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.

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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