economic growth remains, at best, a legal grey area. However, the Government has sought to reassure us—on three separate occasions—that there are adequate provisions in the bill to safeguard the other functions, such as the hard-won health and safety laws that this party has campaigned for over the years.

We are debating hypotheticals and discussing future scenarios that we hope do not arise. As we debate this issue for—according to the minister—the third time, I can see that the minister is not going to budge. Therefore, I can say to the Government only that I hope that its assurances throughout the debate—that the pursuit of sustainable economic growth for regulators will not come at the sacrifice of their other functions—are followed up by close scrutiny of the bill after it is passed today.

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): Will Jenny Marra give way?

Jenny Marra: I am sorry, minister, but on this occasion I will not, as I know that we are tight for time.

On the first and second of the concerns that I outlined earlier, around the need for transparency and accountability, and the need to protect local authority discretion, I am pleased that the minister has listened and has sought to improve the bill on both counts.

After stage 2, I was grateful to receive a letter from Mr Ewing reiterating his commitment to utter transparency when the Government is exercising its new functions that will result from this bill. I was pleased again when the Government lodged amendments at stage 2 that will ensure publication of any direction for variation in regulation, of guidance on the sustainable economic growth section and of the code of practice. In that regard, I note today's amendment from Paul Wheelhouse, which will see the Government report to

Parliament on its environmental regulation. Those are welcome developments that will aid our future assessment of the effectiveness of the law.

Similarly, the amendments that were lodged at stage 2 by Fergus Ewing that will exempt local authorities from the sustainable economic growth duty are also to be welcomed. We believe that the fact that the duty will not apply to them will allow them to prioritise their regulatory functions according to the varying and changing circumstances that they find themselves in locally. Again, that is to be welcomed. However, I am disappointed that the Government did not accept Margaret McDougall's amendments, which had sympathy across the chamber and which, I believe, would have increased that flexibility further in the planning process.

In summary, Labour will vote for the bill despite having enduring concerns around the future operation of the sustainable economic growth provision. I urge the minister to monitor and to reflect regularly on the duty's impact on Scotland's regulatory system, and not to let it erode some of the other very important functions of our regulators.

15:15

Murdo Fraser (Mid Scotland and Fife) (Con): Lack of consistency is clearly in the air this afternoon, but the Scottish Conservatives are consistent in our view. We welcome the bill and will vote for it at decision time, although we have one concern, which I highlighted earlier and will return to. Overall, it is a good bill that will make it easier for businesses in Scotland to operate, and will enhance the performance of SEPA in particular.

As the convener of the Economy, Energy and Tourism Committee, I reiterate the thanks that I expressed at stage 1 to my fellow committee members for their assistance in dealing with the bill, and our thanks to our ever-efficient and supportive team of clerks. We considered a number of substantive issues at stage 2—as we did again this afternoon—and had a good debate where that was required.

The genesis of the bill was the Scottish Government's regulatory review group. Too often, such Government-appointed committees are no more than talking shops, so it is good to see some positive changes emerging from the work that has been done. At the core of the bill is the introduction of an economic duty on public bodies. That is an ambition that the Scottish Conservatives have had for many years—it was in our manifestos in 2007, 2010 and 2011—so I am, therefore, delighted to see it now becoming law. As my good friend the late David McLetchie once commented in the chamber, the next best thing to a Conservative Government is an SNP Government delivering Conservative policies. I look forward to many more aspects of our manifestos becoming the law in due course.

Throughout the passage of the bill, we have heard concerns from some that the duty on regulators to contribute to achieving sustainable economic growth is inappropriate. The only real concern that I had was about the definition of sustainable economic growth, but that has now been resolved following an undertaking from the Scottish Government that the definition will be explicitly stated in guidance.

I appreciate that there are those in the chamber—not least in the Green Party—who take a different view from that of my party on the bill, and I respect their stance. However, I believe that the promotion of sustainable economic growth is in everyone's interests. I am not surprised to hear that the Green Party takes a different view, but I am slightly surprised by the attitude of the Labour Party this afternoon. We know that the actions of successive Labour Governments have had the effect of destroying economic growth in our country—not least of which was the ruination of the public finances by Gordon Brown—but I am a little surprised to hear Labour being so open in admitting its opposition to economic growth.

The one concern that I had with the bill was the introduction fairly late in the process of measures that will allow the implementation of a plastic bag tax. As I said earlier—I will not rehearse all the arguments—I am not convinced that a plastic bag tax is appropriate or that it will have the consequences that its promoters intend.

Perhaps more important than the substance of the issue is the way in which that change was introduced. There was no opportunity at stage 1 for committees of the Parliament to scrutinise the proposal, to take evidence, to quiz ministers or to hold the proposals up to the light because it was only at the very last moment, just before the stage 1 debate, that the intention to introduce the measures was signalled. There was a very short debate on the matter at stage 2 and equally short consideration of it this afternoon. I do not believe that that is how legislation of this nature should be dealt with. There are concerns in industry about the impact of the tax; it should have been given proper parliamentary scrutiny and it is regrettable that that was not allowed.

Paul Wheelhouse: I will be brief. We have debated before the reasons for introducing the proposal at that stage. I reassure members that we are learning a lot from what has happened in Wales, where there are similar provisions in place—indeed, there are fixed-penalty notices in Wales. It is something that we have studied. We

are reasonably confident that the measure works in practice and that the number of businesses that are being charged penalties is fairly low.

Murdo Fraser: I am interested to hear that from the minister—although, to be frank, it would have been better if that evidence had been brought to Parliament so that we could all have debated it in committee and in Parliament. I am sorry that that opportunity was lost.

The concern that I have raised will not prevent me and my colleagues from voting for the bill today, because we feel that, overall, it will be beneficial. Over the years, I have heard a great many concerns from businesses about how regulation impacts on them. Often, the problem is not regulations themselves but interpretation of them, which can be a particular problem when many of the 32 local authorities in Scotland interpret the same regulation in different ways. As we heard at stage 1, that can give rise to a particular challenge for mobile food retailers who sell their products in more than one local authority area.

We also regularly hear concerns from businesses about the planning system, which the bill will go some way towards addressing. I hope that the threat of reduced planning fees will be enough to ensure excellent performance and I genuinely welcome the constructive language that has been used by ministers in relation to how they will engage with local authorities and planning departments.

We are going to get a better system of regulation, a faster and more responsive planning system and a requirement for public bodies to promote sustainable economic growth—that is what the bill will deliver and that is what the Scottish Conservatives wish for our public agencies. That is why we will be pleased to support the bill at stage 3 this afternoon.

The Deputy Presiding Officer: Thank you. We are incredibly tight for time. If members take their full four minutes, I will not be able to call everyone who wishes to speak in the debate.

15:20

Mike MacKenzie (Highlands and Islands) (SNP): It is difficult to imagine who would be against regulation that aims to be transparent, proportionate, consistent and accountable. Who would be against regulation that is appropriately targeted when and where it is required? That is what the bill aims to do and to my mind, it is a useful step towards achieving that purpose.

I welcome the Tory support for the bill, as articulated by Murdo Fraser. Perhaps the Tories are not better together with Labour after all.

I believe that a more consistent, efficient and effective approach to regulation can enhance economic growth, so I was pleased to hear Professor Russel Griggs, who chairs the regulatory review group, say in committee that the bill will, in his opinion, enhance sustainable economic growth.

I assume that all members are in favour of sustainable economic growth—not least because enhancing the economy is one of the main tools for tackling poverty. I simply do not accept that the twin aims of improving sustainable growth and improving the environment are mutually exclusive. The debate over the semantics of economic growth as against economic development has been to my mind a false one, and despite my repeated requests, no one who gave evidence to the committee was able to demonstrate what they meant by referring to a real-life example.

The Federation of Small Businesses gave ample evidence of the increasing burden of compliance and of the confusion, difficulty and costs that arise when different approaches to regulation are taken in different areas—sometimes even within the same area—often for no apparent good reason. It is important to heed those complaints. Not only are small businesses important in terms of the amount of employment that they create in aggregate, but some of the small businesses of today will become the big businesses and big employers of tomorrow. One of the problems in our economy is that that progression of small businesses growing into big businesses happens all too rarely. The economists call it a lack of churn. Today's fat cats need to be constantly challenged by tomorrow's fat cats—today's lean and hungry cats. That is how we will drive innovation and improve productivity and how we will remain competitive. If we want to provide higher quality employment, tackle unemployment, and improve the fortunes of the working poor we need to listen carefully to and support small businesses.

A further misconception that has featured in our discussions is the apparent belief that most businesses wilfully break regulations and wish to damage the environment. I believe that the opposite is true and one of the improvements that the bill offers is a greater ability on the part of SEPA to properly tackle real environmental crimes and problems.

I believe that the bill is a step in the right direction and I look forward to our having full powers over regulation, when we will be able to do so much more.

15:23

Margaret McDougall (West Scotland) (Lab): As Murdo Fraser said, I have been dogged with regard to the varying of planning authority fees, having pushed my amendments at stage 2 and stage 3. I am disappointed that the Government was not persuaded to support the amendments, because I believe that they were sensible and responsible amendments that either added safeguards where none currently exists or sought to remove section 41 if additional safeguards were not introduced.

The Minister for Local Government and Planning (Derek Mackay): Will the member take an intervention?

Margaret McDougall: If I have time.

Derek Mackay: It is fair to say that some of the member's points were fair and reasonable—those regarding what the Government was going to do anyway—but the member missed the point in some of her amendments. This is not a centralising Government; the Government already has the power to set planning fees, subject to parliamentary scrutiny—

The Deputy Presiding Officer: Briefly, minister.

Derek Mackay: And that has not changed in any way.

Margaret McDougall: However, the issue is the varying of fees as a sanction against planning authorities.

Democratically elected councillors already sit on planning authorities and I am confident that they understand their responsibilities. Audit Scotland already monitors planning authorities' performance and makes recommendations to address any concerns that it has, so why is the Government so intent on penalising them?

In a response to my stage 2 amendments, the Minister for Local Government and Planning, Derek Mackay, stated that section 41 would

"improve behaviour and outcomes, and there will be no loss of income because planning authorities will step up to the plate."—[*Official Report*, *Economy, Energy and Tourism Committee*, 11 September 2013; c 3187.]

That is a glib remark, which implies that planning authorities will do better if they are threatened with sanctions. As a former council leader, the minister knows that delays can occur for all sorts of reasons. As Unison Scotland indicated,

"Delays are due to underfunding and heavy workloads … there is a range of community planning partners involved in the process",

such as Scottish Water and SEPA, but

"There are no proposals to introduce carrots or sticks for these organisations."

The proposal is a clear attack on planning authorities if no other organisation is being taken to task. That is why I believed that it made sense for the Government to be required to lay a statement before the Parliament before any action was taken so that the issue could be scrutinised. However, the Scottish Government does not support that move.

Surely more transparency and scrutiny of Government decisions should be welcomed. Are we to assume that the Government's priority is quantity rather than quality? What happens to local accountability if the Government will step in when it decides that a planning authority is underperforming?

Despite all that the minister has said about the high-level group working with the Convention of Scottish Local Authorities, when I spoke to COSLA yesterday it was still of the view that there is fundamentally too much ministerial interference in the operations of a specific council service and that it would be counter-productive to reduce fees.

COSLA also believes that, before the section is enacted, there must be agreement between it and the Government on what counts as good performance. I reiterate the calls for that to be made clear so that planning authorities know exactly what is considered satisfactory and unsatisfactory performance. It should not be left up to one person's subjective view.

I am disheartened that the Scottish Government decided not to support my amendments because, even if section 41 remained, the other amendments would have introduced more transparency in the process, allowed for greater scrutiny and oversight of decisions and made clear to local authorities exactly what was expected of them.

I would be grateful if the minister could address in his closing speech some of those concerns and offer reassurances that the Scottish Government will work closely with COSLA and other stakeholders to get an agreement regarding the issues that are still outstanding in section 41.

15:27

Chic Brodie (South Scotland) (SNP): As a member of the Economy, Energy and Tourism Committee, I am happy to support the bill.

Change is a constant. No doubt those who are directly impacted by, and are close to, the issue feel that change is not necessary. They may argue that there is no need for change, but there is. They may assert that our existing processes for protecting our people, our businesses and, above all, our environment are already secure, but they are wrong.

The Deputy Presiding Officer: Mr Brodie, is your microphone up?

Chic Brodie: I beg your pardon. Thank you, Presiding Officer.

They may aver that our current regulatory system is consistent, appropriate and accountable, but it is not. That is why I believe—I say this with not a little compliance and commercial background—that our regulatory framework, particularly in planning, is, to be frank, antediluvian and inconsistent in some cases.

If we are to address the malaise and problems in economic distribution to which Mike MacKenzie referred, the bill is important. It places a stake in the ground. That does not mean that a strangulation of environmental protection is necessary—far from it. If handled carefully and consistently, sustainable economic growth and sustainable environmental development are twins that can be joined at the hip. The bill and the code of practice that is provided for therein strengthen that.

Across our nation, that means consistent and better regulation. That means overcoming the unnecessary hurdles that could get in the way of desired and essential economic success. It will not lend substance to the claim that the bill will necessarily confuse existing and specified regulators.

If we are to grow economically and successfully, we must rid ourselves of the obstacles that stand in the way of efficiency, effectiveness and the securing of environmental protection. Along with our local authorities and our planners, we must embrace more fully those three Es. I propose that in the hope that there is no naivety in the statement that, given the Government's commitment to ensuring that communities and consumers will be involved in deliberations on the future application of the bill through the code of practice, the bill will be seen in that light and not as an amber light for those who would traduce its principles as they skip along to the nearest tribunal or court.

The bill is a three-legged stool. First, it encourages consistency of application while contributing to sustainable economic growth. Secondly, it develops and enhances environmental regulatory powers. Thirdly—this is long overdue—it allows regulations to be developed whereby planning fees can and will be related to performance. In that respect, the bill is solid. Today, all of us—consumers, planners, environmentalists, business and Government—will take a major step forward for Scotland's growth and its environment as they are enshrined in the bill. I support it.

15:31

Hanzala Malik (Glasgow) (Lab): I welcome the opportunity to speak in the debate on the Regulatory Reform (Scotland) Bill. The fact that I have 17 years' experience as a local councillor and chair of development and regeneration services means that I have seen the planning process up close and appreciate that reform was needed.

I agree with the bill's intention of securing more favourable business conditions in Scotland and delivering benefits for the environment. As always, there have been disagreements on how to achieve that. At stage 1, serious reservations were raised about the proposed duty on regulators to contribute to the achievement of sustainable economic growth. In handing regulators conflicting remits, that provision is, at best, unhelpful. Since then, the Scottish Government has given reassurances that the duty will not prioritise sustainable economic growth over other important regulatory objectives such as health and safety.

Many of my concerns stemmed from the lack of clarity about the meaning of the term "sustainable economic growth". Therefore, I welcome the Scottish Government's intention to provide definitions of sustainable economic growth and sustainable development in its guidance. Although I supported Alison Johnstone's stage 3 amendments that sought to address the issue, the Scottish Government has provided sufficient reassurances and concessions to allow me to feel reasonably confident in supporting the bill as a whole at decision time.

On the issue of penalising poorly performing local authorities, Derek Mackay confirmed to the Economy, Energy and Tourism Committee that the Scottish Government would provide a planning authority with assistance before removing resources from it. Unfortunately, my colleague Margaret McDougall's amendments to make that undertaking part of the bill were not fruitful, but I will be interested to see how that measure is implemented when already cash-strapped councils are struggling to make ends meet.

Derek Mackay: The member makes a helpful point. This financial year has seen an increase in planning fees of some 20 per cent, which is the largest increase since the Parliament was created. If we want to continue to invest in the planning service and to continue to raise planning fees, I must have a guarantee that we will get improved performance. Improved performance and increased fees to do the resource job that Mr Malik has requested be done go together.

Hanzala Malik: I do not disagree with the minister about improved performance, but I have

reservations about the cost, which is important to local authorities.

I thank Murdo Fraser for his captainship of the committee. He has done a marvellous job during consideration of the bill. His chairmanship has been helpful in the short time for which I have been on the committee.

The Deputy Presiding Officer (John Scott): I call Christian Allard, who has up to four minutes—less would be more, please.

15:35

Christian Allard (North East Scotland) (SNP): I welcome the stage 3 debate on the Regulatory Reform (Scotland) Bill. I read with interest the Economy, Energy and Tourism Committee's stage 1 report on the bill, which was published on 8 October last year. Unfortunately for me today, I joined the committee a month later, in November.

The bill's purpose was clear from the outset—it is to improve the way in which regulation is developed and applied across Scotland, to protect people and the environment and to help businesses to flourish and create jobs. Much work has been done at the committee level by our Economy, Energy and Tourism Committee and in the Rural Affairs, Climate Change and Environment Committee.

I read in the Economy, Energy and Tourism Committee's report that the Scottish Government adopted the five key principles for regulatory functions that the regulatory review group proposed. They are that regulatory functions should be

"exercised in a way that is transparent, accountable, proportionate and consistent, and ... targeted only at cases in which action is needed".

The intention is again clear. The Government has a distinctive better regulation agenda to create a more successful country through increasing economic growth. The bill will not only improve the public sector's efficiency and affordability but provide a more supportive business environment.

I will give three examples of how the bill will achieve that. The first example is that the Scottish Environment Protection Agency will be given a new statutory function and a broader role to reflect the sort of environmental regulator that Scotland will need in the future. The way in which SEPA works with businesses and other stakeholders has already changed beyond recognition, but the bill will provide a simpler legislative framework for SEPA, to reduce the administrative burden on businesses and make it easier for them to understand SEPA's role in protecting them and communities from environmental harm.

The second example is from how the bill will bring transparency to policy development and decision making in offshore energy development. The seas around us have the potential to bring sustainable and renewable energy to levels that many countries would love to reach. With 25 per cent of Europe's tidal power and 10 per cent of its wave power—and with the potential that we have in offshore wind—Scotland needs better and quicker mechanisms in place to deal with the concerns of the people who would be affected by such decisions and the concerns about lengthy delays for the people who are behind such vital projects for our country.

The third example relates to part 3 of the bill, which will bring consistency and transparency to the regulation of mobile food businesses and, when possible, reduce the cost of operation for those businesses. I worked all my life in the food industry before coming to Parliament, and I celebrate any good news to help food businesses to cope with regulation better. I cannot wait for the new food body to be established in Scotland, to ensure that Scottish food is safe to eat and to improve the diet and nutrition of people such as me who overindulge.

More important, that agency will be an effective and proportionate regulator that supports the Scottish food and drink industry in growing its strong international reputation for safe, quality food. I know that ministers are preparing a bill to create the new food body early this year. As I said, I cannot wait to see that launched. I will support it as I support the bill, to protect people and help businesses to flourish.

15:38

Gavin Brown (Lothian) (Con): A common complaint from businesses of all sizes is that there is too much regulation and that the burden of red tape is too great. After the bill is passed, I am sure that it will remain a common complaint that there is too much regulation and that the cost of complying with it is too high. However, I hope—as most of us in the Parliament do—that that complaint will become a little less common.

Red tape comes from various sources. Much of it comes from Brussels; some comes from Westminster and from here; and some comes from councils. We must focus on what we can do and the bill is right to do that. We are focusing on the legislation that will flow from this place and on the regulators that were in broad terms set up by this place.

It is not just the regulations that are passed that cause angst to business; often it is the way in which they are enforced and the inconsistency

with which that is done in different parts of the country.

We welcome the bill. As my colleague Murdo Fraser said, we welcome the better regulation agenda as a whole, and all the work that the regulatory review group has done since it was set up. The policy memorandum states that the bill seeks

"to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment."

We can sign up to those suggestions and ideas. The bill deals with the flow of regulation passing through Parliament.

The issue that attracted most attention today and during the stage 1 debate, and in the committee's work, was the duty of regulators in respect of sustainable economic growth. As I said earlier, the Government has called this right. There is a fine balance to be found and good points have been made, even by those who are against that provision. However, the way in which the provision has been framed was the right way to do it, and it makes it clear that the regulators will not have to sacrifice their core and other functions. The requirement is additional to those functions.

Some members have worries about the requirement becoming the overall priority against what the regulators were set up to do, but I do not share those fears and I have not done so since stage 1. The original section made it clear that the regulators had to

"contribute to achieving sustainable economic growth";

that was correct, as was the caveat

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

That was set up from the start. The additional security that was given by the Government, through the committee, about the way in which the code and guidance will be set up, strengthens that and reduces the risks; while those risks were quite rightly pointed out, they have been dealt with fairly well.

