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 the 1990 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’. 