Rural Affairs, Climate Change and Environment Committee

6th Report, 2013 (Session 4)

Report on the Regulatory Reform (Scotland) Bill

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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
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](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](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](http://www.scottish.parliament.uk/S4_Bills/Regulatory%20Reform%20(Scotland)%20Bill/b26s4-introd-pm.pdf)


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


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.”

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

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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. An analysis of responses 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. This was held between October 2012 and

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January 2013. However, while the individual responses have not yet been published an analysis of these has been published online.\(^\text{13}\)

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\(^\text{14}\). An independent analysis\(^\text{15}\) and summary analysis\(^\text{16}\) of the 80 responses\(^\text{17}\) was also carried out. The Scottish Government has also recently published an analysis of responses\(^\text{18}\).

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.


\(^\text{16}\) Scottish Government, Independent Analysis of the Better Regulation Bill Consultation Responses - Executive Summary, Available at: http://www.scotland.gov.uk/Publications/2013/03/1930


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 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

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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 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 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.”

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.”

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

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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”

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.

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 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 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


\[26\] 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”.

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”.

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. 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.

28 Professor Colin T Reid. Written Submission, paragraph 5.
29 Law Society of Scotland. Written Submission, paragraph 15.
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.”

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

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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—

“When 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.”

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.
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.

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.”

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

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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”

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

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.”

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.”

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

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

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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

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 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 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,

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for example, operators in the waste management and transfer industry. George Burgess confirmed that this system already exists as part of the regulatory regime. 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. 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 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

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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 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 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.

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.


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 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

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business had committed an offence accidentally and one where the perpetrator had deliberately played “fast and loose” 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 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.”

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 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.”

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.

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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”\(^\text{56}\)

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”.  

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.
ANNEXE C: LIST OF WRITTEN EVIDENCE AND SUPPLEMENTARY WRITTEN EVIDENCE

SUBMISSIONS RECEIVED IN RESPONSE TO CALL FOR VIEWS

- Association of Salmon Fishery Boards (117KB pdf)
- Federation of Small Businesses (168KB pdf)
- Food Standards Agency (111KB pdf)
- Dr Sarah Hendry, Centre for Water Law, Policy and Science, University of Dundee (152KB pdf)
- Law Society of Scotland (151KB pdf)
- Loch Lomond & The Trossachs National Park Authority (172KB pdf)
- North Ayrshire Council (8KB pdf)
- North Lanarkshire Council (64KB pdf)
- Professor Colin T. Reid (87KB pdf)
- Regulatory Review Group (67KB pdf)
- Professor Andrea Ross (119KB pdf)
- RSPB Scotland (382KB pdf)
- Scotch Whisky Association (SWA) (180KB pdf)
- Scottish Environment LINK (263KB pdf)
- Scottish Environment Protection Agency (SEPA) (97KB pdf)
- Scottish Land & Estates (83KB pdf)
- Scottish Natural Heritage (92KB pdf)
- Scottish Power (121KB pdf)
- Scottish and Southern Energy (SSE) (126KB pdf)
- Scottish Water (168KB pdf)

SUPPLEMENTARY WRITTEN EVIDENCE

- Letter from the Minister for Environment and Climate Change regarding the Committees involvement with the Bill (426KB pdf)
- Letter from the Minister alerting the Committee to potential Stage 2 amendments on the Bill (314KB pdf)
- Letter from the Minister in advance of giving oral evidence on the Bill (2MB pdf)
- Letter from the Minister following up on the evidence of 5 June, relating to Part 1 of the Bill (275KB pdf)
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