The FSB pointed out in its written submission that how the code is monitored and reported on will determine its effectiveness in changing practice. Producing legislation is one thing, but in many ways the hard work is about to begin for the Government and the Parliament. Setting out a framework is one thing, but what will matter most is what goes into the guidance and code of practice. That is harder to define and put together than the primary legislation. The work is far from complete and it is incumbent on us all, particularly the Economy, Energy and Tourism Committee and the Government, as well as parliamentarians across the board, to ensure that we get the code and guidance right so that the legislation does in practice what it was set up to do. That is why we will support the bill come decision time at 5 o'clock.

The Deputy Presiding Officer: I now call Jenny Marra. You have up to six minutes—less would be more.

15:43

Jenny Marra: I begin by dealing with the amendments that Murdo Fraser spoke to earlier this afternoon, which sought to remove the Scottish Government's stage 2 amendment inserting enforcement provisions for the carrier bag charge that the Government is in the process of introducing. During stage 2 and again today, Mr Fraser argued against that Government amendment on two counts: the first was to do with the substance of the policy; and the second concerned the way in which the Government has sought to introduce the policy at a late stage. I agree with Mr Fraser that it was a bit of a surprise when the Government amendment came out of the blue at stage 2, and I share his concern about the lack of consultation on the amendment, which was not discussed at all during stage 1. It is a shame that we were not able to take evidence and give the policy more consideration at that point.

I will recap some of the points that have been raised today. I put on the record again our continued unease about the section on sustainable economic growth and the insertion of a sustainable economic growth duty in the bill, and our support for Alison Johnstone's amendments. I accept the Government's assurances that it will do its utmost to ensure that regulators are not forced to compromise on their other, equally important, duties.

I again welcome the minister's drive towards greater transparency in the bill with the amendments that he lodged at stage 2. However, I remain disappointed that he did not see the value, as COSLA and others did, of accepting the amendments from my colleague Margaret McDougall, which in our opinion would have bolstered the planning process in Scotland.

As I argued earlier, the fact that the bill exempts local authorities from the need to pursue sustainable economic growth is a welcome step, and I think that members know why. COSLA and Unison gave evidence to the committee that made the case for maintaining the status quo in that regard. We need to ensure that our local authorities are empowered to adapt to local situations, which can vary widely throughout Scotland. If COSLA and others tell us that it is happening now, we should listen, and I am glad that the minister chose to do so at stage 2.

Because of the focus on part 1, an issue that has been a little lost in the debate is that of the powers that the bill gives to SEPA. The steps to ensure better safety measures for SEPA officers are of course welcome. The bill widens SEPA's remit extensively, and I am confident that the organisation will take on its new responsibilities with vigour. I have had the pleasure of meeting Professor David Sigsworth on a number of occasions and I have seen at first hand the benefit of his experience and expertise.

We believe that the bill gives the Government the opportunity to bring about better regulation for Scotland. Ministers are giving themselves new powers, and they must realise that with them comes great responsibility to keep those powers under review and ensure that the concerns that have been raised from across the Parliament in today's debate and throughout the passage of the bill are taken into proper and serious account.

The Deputy Presiding Officer: Many thanks for being so brief.

15:46

The Minister for Energy, Enterprise and Tourism (Fergus Ewing): I thank all members who have participated in the debate. I also thank Murdo Fraser, who has taken the office of Captain Fraser this afternoon, although I do not know whether that is a promotion. More seriously, I thank the convener of the Economy, Energy and Tourism Committee and its members for their work, which has helped us to improve the bill throughout its passage. We are grateful to them and of course to the clerks to that committee.

A number of hard-working officials have been involved, and I would like to slightly break with precedent and say who they are. They have done a considerable amount of work on what is a comprehensive bill that covers a wide range of areas, which poses particular challenges. I therefore give my most sincere thanks to Joe Brown of better regulation and industry engagement; Ian Black of planning modernisation; Stuart Foubister of marine licensing in the licensing division; Bridget Marshall and Richard McLeod of better environmental regulation; and Neil Watt, the bill manager. Also, Sandra Reid, who serves with the regulatory reform group, has done a power of work on the bill, which has made our task as ministers somewhat easier. This afternoon, we have the unusual occurrence of a trio of ministers. I suspect that this will be our one and only public performance—I assure members that, unlike Frank Sinatra, we will not make a comeback.

I will touch on a couple of points that have been raised in the debate. Gavin Brown made the good and solid point that the hard work has not yet really begun, because the work that Derek Mackay, Paul Wheelhouse and I will do with our respective portfolio responsibilities will be substantial and demanding, and parts of it will not be easy. We take extremely seriously the duties to come forward with guidance and codes of practice and to engage with stakeholders, and the onus on the Scottish Government to proceed in a transparent, open and fair way. That underpins the approach that we have taken on the bill and it will also underpin the approach that we will take in implementing it and making it work. Mr Brown made that point well, and it is apt to repeat it.

It is important to say that it is not correct that local authorities are exempt from the bill, as I think Jenny Marra said. Section 1 is clear that the planning functions of local authorities are exempt from the bill, but local authorities themselves are of course included in the list in schedule 1 of bodies that are covered by the generality of the bill. That relates to section 1, on duties in respect of consistency of application of regulatory functions, and section 4, on the duty to have regard to sustainable economic growth.

We have had useful debates, and I must be fair to Alison Johnstone and say that she led them. I have not agreed with her, but she has made her arguments in a reasonable fashion throughout and I thank her for that. I understand her perspective, and although the Government does not share it, I hope that we can implement the bill in a way that will, in most cases, secure her agreement.

On the plastic bag tax, we listened extremely carefully to Murdo Fraser's trenchant remarks. We will let the Parliament know, through a letter from cabinet secretary Richard Lochhead at the end of the stage 1 process, as soon as we are aware, regarding the points that Murdo Fraser raised. I wanted to respond to that.

Murdo Fraser: Will the minister repeat what he said? It did not make sense to me at all. He said that he would write to me at the end of the stage 1 process. Will he perhaps reflect on and correct what he said?

Fergus Ewing: I think that the point that I am being asked to make is that we let the Parliament know what we intended to do, through a letter from Richard Lochhead at the end of the bill's stage 1 process. Murdo Fraser made the point that the Parliament should be properly consulted in the progress of any legislation, which is a point that I made a great deal—especially, I may say, when I was in opposition. [*Laughter*.] It is right that one puts into practice what one preaches, even if it was preached in a past life, long ago.

What the bill does will be enhanced by COSLA's co-operation. In that regard, I mention Stephen

Hagan and his officials. I have been hugely heartened by the positive and constructive approach that we have been able to take together.

Mike MacKenzie mentioned the Federation of Small Businesses. The FSB and other business organisations, such as Scottish Chambers of Commerce, have taken the lead in driving the process forward. It was as a result of engagement with business organisations that I became aware of the difficulty that mobile food vans encounter, which Mr Fraser mentioned. I was at a meeting that was hosted by the Confederation of British Industry, one of whose members had encountered the problem. I mention that because today we are putting right an inconsistency, which seemed to me to be manifestly unfair, and engagement with the business organisations—the Institute of Directors and the Scottish Council for Development and Industry, as well as those that I have already mentioned—and trade associations helps us to find out what is happening on the ground out there in the business world. We have shown that we can respond to what businesses want when they raise issues with their organisations. The point is well worth making.

More recently, the Scottish food enforcement liaison committee has provided us with a draft set of national standards for mobile food businesses, on which we will consult later this year. In September, I attended a meeting at COSLA at which local authority regulators discussed where it might be appropriate to introduce national standards, to increase consistency. As a result, COSLA and local authorities are considering, first, whether a more consistent and transparent approach to setting fees can be agreed in respect of civic and miscellaneous licensing, and, secondly, how to streamline the process, procedures and fees that relate to food export certificates.

I do not expect either matter to engage the public on the front page of newspapers, but that does not mean that they are not important. The level of fees, the need for consistency and so on are extremely important to businesses, especially small businesses, as Mike MacKenzie said.

Presiding Officer, you indicated that I should come to a close early. My speech was considerably lengthier, but I will not have the opportunity to read it all out. I thank everyone involved and commend the Regulatory Reform (Scotland) Bill.

The Deputy Presiding Officer: Thank you for your brevity.

Decision Time

17:01

The Deputy Presiding Officer (John Scott): There are four questions to be put as a result of today's business. The first question is, that motion S4M-08745, in the name of Fergus Ewing, on the Regulatory Reform (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Buchanan, Cameron (Lothian) (Con)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Gray, Iain (East Lothian) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)

Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDonald, Mark (Aberdeen Donside) (SNP)
McDougall, Margaret (West Scotland) (Lab)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McTaggart, Anne (Glasgow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against

Harvie, Patrick (Glasgow) (Green)
Johnstone, Alison (Lothian) (Green)

Abstentions

Finnie, John (Highlands and Islands) (Ind)

The Deputy Presiding Officer: The result of the division is: For 93, Against 2, Abstentions 1.

Motion agreed to,

That the Parliament agrees that the Regulatory Reform (Scotland) Bill be passed.

Regulatory Reform (Scotland) Bill

[AS PASSED]

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Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Regulatory Reform (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to enable provision to be made for the purpose of promoting regulatory consistency; to make provision in relation to primary authorities; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

PART 1

REGULATORY FUNCTIONS

Regulations to encourage or improve regulatory consistency

1 Power as respects consistency in regulatory functions

(1) The Scottish Ministers may by regulations make any provision which they consider will encourage or improve consistency in the exercise by regulators of regulatory functions.

(2) Regulations under subsection (1)—

(a) must specify the regulators to which they apply,

(b) may specify regulatory functions in respect of which they are, or are not, to apply,

(c) may prescribe the forms, procedure or other arrangements in respect of which a regulator is to impose, set, secure compliance with or enforce a regulatory requirement (including the manner in which and extent to which fees may be charged or costs recovered),

(d) may require a regulator to co-operate, or co-ordinate activity, with other regulators or the Scottish Ministers (including providing information to the Scottish Ministers).

(3) Before making regulations under subsection (1), the Scottish Ministers must consult—

(a) the regulators to which the regulations would apply,

(b) such persons or bodies as appear to the Scottish Ministers to represent the interests of persons substantially affected by the proposed regulations,

(c) such other persons or bodies as the Scottish Ministers consider appropriate.

(4) For the purposes of subsection (1), "consistency" includes consistency—

(a) in the way in which particular regulators, their employees or their agents impose, set, secure compliance with or enforce a regulatory requirement,

(b) in the way in which different regulators, or the employees or agents of different regulators, impose, set, secure compliance with or enforce a regulatory requirement.

(5) In this Part—

"regulator" means a person, body or office-holder listed, or of a description listed, in schedule 1,

"regulatory functions" means—

(a) functions conferred by or under any enactment of—

(i) imposing requirements, restrictions or conditions in relation to an activity,

(ii) setting standards or outcomes in relation to an activity, or

(iii) giving guidance in relation to an activity, or

(b) functions which relate to the securing of compliance with, or enforcement of, requirements, restrictions, conditions, standards, outcomes or guidance which by or under any enactment relate to an activity,

but does not include any such functions exercisable by a planning authority,

"regulatory requirement" means a requirement, restriction, condition, standard or outcome (whether contained in guidance or otherwise)—

(a) which is to be complied with, met, attained or achieved by a person, body or office-holder whether by or under an enactment (including this Act) or otherwise, and

(b) in respect of which a regulator has regulatory functions.

(6) In the definition of "regulatory functions" in subsection (5), "activity" includes—

(a) providing goods and services, and

(b) employing or offering employment to any person.

2 Regulations under section 1: further provision

(1) Regulations under section 1 ("the regulations") may include provision requiring a regulator—

(a) to secure compliance with or enforce an existing regulatory requirement,

(b) to impose, set, secure compliance with or enforce any other regulatory requirement which the regulator proposes to, or may, impose or set.

(2) Subject to subsection (3), the regulations may also include provision—

(a) amending a regulatory requirement,

(b) for a regulatory requirement to cease to have effect (by means of repealing or revoking an enactment containing the requirement or otherwise),

(c) creating a regulatory requirement,

(d) requiring a regulator to create, amend or remove a regulatory requirement,

(e) where a regulator is required to act as mentioned in paragraph (d), imposing conditions in relation to that requirement.

(3) The regulations may not include provision that would—

(a) amend a regulatory requirement which, by or under an enactment (a "mandatory enactment")—

(i) must be complied with, met, attained or achieved, and

(ii) a regulator is required to impose or set,

(b) repeal or revoke a mandatory enactment.

(4) But the regulations may include provision such as is mentioned in subsection (3) if the regulations otherwise make provision having an equivalent effect to the mandatory enactment.

(5) A provision in the regulations requiring a regulator to impose or set a regulatory requirement is not a mandatory enactment for the purposes of subsection (3) (unless such provision is included by virtue of subsection (4)).

(6) Where the regulations include provision such as is mentioned in subsection (2), they may also include provision preventing a regulator from imposing or setting a regulatory requirement—

(a) that amends, replaces or revokes a regulatory requirement amended or created by the regulations,

(b) that has an equivalent effect to a regulatory requirement which ceases to have effect by virtue of the regulations.

(7) Where the regulations make provision that would (but for this subsection) apply to a regulator, the Scottish Ministers may, if they consider it necessary or expedient, direct that, for a period no longer than that mentioned in subsection (8)—

(a) the provision is not to apply to the regulator, or

(b) the provision is to apply to the regulator—

(i) with such modifications as may be specified in the direction,

(ii) subject to such conditions as may be so specified.

(8) The period is that beginning with the day on which the direction is given and ending 6 months later.

(8A) The Scottish Ministers must publish (in such manner as they consider appropriate) any direction given under subsection (7).

(9) Where the regulations include provision such as is mentioned in subsection (1)(b), such provision does not affect any requirement for the regulator to consult before imposing or setting the regulatory requirement mentioned in that subsection.

(10) This section is without prejudice to the generality of the power to make regulations under section 1.

Compliance and enforcement

3 Regulations under section 1: compliance and enforcement

(1) A regulator to which regulations under section 1 apply must comply with the regulations except to the extent that—

(a) the regulator lacks the powers necessary to comply, or

(b) the regulations impose on the regulator a requirement that conflicts with any other obligation imposed on the regulator by or under an enactment.

(2) Where a regulator fails to comply with the regulations, the Scottish Ministers may—

(a) declare the regulator to have so failed, and

(b) direct the regulator to take such steps to remedy the failure as are specified in the direction within such reasonable period as may be so specified.

(3) Where a regulator fails to take some or all of the steps specified in a direction under subsection (2)(b), the Scottish Ministers may—

(a) take the steps,

(b) arrange for any other person to take the steps, or

(c) apply to the Court of Session for an order requiring the regulator to take the steps.

(4) The Scottish Ministers may recover from a regulator the costs incurred by the Scottish Ministers in relation to—

(a) taking steps under paragraph (a) of subsection (3),

(b) arranging for another person to take steps under paragraph (b) of that subsection (including costs incurred by that other person which the Scottish Ministers have to bear),

(c) an application relating to the regulator under paragraph (c) of that subsection up to the time of making the application.

(5) The Scottish Ministers may recover the costs mentioned in subsection (4) as a civil debt.

Exercise of regulatory functions: economic duty and code of practice

4 Regulators' duty in respect of sustainable economic growth

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

(2) The Scottish Ministers may give guidance to regulators with respect to the carrying out of the duty imposed by subsection (1).

(3) Regulators must have regard to guidance given under subsection (2).

(3A) The Scottish Ministers must publish (in such manner as they consider appropriate) any such guidance.

(4) Subsection (1) does not apply to a regulator to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect as that mentioned in that subsection.

5 Code of practice

(1) The Scottish Ministers may issue and from time to time revise a code of practice in relation to the exercise of regulatory functions by a regulator.

(1A) The Scottish Ministers must publish (in such manner as they consider appropriate) any code of practice issued under subsection (1).

(2) A code of practice issued under subsection (1) applies only to—

(a) such regulators as may be specified in the code, and

(b) such regulatory functions as may be so specified.

(3) A copy of a code of practice issued under subsection (1) must be issued to the regulators to whom it applies.

(4) A regulator to whom a code of practice issued under subsection (1) applies must, from the date a copy is issued to the regulator, have regard to the code—

(a) in determining any general policy or principles by reference to which the regulator exercises any regulatory functions to which the code applies, and

(b) in exercising any such regulatory functions.

(5) References in this section to a code of practice issued under subsection (1) include references to such a code as revised from time to time under that subsection.

6 Code of practice: procedure

(1) Where the Scottish Ministers propose to issue or revise a code of practice under section 5, they must prepare a draft of the code (or revised code).

(2) In preparing the draft, the Scottish Ministers must seek to secure that it is consistent with the principles in subsection (3).

(3) The principles are—

(a) that regulatory functions should be—

(i) exercised in a way that is transparent, accountable, proportionate and consistent, and

(ii) targeted only at cases in which action is needed, and

(b) that regulatory functions should be exercised in a way that contributes to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of such functions to do so.

(4) The Scottish Ministers must consult the following about the draft—

(a) persons appearing to them to be representative of regulators in respect of which the code or revised code would apply,

(b) such other persons as they consider appropriate.

(5) If the Scottish Ministers decide to proceed with the draft (either in its original form or with modifications) they must lay the draft before the Scottish Parliament.

(6) Where the draft so laid is approved by resolution of the Parliament, the Scottish Ministers may issue the code (or revised code).

Power to modify list of regulators

7 Power to modify schedule 1

(1) The Scottish Ministers may by order modify schedule 1 so as to—

(a) add—

(i) a person, body or office-holder which has regulatory functions to the list of persons, bodies and office-holders for the time being listed there, or

(ii) a description of a person, body or office-holder having regulatory functions to that list,

(b) remove—

(i) a person, body or office-holder from that list, or

(ii) a description of a person, body or office-holder from that list,

(c) amend an entry on that list.

(2) An order under subsection (1) may, in relation to a person, body or office-holder or a description of a person, body or office-holder—

(a) specify that a function is or is not to be a regulatory function for the purposes of section 1, 4 or 5,

(b) specify the extent to which a function is or is not to be a regulatory function for such purposes.

PART 1A

PRIMARY AUTHORITIES

7A Scope of Part 1A

(1) This Part applies where—

(a) a person carries on an activity in the area of two or more local authorities, and

(b) each of those authorities has the same relevant function in relation to that activity.

(2) In this Part (other than section 7E), "the regulated person" means the person referred to in subsection (1)(a).

7B Meaning of "relevant function"

(1) In this Part, "relevant function", in relation to a local authority, means a regulatory function—

(a) exercised by that authority, and

(b) specified for the purposes of this Part by order made by the Scottish Ministers.

(2) In subsection (1), "regulatory function" has the same meaning as in section 1(5).

7C Nomination of primary authorities

(1) For the purposes of this Part, the Scottish Ministers may nominate a local authority to be the "primary authority" for the exercise of the relevant function in relation to the regulated person.

(2) The Scottish Ministers may delegate their function under subsection (1) to another person.

(3) Sections 7F and 7G apply in any case where a primary authority is nominated under this section in relation to the regulated person.

7D Nomination of primary authorities: conditions and registers

(1) The Scottish Ministers may nominate a local authority under section 7C(1) in relation to the regulated person only if—

(a) the Scottish Ministers consider the authority suitable for nomination, and

(b) the authority and the regulated person have agreed in writing to the nomination.

(2) The Scottish Ministers may in particular consider as suitable for nomination under subsection (1)—

(a) the local authority in whose area the regulated person principally carries out the activity in relation to which the relevant function is exercised, or

(b) the local authority in whose area the regulated person administers the carrying out of that activity.

(3) The Scottish Ministers may at any time revoke a nomination under section 7C(1) if they consider that—

(a) the authority is no longer suitable for nomination, or

(b) it is appropriate to do so for any other reason.

(4) Subsection (2) applies in relation to a revocation of a nomination as it applies in relation to a nomination.

(5) The Scottish Ministers must maintain or cause to be maintained a register of nominations.

(6) Subsections (1) to (5) apply in relation to a person to whom the function under section 7C(1) is delegated as they apply in relation to the Scottish Ministers.

7E Primary authorities: power to make further provision

(1) The Scottish Ministers may by order make further provision about the exercise of relevant functions by primary authorities in relation to persons (in this section, "regulated persons").

(2) The provision that may be made under subsection (1) includes provision—

(a) requiring a local authority other than the primary authority (an "enforcing authority") to notify the primary authority before taking any enforcement action against a regulated person pursuant to the relevant function,

(b) prescribing the circumstances in which—

(i) the enforcing authority may not take any enforcement action against a regulated person,

(ii) the primary authority may direct the enforcing authority not to take any enforcement action against a regulated person,

(iii) the enforcing authority must notify the primary authority that it has taken enforcement action against a regulated person,

(c) specifying time periods for the purposes of paragraph (b),

(d) prescribing the circumstances in which provision made by virtue of paragraphs (a) to (c) does not apply including, in particular, circumstances—

(i) where the enforcement action is required urgently to avoid a significant risk of serious harm to human health, the environment (including the health of animals or plants) or the financial interests of consumers,

(ii) where the application of provision made by virtue of those paragraphs would be wholly disproportionate,

(e) requiring an enforcing authority to notify the primary authority, as soon as reasonably practicable, of any enforcement action it takes against a regulated person in circumstances prescribed under paragraph (d).

(3) In subsection (2), "enforcement action" means any action—

(a) which relates to securing compliance with or enforcement of any requirement, restriction, condition, standard, outcome or guidance in the event of breach (or putative breach) of the requirement, restriction, condition, standard, outcome or (as the case may be) guidance,

(b) taken with a view to or in connection with—

(i) the imposition of any sanction (criminal or otherwise) in respect of an act or omission, or

(ii) the pursuit of any remedy conferred by an enactment in respect of an act or omission.

(4) Where a relevant function consists of or includes a function of inspection, an order under subsection (1) may make provision for or about an inspection plan including, in particular, provision for or in connection with—

(a) prescribing the circumstances in which a primary authority may make, revise or withdraw an inspection plan,

(b) specifying the matters that a primary authority must take into account in preparing an inspection plan,

(c) specifying the matters that must be included in an inspection plan,

(d) prescribing the circumstances in which a primary authority must consult a regulated person in relation to the carrying out of the function of inspection,

(e) prescribing the arrangements for notifying a local authority about the making, revising or withdrawal of an inspection plan,

(f) specifying the duties of a local authority in relation to an inspection plan,

(g) prescribing the circumstances in which a local authority must notify a primary authority before carrying out the function of inspection.

(5) An "inspection plan" is a plan made by a primary authority containing recommendations as to how a local authority with the function of inspection should exercise that function in relation to a regulated person.

(6) Before making an order under subsection (1), the Scottish Ministers must consult—

(a) any primary authority to which the order would apply,

(b) such persons or bodies as appear to the Scottish Ministers to represent the interests of persons substantially affected by the proposed order, and

(c) such other persons or bodies as the Scottish Ministers consider appropriate.

7F Advice and guidance

(1) The primary authority has the function of giving advice and guidance to—

(a) the regulated person in relation to the relevant function,

(b) other local authorities having the relevant function as to how they should exercise that function in relation to the regulated person.

(2) The primary authority may make arrangements with the regulated person as to how the authority will exercise its function under subsection (1).

7G Power to charge

The primary authority may charge the regulated person such fees as it considers represent the costs reasonably incurred by it in exercising functions as the primary authority under or by virtue of this Part in relation to the regulated person.

7H Guidance

(1) The Scottish Ministers may issue guidance to local authorities about the operation of this Part including, in particular, guidance about—

(a) inspection plans for or about which provision is made under an order under section 7E(1),

(b) arrangements under section 7F(2),

(c) the charging of fees under section 7G.

(2) A local authority must have regard to any guidance issued to it under this section.

(3) Before issuing guidance under this section, the Scottish Ministers must consult such persons as they consider appropriate.

(4) The Scottish Ministers must publish (in such manner as they consider appropriate) any guidance issued under this section.

(5) The Scottish Ministers may at any time vary or revoke any guidance issued under this section.

PART 2

ENVIRONMENTAL REGULATION

CHAPTER 1

REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

8 General purpose: protecting and improving the environment

(1) The purpose of this Chapter is to enable provision to be made for or in connection with protecting and improving the environment, including (without prejudice to that generality)—

(a) regulating environmental activities,

(b) implementing EU obligations, and international obligations, relating to protecting and improving the environment.

(2) In subsection (1), "international obligations" means any international obligations of the United Kingdom other than obligations to observe and implement EU obligations.

9 Meaning of expressions used in section 8 and schedule 2

(1) Expressions used in section 8 have the following meanings for the purposes of this Chapter—

"environmental activities" means—

(a) activities that are capable of causing, or liable to cause, environmental harm, and

(b) activities connected with such activities,

"protecting and improving the environment" includes, in particular—

(a) preventing deterioration (or further deterioration) of, and protecting and enhancing, the status of ecosystems, and

(b) promoting the sustainable use of natural resources based on the long-term protection of available natural resources.

(2) In subsection (1)—

"activities" means activities of any nature whether industrial, commercial or otherwise and whether carried on in particular premises or otherwise; and includes (with or without other activities) the production, treatment, keeping, depositing or disposal of any substance,

"environmental harm" means—

(a) harm to the health of human beings or other living organisms,

(b) harm to the quality of the environment, including—

(i) harm to the quality of the environment taken as a whole,

(ii) harm to the quality of air, water or land, and

(iii) other impairment of, or interference with, ecosystems,

(c) offence to the senses of human beings,

(d) damage to property, or

(e) impairment of, or interference with, amenities or other legitimate uses of the environment.

(3) In schedule 2 (introduced by section 10), "regulated activities" means any environmental activities in respect of which regulations under that section make provision.

10 Regulations relating to protecting and improving the environment

(1) The Scottish Ministers may by regulations make provision for any of the purposes specified in Part 1 of schedule 2.

(2) Part 2 of that schedule has effect for supplementing Part 1 of the schedule.

(3) In accordance with section 8, the provision that may be made by regulations under this section is provision for or in connection with protecting and improving the environment, including any of the matters mentioned in paragraph (a) or (b) of subsection (1) of that section.

11 Regulations relating to protecting and improving the environment: consultation

(1) Before making any regulations under section 10, the Scottish Ministers must consult—

(a) any regulator on whom the proposed regulations would confer functions, and

(b) such other persons as they think fit, including such persons appearing to them to be representative of the interests of local government, industry, agriculture, fisheries or small businesses as they consider appropriate.

(2) Consultation undertaken before the coming into force of this section is as effective compliance with subsection (1) as if undertaken after its coming into force.

(3) In subsection (1), "regulator" is to be construed in accordance with paragraph 3(1) of schedule 2.

CHAPTER 2

SEPA'S POWERS OF ENFORCEMENT

Fixed monetary penalties

12 Fixed monetary penalties

(1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a fixed monetary penalty on a person in relation to a relevant offence.

(2) Provision under subsection (1) must provide that a fixed monetary penalty—

(a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates,

(b) is to be imposed by notice, and

(c) may not be imposed on a person in relation to an offence constituted by an act or omission if a fixed monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.

(3) For the purposes of this Chapter, a "fixed monetary penalty" is a requirement to pay to SEPA a penalty of an amount specified in an order made under subsection (1).

(4) The maximum amount of such penalty that may be so specified in relation to a particular offence is an amount equivalent to level 4 on the standard scale.

(5) In this section, "the standard scale" has the meaning given by section 225(1) of the Criminal Procedure (Scotland) Act 1995.

13 Fixed monetary penalties: procedure

(1) Provision under section 12—

(a) must secure the results in subsection (2) ("the mandatory results"),

(b) may secure the result in subsection (3) ("the optional result").

(2) The mandatory results are that—

(a) where SEPA proposes to impose a fixed monetary penalty on a person, it must serve on the person a notice of what is proposed (a "notice of intent") which complies with subsection (4),

(b) except where the person has discharged liability by virtue of provision made under subsection (3), the person may make written representations to SEPA in relation to the proposed imposition of the fixed monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates),

(c) SEPA must, after the end of the period for making representations, decide whether to impose the fixed monetary penalty,

(d) SEPA must, in so deciding, have regard to any representations,

(e) where SEPA decides to impose the fixed monetary penalty, the notice imposing it ("the final notice") complies with subsection (5), and

(f) the person on whom a fixed monetary penalty is imposed may appeal against the decision to impose it.

(3) The optional result is that the notice of intent also offers the person the opportunity to discharge the person's liability for the fixed monetary penalty by payment of a sum specified in the notice of intent (which sum must be less than or equal to the amount of the penalty).

(4) To comply with this subsection the notice of intent must include information as to—

(a) the grounds for the proposal to impose the fixed monetary penalty,

(b) the right to make written representations,

(c) the period within which representations may be made,

(d) where provision is made under subsection (3)—

(i) how payment to discharge the liability for the fixed monetary payment may be made,

(ii) the period within which liability for the fixed monetary penalty may be discharged, and

(iii) the effect of payment of the sum referred to in subsection (3).

(5) To comply with this subsection the final notice must include information as to—

(a) the grounds for imposing the penalty,

(b) how payment may be made,

(c) the period within which payment must be made,

(d) any early payment discounts or late payment penalties,

(e) rights of appeal, and

(f) the consequences of non-payment.

(6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—

(a) include the grounds that—

(i) the decision was based on an error of fact,

(ii) the decision was wrong in law, and

(iii) the decision was unreasonable, but

(b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 23(1).

14 Fixed monetary penalties: effect on criminal proceedings etc.

(1) Provision under section 12 must secure that in a case where a notice of intent referred to in section 13(2)(a) in respect of an offence constituted by an act or omission is served on a person—

(a) no criminal proceedings may be commenced against the person in respect of that offence constituted by that act or omission—

(i) before the end of any period in which the person may discharge liability for the fixed monetary penalty pursuant to section 13(3), or

(ii) if the person so discharges liability, and

(b) the period as mentioned in subsection (2) is not to be counted in calculating any period within which criminal proceedings in respect of that offence constituted by that act or omission must be commenced.

(2) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.

(3) Provision under section 12 must also secure that, in a case where a fixed monetary penalty is imposed on a person in respect of an offence constituted by an act or omission, no criminal proceedings may be commenced against the person in respect of that offence constituted by that act or omission.

(4) The references in subsections (1)(a) and (3) to criminal proceedings being commenced are to be read as if they included references to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.

Variable monetary penalties

15 Variable monetary penalties

(1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a variable monetary penalty on a person in relation to a relevant offence.

(2) Provision under subsection (1) must provide that a variable monetary penalty—

(a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates,

(b) is to be imposed by notice, and

(c) may not be imposed on a person in relation to an offence constituted by an act or omission if a variable monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.

(3) For the purposes of this Chapter, a "variable monetary penalty" is, subject to subsection (4), a requirement to pay SEPA a penalty of such amount as SEPA may in each case determine.

(4) SEPA may not in any case impose a variable monetary penalty that exceeds the maximum amount specified in an order made under subsection (1) in relation to that case.

(5) The maximum amount that may be so specified is—

(a) in the case mentioned in subsection (6), the maximum amount of the fine that may be imposed on summary conviction in such a case,

(b) in any other case, £40,000.

(6) The case is one where the offence in respect of which the variable monetary penalty is imposed—

(a) is triable summarily (whether or not it is also triable on indictment), and

(b) is punishable on summary conviction by a fine (whether or not it is also punishable by a term of imprisonment).

(7) The Scottish Ministers may by order substitute another sum for the one for the time being mentioned in subsection (5)(b).

16 Variable monetary penalties: procedure

(1) Provision under section 15 must secure the results in subsection (2).

(2) The results are that—

(a) where SEPA proposes to impose a variable monetary penalty on a person, it must serve on the person a notice (a "notice of intent") which complies with subsection (3),

(b) the person may make written representations to SEPA in relation to the proposed imposition of the variable monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates),

(c) SEPA must, after the end of the period for making such representations, decide whether to impose a variable monetary penalty and, if so, the amount of the penalty,

(d) SEPA must, in so deciding, have regard to any representations,

(e) where SEPA decides to impose a variable monetary penalty, the notice imposing it (the "final notice") complies with subsection (4), and

(f) the person on whom a variable monetary penalty is imposed may appeal against the decision as to the imposition or amount of the penalty.

(3) To comply with this subsection the notice of intent must include information as to—

(a) the grounds for the proposal to impose the variable monetary penalty,

(b) the right to make written representations, and

(c) the period within which representations may be made.

(4) To comply with this subsection the final notice must include information as to—

(a) the grounds for imposing the penalty,

(b) how payment may be made,

(c) the period within which the payment must be made,

(d) any early payment discounts or late payment penalties,

(e) rights of appeal, and

(f) the consequences of non-payment.

(5) Provision to secure the result in subsection (2)(c) must include provision for—

(a) the person on whom the notice of intent is served to be able to offer an undertaking as to action to be taken by that person, within such period as may be specified in the undertaking, for all or any of the following purposes—

(i) to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,

(ii) to benefit the environment to the extent that the commission of the offence has harmed the environment,

(iii) to secure that no financial benefit arising from the commission of the offence accrues to the person,

(b) SEPA to be able to accept or reject such an undertaking, and

(c) SEPA to take any undertaking so accepted into account in its decision.

(6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—

(a) include the grounds that—

(i) the decision was based on an error of fact,

(ii) the decision was wrong in law,

(iii) the amount of the penalty is unreasonable, and

(iv) the decision was unreasonable for any other reason, but

(b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 23(1).

17 Variable monetary penalties: effect on criminal proceedings etc.

(1) Provision under section 15 must secure the result in subsection (2) in a case where—

(a) either—

(i) a variable monetary penalty is imposed on a person, or

(ii) an undertaking referred to in section 16(5) is accepted from a person, or

(b) both such a penalty is imposed on, and such an undertaking is accepted from, a person.

(2) The result is that no criminal proceedings may be commenced against the person for an offence constituted by an act or omission if the variable monetary penalty or, as the case may be, the undertaking related to that offence constituted by that act or omission.

(3) Provision under section 15 must provide that the period mentioned in subsection (4) is not to be counted in calculating any period within which criminal proceedings in respect of an act or omission in relation to which a notice of intent under section 16(2)(a) is served must be commenced.

(4) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.

(5) The reference in subsection (2) to criminal proceedings being commenced is to be read as if it included a reference to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.

Non-compliance penalties

18 Undertakings under section 16: non-compliance penalties

(1) Provision under section 15 may include provision for a person to pay a monetary penalty (in this Part, a "non-compliance penalty") to SEPA if the person fails to comply with an undertaking referred to in section 16(5) which is accepted from the person.

(2) Where such provision is included, it may also—

(a) specify the amount of the non-compliance penalty,

(b) provide for the amount to be calculated by reference to criteria specified by order by the Scottish Ministers,

(c) provide for the amount to be determined by SEPA (subject to any maximum amount set out in the provision),

(d) provide for the amount to be determined in any other way.

(2A) Where provision is included as mentioned in subsection (1), it must provide that the maximum amount of the non-compliance penalty that may be imposed in any case is not to exceed the maximum amount of the variable monetary penalty to which the non-compliance penalty relates in such a case.

(3) Where provision is included as mentioned in subsection (1), it must secure that—

(a) the non-compliance penalty is imposed by notice served by SEPA, and

(b) the person on whom it is imposed may appeal against the notice.

(4) Provision pursuant to subsection (3)(b) must secure that the grounds on which a person may appeal against a notice referred to in that subsection include that—

(a) the decision to serve the notice was based on an error of fact,

(b) the decision was wrong in law,

(c) the decision was unreasonable for any reason (including, in a case where the amount of the non-compliance penalty was determined by SEPA, that the amount is unreasonable).

Enforcement undertakings

19 Enforcement undertakings

(1) The Scottish Ministers may by order make provision—

(a) for or about enabling SEPA to accept an enforcement undertaking from a person in a case where SEPA has reasonable grounds to suspect that the person has committed a relevant offence, and

(b) for the acceptance of the undertaking to have the consequences in subsection (4).

(2) For the purposes of this Chapter, an "enforcement undertaking" is an undertaking to take action of a type mentioned in subsection (3) and specified in the undertaking within such period as may be so specified.

(3) The types of action are—

(a) action to secure that the offence does not continue or recur,

(b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,

(c) action of a description specified by order by the Scottish Ministers.

(4) The consequences are that, unless SEPA has certified under provision made in pursuance of subsection (5)(g) that the person from whom the enforcement undertaking is accepted has not complied with the undertaking or any part of it—

(a) no criminal proceedings may be commenced against the person from whom the enforcement undertaking is accepted in respect of an offence constituted by an act or omission if the undertaking relates to that offence constituted by that act or omission,

(b) SEPA may not impose on the person a fixed monetary penalty which it would otherwise have power to impose by virtue of section 12 in respect of the act or omission, and

(c) SEPA may not impose on the person a variable monetary penalty which it would otherwise have power to impose by virtue of section 15 in respect of the act or omission.

(5) An order under this section may in particular include provision—

(a) as to the procedure for entering into an enforcement undertaking,

(b) as to the terms of an enforcement undertaking,

(c) as to publication of an enforcement undertaking by SEPA,

(d) as to variation of an enforcement undertaking,

(e) as to circumstances in which a person may be regarded as having complied with an enforcement undertaking,

(f) as to monitoring by SEPA of compliance with an enforcement undertaking,

(g) as to certification by SEPA that an enforcement undertaking or any part of it has not been complied with,

(h) for appeals against such certification,

(i) in a case where a person has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking, for that person to be regarded as not having complied with it,

(j) in a case where a person has complied partly but not fully with an enforcement undertaking, for that partial compliance to be taken into account in the imposition of any criminal or other sanction on the person,

(k) for the purpose of enabling criminal proceedings in respect of an act or omission in relation to which SEPA has accepted an enforcement undertaking to be commenced against a person who has not complied with the undertaking or any part of it, for the period mentioned in subsection (6) not to be counted in calculating any period within which such proceedings must be commenced.

(6) The period is that beginning with the day on which the enforcement undertaking is accepted and ending with—

(a) the day on which SEPA certifies, under provision made in pursuance of subsection (5)(g), that the undertaking or any part of it has not been complied with, or

(b) where an appeal against such a certification is taken, the day on which the appeal is finally determined.

(6A) The reference in subsection (4)(a) to criminal proceedings being commenced is to be read as if it included a reference to—

(a) a warning being given by the procurator fiscal,

(b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995) being sent,

(c) a compensation offer under section 302A of that Act being sent,

(d) a combined offer under section 302B of that Act being sent, and

(e) a work order under section 302ZA of that Act being made.

(7) References in this section to taking action specified in an enforcement undertaking include references to refraining from taking such action.

Operation of penalties and cost recovery

20 Combination of sanctions

(1) Provision may not be made by order under section 12 and section 15 conferring powers on SEPA in relation to the same offence unless it secures that—

(a) SEPA may not serve a notice of intent referred to in section 13(2)(a) on a person in relation to an act or omission where a variable monetary penalty has been imposed on that person in relation to the act or omission, and

(b) SEPA may not serve a notice of intent referred to in section 16(2)(a) on a person in relation to any act or omission where—

(i) a fixed monetary penalty has been imposed on the person in relation to the act or omission, or

(ii) the person has discharged liability for a fixed monetary penalty in relation to that act or omission pursuant to section 13(3).

(2) Provision under section 12 must secure that in a case where a notice of intent referred to in section 13(2)(a) is served on a person—

(a) SEPA may not, before the end of any period in which the person may discharge liability to the fixed monetary penalty pursuant to section 13(3), impose a variable monetary penalty on the person in respect of the act or omission to which the notice relates, and

(b) SEPA may not, if the person so discharges liability, impose a variable monetary penalty on the person in respect of that act or omission.

(3) Provision under section 12 must also secure that in a case where a fixed monetary penalty is imposed on a person, SEPA may not impose a variable monetary penalty on the person in respect of the act or omission giving rise to the penalty.

(4) Provision under section 12 must also secure the result that a fixed monetary penalty in respect of an offence constituted by an act or omission may not be imposed on a person if, in respect of that offence as constituted by that act or omission—

(a) criminal proceedings have been commenced against the person,

(b) the person has been given a warning by the procurator fiscal,

(c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),

(d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal),

(da) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or

(e) a work order has been made against the person under section 303ZA of that Act (work orders).

(5) Provision under section 15 must also secure the result that a variable monetary penalty in respect of an offence constituted by an act or omission may not be imposed on a person if, in respect of that offence as constituted by that act or omission—

(a) criminal proceedings have been commenced against the person,

(b) the person has been given a warning by a procurator fiscal,

(c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),

(d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal),

(da) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or

(e) a work order has been made against the person under section 303ZA of that Act (work orders).

21 Monetary penalties

(1) An order under this Chapter which confers power on SEPA to require a person to pay a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty may include provision for—

(a) early payment discounts,

(b) the payment of interest or other financial penalties for late payment of the penalty (such interest or other financial penalties not in total to exceed the amount of the penalty),

(c) enforcement of the penalty.

(2) Where such provision is included, it may also provide for—

(a) SEPA to recover the penalty, and any interest or other financial penalty for late payment, as a civil debt,

(b) the penalty, and any interest or other financial penalty for late payment, to be recoverable as if it were payable under an extract registered decree arbitral bearing a warrant for execution issued by a sheriff of any sheriffdom.

22 Costs recovery

(1) Provision under section 15 may include provision for SEPA to require a person on whom a variable monetary penalty is imposed to pay the costs incurred by SEPA in relation to the imposition of the penalty up to the time of its imposition.

(2) Where such provision is included, it must secure that—

(a) a requirement to pay the costs is imposed by notice,

(b) the notice specifies the amount required to be paid,

(c) SEPA may be required to provide a detailed breakdown of the amount,

(d) the person required to pay costs may appeal against—

(i) the decision of SEPA to impose the requirement,

(ii) the decision of SEPA as to the amount of the costs (including that some or all of the costs were unnecessarily incurred),

(e) SEPA is required to publish guidance about how it will exercise the power conferred by the provision.

(3) In subsection (1), the references to costs include in particular—

(a) investigation costs,

(b) administration costs,

(c) costs of obtaining expert advice (including legal advice).

(4) Subsections (1)(b) and (c) and (2) of section 21 apply to costs required to be paid by virtue of subsection (1) of this section as they apply to a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty.

Guidance

23 Guidance as to use of enforcement measures

(1) The Lord Advocate may issue, and from time to time revise, guidance to SEPA on the exercise of its functions relating to enforcement measures.

(2) SEPA must comply with such guidance or revised guidance in exercising those functions.

(3) In this section, an "enforcement measure" means a fixed monetary penalty, variable monetary penalty or enforcement undertaking (and any references in this Chapter to the imposition of an enforcement measure include acceptance of an enforcement undertaking).

(4) Where power is conferred on SEPA by virtue of this Chapter to impose an enforcement measure in relation to an offence, the provision conferring the power must secure the results in subsection (5).

(5) The results are that—

(a) SEPA must publish guidance about—

(i) how the offence is enforced,

(ii) the sanctions (including criminal sanctions) to which a person who commits the offence may be liable,

(iii) the action which SEPA may take to enforce the offence, whether by virtue of this Chapter or otherwise,

(iv) the circumstances in which SEPA is likely to take any such action,

(v) SEPA's use of the enforcement measure,

(b) in the case of guidance relating to a fixed monetary penalty or variable monetary penalty, the guidance must contain the relevant information, and

(c) SEPA must have regard to the guidance in exercising its functions.

(6) In the case of guidance relating to a fixed monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed,

(b) the circumstances in which it may not be imposed,

(c) the amount of the penalty,

(d) how liability for the penalty may be discharged and the effect of discharge, and

(e) rights to make representations and rights of appeal.

(7) In the case of guidance relating to a variable monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed,

(b) the circumstances in which it may not be imposed,

(c) the matters likely to be taken into account by SEPA in determining the amount of the penalty (including, where relevant, any discounts for voluntary reporting of non-compliance), and

(d) rights to make representations and rights of appeal.

(8) SEPA may from time to time revise guidance published by it by virtue of subsection (5).

(9) The references in subsections (5) to (7) to guidance include references to any revised guidance under subsection (8).

(10) Before publishing any guidance or revised guidance by virtue of this section, SEPA must consult—

(a) the Lord Advocate, and

(b) such other persons as it considers appropriate.

Publication of enforcement action

24 Publication of enforcement action

(1) Subsection (2) applies where the Scottish Ministers make provision by order under—

(a) section 12 as to the imposition by SEPA of a fixed monetary penalty,

(b) section 15 as to the imposition by SEPA of a variable monetary penalty, or

(c) section 19 as to the acceptance by SEPA of an enforcement undertaking.

(2) The order may require SEPA to publish such information as may be specified in the order as regards cases in which it has done what the order permits it to do.

Interpretation of Chapter 2

25 Interpretation of Chapter 2

In this Chapter—

"early payment discounts" means early payment discounts included in an order under this Chapter by virtue of section 21(1);

"enforcement undertaking" has the meaning given in section 19;

"fixed monetary penalty" has the meaning given in section 12;

"late payment penalties" means a requirement to pay interest or other financial penalties for late payment of a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty included in an order under this Chapter by virtue of section 21(1);

"non-compliance penalty" has the meaning given in section 18(1);

"variable monetary penalty" has the meaning given in section 15.

CHAPTER 3

COURT POWERS

Compensation orders

26 Compensation orders against persons convicted of relevant offences

(1) Where a person is convicted of a relevant offence, subsection (1) of section 249 of the Criminal Procedure (Scotland) Act 1995 (compensation order against convicted person) has effect in relation to the conviction subject to the modification in subsection (2).

(2) The modification is that the reference to payment of compensation in favour of the victim for any loss or damage caused directly or indirectly to the victim is to be read as if it included a reference to payment of compensation to a relevant person for costs incurred or to be incurred by the relevant person in preventing, reducing, remediating or mitigating the effects of—

(a) any harm to the environment resulting directly or indirectly from the offence,

(b) any other harm, loss, damage or adverse impacts so resulting from the offence.

(3) In subsection (2), the reference to costs does not include any costs which the relevant person has already recovered by virtue of—

(a) regulations under section 10 made in pursuance of paragraph 18(1) or 20 of schedule 2, or

(b) any other enactment.

(4) Where a compensation order (within the meaning of subsection (1) of section 249 of the 1995 Act) is made in respect of costs mentioned in subsection (2), that section has effect as if—

(a) the reference in subsection (8)(a) to the prescribed sum were, in relation to those costs, a reference to £50,000, and

(b) subsection (8A) were omitted.

(5) The Scottish Ministers may by order substitute a different sum of money for the one for the time being specified in subsection (4)(a).

(6) In this section—

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995,

"relevant person" means—

(a) SEPA,

(b) a local authority, or

(c) an owner or occupier of land—

(i) to which the harm, loss or damage mentioned in subsection (2) was caused, or

(ii) on which there was an adverse impact as mentioned in that subsection,

"owner", in relation to any land in Scotland, means a person (other than a creditor in a heritable security not in possession of the security subjects) for the time being entitled to receive or who would, if the land were let, be entitled to receive the rents of the land, and includes a trustee, factor, guardian or curator; and in the case of public or municipal land includes the persons to whom the management of the land is entrusted.

Fines

27 Fines for relevant offences: court to consider financial benefits

(1) Subsection (2) applies where—

(a) a person is convicted by a court of a relevant offence, and

(b) the court proposes to impose a fine in respect of the offence.

(2) In determining the amount of the fine, the court must in particular have regard to any financial benefit which has accrued or is likely to accrue to the person in consequence of the offence.

Publicity orders

28 Power to order conviction etc. for offence to be publicised

(1) This section applies where a person is convicted by a court of a relevant offence.

(2) The court may, instead of or in addition to dealing with the person in any other way, make an order (a "publicity order") requiring the person to publicise in a specified manner—

(a) the fact that the person has been convicted of the relevant offence,

(b) specified particulars of the offence,

(c) specified particulars of any other sentence passed by the court in respect of the offence.

(3) A publicity order is to be taken to be a sentence for the purposes of any appeal.

(4) The court may make a publicity order—

(a) at its own instance, or

(b) on the motion of the prosecutor.

(4A) In deciding on the terms of a publicity order that it proposes to make, the court must have regard to any representations made by the prosecutor or by or on behalf of the person.

(5) A publicity order—

(a) must specify a period within which the requirement to publicise the matters mentioned in paragraphs (a) to (c) of subsection (2) are to be complied with, and

(b) may require the convicted person to supply SEPA, within a specified period, with evidence that that requirement has been complied with.

(6) In subsections (2) and (5), "specified", in relation to a publicity order, means specified in the order.

(7) A person who fails to comply with a publicity order commits an offence.

(8) A person who commits an offence under subsection (7) is liable—

(a) on summary conviction, to a fine not exceeding £40,000,

(b) on conviction on indictment, to a fine.

28A Corporate offending

(1) Subsection (2) applies where—

(a) an offence under section 28(7) is committed by a relevant organisation, and

(b) the commission of the offence involves the connivance or consent, or is attributable to the neglect, of a responsible official of the relevant organisation.

(2) The responsible official (as well as the relevant organisation) commits the offence.

(3) In this section—

"a relevant organisation" means—

(a) a company,

(b) a limited liability partnership,

(c) a partnership (other than a limited liability partnership), or

(d) another body or association,

"a responsible official" means—

(a) in the case of a company, a director, secretary, manager or similar officer of the company,

(b) in the case of a limited liability partnership, a member of the partnership,

(c) in the case of a partnership (other than a limited liability partnership), a partner of the partnership, or

(d) in the case of another body or association, a person who is concerned in the management or control of its affairs,

and in each case includes a person purporting to act in a capacity mentioned in any of paragraphs (a) to (d) of this definition.

CHAPTER 4

MISCELLANEOUS

Vicarious liability

29 Vicarious liability for certain offences by employees and agents

(1) Subsection (2) applies where a person ("A") commits a relevant offence while acting as the employee or agent of another person ("B").

(2) B also commits the relevant offence and is liable to be proceeded against and punished accordingly.

(3) Where B is charged with a relevant offence by virtue of subsection (2), it is a defence for B to show—

(a) that B did not know that the relevant offence was being committed by A,

(b) that no reasonable person could have suspected that the relevant offence was being committed by A, and

(c) that B took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against B in respect of the relevant offence whether or not proceedings are also taken against A in respect of that offence.

30 Liability where activity carried out by arrangement with another

(1) Subsection (2) applies where, in the course of carrying on a regulated activity—

(a) a person ("A") commits a relevant offence,

(b) at the time the offence is committed, A is carrying on the regulated activity for another person ("B"), and

(c) B manages or controls the carrying on of the regulated activity.

(2) B also commits the relevant offence and is liable to be proceeded against and punished accordingly.

(3) Where B is charged with a relevant offence by virtue of subsection (2), it is a defence for B to show—

(a) that B did not know that the relevant offence was being committed by A,

(b) that no reasonable person could have suspected that the relevant offence was being committed by A, and

(c) that B took all reasonable precautions and exercised all due diligence to prevent the offence being committed.

(4) Proceedings may be taken against B in respect of the relevant offence whether or not proceedings are also taken against A in respect of that offence.

(5) For the purposes of subsection (1)(b), A is carrying on a regulated activity for B whether A is carrying on the activity—

(a) by arrangement between A and B, or

(b) by arrangement with, or as employee or agent of, any other person ("C") with whom B has an arrangement under which C is to carry on the regulated activity.

(6) For the purposes of this section, "regulated activity"—

(a) has the meaning given in section 9(3), and

(b) includes activities specified in an order made by the Scottish Ministers for the purposes of this section.

(7) An order under subsection (6) may specify only activities that are environmental activities within the meaning of section 9.

Offence relating to significant environmental harm

31 Significant environmental harm: offence

(1) It is an offence for a person to—

(a) act, or permit another person to act, in a way that causes or is likely to cause significant environmental harm, or

(b) fail to act, or permit another person not to act, in a way such that (in either case) the failure to act causes or is likely to cause significant environmental harm.

(2) But no offence is committed under subsection (1) by a person who permits another person to act or not to act as mentioned in that subsection if the permission was given by or under an enactment conferring power on the person to authorise the act, or failure to act, that caused or (as the case may be) was likely to cause such harm (however such authorisation may be expressed).

(3A) A person who acts, fails to act or permits another person to act or not to act as mentioned (in each case) in subsection (1) commits an offence under that subsection whether or not the person—

(a) intended the acts or failures to act to cause, or be likely to cause, significant environmental harm, or

(b) knew that, or was reckless or careless as to whether, the acts or failures to act would cause or be likely to cause such harm.

(4) For the purposes of subsection (1), a person acts in a way that is likely to cause significant environmental harm, or fails to act in a way such that the failure is likely to cause such harm if, at the time of so acting or failing to act, such harm may reasonably have been considered likely to occur even if it did not (for whatever reason) in fact occur.

(5) It is a defence for a person charged with an offence under subsection (1) to show that—

(a) the acts or failures alleged to constitute the offence were necessary in order to avoid, prevent or reduce an imminent risk of serious adverse effects on human health,

(b) the person took all such steps as were reasonably practicable in the circumstances to minimise any environmental harm, and

(c) particulars about the acts or failures were given to SEPA as soon as practicable after the acts or failures took place.

(6) It is a defence for a person charged with an offence under subsection (1) to show that the acts or failures alleged to constitute the offence were authorised by or otherwise carried out in accordance with—

(a) regulations made under section 10,

(b) an authorisation given under such regulations, or

(c) an enactment specified in an order made by the Scottish Ministers for the purposes of this section.

(7) A person who commits an offence under subsection (1) is liable—

(a) on summary conviction to—

(i) a fine not exceeding £40,000,

(ii) imprisonment for a term not exceeding 12 months, or

(iii) both,

(b) on conviction on indictment to—

(i) a fine,

(ii) imprisonment for a term not exceeding 5 years, or

(iii) both.

(8) In this section, "environmental harm" has the same meaning as in section 9(2).

(9) For the purposes of this section, environmental harm is "significant" if—

(a) it has or may have serious adverse effects, whether locally, nationally or on a wider scale, or

(b) it is caused or may be caused to an area designated in an order by the Scottish Ministers for the purposes of this section.

(10) An order under subsection (9) may make different provision for—

(a) different areas, or

(b) different types of significant environmental harm in relation to different areas.

32 Power of court to order offence to be remedied

(1) This section applies where—

(a) a court convicts a person of an offence under section 31(1),

(b) it appears to the court that it is within the power of the person to remedy or mitigate the significant environmental harm to which the conviction relates.

(2) The court may, in addition to or instead of dealing with the person in any other way, order the person to take such steps as may be specified in the order to remedy or mitigate the harm.

(3) An order under subsection (2) (a "remediation order") is to be taken to be a sentence for the purposes of any appeal.

(4) A remediation order must specify a period ("the compliance period") within which the steps mentioned in that subsection are to be taken.

(5) On an application by the person convicted of the offence, the court may, on more than one occasion—

(a) extend the compliance period within which those steps are to be taken,

(b) vary the steps specified in a remediation order.

(6) An application under subsection (5) must be made before the end of the compliance period.

(7) A person who fails to comply with a remediation order commits an offence.

(8) A person who commits an offence under subsection (7) is liable—

(a) on summary conviction to—

(i) a fine not exceeding £40,000,

(ii) imprisonment for a term not exceeding 12 months, or

(iii) both,

(b) on conviction on indictment to—

(i) a fine,

(ii) imprisonment for a term not exceeding 5 years, or

(iii) both.

32A Corporate offending

(1) Subsection (2) applies where—

(a) an offence under section 31(1) or 32(7) is committed by a relevant organisation, and

(b) the commission of the offence involves the connivance or consent, or is attributable to the neglect, of a responsible official of the relevant organisation.

(2) The responsible official (as well as the relevant organisation) commits the offence.

(3) In this section—

"a relevant organisation" means—

(a) a company,

(b) a limited liability partnership,

(c) a partnership (other than a limited liability partnership), or

(d) another body or association,

"a responsible official" means—

(a) in the case of a company, a director, secretary, manager or similar officer of the company,

(b) in the case of a limited liability partnership, a member of the partnership,

(c) in the case of a partnership (other than a limited liability partnership), a partner of the partnership, or

(d) in the case of another body or association, a person who is concerned in the management or control of its affairs,

and in each case includes a person purporting to act in a capacity mentioned in any of paragraphs (a) to (d) of this definition.

Offences relating to supply of carrier bags: fixed penalty notices

32B Offences relating to supply of carrier bags: fixed penalty notices

(1) The Climate Change (Scotland) Act 2009 is amended as follows.

(2) After section 88 insert—

"*Carrier bag offences: fixed penalty notices*

88A Offences relating to supply of carrier bags: fixed penalty notices

(1) A person authorised for the purpose of this section by an enforcement authority may give a person a fixed penalty notice if the person so authorised has reason to believe that the person to whom the notice is given has committed a relevant offence.

(2) In subsection (1), "relevant offence" means an offence provided for in regulations made under section 88.

(3) The Scottish Ministers may by regulations make further provision about fixed penalty notices under subsection (1).

(4) Subject to section 89, the regulations may in particular include provision about—

(a) the enforcement authority in relation to the regulations; and

(b) the functions of that authority in relation to fixed penalty notices.

(5) Schedule 1A makes further provision about fixed penalties.".

(3) After schedule 1 insert—

"SCHEDULE 1A

(introduced by section 88A(5))

FIXED PENALTIES

Preliminary

1 In this schedule, unless the context otherwise requires—

"enforcement authority" means the enforcement authority provided for in the regulations;

"notice" means a fixed penalty notice given under section 88A(1);

"the offence" means the offence to which the notice relates;

"prescribed" means prescribed by the regulations;

"the regulations" means regulations under section 88A(3).

Content of fixed penalty notice

2 (1) A notice must give reasonable particulars of the circumstances alleged to constitute the offence.

(2) A notice must also contain the following information—

(a) the amount of the fixed penalty;

(b) the payment deadline;

(c) the discounted amount and the discounted payment deadline;

(d) the name of—

(i) the enforcement authority to which payment should be made; or

(ii) a person acting on behalf of the enforcement authority to whom payment should be made;

(e) the address at which payment should be made; and

(f) the method by which payment should be made.

(3) A notice given to a person must state that—

(a) any liability to conviction of the offence is discharged if the person makes payment of—

(i) the fixed penalty before the payment deadline; or

(ii) the discounted amount before the discounted payment deadline;

(b) the payment of a fixed penalty is not a conviction nor may it be recorded as such;

(c) no proceedings may be commenced against the person in respect of the offence unless the payment deadline has passed and the discounted amount or fixed penalty has not been paid;

(d) the person has the right to make representations as mentioned in paragraph 8.

Period in which notice can be given

3 A notice may not be given after such time relating to the offence as may be prescribed.

Amount of penalty

4 (1) The amount of the fixed penalty, and the discounted amount, are such amounts as may be prescribed.

(2) The maximum amount of the fixed penalty that may be prescribed is an amount equal to level 2 on the standard scale (within the meaning of section 225(1) of the Criminal Procedure (Scotland) Act 1995).

(3) The discounted amount prescribed must be less than the maximum amount of the fixed penalty.

Deadlines for payment

5 (1) The payment deadline is the first working day occurring at least 28 days after the day on which the notice is given.

(2) But the enforcement authority may extend the payment deadline in any particular case after the notice is given if it considers it appropriate to do so.

(3) The discounted payment deadline is the first working day occurring at least 14 days after the day on which notice is given.

(4) But the enforcement authority may extend the discounted payment deadline in any particular case after the notice is given if it considers it appropriate to do so.

(5) On extending the payment deadline under sub-paragraph (2), or the discounted payment deadline under sub-paragraph (4), the enforcement authority must notify the recipient of the notice.

(6) In this paragraph, "working day" means any day other than a Saturday, a Sunday, Christmas Day or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

Method of payment

6 The fixed penalty (and the discounted payment amount) is payable—

(a) to the enforcement authority or the person acting on its behalf specified in the notice;

(b) at the address specified in the notice; and

(c) by the method specified in the notice.

Restriction on proceedings and effect of payment

7 (1) The earliest date that proceedings for the offence may be commenced is the day after the payment deadline.

(2) But no such proceedings may be commenced against a person if—

(a) the person makes payment of the discounted amount on or before the discounted payment deadline (or that deadline as extended under paragraph 5(4)); or

(b) the person makes payment of the fixed penalty on or before the payment deadline (or that deadline as extended under paragraph 5(2)).

(3) In proceedings for the offence, a certificate which—

(a) purports to be signed by or on behalf of a person having responsibility for the financial affairs of the enforcement authority; and

(b) states that payment of an amount specified in the certificate was, or was not, received by a date so specified,

is sufficient evidence of the facts stated.

(4) Where the enforcement authority is a local authority, the reference to a person having responsibility for the financial affairs of the enforcement authority in sub-paragraph (3)(a) is to be read as a reference to the person who has, as respects the local authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration).

Withdrawal of fixed penalty notice

8 (1) A recipient of a notice may make representations to the enforcement authority as to why the notice ought not to have been given.

(2) If, having considered any representations under sub-paragraph (1), the enforcement authority considers that the notice ought not to have been given, it may give to the person a notice withdrawing the notice.

(3) Where a notice under sub-paragraph (2) is given—

(a) the enforcement authority must repay any amount which has been paid in pursuance of the fixed penalty notice; and

(b) no proceedings may be commenced against the person for the offence.

Effect of prosecution on fixed penalty notice

9 Where proceedings for an offence in respect of which a notice has been given are commenced, the notice is to be treated as withdrawn.

General and supplemental

10 The regulations may make provision about—

(a) the application by enforcement authorities of payments received under this schedule;

(b) the keeping of accounts, and the preparation and publication of statements of account, in relation to such payments.

11 (1) The regulations may prescribe—

(a) the form of notices including notices under paragraph 8(2);

(b) the circumstances in which notices may not be given; and

(c) the method by which fixed penalties may be paid.

(2) The regulations may modify sub-paragraphs (1) and (3) of paragraph 5 so as to substitute a different deadline for the deadline for the time being specified there.

12 The enforcement authority must have regard to any guidance given by the Scottish Ministers to it in relation to the functions conferred on it by the regulations.".

Publicity and remediation orders: appeals by prosecutor

33 Orders under sections 28 and 32: prosecutor's right of appeal

(1) The Criminal Procedure (Scotland) Act 1995 is amended in accordance with this section.

(2) In section 108 (Lord Advocate's rights of appeal against disposal)—

(a) in subsection (1), after paragraph (ca) insert—

"(cb) a decision under section 28(2) of the Regulatory Reform (Scotland) Act 2013 not to make a publicity order;

(cc) a decision under section 32(2) of that Act not to make a remediation order;",

(b) in subsection (2)(b)(ii), for the words "or (ca)" substitute ", (ca), (cb) or (cc)".

(3) In section 175 (right of appeal from summary proceedings)—

(a) in subsection (4), after paragraph (ca) insert—

"(cb) a decision under section 28(2) of the Regulatory Reform (Scotland) Act 2013 not to make a publicity order;

(cc) a decision under section 32(2) of that Act not to make a remediation order;",

(b) in subsection (4A)(b)(ii), for "or (ca)" substitute ", (ca), (cb) or (cc)".

Contaminated land and special sites

34 Contaminated land and special sites

(1) The Environmental Protection Act 1990 is amended as follows.

(1A) In section 78F (determination of appropriate person to bear responsibility for remediation), after subsection (5) insert—

"(5A) But where the contaminated land is owned or occupied by the Crown by virtue of its having vested as *bona vacantia* in the Crown, or its having fallen to the Crown as *ultimus haeres*, the Crown is not an appropriate person under subsection (4) or (5) for the purposes of this Part.".

(2) After section 78Q insert—

"**78QA Land no longer considered to be contaminated**

(1) Subsection (2) applies where—

(a) a local authority has given notice under section 78B above that land in its area has been identified as contaminated land;

(aa) the land is not designated as a special site by virtue of section 78C(7) or 78D(6) above; and

(b) the local authority is satisfied that the land is no longer contaminated land.

(2) The local authority may give notice (a "non-contamination notice") that the land is no longer contaminated land to—

(a) the appropriate Agency;

(b) the owner of the land;

(c) any person who appears to the local authority to be in occupation of the land;

(d) each person who appears to the authority to be an appropriate person.

(3) Where a non-contamination notice is given in respect of land—

(a) the notice mentioned in subsection (1) above ceases to have effect (and accordingly the land is no longer identified as contaminated land for the purposes of this Part);

(b) no remediation notice may be served in respect of the land;

(c) any remediation notice in force in respect of the land at the time the non-contamination notice is given ceases to have effect (except to the extent that the non-contamination notice provides otherwise); and

(d) no proceedings may be begun against a person for an offence under section 78M(1) above in respect of such a remediation notice except in relation to a provision of the notice which continues to have effect by virtue of paragraph (c) above.

(3A) A non-contamination notice shall not prevent the land, or any of the land, to which the notice relates being identified as contaminated land on a subsequent occasion.

(3B) Where land, or any of the land, to which a non-contamination notice relates is subsequently identified as contaminated land, or is subsequently designated as a special site by virtue of section 78C(7) or 78D(6), subsection (3)(b) above does not prevent a remediation notice being served in respect of the land.

(4) Where a local authority gives a non-contamination notice, it must keep (in such form as it thinks fit) a record of—

(a) details of the land to which the notice relates;

(b) its reasons for giving the notice; and

(c) the date of—

(i) the notice mentioned in subsection (1) above;

(ii) service of the non-contamination notice.

(5) Subsection (8) of section 78R below applies to records kept under subsection (4) above as it applies to registers maintained by enforcing authorities under that section; and for that purpose, the reference to entries is to be read as if it were a reference to information in such records.

(6) In performing its function under subsection (2) above, a local authority must have regard to any guidance issued by the Scottish Ministers in accordance with section 78YA below.

(7) In this section, references to land in respect of which a non-contamination notice is given include references to part of that land.".

(3) After section 78T insert—

"78TA Registers: removal of information about land designated as special site

(1) Subsection (2) applies where a local authority has entered in a register maintained under section 78R above particulars of or relating to notices mentioned in paragraph (e) or (f) of subsection (1) of that section.

(2) The local authority may remove the particulars from the register.

(3) Particulars may be removed under subsection (2) above only if—

(a) the Scottish Environment Protection Agency has given the local authority a notice under section 78Q(4) above that the land to which the notices relate is no longer land which is required to be designated as a special site; and

(b) the date specified in the notice given under that section has passed.

(4) Where a local authority removes particulars from a register under subsection (2) above, it must keep (in such form as it thinks fit) a record of—

(a) the particulars that have been removed;

(b) its reasons for removing them; and

(c) the date on which the particulars—

(i) were originally entered in the register; and

(ii) were removed.

(5) Subsection (8) of section 78R above applies to records kept under subsection (4) above as it applies to registers maintained by enforcing authorities under that section; and for that purpose, the reference to entries is to be read as if it were a reference to information in such records.

(6) In performing its functions under subsection (4) above, a local authority must have regard to any guidance issued by the Scottish Ministers in accordance with section 78YA below.

(7) Where a local authority removes particulars from a register under subsection (2) above, it must give notice of such removal to—

(a) the Scottish Environment Protection Agency;

(b) any person who is the owner of land designated as a special site by a notice to which the particulars relate;

(c) any person who appears to the local authority to be in occupation of the whole or any part of that land;

(ca) each person—

(i) who appears to the Scottish Environment Protection Agency to be an appropriate person in relation to that land; and

(ii) in respect of whom details have been given by the Scottish Environment Protection Agency to the local authority sufficient to enable notice of such removal to be given; and

(d) each person who appears to the local authority to be an appropriate person in relation to that land.

78TB Effect of removal of information from register

(1) Where a local authority removes particulars from a register under section 78TA(2) above—

(b) any remediation notice relating to the land ceases to have effect; and

(c) no proceedings may be begun against a person for an offence under section 78M(1) above in respect of any remediation notice relating to the land.

(2) In subsection (1), "the land" means land designated as a special site by a notice to which the particulars mentioned in that subsection relate.".

(3A) In section 78X (supplementary provisions), in subsection (4), after paragraph (f) insert—

"(g) in relation to property and rights that have vested as *bona vacantia* in the Crown, or that have fallen to the Crown as *ultimus haeres*, the Queen's and Lord Treasurer's Remembrancer.".

(4) In section 78YA (supplementary provisions with respect to guidance by the Scottish Ministers), in subsection (4A), after "draft" where it second occurs insert ", and a draft of any guidance referred to in section 78QA(6) or section 78TA(6) above,".

Amendment of powers under section 108 of Environment Act 1995

34A Amendment of powers under section 108 of Environment Act 1995

(1) The Environment Act 1995 is amended as follows.

(2) In section 108 (powers of enforcing authorities and persons authorised by them)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (b) is repealed,

(ii) after paragraph (c) insert—

"(d) of determining whether any of the following offences are being or have been committed—

(i) an offence under section 110 of this Act;

(ii) an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 (offences relating to significant environmental harm);

(iii) an offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (statutory offences: art and part and aiding or abetting) as it applies in relation to an offence mentioned in sub-paragraph (i) or (ii) above;

(iv) an attempt, conspiracy or incitement to commit an offence mentioned in sub-paragraph (i) or (ii) above; or

(e) in a case only where the person is authorised by SEPA, of determining whether, and if so to what extent, any financial benefit has accrued or is likely to accrue to a person in connection with an offence mentioned in subsection (1A) below which the authorised person reasonably believes is being or has been committed.",

(b) after subsection (1) insert—

"(1A) The offence is a relevant offence (within the meaning of section 39 of the Regulatory Reform (Scotland) Act 2013) for the purpose of provision made under section 16, or of section 27, of that Act).",

(c) in subsection (4)—

(i) in paragraph (h), after sub-paragraph (iii) insert—

"(iv) to ensure that it is available for use as evidence in any proceedings for an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013;",

(ii) in paragraph (j), the words from "to answer" to the end become sub-paragraph (i) of that paragraph, and after that sub-paragraph insert "; and

(ii) without prejudice to the generality of paragraph (c) above, to attend at such place and at such reasonable time as the authorised person may specify to answer those questions and sign such a declaration;",

(iii) after paragraph (j) insert—

"(ja) in a case only where he is authorised under subsection (1) or (2) above by SEPA, and without prejudice to the generality of paragraphs (c) and (j) above, to require any person whom he has reasonable cause to believe to be able to give any information relevant to an examination or investigation under paragraph (c) above, to provide the person's name, address and date of birth;",

(iv) after paragraph (k) insert—

"(ka) as regards any premises which by virtue of an authorisation from SEPA he has power to enter, to search the premises and seize and remove any documents found in or on the premises which he has reasonable cause to believe—

(i) may be required as evidence for the purpose of proceedings relating to an offence under any of the pollution control enactments, or under section 31(1) of the Regulatory Reform (Scotland) Act 2013, which he reasonably believes is being or has been committed; or

(ii) may assist in determining whether, and if so to what extent, any financial benefit has accrued or is likely to accrue as mentioned in subsection (1)(e) above;",

(d) in subsection (5), after "with" insert ", or whether an offence under section 31(1) of the Regulatory Reform (Scotland) Act 2013 is being, or has been, committed,",

(e) in subsection (6), paragraph (a) and the word "and" immediately following it are repealed,

(f) after subsection (7) insert—

"(7A) An authorised person may not exercise the power in subsection (4)(ka) above to seize and remove documents except under the authority of a warrant by virtue of Schedule 18 to this Act.

(7B) Section 108A applies where documents are removed under that power.

(7C) Subsections (7D) and (7E) apply where a document removed under that power contains information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings.

(7D) The information may not be used—

(a) in evidence for the purpose of proceedings mentioned in paragraph (ka)(i) of subsection (4) above against a person who would be entitled to make such a claim in relation to the document; or

(b) to determine whether any financial benefit has accrued or is likely to accrue as mentioned in subsection (1)(e) above.

(7E) The document must be returned to the premises from which it was removed, or to the person who had possession or control of it immediately before it was removed, as soon as reasonably practicable after the information is identified as information described in subsection (7C) above (but the authorised person may retain, or take copies of, any other information contained in the document).",

(g) in subsection (12), at the end add ", except in a case where the proceedings relate to—

(a) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements and declarations), or

(b) another offence where in giving evidence the person makes a statement inconsistent with the answer.",

(h) in subsection (15)—

(i) after the definition of "authorised person" insert—

""document" includes any thing in which information of any description is recorded (by any means) and any part of such a thing;",

(ii) in the definition of "pollution control functions", paragraph (a) is repealed.

(3) After section 108, insert—

"**108A Procedure where documents removed**

(1) An authorised person (within the meaning of subsection (15) of section 108 of this Act) who removes any documents under the power in subsection (4)(ka) of that section shall, if requested to do so by a person mentioned in subsection (2) below, provide that person with a record of what the authorised person removed.

(2) The persons are—

(a) a person who was the occupier of any premises from which the documents were removed at the time of their removal;

(b) a person who had possession or control of the documents immediately before they were removed.

(3) The authorised person shall provide the record within a reasonable time of the request for it.

(4) A person who had possession or control of documents immediately before they were removed may apply to SEPA—

(a) for access to the documents; or

(b) for a copy of them.

(5) SEPA shall—

(a) allow the applicant supervised access to the documents for the purpose of copying them or information contained in them; or

(b) copy the documents or information contained in them (or cause the documents or information to be copied) and provide the applicant with such copies within a reasonable time of the application.

(6) But SEPA need not comply with subsection (5) above where it has reasonable grounds for believing that to do so might prejudice—

(a) any investigation for a purpose mentioned in paragraph (a), (d) or (e) of subsection (1) of section 108 of this Act; or

(b) any criminal proceedings which may be brought as a result of any such investigation.

(7) In subsection (5) above, "supervised access" means access under the supervision of a person approved by SEPA.

(8) A person who claims that an authorised person or SEPA has failed to comply with the requirements of subsection (1), (3) or (5) above may apply to the sheriff for an order under subsection (10) below.

(9) An application under subsection (8) above—

(a) relating to a failure to comply with the requirements of subsection (1) or (3) above may be made only by a person who is entitled to make a request under subsection (1) above;

(b) relating to a failure to comply with subsection (5) above may be made only by a person who had possession or control of the documents immediately before they were removed.

(10) The sheriff may, if satisfied that the authorised person or SEPA has failed to comply with the requirements of subsection (1), (3) or (5) above, order the person, or as the case may SEPA, to comply with the requirements within such time and in such manner as may be specified in the order.".

(4) In Schedule 18 (supplemental provisions with respect to powers of entry)—

(a) in paragraph 2—

(i) after sub-paragraph (1) insert—

"(1A) If it is shown to the satisfaction of the sheriff or a justice of the peace, on sworn information in writing, that there are reasonable grounds for the exercise in relation to any documents of a power in section 108(4)(ka) of this Act, the sheriff or justice of the peace may by warrant authorise SEPA to designate a person who shall be authorised to exercise the power in relation to the documents in accordance with the warrant and, if need be, by force.",

(ii) for sub-paragraph (3) substitute—

"(3) A warrant under this Schedule in respect of the power in section 108(6) of this Act to enter any premises used for residential purposes shall not be issued unless the sheriff or justice of the peace is satisfied that such entry is necessary for any purpose for which the power is proposed to be exercised.",

(iii) after sub-paragraph (4) add—

"(5) A sheriff may grant a warrant under this Schedule in relation to premises situated in an area of Scotland even though the area is outside the territorial jurisdiction of that sheriff; and any such warrant may, without being backed or endorsed by another sheriff, be executed throughout Scotland in the same way as it may be executed within the sheriffdom of the sheriff who granted it.",

(b) in paragraph 3—

(i) after "shall" insert ", if so required,",

(ii) the words "designation and other" are repealed.

Authorisations relating to waste management: offences by partnerships

35 Carriers of controlled waste: offences by partnerships affecting registration

In section 3(5) of the Control of Pollution (Amendment) Act 1989 (restrictions on powers under section 2)—

(a) after paragraph (a), insert—

"(aa) a partnership has been convicted of a prescribed offence committed at a time when the applicant or registered carrier was a member of that partnership;",

(b) the word "or" immediately following paragraph (b) is repealed,

(c) after paragraph (b), insert—

"(ba) where the applicant or registered carrier is a partnership, a person who is a member of that partnership—

(i) has been convicted of a prescribed offence;

(ii) was a member of another partnership at a time when a prescribed offence of which that other partnership has been convicted was committed; or

(iii) was a director, manager, secretary, or other similar officer of a body corporate at a time when a prescribed offence of which that body corporate has been convicted was committed; or",

(d) in paragraph (c)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (i), insert—

"(ia) was a member of a partnership at a time when a prescribed offence of which that partnership has been convicted was committed; or",

(iii) in sub-paragraph (ii), for the word "for" substitute "of".

36 Waste management licences: offences by partnerships

In section 74(7) of the Environmental Protection Act 1990 (meaning of "fit and proper person")—

(a) after paragraph (a), insert—

"(aa) a partnership has been convicted of a relevant offence committed when the holder or, as the case may be, proposed holder of the licence was a member of that partnership;",

(b) the word "or" immediately following paragraph (b) is repealed,

(c) after paragraph (b), insert—

"(ba) where the holder or, as the case may be, proposed holder of the licence is a partnership, a person who is a member of that partnership—

(i) has been convicted of a relevant offence;

(ii) was a member of another partnership at a time when a relevant offence of which that other partnership has been convicted was committed; or

(iii) was a director, manager, secretary, or other similar officer of a body corporate at a time when a relevant offence of which that body corporate has been convicted was committed; or",

(d) in paragraph (c)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (i), insert—

"(ia) was a member of a partnership at a time when a relevant offence of which that partnership has been convicted was committed; or",

(iii) in sub-paragraph (ii), for the word "for" substitute "of".

Air quality assessments

37 Duty of local authorities in relation to air quality assessments etc.

In section 84 of the Environment Act 1995 (duties of local authorities in relation to designated areas)—

(a) subsection (1) is repealed,

(b) in subsection (2), for the words from the beginning to "to" where it fourth occurs, substitute "Where an order under section 83 above comes into operation, the local authority which made the order shall".

Smoke control areas: fuels and fireplaces

37A Smoke control areas: authorised fuels and exempt fireplaces

(1) The Clean Air Act 1993 is amended as follows.

(2) In section 20 (offence of emitting smoke in smoke control area where emission caused by use of fuel other than authorised fuel)—

(a) after subsection (5) insert—

"(5A) In this Part, "authorised fuel" means a fuel included in a list of authorised fuels kept by the Scottish Ministers for the purposes of this Part.

(5B) The Scottish Ministers must—

(a) publish the list of authorised fuels; and

(b) publish a revised copy of the list as soon as is reasonably practicable after any change is made to it.

(5C) The list must be published in such manner as the Scottish Ministers consider appropriate.",

(b) in subsection (6), for "In" substitute "Except as provided in subsection (5A), in".

(3) In section 21 (power by order to exempt certain fireplaces)—

(a) the existing text becomes subsection (5); and for the word "The" at the beginning of that subsection substitute "Except where subsection (1) applies, the".

(b) before that subsection insert—

"(1) For the purposes of this Part, the Scottish Ministers may exempt any class or description of fireplace from the provisions of section 20 (prohibition of smoke emissions in smoke control areas) if they are satisfied that such fireplaces can be used for burning fuel other than authorised fuels without producing any smoke or a substantial quantity of smoke.

(2) An exemption under subsection (1) may be made subject to such conditions as the Scottish Ministers consider appropriate.

(3) The Scottish Ministers must—

(a) publish a list of those classes or descriptions of fireplace that are exempt under subsection (1), including details of any conditions to which an exemption is subject; and

(b) publish a revised copy of the list as soon as is reasonably practicable after any change is made to the classes or descriptions of fireplace that are so exempt or to the conditions to which an exemption is subject.

(4) The list must be published in such manner as the Scottish Ministers consider appropriate.".

(4) In the title of section 21, the words "by order" are repealed.

(5) In section 29 (interpretation of Part 3), in the definition of "authorised fuel", for "20(6)" substitute "20".

CHAPTER 5

GENERAL PURPOSE OF SEPA

38 General purpose of SEPA

After section 20 of the Environment Act 1995, insert—

"20A General purpose of SEPA

(1) SEPA is to carry out the functions conferred on it by or under this Act or any other enactment for the purpose of protecting and improving the environment (including managing natural resources in a sustainable way).

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

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

(b) achieving sustainable economic growth.

(3) In subsection (1), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

CHAPTER 6

REPORTING AND INTERPRETATION: PART 2

38A Annual report on operation of Part 2

The Scottish Ministers must, as soon as practicable after the end of each calendar year, lay before the Scottish Parliament a report on the operation of this Part.

39 Meaning of "relevant offence" and "SEPA" in Part 2

In this Part—

"relevant offence" means an offence specified in an order made by the Scottish Ministers for the purposes of this Part,

"SEPA" means the Scottish Environment Protection Agency.

PART 3

MISCELLANEOUS

Marine licensing decisions

40 Marine licence applications, etc.: proceedings to question validity of decisions

(1) The Marine (Scotland) Act 2010 is amended as follows.

(2) In section 38 (appeals against licensing decisions), after subsection (3) add—

"(4) The duty in subsection (1) does not apply in relation to a decision under section 29 to which section 63A applies.".

(3) After section 63, insert—

"*Proceedings for questioning certain decisions under sections 28 and 29*

63A Proceedings for questioning certain decisions under sections 28 and 29

(1) If a person is aggrieved by a decision of the Scottish Ministers to which this section applies, and wishes to question the validity of the decision on either of the grounds mentioned in subsection (2), the person (the "aggrieved person") may make an application to the Inner House of the Court of Session under this section.

(2) The grounds are that—

(a) the decision is not within the powers of the Scottish Ministers under this Part,

(b) one or more of the relevant requirements have not been complied with in relation to the decision.

(3) This section applies to—

(a) a decision to cause, or not to cause, an inquiry to be held under section 28(1) in connection with the Scottish Ministers' determination of an application for a marine licence to carry on an activity in respect of which a generating station application must also be made, and

(b) a decision under section 29 in relation to an application for a marine licence to carry on such an activity.

(4) An application under this section must be made within the period of 6 weeks beginning with the date on which the decision to which the application relates is taken.

(5) On an application under this section, the Inner House of the Court of Session—

(a) may suspend the decision until the final determination of the proceedings,

(b) may quash the decision either in whole or in part if satisfied that—

(i) the decision in question is not within the powers of the Scottish Ministers under this Part, or

(ii) the interests of the aggrieved person have been substantially prejudiced by failure to comply with any of the relevant requirements in relation to the decision.

(6) In this section—

"generating station application" means an application for consent under section 36 of the Electricity Act 1989 (consent for the construction etc. of generating stations);

"the relevant requirements" in relation to a decision to which this section applies, means the requirements of this Act, or of any order or regulations made under this Part, which are applicable to that decision.

63B Applications under section 63A: requirement for permission

(1) No proceedings may be taken in respect of an application under section 63A(1) unless the Inner House of the Court of Session has granted permission for the application to proceed.

(2) The Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and

(b) the application has a real prospect of success.

(3) The Court may grant permission under subsection (1) for an application to proceed—

(a) subject to such conditions as the Court thinks fit, or

(b) only on such of the grounds specified in the application as the Court thinks fit.".

Planning authorities' functions: charges and fees

41 Planning authorities' functions: charges and fees

In section 252 of the Town and Country Planning (Scotland) Act 1997 (fees for planning applications, etc.)—

(a) in subsection (1A), after paragraph (d) insert—

"(da) make provision for the charge or fee payable to different planning authorities to be of different amounts,",

(b) after subsection (1A) insert—

"(1AA)Provision such as mentioned in subsection (1A)(da) may be made in respect of a planning authority where the Scottish Ministers are satisfied that the functions of the authority are not being, or have not been, performed satisfactorily.

(1AB) The power to make provision such as is mentioned in subsection (1A)(da) is without prejudice to the generality of the power in section 275(2A).",

(c) subsections (5) and (6) are repealed.

Street traders' licences

42 Application for street trader's licence: food businesses

In section 39 of the Civic Government (Scotland) Act 1982 (street traders' licences)—

(a) in subsection (4)—

(i) for "the food " substitute "a food",

(ii) after "1990)" insert "mentioned in subsection (4A)",

(b) after subsection (4) insert—

"(4A) A food authority referred to in subsection (4) is a food authority in Scotland which, in respect of the activity mentioned in that subsection—

(a) has registered the establishment that carries out or intends to carry out the activity for the purposes of Article 6.2 of Regulation EC No. 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs, or

(b) where no such food authority has registered the establishment for those purposes, a food authority which is—

(i) the licensing authority to which the application mentioned in subsection (4) in respect of the activity is made, or

(ii) another licensing authority to which an application for a street trader's licence in respect of the activity is or has been made.".

PART 4

GENERAL

43 Consequential modifications and repeals

Schedule 3 makes minor modifications of enactments (including repealing enactments that are spent) and modifications consequential on the provisions of this Act.

44 Subordinate legislation

(1) Any power of the Scottish Ministers to make an order or regulations under this Act includes power to make—

(a) different provision for different purposes,

(b) incidental, supplemental, consequential, transitional, transitory or saving provision.

(2) The power to make regulations under section 1 includes power to modify any enactment (including this Act other than that section and sections 2, 3 and 7).

(3) The following orders are subject to the affirmative procedure—

(a) an order under section 7B, 7E, 12 or 15,

(b) an order under section 7 that contains provision such as is mentioned in subsection (1)(a) of that section,

(c) an order under that section that specifies under subsection (2) of that section—

(i) that a function is to be a regulatory function for the purposes of section 1, 4 or 5,

(ii) the extent to which a function is to be a regulatory function for such purposes,

(d) an order under section 45(1) which contains provisions that add to, replace or omit any part of the text of an Act.

(4) The following regulations are subject to the affirmative procedure—

(a) regulations under section 1,

(b) regulations under section 10 which contain provisions that add to, replace or omit any part of the text of an Act.

(5) All other orders and regulations under this Act are subject to the negative procedure.

(6) This section does not apply to an order under—

(a) section 47(2), or

(b) paragraph 29 of schedule 2.

45 Ancillary provision

(1) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

(2) An order under this section may modify any enactment (including this Act), instrument or document.

46 Crown application

(1) No contravention by the Crown of any provision made by or under this Act makes the Crown criminally liable.

(2) But the Court of Session may, on the application of the Scottish Ministers or any public body or office-holder having responsibility for enforcing the provision, declare unlawful any act or omission of the Crown which constitutes such a contravention.

(3) Despite subsection (1), any provision made by or under the provisions of this Act applies to persons in the public service of the Crown as it applies to other persons.

47 Commencement

(1) This Part (other than section 43) comes into force on the day after Royal Assent.

(2) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) An order under subsection (2) may include transitional, transitory or saving provision.

48 Short title

The short title of this Act is the Regulatory Reform (Scotland) Act 2013.

SCHEDULE 1
(introduced by section 1(5))

REGULATORS FOR THE PURPOSES OF PART 1

Accountant in Bankruptcy

Food Standards Agency

Healthcare Improvement Scotland

Local authorities

Scottish Charity Regulator

Scottish Environment Protection Agency

Scottish Fire and Rescue Service

Scottish Housing Regulator

Scottish Natural Heritage

Social Care and Social Work Improvement Scotland

VisitScotland

SCHEDULE 2
(introduced by section 10)

PARTICULAR PURPOSES FOR WHICH PROVISION MAY BE MADE UNDER SECTION 10

PART 1

LIST OF PURPOSES

Environmental activities

1 (1) Further defining environmental activities.

(2) Modifying the definition of any of those activities.

(3) Specifying other activities as environmental activities.

Emissions

2 (1) Establishing standards, objectives or requirements in relation to emissions.

(2) In relation to emissions, authorising the making of plans for—

(a) the setting of overall limits,

(b) the allocation of quotas, or

(c) the progressive improvement of standards or objectives.

(3) Authorising the making of schemes for the trading or other transfer of quotas so allocated.

Regulators

3 (1) Determining the authorities (whether SEPA or any other public or local authority or the Scottish Ministers) by whom functions conferred by the regulations for or in connection with regulating regulated activities are to be exercisable (such authorities being referred to in this schedule as "regulators").

(2) Specifying any other purposes for which any such functions are to be exercisable.

(3) Enabling the Scottish Ministers to give directions (whether general or specific) with which regulators are to comply, or guidance to which regulators are to have regard, in exercising functions under the regulations, including—

(a) directions providing for any functions exercisable by one regulator to be exercisable instead by another,

(b) directions given for the purpose of the implementation of any obligations of the United Kingdom under the EU Treaties or under any international obligations to which the United Kingdom is a party,

(c) directions relating to the exercise of any function in a particular case or description of case,

(d) directions providing for any matter to which the directions relate to be determined, in such manner (if any) as the directions may specify, by a person other than the Scottish Ministers.

Regulation of activities

4 (1) Prohibiting persons from carrying on, or from causing or permitting others to carry on, any regulated activity.

(2) Prohibiting persons from carrying on any regulated activity except so far as it is—

(a) authorised by or under the regulations, and

(b) carried on in accordance with the regulations.

(3) Enabling the carrying on of regulated activities to be authorised by providing that they are to be carried on—

(a) in accordance with a permit granted by a regulator under the regulations (a "permit"),

(b) subject to a requirement to register the carrying on of the activity with a regulator ("registration"),

(c) subject to a requirement to notify a regulator that the activity is being, or is proposed to be, carried on ("notification"),

(d) subject to compliance with rules specified in or made under the regulations ("general binding rules").

(4) Enabling the carrying on of regulated activities to be authorised by means of a permit, registration or notification whether or not the carrying on of those activities is also subject to general binding rules.

(5) Specifying a procedure under which the regulators may determine general binding rules.

(6) Treating as authorised the carrying on of regulated activities which are subject to general binding rules.

(7) Specifying the subsistence of an authorisation to carry on regulated activities which are subject to general binding rules.

Permits

5 (1) Prescribing the form and content of applications for permits.

(2) Regulating the procedure to be followed in connection with—

(a) applications for permits,

(b) the determination of such applications, and

(c) the grant of permits.

6 (1) Prescribing the form and content of permits.

(2) Authorising permits to be granted subject to conditions imposed by regulators.

(3) Securing that permits have effect subject to specified conditions.

(4) Requiring persons carrying on regulated activities authorised by way of a permit to submit to regulators, in respect of specified periods and at specified intervals, such information as may be specified relating to the carrying on of the activities and compliance with any conditions subject to which the permit was granted.

7 (1) Requiring permits, or the conditions to which permits are subject, to be reviewed by regulators (whether periodically or in specified circumstances).

(2) Authorising or requiring the variation of permits or such conditions by regulators (whether on applications made by holders of permits or otherwise).

(3) Regulating the making of changes in the carrying on of the activities to which permits relate.

8 (1) Regulating the transfer and surrender of permits.

(2) Authorising the suspension of permits by regulators.

(3) Authorising the revocation of permits by regulators.

(4) Authorising the imposition by regulators of requirements with respect to the taking of preventive or remedial action (by holders of permits or other persons) in connection with the surrender and revocation of permits.

9 (1) Authorising, or authorising the Scottish Ministers to make schemes for, the charging by the Scottish Ministers or public or local authorities of fees or other charges in respect of—

(a) the testing or analysis of substances in cases mentioned in sub-paragraph (2),

(b) the validating of, or of the results of, any testing or analysis of substances in such cases, or

(c) assessing how the environment might be affected by the release into it of any substances in such cases.

(2) The cases are those where the testing, analysis, validating or assessing is in any way in anticipation of, or otherwise in connection with, the making of applications for the grant of permits or is carried out in pursuance of conditions to which any permit is subject.

Registration

10 (1) Prescribing the form and content of—

(a) applications for registration,

(b) registration.

(2) Regulating the procedure for registration including—

(a) the procedure to be followed in connection with—

(i) applications for registration,

(ii) the determination of such applications, and

(iii) the grant of registration, and

(b) variation, transfer, surrender, suspension and revocation of registrations.

(3) Authorising registration to be granted subject to conditions imposed by regulators.

(4) Securing that registrations have effect subject to specified conditions.

(5) Specifying restrictions or other requirements in connection with registration, including—

(a) circumstances in which registration may be refused,

(b) the subsistence of registration.

Provisions common to permits and registration

11 (1) Enabling the granting of permits, or the registration of activities, authorising the carrying on of—

(a) one or more regulated activities,

(b) a regulated activity at one or more than one place.

(2) Securing that permits and registrations have effect subject to standard rules specified in or made under the regulations in respect of permits and registrations.

(3) Specifying a procedure under which regulators may determine such rules.

(4) Specifying restrictions or other requirements in connection with—

(a) applications for permits or registration,

(b) the grant of permits (including provisions for restricting the grant of permits to those who are fit and proper persons within the meaning of the regulations),

(c) the registration of regulated activities (including provision for restricting registration to the carrying on of such activities by those who are fit and proper persons within the meaning of the regulations).

(5) Specifying the circumstances in which persons or descriptions of persons may be deemed—

(a) to have control over activities the carrying on of which is authorised by grant of a permit or by registration (including complying with any conditions or requirements of the permit or registration),

(b) to be carrying on a regulated activity for the purposes of notices that may be served by regulators under paragraph 18,

(c) to be authorised to carry on a regulated activity without having applied for a permit or registration, or having given notification, in respect of that activity.

(6) Enabling the granting of a permit to, or registration of the carrying on of regulated activities by, more than one person.

(7) Enabling permits and registrations—

(a) to be varied, transferred, surrendered, suspended or revoked wholly or in part,

(aa) to be varied, suspended or revoked as mentioned in paragraph (a) in consequence of the person to whom the permit was granted or (as the case may be) who is authorised to carry on the regulated activities to which the registration relates ceasing to be a fit and proper person within the meaning of the regulations,

(b) to be consolidated.

(8) Providing for the transfer of a permit or registration to be refused if the person to whom it is proposed to be transferred is not a fit and proper person within the meaning of the regulations.

Notification of regulated activities

12 (1) Prescribing the form and content of notifications and otherwise regulating the procedure for notifying the carrying on or proposed carrying on of regulated activities.

(2) Specifying restrictions or other requirements in connection with notifications, including—

(a) the subsistence of a notification,

(b) the subsistence of an authorisation to carry on a regulated activity in respect of which the notification is given.

Charging schemes

13 (1) Authorising, or authorising regulators to make, vary and revoke schemes for the charging by regulators of fees or other charges—

(a) in respect of, or in respect of applications for—

(i) the grant of a permit,

(ii) the variation of a permit or the conditions to which it is subject,

(iii) the transfer, surrender or revocation of a permit,

(iv) registration,

(v) the variation, transfer, surrender or revocation of registration,

(b) in respect of the subsistence of a permit or registration,

(c) in respect of consolidation of permits and registrations,

(d) in respect of notifications,

(e) in respect of other specified matters.

(2) Regulating the procedure for making, varying and revoking such schemes.

Information, publicity and consultation

14 Enabling persons of any specified description (whether or not they are holders of permits or carrying on activities that are subject to registration, a requirement of notification or general binding rules) to be required—

(a) to provide such information in such manner as is specified in the regulations,

(b) to compile information—

(i) on emissions,

(ii) on energy consumption and on the efficiency with which energy is used,

(iii) on waste and on the origins and destinations of waste.

15 Securing that—

(a) publicity is given to specified matters,

(b) regulators maintain registers of specified matters (but excepting information which under the regulations is, or is determined to be, commercially confidential and subject to any other exceptions specified in the regulations) which are open to public inspection,

(c) regulators publish, in a manner specified in the regulations, such registers,

(d) copies of entries in such registers, or of specified documents, may be obtained by members of the public.

16 Requiring or authorising regulators to carry out consultation in connection with the exercise of any of their functions (including consultation on any guidance they propose to issue in connection with the exercise of those functions), and providing for them to take into account representations made to them on consultation.

Enforcement and offences

17 (1) Conferring functions on regulators with respect to compliance with, and enforcement of, the regulations.

(2) Conferring power on regulators—

(a) to arrange for preventive or remedial action to be taken at the expense of persons carrying on regulated activities,

(b) to require such persons to provide such financial security as the regulators making the arrangements consider appropriate pending the taking of the preventative or remedial action.

(3) Authorising regulators to appoint suitable persons to exercise the functions mentioned in sub-paragraph (1) and the powers in sub-paragraph (2); and conferring powers (such as those specified in section 108(4) of the Environment Act 1995 (powers of entry, etc.)) on persons so appointed.

(4) Regulating the procedure under which regulators may make arrangements, or impose requirements, such as are mentioned in sub-paragraph (2).

18 (1) Authorising regulators to serve on any persons carrying on regulated activities (whether or not the carrying on of those activities is authorised by or under the regulations) notices, including notices requiring such persons—

(a) to notify the regulated activities being carried on by them,

(b) to take preventative or remedial action at their own expense, including such action in respect of contraventions (actual or potential) of authorisations, or conditions of authorisations, relating to the regulated activities,

(c) to provide such financial security as the regulators serving the notices consider appropriate pending the taking of preventative or remedial action required by virtue of paragraph (b),

(d) to take steps to remove imminent risks of serious adverse impacts on the environment (whether or not arising from any contraventions such as are mentioned in paragraph (b)),

(e) to stop the carrying on of regulated activities (whether or not the notice also requires the person to take such preventative or remedial action as may be specified in the notice).

(2) Authorising regulators, where such notices are not complied with by persons on whom they are served—

(a) to take, or arrange for the taking of, preventative or remedial action at the expense of those persons,

(b) to impose monetary penalties on those persons.

(3) Authorising regulators who serve such notices to require the persons on whom the notice is served to pay the cost incurred by the regulators in relation to the service of the notice up to the time of its service.

(4) Providing for the enforcement of such notices by civil proceedings.

(5) Specifying a procedure under which monetary penalties such as are mentioned in sub-paragraph (2)(b) may be imposed.

(6) Authorising regulators, where they are required by virtue of such a procedure to serve a notice, to require the person on whom the notice is served to pay the costs incurred by the regulators in relation to the service of the notice up to the time of its service.

(7) Providing for the enforcement of such notices by civil proceedings.

19 Creating offences and dealing with matters relating to such offences, including—

(a) the provision of defences, and

(b) evidentiary matters.

20 Enabling, where a person has been convicted of an offence under the regulations, a court dealing with that person for the offence to order the taking of remedial action (in addition to or instead of imposing any punishment).

Appeals

21 (1) Conferring rights of appeal in respect of decisions made, notices served or other things done (or omitted to be done) under the regulations.

(2) Making provision for (or for the determination of) matters relating to the making, considering and determination of such appeals (including provision for or in connection with the holding of inquiries or hearings).

General

22 (1) Making provision which, subject to any modifications that the Scottish Ministers consider appropriate, corresponds or is similar to—

(a) any provision made by or under, or capable of being made under, Part 2 of the Environmental Protection Act 1990, or

(b) any provision made, or capable of being made, under section 2(2) of the European Communities Act 1972 in connection with an EU obligation relating to protecting and improving the environment.

(2) Making provision about the application of the regulations to the Crown.

PART 2

SUPPLEMENTARY PROVISIONS

Particular types of regulated activity

23 The regulations may provide for specified provisions of the regulations to have effect in relation only to—

(a) specified regulated activities,

(b) the carrying on of regulated activities in specified circumstances, or

(c) the carrying on of regulated activities by specified persons or descriptions of persons.

Emissions trading scheme

24 (1) The regulations may authorise the inclusion in a trading scheme of—

(a) provision for penalties in respect of contraventions of provisions of the scheme,

(b) provision for the amount of any penalty under the scheme to be such as may be set out in, or calculated in accordance with—

(i) the scheme, or

(ii) the regulations (including regulations made after the scheme).

(2) In this paragraph, "trading scheme" means a scheme of the kind mentioned in paragraph 2(3).

General binding rules

25 (1) General binding rules may—

(a) impose conditions or requirements,

(b) prescribe standards or objectives to be complied with or achieved, and

(c) require standards or objectives specified in or under other enactments to be complied with or achieved.

(2) Before determining any general binding rules in accordance with a procedure specified under paragraph 4(5), a regulator must—

(a) publish a draft of the proposed rules,

(b) publicise the opportunity to make representations about the proposed rules under sub-paragraph (3) in such manner as the regulator thinks fit,

(c) make copies of the proposed rules available for public inspection for such period, which must be at least 28 days, as the regulator may determine.

(3) Any person who wishes to make representation about the proposed rules to the regulator may do so within the period determined under sub-paragraph (2)(c).

(4) The regulator must, in determining the rules, have regard to any representations on the proposed rules received by the regulator within that period.

Determination of matters by regulators

26 The regulations may make provision for anything which, by virtue of paragraphs 5 to 12, could be provided for by the regulations to be determined under the regulations by regulators.

Determination of rules and imposition of conditions

27 The regulations may provide—

(a) for regulators to have regard to any specified general principles, and to any directions or guidance given under the regulations—

(i) in determining any general binding rules,

(ii) in imposing any conditions as mentioned in paragraph 6(2) or 10(3),

(iii) in setting any standard rules they may make by virtue of paragraph 11(2),

(b) for such guidance to include the sanctioning of reliance by a regulator on any arrangements referred to in the guidance to operate to secure a particular result as an alternative to imposing any such conditions,

(c) for such conditions to be imposed by reference to agreements between or among persons authorised to carry on regulated activities as to the carrying on by them of the activities.

Charging schemes

28 The regulations may—

(a) require any such scheme as is mentioned in paragraph 9 or 13 to be so framed that the fees and charges payable under the scheme—

(i) are determined in the light of any specified general principles and any directions or guidance given under the regulations,

(ii) are sufficient, taking one year with another, to cover such expenditure (whether or not incurred by the regulator to whom they are so payable) as is specified,

(b) authorise any such scheme to make different provision for different cases (and specify particular kinds of such cases).

Fit and proper persons

28A The regulations may make provision that the conditions subject to which a registration or permit has effect include a condition that the person authorised to carry on the regulated activities to which the registration relates, or to whom the permit is granted, must remain a fit and proper person within the meaning of the regulations.

Power to specify EU instruments for the purposes of paragraph 22

29 The Scottish Ministers may, for the purposes of paragraph 22(1)(b), by order specify an EU instrument as one that is or contains an EU obligation mentioned in that paragraph.

Offences

30 (1) The regulations may provide for any such offence as is mentioned in paragraph 19 to be triable—

(a) only summarily,

(b) either summarily or on indictment.

(2) The regulations may provide for such an offence to be punishable—

(a) on summary conviction by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 12 months),

(ii) a fine not exceeding such amount as is specified (which must not exceed £40,000), or

(iii) both,

(b) on conviction on indictment by—

(i) imprisonment for a term not exceeding such period as is specified (which must not exceed 5 years),

(ii) a fine, or

(iii) both.

(3) The regulations may provide for continuing offences and for any such offences to be punishable by a daily or other periodic fine of such amount as is specified (in addition to any punishment provided for in pursuance of sub-paragraph (2)).

(4) The Scottish Ministers may by order substitute for the sum for the time being specified in sub-paragraph (2)(a)(ii) such other sum as appears to them to be justified by a change in the value of money appearing to them to have taken place since the last occasion on which the sum was fixed.

(5) An order under sub-paragraph (4) is not to affect the punishment for an offence committed before that order comes into force.

Service of notices

31 The regulations may make provision for or in connection with the service of any notice or other document required under the regulations to be served on or given to any person.

Powers exercisable in the regulations

32 The regulations may—

(a) modify any enactment, instrument or document,

(b) in making different provision for different purposes, make different provision for different cases, persons, circumstances or areas,

(c) contain provision for the delegation of functions,

(d) impose requirements in relation to any standards or other matters set out in such documents as may be specified in the regulations.

Interpretation

33 In this schedule—

"authorise", in relation to regulated activities, means authorise the carrying on of the activities in accordance with a permit, subject to registration, subject to notification or subject to compliance with general binding rules; and related expressions are to be construed accordingly,

"functions" includes powers and duties,

"general binding rules" means rules specified in or made under the regulations in pursuance of paragraph 4(3)(d),

"notification" means notification of the carrying on of, or of a proposal to carry on, a regulated activity in accordance with any provision made in the regulations in pursuance of paragraph 4(3)(c),

"permit" means a permit granted under any provision made in the regulations in pursuance of paragraph 4(3)(a),

"registration" means registration under any provision made in the regulations in pursuance of paragraph 4(3)(b),

"the regulations" means regulations under section 10,

"regulated activities" has the meaning given in section 9(3),

"regulators" has the meaning given in paragraph 3(1),

"specified" means specified in the regulations.

SCHEDULE 3
(introduced by section 43)

MINOR AND CONSEQUENTIAL MODIFICATIONS

PART 1

REGULATION OF ENVIRONMENTAL ACTIVITIES, ETC.

Sewerage (Scotland) Act 1968

Z1(1) The Sewerage (Scotland) Act 1968 is amended as follows.

(2) In section 29A (priority substances etc.), in subsection (3)—

(a) the word "or" immediately following paragraph (a) is repealed, and

(b) for paragraph (b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013, or

(c) any directive concerning the same subject-matter as the directive mentioned in subsection (1).".

(3) In section 38H (Controlled Activities Regulations), for subsection (3)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

Prevention of Oil Pollution Act 1971

1 In section 11A of the Prevention of Oil Pollution Act 1971 (certain provisions not to apply where discharge or escape authorised under certain enactments), in subsection (1), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

Environmental Protection Act 1990

2 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 35 (waste management licences: general), in subsection (11A), after "1999" insert "or by an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

(2A) In section 46 (receptacles for household waste), in subsection (4)—

(a) the word "and" immediately following paragraph (d) is repealed,

(b) after paragraph (e) add—

"(f) the removal of the receptacles placed for the purpose of facilitating the emptying of them; and

(g) the time when the receptacles must be placed for that purpose and removed.".

(2B) In section 47 (receptacles for commercial or industrial waste), in subsection (4)—

(a) the word "and" immediately following paragraph (d) is repealed,

(b) after paragraph (e) add—

"(f) the removal of the receptacles placed for the purpose of facilitating the emptying of them; and

(g) the time when the receptacles must be placed for that purpose and removed.".

(3) In section 79 (statutory nuisances and inspections therefor), in subsection (10), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

Clean Air Act 1993

3 (1) The Clean Air Act 1993 is amended as follows.

(2) In section 31 (regulations about sulphur content of oil fuel for furnaces or engines), in subsection (4)—

(a) in paragraph (a)—

(i) the word "or" immediately following sub-paragraph (i) is repealed,

(ii) after sub-paragraph (ii) insert "; or

(iii) part of an activity subject to regulation by the Scottish Environment Protection Agency under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013;",

(b) in paragraph (b), after "sub-paragraph (ii)" insert "or (iii)".

(3) In section 33 (cable burning), in subsection (1), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(4) In section 35 (obtaining information), in subsection (3), after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(5) In section 36 (notices requiring information about air pollution), in subsection (2A) after "1999" insert "or to an activity subject to regulation by the Scottish Environment Protection Agency under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

(6) In section 41A (relation to Pollution Prevention and Control Act 1999)—

(a) in subsection (1), after "activities)" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013",

(b) in subsection (2)—

(i) in paragraph (a), after "permit" insert "or authorisation",

(ii) in paragraph (b), after "permit" insert "or authorisation",

(c) in subsection (3)—

(i) the words from "permit" to the end of the subsection become paragraph (a) of that subsection,

(ii) after that paragraph insert "; and

(b) "authorisation" means an authorisation under regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013, and the reference to an appeal is to an appeal under those regulations.".

(7) In the title to section 41A, after "1999" insert "and Regulatory Reform (Scotland) Act 2013".

Environment Act 1995

4 (1) The Environment Act 1995 is amended as follows.

(2) In section 56 (interpretation of Part 1), in the definition of "environmental licence" in relation to SEPA, after paragraph (aa) insert—

"(ab) an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013,".

(3) In section 108 (powers of enforcing authorities and persons authorised by them), in subsection (15), in paragraph (n) of the defintion of "pollution control functions" in relation to SEPA, after "1999" insert "or section 10 of the Regulatory Reform (Scotland) Act 2013".

(4) In section 114 (power of the Scottish Ministers to delegate functions of determining, or to refer matters involved in, appeals), in subsection (2)(a)(viii), after "Scotland" insert "or under section 10 of the Regulatory Reform (Scotland) Act 2013".

Merchant Shipping Act 1995

5 In section 136A of the Merchant Shipping Act 1995 (discharges etc. authorised under other enactments), after "1999" insert "or an authorisation under regulations under section 10 of the Regulatory Reform (Scotland) Act 2013".

Pollution Prevention and Control Act 1999

6 In the Pollution Prevention and Control Act 1999, in section 1 (general purpose of section 2 and definitions)—

(a) paragraph (a) is repealed,

(b) in paragraph (b), the words ", otherwise in pursuance of that Directive," are repealed.

Water Environment and Water Services (Scotland) Act 2003

7 (1) The Water Environment and Water Services (Scotland) Act 2003 is amended as follows.

(2) In section 2 (the general duties), in subsection (8), in the defintion of "the relevant enactments", after "Part" insert ", Part 2 of the Regulatory Reform (Scotland) Act 2013".

(3) Section 20 (regulation of controlled activities) is repealed.

(4) Section 21 (controlled activities regulations: procedure) is repealed.

(5) In section 22 (remedial and restoration measures)—

(a) in subsection (2)(a), the words "(as defined in section 20(6))" are repealed,

(b) after subsection (3) insert—

"(4) In subsection (2)(a), "pollution" in relation to the water environment means the direct or indirect introduction, as a result of human activity, of substances or heat into the water environment, or any part of it, which may give rise to any harm; and "harm" means—

(a) harm to the health of human beings or other living organisms,

(b) harm to the quality of the water environment, including—

(i) harm to the quality of the water environment taken as a whole,

(ii) other impairment of, or interference with the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems,

(c) offence to the senses of human beings,

(d) damage to property, or

(e) impairment of, or interference with, amenities or other legitimate uses of the water environment.".

(6) In section 23 (fixing of charges for water services)—

(a) in paragraph (a) of subsection (4), the words "(as defined in section 20(6))" are repealed,

(b) after that subsection insert—

"(5) In subsection (4)(a), "abstraction" means the doing of anything by which any water is removed or diverted by mechanical means, pipe or any engineering structure or works from any part of the water environment, whether temporarily or permanently, including anything by which the water is so removed or diverted for the purpose of being transferred to another part of the water environment, and includes—

(a) the construction or extension of any well, borehole, water intake or other work by which water may be abstracted,

(b) the installation or modification of any machinery or apparatus by which additional quantities of water may be abstracted by means of a well, borehole, water intake or other work.".

(7) In section 28 (interpretation of Part 1), the definition of "controlled activity" is repealed.

(8) In section 36 (orders and regulations)—

(a) in each of subsections (3), (5) and (6) the word "20," is repealed,

(b) in subsection (4), paragraph (b) and the "or" immediately preceding it are repealed.

(9) In schedule 1 (matters to be included in river basin management plans), in paragraph 10(b), for the words "schedule 2" substitute "paragraph 3(1) of schedule 2 to the Regulatory Reform (Scotland) Act 2013".

(10) Schedule 2 (controlled activities regulations: particular purposes) is repealed.

Water Services etc. (Scotland) Act 2005

9 In section 25 of the Water Services etc. (Scotland) Act 2005 (sewerage nuisance: code of practice), in subsection (9), after "(c.24)" insert "or by an authorisation under regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013".

Water Resources (Scotland) Act 2013

10A(1) The Water Resources (Scotland) Act 2013 is amended as follows.

(2) In section 5 (qualifying abstraction), in subsection (2), for the words from "20(3)(b)" to the end of the subsection substitute "23(5) of the 2003 Act.".

(3) In section 21 (Controlled Activities Regulations), for subsection (5)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

(4) In section 50 (Controlled Activities Regulations), for subsection (5)(b) substitute—

"(b) regulations made under section 10 of the Regulatory Reform (Scotland) Act 2013.".

PART 2

ENFORCEMENT OF REGULATIONS ON ENVIRONMENTAL ACTIVITIES, ETC.

Environmental Protection Act 1990

11 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 33A (fixed penalty notices for contraventions of section 33(1)(a) and (c): Scotland)—

(a) in subsection (1), in paragraph (a)—

(i) for the words "officer of a local authority" substitute "person or a constable",

(ii) the words from "in" to the end of paragraph (b) are repealed,

(b) in subsection (4), paragraph (b) and the word "or" immediately preceding it are repealed,

(c) after subsection (8) insert—

"(8A) If an authorised person proposes to give a person a notice under this section, the authorised person may require the person to give him his name and address.

(8B) A person commits an offence if he fails to give his name and address when required to do so under subsection (8A) above.

(8C) A person who commits an offence under subsection (8B) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale.",

(d) in subsection (11), in paragraph (a), for the words from "the" where it first occurs to "committed" substitute "a proper officer",

(e) after subsection (11) insert—

"(11A) In subsection (11) above, "proper officer" means—

(a) in a case where a notice under this section is given by an officer of a local authority authorised as mentioned in paragraph (a) of the definition of "authorised person" in subsection (13) below, the officer who has, as respects the authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration);

(b) in a case where a notice under this section is given by an officer of Loch Lomond and The Trossachs National Park Authority authorised as mentioned in paragraph (b) of that definition, the proper officer for that Authority appointed under paragraph 12(3) of schedule 2 to the National Parks (Scotland) Act 2000.",

(f) in subsection (12)—

(i) after "payable", where it second occurs, insert—

"(a) in a case such as is mentioned in paragraph (a) of subsection (11A) above,",

(ii) at the end insert—

"(b) in a case such as is mentioned in paragraph (b) of that subsection, to Loch Lomond and The Trossachs National Park Authority; and as respects the sums received by that Authority, those sums shall accrue to that Authority.",

(g) in subsection (13)—

(i) for the definition of "authorised officer" substitute—

""authorised person" means—

(a) an officer of a local authority who is authorised in writing by the authority for the purpose of issuing notices under this section in relation to a relevant offence committed in the area of the authority;

(b) an officer of Loch Lomond and The Trossachs National Park Authority who is authorised in writing by the Authority for the purpose of issuing notices under this section in relation to a relevant offence committed in the area designated as the National Park for which the Authority is established; or

(c) such other persons as may be specified by order made by the Scottish Ministers.",

(ii) the definition of "proper officer" is repealed,

(h) after subsection (13) insert—

"(13A) The Scottish Ministers may by order make such modifications of this section as they consider necessary or expedient in connection with the specification of a person by an order under paragraph (c) of the definition of "authorised person" in subsection (13) above.

(13B) An order under subsection (13A) above may include provision—

(a) applying any provision of this section to such a person with such modifications as may be specified in the order;

(b) for any such provision not to apply in relation to such a person.".

(3) In section 59 (power to require removal of waste unlawfully deposited), after subsection (8B) insert—

"(8C) An authority may not recover costs under subsection (8) above if a compensation order has been made under section 249 of the Criminal Procedure (Scotland) Act 1995 in favour of the authority in respect of any part of those costs.

(8D) Subsection (8C) does not apply if the compensation order is set aside on appeal.".

(4) In section 88 (fixed penalty notices for leaving litter)—

(a) in subsection (1), in paragraph (a)—

(i) for the words "officer of a litter authority" substitute "person or a constable",

(ii) the words from "in" to the end of paragraph (b) are repealed,

(b) in subsection (5A), for the words "to the litter authority in whose area the offence was committed" substitute—

"(a) where the notice is given by an officer of a litter authority authorised as mentioned in paragraph (a) of the definition of "authorised person" in subsection (10) below, to that litter authority;

(b) where the notice is given by an officer of Loch Lomond and The Trossachs National Park Authority authorised as mentioned in paragraph (b) of that definition, to that Authority.",

(c) in subsection (6)—

(i) the words from "a litter" to the end become paragraph (a) of that subsection, and

(ii) after that paragraph insert—

"(b) Loch Lomond and The Trossachs National Park Authority, shall accrue to that Authority.",

(d) in subsection (8), in paragraph (a)(ii), for the words from "the" where it first occurs to "committed" substitute "a proper officer",

(e) after subsection (8) insert—

"(8A) In subsection (8) above, "proper officer" means—

(a) in a case where a notice under this section is given as mentioned in paragraph (a) of subsection (5A) above, the officer who has, as respects the litter authority, the responsibility mentioned in section 95 of the Local Government (Scotland) Act 1973 (financial administration);

(b) in a case where a notice is given as mentioned in paragraph (b) of that subsection, the proper officer for that Authority appointed under paragraph 12(3) of schedule 2 to the National Parks (Scotland) Act 2000.

(8B) If an authorised person proposes to give a person a notice under this section, the authorised person may require the person to give him his name and address.

(8C) A person commits an offence if he fails to give his name and address when required to do so under subsection (8B) above.

(8D) A person who commits an offence under subsection (8C) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale.",

(f) in subsection (10)—

(i) for the definition of "authorised officer" substitute—

""authorised person" means—

(a) an officer of a litter authority who is authorised in writing by the authority for the purpose of issuing notices under this section in relation to an offence under section 87 above committed in the area of the authority;

(b) an officer of Loch Lomond and The Trossachs National Park Authority who is authorised in writing by the Authority for the purpose of issuing notices under this section in relation to an offence under section 87 above committed in the area designated as the National Park for which the Authority is established; or

(c) such other persons as may be specified by order made by the Scottish Ministers.",

(ii) the definition of "proper officer" is repealed,

(g) after subsection (10) insert—

"(10A) The Scottish Ministers may by order make such modifications of this section as they consider necessary or expedient in connection with the specification of a person by an order under paragraph (c) of the definition of "authorised person" in subsection (10) above.

(10B) An order under subsection (10A) above may include—

(a) provision applying any provision of this section to such a person with such modifications as may be specified in the order;

(b) provision for any such provision not to apply in relation to such a person.".

Criminal Procedure (Scotland) Act 1995

12 In section 249 of the Criminal Procedure (Scotland) Act 1995 (compensation order against convicted person), after subsection (10) add—

"(11) This section is subject to section 26 of the Regulatory Reform (Scotland) Act 2013.".

Reservoirs (Scotland) Act 2011

13 (1) The Reservoirs (Scotland) Act 2011 is amended as follows.

(2) Sections 78 to 81 (enforcement undertakings, fixed monetary penalties, fixed monetary penalties: procedure and fixed monetary penalties: criminal proceedings and conviction, etc.) are repealed.

(3) In section 82 (further enforcement measures)—

(a) in subsection (4)—

(i) for the word "any" substitute "either",

(ii) paragraph (a) is repealed,

(b) in subsection (5), the definition of "variable monetary penalty" is repealed.

(4) In section 83 (further enforcement measure: procedure), subsections (6)(b) and (7)(c) are repealed.

(5) In section 84 (further enforcement measures: criminal proceedings and conviction), subsection (3)(b) is repealed.

(6) In section 86 (consultation in relation to certain orders), in subsection (1), paragraphs (b) and (c) are repealed.

(7) In the title of section 86, the words ", 78(1), 79(1)" are omitted.

(8) In section 87 (guidance as to use of stop notices, etc.), paragraphs (b) and (c) are repealed,

(9) In the title of section 87, the words ", fixed monetary penalties" are omitted.

(10) In section 89 (guidance: appeals), the words ", 78, 80," are repealed.

(11) In section 90 (publication of enforcement action)—

(a) in subsection (2), paragraph (b) is repealed,

(b) in subsection (3) the words ", fixed monetary penalty" are repealed.

(12) In section 114 (orders and regulations), in subsection (4)(f), the words ", 78(1), 79(1)" are repealed.

(13) In the schedule (index of defined expressions), the entries in the first column relating to "enforcement undertaking" and "fixed monetary penalty", and the corresponding interpretation provisions in the second column, are repealed.

PART 3

PURPOSES OF SEPA

Environment Act 1995

14 (1) The Environment Act 1995 is amended as follows.

(2) In section 31 (guidance on sustainable development and other aims and objectives), after subsection (2) insert—

"(2A) The Scottish Ministers may give guidance to SEPA with respect to the carrying out of its duties under section 20A.".

(3) In the title to section 31, after "on" insert "SEPA's general purpose and on".

(4) Section 32 (general environmental and recreational duties) is repealed.

(5) In section 33 (general duties with respect to pollution)—

(a) subsections (1), (4) and (5) are repealed,

(b) in subsection (2)—

(i) for "shall" substitute "may",

(ii) in paragraph (a), the words "pollution control" are repealed,

(iii) in paragraph (b), the words "pollution of" are repealed,

(iv) for "such pollution" substitute "the general state of the environment".

(6) The title to section 33 becomes "**General duties as respects the state of the environment and effects of pollution**".

(7) Section 34 (general duties with respect to water) is repealed.

(8) Section 36 (codes of practice with respect to environmental and recreational duties) is repealed.

(9) In section 39 (general duty of the new Agencies to have regard to the costs and benefits in exercising powers)—

(a) in subsection (1), for "Each new" substitute "The",

(b) in subsection (2), for "a new" substitute "the".

(10) In the title to section 39, for the words "new Agencies" substitute "Agency".

(11) In section 81 (functions of the new Agencies), in subsection (2)—

(a) the word "means" is repealed,

(b) at the beginning of paragraph (a) insert "means",

(c) in paragraph (b), for the words from "the functions" to the end of the paragraph, substitute "has the same meaning as in section 108(15) below in relation to SEPA".

Water Industry (Scotland) Act 2002

15 In schedule 7 to the Water Industry (Scotland) Act 2002 (modifications of other enactments), paragraph 24(2) is repealed.

PART 4

CONTROL OF POLLUTION ACT 1974

16 (1) The Control of Pollution Act 1974 is amended as follows.

(2) The following provisions are repealed—

(a) section 30B (classification of quality waters),

(b) section 30C (water quality objectives),

(c) section 30D (general duties to achieve and maintain objectives, etc.),

(d) section 30E (consultation and collaboration),

(e) section 31B (nitrate sensitive areas),

(f) section 31C (registering of agreement),

(g) section 41 (registers),

(h) section 42A (exclusion from registers of information affecting national security),

(i) section 42B (exclusion from registers of certain confidential information),

(j) section 43 (control of discharges into sewers),

(k) section 44 (provisions supplementary to section 43),

(l) section 45 (early variation of conditions of discharges),

(m) section 52 (charges in respect of certain discharges in England and Wales),

(n) section 57 (periodical inspections by local authorities),

(o) sections 63 to 67 (noise abatement zones),

(oa) section 69 (execution of works by local authority),

(p) in section 87 (miscellaneous provisions relating to legal proceedings), subsection (3),

(q) section 88 (civil liability for contravention of section 3(3)),

(r) section 90 (establishment charges and interest in respect of certain expenses of authorities),

(s) section 101 (disposal of waste etc. by Atomic Energy Authority),

(t) Schedule 1 (noise abatement zones), and

(u) Schedule 1A (orders designating nitrate sensitive areas: Scotland).

(2A) In section 30Y (introductory), in subsection (1) (meaning of "abandonment" in relation to a mine), in paragraph (b)—

(a) the word "or" immediately following sub-paragraph (i) is repealed,

(b) after sub-paragraph (ii) insert "or

(iii) any disclaimer by notice signed by the Queen's and Lord Treasurer's Remembrancer under section 1013 of the Companies Act 2006 (Crown disclaimer of property vesting as *bona vacantia*).".

(3) In section 51 (codes of good agricultural practice), in subsection (2), the words from "but" to the end of the subsection are repealed.

(4) In section 55A (regulations under Part 2), the words "and sections 43 to 45" are repealed.

(5) In section 56 (interpretation etc. of Part 2)—

(a) in subsection (1)—

(i) in the definition of "coastal waters", "controlled waters", "ground waters", "inland waters" and "relevant territorial waters", for the words from the beginning to "meanings" substitute ""controlled waters" has the meaning",

(ii) the definitions of "effluent", "micro-organism", "operations", "sewage effluent", "substance" and "trade effluent" are repealed,

(b) subsections (3), (5) and (6) are repealed.

(6) In section 73 (interpretation and other supplementary provisions)—

(a) in subsection (1), the definitions of the following expression are repealed—

(i) "noise abatement order" and "noise abatement zone",

(ii) "noise level register",

(iii) "noise reduction notice", and

(iv) "person responsible",

(b) in subsection (2), for the words "sections 62 to 67" in both places where they occur, substitute "section 62".

(7) In section 74 (penalties)—

(a) in subsection (1), in paragraph (a), the words "in the case of a first offence against this Part of this Act," are repealed,

(b) the words from "; and" immediately following that paragraph to the end of the section are repealed.

(7A) In section 104 (orders and regulations)—

(a) in subsection (1), the following words are repealed—

(i) "(except sections 63 and 65(6))", and

(ii) "regulations made by virtue of section 18 of this Act or",

(b) in subsection (2), the following words are repealed—

(i) "regulations shall be made by virtue of section 18 of this Act and no",

(ii) "regulations or".

(8) In section 105 (interpretation etc. – general), in subsection (1), the definition of "trade effluent" is repealed.

PART 5

MISCELLANEOUS ENACTMENTS

Scottish Board of Health Act 1919

16A In the Scottish Board of Health Act 1919, in section 4 (transfer of powers and duties to and from the Board), paragraph (d) of subsection (1) is repealed.

Local Government (Scotland) Act 1973

17 In the Local Government (Scotland) Act 1973, in Schedule 27 (adaptation and amendment of enactments), paragraphs 146 to 148 are repealed.

Local Government, Planning and Land Act 1980

18 In the Local Government, Planning and Land Act 1980, in Schedule 2 (relaxation of controls over functions relating to clean air and pollution), paragraphs 10, 14 and 18 are repealed.

Litter Act 1983

19 In the Litter Act 1983—

(a) in section 4 (consultation and proposals for abatement of litter), subsections (4), (4ZA), (4A) and (5) are repealed,

(b) in section 9 (orders), subsection (3) is repealed,

(c) in section 13 (short title, commencement and extent), in subsection (4), the words "4(4)," are repealed.

Water Act 1989

19A In the Water Act 1989, in Schedule 23 (control of water pollution in Scotland), paragraphs 2 and 3 are repealed.

Planning (Consequential Provisions) Act 1990

19B In the Planning (Consequential Provisions) Act 1990, in Schedule 2 (consequential amendments), paragraph 31(1) is repealed.

Environmental Protection Act 1990

20 In the Environmental Protection Act 1990—

(za) in section 79 (statutory nuisances and inspections therefor), in subsection (10), the words from "Part I" to "under", where it third occurs, are repealed,

(zb) in section 80 (summary proceedings for statutory nuisances)—

(i) in paragraph (a) of subsection (9), the words "or 65" are repealed,

(ii) paragraph (b) of that subsection, and the word "or" immediately preceding it, are repealed,

(iii) paragraph (c) of that subsection, and the word "or" immediately preceding it, are repealed,

(iv) subsection (10) is repealed,

(a) section 84 (termination of Public Health Act controls over offensive trades, etc.) is repealed,

(b) section 145 (penalties for offences of polluting controlled waters, etc.) is repealed,

(c) in Schedule 15 (consequential and minor amendments of enactments)—

(zi) paragraph 2 is repealed,

(i) in paragraph 15, sub-paragraphs (2) and (4) are repealed,

(ii) paragraph 17 is repealed,

(d) in Schedule 16 (repeals), in Part 1 (enactments relating to processes), the entry relating to 1990 c.43 (Environmental Protection Act 1990) is repealed.

Natural Heritage (Scotland) Act 1991

21 (1) Section 24 of the Natural Heritage (Scotland) Act 1991 (rights of entry and inspection under Parts 2 and 3) is amended as follows.

(2) In subsection (1)—

(a) in the opening words, the words "SEPA or" are repealed,

(b) in paragraph (a)—

(i) the words "SEPA or" are repealed,

(ii) the words "II or" are repealed,

(c) in paragraph (c)—

(i) for the words "either of these Parts" substitute "Part III",

(ii) for the words "one of these Parts" substitute "that Part".

(3) In subsection (9), the words "SEPA or", in both places where they occur, are repealed.

(4) In the title to section 24, for the words "Parts II and III" substitute "Part III".

Agricultural Holdings (Scotland) Act 1991

22 In section 26 of the Agricultural Holdings (Scotland) Act 1991 (certificates of bad husbandry), subsection (2) is repealed.

Clean Air Act 1993

22A In the Clean Air Act 1993, in section 42 (colliery spoilbanks)—

(a) in subsection (2), for the words "or quarry" substitute ", or the operator of a quarry,",

(b) in subsection (6), for the words from "mine" to the end substitute—

""mine" is to be construed in accordance with section 180 of the Mines and Quarries Act 1954;

"operator", in relation to a quarry, has the meaning given by regulation 2(1) of the Quarries Regulations 1999 (S.I. 1999/2024);

"owner", in relation to a mine, is to be construed in accordance with section 181(1) and (4) of the Mines and Quarries Act 1954;

"quarry" is to be construed in accordance with regulation 3 of the Quarries Regulations 1999.".

Radioactive Substances Act 1993

23 In the Radioactive Substances Act 1993, in Schedule 3 (enactments other than local enactments to which section 40 applies)—

(a) paragraph 11 is repealed,

(b) in paragraph 16—

(i) the words ", 30B, 30D, 41 to 42B" are repealed,

(ii) for "(3)" substitute "(2)".

Local Government etc. (Scotland) Act 1994

24 In the Local Government etc. (Scotland) Act 1994, in Schedule 13 (minor and consequential amendments), sub-paragraphs (3), (5) and (10) of paragraph 95 are repealed.

Environment Act 1995

25 (1) The Environment Act 1995 is amended as follows.

(1A) In section 21 (transfer of functions to SEPA)—

(a) in subsection (1)—

(i) paragraph (a)(i), (iii) and (iv) are repealed,

(ii) in paragraph (a)(ii), the words from "Part III" to "and" are repealed,

(iii) paragraphs (c), (d), (f) and (h) are repealed,

(b) in subsection (2), paragraph (b) is repealed.

(2) Section 23 (functions of the staff commission established under section 12 of the Local Government etc. (Scotland) Act 1994) is repealed.

(2A) In section 56 (interpretation of Part 1), in subsection (1), in the definition of "disposal authority", paragraph (b) is repealed.

(2B) In section 91 (interpretation of Part 4), in subsection (1), in the definition of "action plan", for "84(2)(b)" substitute "84(2)".

(2C) In section 110 (offences)—

(a) in subsection (1), after "to" insert "assault, hinder or",

(b) in subsection (4)—

(i) in paragraph (a), after "of" where it second occurs insert "assaulting, hindering or",

(ii) in sub-paragraph (i) of that paragraph, after "maximum" insert "or to imprisonment for a term not exceeding 12 months, or to both",

(iii) in paragraph (b), for the words "level 5 on the standard scale" substitute "the prescribed sum within the meaning of section 225(8) of the Criminal Procedure (Scotland) Act 1995 or to imprisonment for a term not exceeding 12 months, or to both",

(c) after subsection (5) insert—

"(5A) A person may be convicted of the offence under subsection (1) above of hindering or obstructing even though it is—

(a) effected by means other than physical means, or

(b) effected by action directed only at any vehicle, apparatus, equipment or other thing used or to be used by an authorised person.

(5B) Subsection (5C) applies where, in the trial of a person ("the accused") charged in summary proceedings with an offence under subsection (1) above, the court—

(a) is not satisfied that the accused committed the offence, but

(b) is satisfied that the accused committed an offence under subsection (2) above.

(5C) The court may acquit the accused of the charge and, instead, find the accused guilty of an offence under subsection (2) above.".

(3) In section 114 (power of the Scottish Ministers to delegate functions relating to appeals), subsections (2)(a)(i) and (3)(b) are repealed.

(3A) In Schedule 11 (air quality: supplemental provisions)—

(a) in paragraph 1(1)(b), the words "or 84" are repealed,

(b) in paragraph 4(2)(b), the words "or 84" are repealed.

(4) In schedule 20 (delegation of appellate functions of the Scottish Ministers), paragraph 4(3)(a) is repealed.

(5) In Schedule 22 (minor and consequential amendments)—

(za) paragraph 1 is repealed,

(a) in paragraph 29—

(i) in sub-paragraph (2), for the words from "section 30C(1)" to the end of that sub-paragraph, substitute "section 51",

(ii) sub-paragraphs (4)(b) to (e), (5), (6), (8), (9)(a) and (b), (10) to (15), (17) to (22), (25), (26), (29) and (30) are repealed,

(aa) paragraph 93 is repealed,

(b) in paragraph 96, sub-paragraphs (2) to (5), (7) and (8) are repealed.

(7) In Schedule 23 (transitional and transitory provisions and savings), the following paragraphs are repealed—

(a) paragraph 4,

(c) paragraph 6,

(d) paragraph 8, and

(e) paragraph 18.

25A The amendments made by paragraph 25 to subsection (4) of section 110 of the Environment Act 1995 do not affect the penalty for an offence under that section committed before the coming into force of those amendments.

Criminal Procedure (Scotland) Act 1995

25B(1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.

(2) In section 277 (transcript of police interview sufficient evidence)—

(a) in subsection (1)—

(i) the word "or" immediately following paragraph (a) is repealed, and

(ii) after paragraph (b) insert "; or

(c) a person authorised by the Scottish Environment Protection Agency under section 108 of the Environment Protection Act 1995 and an accused person.",

(b) after subsection (4) add—

"(5) Subsection (1) is without prejudice to section 108(12) of the Environment Act 1995.".

(3) In section 280 (routine evidence)—

(a) after subsection (3), insert—

"(3A) For the purposes of any criminal proceedings, a report purporting to be signed by a person authorised by the Scottish Environment Protection Agency for the purpose of this subsection is sufficient evidence of any fact or conclusion as to fact contained in the report and of the authority of the signatory.",

(b) in subsection (6)—

(i) after "(1)", where it first occurs, insert ", (3A)", and

(ii) in paragraph (b), after "subsection", where it second occurs, insert "(3A) or".

(4) In Schedule 9 (certificates as to proof of certain routine matters)—

(a) in the table, omit the entry relating to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 Regulation 40,

(b) at the end of the table insert the following entries—

"The Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209)		
Regulation 44	A person authorised to do so by the Scottish Environment Protection Agency	That the person has analysed a sample identified in the certificate (by label or otherwise) and that the sample is of a nature and composition specified in the certificate.
Regulations made by virtue of section 10 of the Regulatory Reform (Scotland) Act 2013 (asp 00)	A person authorised to do so by a regulator (within the meaning of paragraph 3(1) of schedule 2 to that Act)	That the person has analysed a sample identified in the certificate (by label or otherwise) and that the sample is of a nature and composition specified in the certificate.
		In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person held or, as the case may be, did not hold a permit (within the meaning of paragraph 33 of schedule 2 to that Act) granted by such a regulator and, where the

			person held such a permit, any condition to which the permit is subject. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person held or, as the case may be, did not hold registration (within the meaning of paragraph 33 of schedule 2 to that Act) granted by such a regulator and, where the person held such registration— (a) any condition to which the registration is subject; (b) whether the registration subsisted on the date specified in the certificate. In relation to a person specified in the certificate that, on a date and in relation to an activity so specified, the person had given notification (within the meaning of paragraph 33 of schedule 2 to that Act) to such a regulator and, where the person gave such notification, whether the notification subsisted on the date specified in the certificate. In relation to a permit or registration (in each case within the meaning of paragraph 33 of schedule 2 to that Act) a description of any variation, transfer, surrender, suspension or

			revocation of the permit or registration. In relation to a person specified in the certificate that, on a date so specified, such regulator served on the person a notice mentioned in paragraph 18 of schedule 2 to that Act. That such a regulator has, in pursuance of paragraph 4(3)(d) of schedule 2 to that Act, made general binding rules as mentioned in that paragraph, or has, in pursuance of paragraph 11 of that schedule, made standard rules as mentioned in that paragraph; and the content of those general binding rules or standard rules.”.

Town and Country Planning (Scotland) Act 1997

26 In the Town and Country Planning (Scotland) Act 1997, in section 275 (regulations and orders), the subsection numbered “(2A)” inserted by section 54(16)(a) of the Planning etc. (Scotland) Act 2006 is renumbered as “(2B)”.

Planning (Consequential Provisions) (Scotland) Act 1997

26A In the Planning (Consequential Provisions) (Scotland) Act 1997, in Schedule 2 (consequential amendments), paragraph 23(1) is repealed.

Crime and Punishment (Scotland) Act 1997

27 In the Crime and Punishment (Scotland) Act 1997, in section 30 (routine evidence)—

(a) in subsection (1), for the words “subsections (2) and (3)” substitute “subsection (3)”,

(b) subsection (2) is repealed.

City of Edinburgh (Guided Busways) Order Confirmation Act 1998

28 In the City of Edinburgh (Guided Busways) Order Confirmation Act 1998, in section 29 (connection of drains, etc, with streams, etc.) of the Order contained in the Schedule confirmed by section 1 of that Act, subsection (4) is repealed.

Pollution Prevention and Control Act 1999

28A In the Pollution Prevention and Control Act 1999, in Schedule 3 (repeals), in the third column of the entry relating to the Environmental Protection Act 1990, the words "In section 79(10), the words "under Part I or"" are repealed.

Antisocial Behaviour etc. (Scotland) Act 2004

29 In the Antisocial Behaviour etc. (Scotland) Act 2004, in schedule 2 (penalties for certain environmental offences), paragraph 2 is repealed.

Forth Crossing Act 2011

30 In section 70 of the Forth Crossing Act 2011 (control of noise: Control of Pollution Act 1974), subsection (3) is repealed.

PART 6

MODIFICATIONS OF REFERENCES TO "ENACTMENT" ETC.

Control of Pollution Act 1974

31 (1) The Control of Pollution Act 1974 is amended as follows.

(2) In section 73 (interpretation and other supplementary provisions), after subsection (3) insert—

"(3A) In the definition of "statutory undertakers" in subsection (1), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 85 (appeals to Crown Court or Court of Session against decisions of magistrates' court or sheriff), after subsection (3) add—

"(4) In subsection (2), "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 105 (interpretation etc. – general), in subsection (2)(b), after "private" add "or by or under any Act of the Scottish Parliament".

Environmental Protection Act 1990

32 (1) The Environmental Protection Act 1990 is amended as follows.

(2) In section 33 (prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste), after subsection (10) add—

"(11) In subsection (4)(c) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 57 (powers of the Scottish Ministers to require waste to be accepted, treated, disposed of or delivered), after subsection (7) insert—

"(7A) In subsection (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 63 (waste other than controlled waste), after subsection (4) add—

"(5) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(5) In section 73 (appeals and other provisions relating to legal proceedings and civil liability), after subsection (9) add—

"(10) In subsection (2) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(6) In section 78X (supplementary provisions), after subsection (4) insert—

"(4A) In subsection (4)(f)(i) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(7) In section 79 (statutory nuisances and inspections therefor), after subsection (6A) insert—

"(6B) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(8) In section 98 (definitions for Part 6), after subsection (6), insert—

"(6A) In subsection (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(9) In section 140 (power to prohibit or restrict the importation, use, supply or storage of injurious substances or articles), in subsection (11), before the definition of "the environment" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(10) In Schedule 4 (abandoned shopping and luggage trolleys), after paragraph 1(2) add—

"(3) In sub-paragraph (2)(d) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Natural Heritage (Scotland) Act 1991

32A(1) The Natural Heritage (Scotland) Act 1991 is amended as follows.

(2) In section 7 (powers of entry), after subsection (11) add—

"(12) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In Schedule 1 (constitution and proceedings of Scottish Natural Heritage), after paragraph 17(2) add—

"(3) In sub-paragraph (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Radioactive Substances Act 1993

33 (1) The Radioactive Substances Act 1993 is amended as follows.

(2) In section 40 (radioactivity to be disregarded for purposes of certain statutory provisions), in subsection (3)—

(a) in the definition of "statutory provision", in paragraph (a), after "Act" insert "or Act of the Scottish Parliament",

(b) in the definition of "local enactment"—

(i) after paragraph (a) insert—

"(aa) an Act of the Scottish Parliament the Bill for which was a private Bill for the purposes of the standing orders of the Scottish Parliament,",

(ii) in paragraph (b), after "by", where it second occurs, insert "the Scottish Parliament,".

(3) In section 46 (effect of Act on other rights and duties), in paragraph (b)—

(a) the words from "any", where it second occurs, to the end of that paragraph become sub-paragraph (i) of that paragraph,

(b) after that sub-paragraph insert—

"(ii) any Act of the Scottish Parliament, or".

Environment Act 1995

34 (1) The Environment Act 1995 is amended as follows.

(2) In section 27 (power of SEPA to obtain information about land), after subsection (3) add—

"(4) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(3) In section 30 (records held by SEPA), after subsection (3) add—

"(4) In subsection (3) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(4) In section 37 (incidental general functions), after subsection (8) insert—

"(8A) In subsection (8) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(5) In section 38 (delegation of functions by Ministers etc. to new Agencies), in subsection (10) after the definition of "eligible function" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament;".

(6) In section 40 (ministerial directions to the new Agencies), after subsection (8) add—

"(9) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(7) In section 43 (incidental power of the new Agencies to impose charges)—

(a) the existing text becomes subsection (1) of that section,

(b) after that subsection add—

"(2) In subsection (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(8) In section 53 (inquiries and other hearings), after subsection (3) add—

"(4) In subsections (1) and (3) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(9) In section 87 (regulations for the purposes of Part 4), after subsection (9) add—

"(10) In subsection (5)(c) above, "enactment" includes an enactment comprised in an Act of the Scottish Parliament.".

(10) In section 108 (powers of enforcing authorities and persons authorised by them), in subsection (15)—

(a) in the definition of "pollution control enactments" at the end add "(including any enactments comprised in, or in instruments made under, an Act of the Scottish Parliament relating to those functions).",

(b) in the definition of "pollution control functions" in relation to the Scottish Ministers, after "instrument" insert "(including any enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament)".

(11) In section 113 (disclosure of information), in subsection (5), after the definition of "new Agency" insert—

""enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(12) In section 122 (directions), after subsection (5) insert—

"(6) In this section, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(13) In Schedule 6 (the Scottish Environment Protection Agency), in paragraph 15, after sub-paragraph (2) add—

"(3) In sub-paragraph (1) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

(14) In Schedule 11 (air quality: supplemental provisions), in paragraph 5, after sub-paragraph (6) add—

"(7) In the definition of "fixed penalty offence" in sub-paragraph (6) above, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.".

Flood Risk Management (Scotland) Act 2009

35 Section 78 of the Flood Risk Management (Scotland) Act 2009 (SEPA's power to obtain information about land) is repealed.

Regulatory Reform (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to enable provision to be made for the purpose of promoting regulatory consistency; to make provision in relation to primary authorities; to enable provision to be made, and to make provision, as respects regulatory activities, and offences, relating to the environment; to make provision about regulatory functions relating to marine licensing, planning and street traders' licences; and for connected purposes.

Introduced by: John Swinney
On: 27 March 2013
Bill type: Government Bill