

## Written submission from Prof. Colin T. Reid

This evidence is presented in a wholly personal capacity and does not represent the views of any institution or organisation - Prof. Colin T. Reid, Professor of Environmental Law, University of Dundee.

### Part I

A general observation is that actual or perceived inconsistency can be the result of having to operate with unduly complicated and fragmented regulations. When both regulator and regulated are faced with a complex patchwork of much amended regulations, with slightly different procedural provisions in slightly different contexts, it is inevitable that the regulatory burden will seem heavier than it need be. Where there is a well-organised and consolidated set of regulations, using a consistent set of procedural models, it is easier for everybody to understand what is required and what the consequences of non-compliance are, concentrating on the real purpose of the law rather than having to spend all the available energy simply picking through the legislative maze. A simple, coherent, consistent and clear regulatory framework can be understood and operated by all concerned. The energy and effort being expended on the process leading to Part 2 of this Bill and the regulation-making that will follow should be repeated in other areas. There are resource costs in such exercises, but there is also a large pay-back for all concerned in terms of better regulation.

#### *Section 1*

The regulation making power is very broad and it is welcome that it is subject to the affirmative procedure in Parliament.

#### *Section 3*

Given the many broadly-phrased statutory duties imposed on public authorities (not least that proposed in section 4 of this Bill), it is inevitable that these will on some interpretations conflict with the duty imposed by section 3(1). There will often be plenty of room for argument over the "proper" interpretation of these duties and therefore whether there is an existing obligation to justify non-compliance with the more precise provisions in the proposed regulations. Having to juggle competing obligations is hardly adding to the simplification of the regulatory process.

#### *Section 4*

Regardless of the political merits of this provision, there are two problems with the imposition of a duty to contribute to sustainable economic growth. The first is the uncertainty of what this phrase means. This exists both at the large scale - is it economically sustainable growth, or economic growth within the limits of (ecological and social) sustainability? - and then in ascertaining exactly what is meant once that issue is resolved. For example it is striking that the draft Scottish Planning Policy, currently also under consultation, does not provide a clear definition of sustainable economic growth but offers two far-ranging paragraphs on the topic, and draws a clear distinction between pursuing sustainable economic growth and pursuing sustainable development. It is unsatisfactory for legislation to impose a legal duty

where there is so little clarity as to its meaning, regardless of the intention to provide guidance on the issue.

Secondly, it is unclear what yet another duty on public bodies will achieve. How is this duty to fit with their other statutory duties such as to secure best value, to further the conservation of biodiversity, to act in the way best calculated to meet the greenhouse gas emission targets and in the way considered most sustainable? Which is to take priority when there is a conflict? Is it conceivable that this duty will ever be legally enforced? If not, is there clear evidence that the creation of such legal duties really changes the ways decisions are taken to an extent greater than can be achieved through policy, guidance and training? Moreover, authorities already have to cope with so many duties imposed on them, that the benefit gained by singling out one or two duties as deserving special legal status has been lost by the number of duties imposed, duties which inevitably conflict in some situations.

### *Section 5*

The presence of a Code of Practice is not by itself enough to save the inherent uncertainty of the duty proposed.

It is welcome that the making of the Code is subject to such open and inclusive procedural requirements.

### *Section 6(4)*

There should be an express requirement for consultation with the public.

## **Part 2**

### **Chapter 1**

#### *Section 8*

Given the broad powers conferred, a statement of purpose is welcome.

#### *Section 9*

The definition of "protecting and improving the environment" refers to "the status of ecosystems" but there should also be reference to biodiversity, since looking after our priceless natural heritage involves caring for it both at the ecosystem and the species (and even local population) levels, as noted in the Convention on Biological Diversity (1992) to which Ministers must have regard under s.1 of the Nature Conservation (Scotland) Act 2004.

#### *Sections 10 and 11*

Again, very far-reaching regulation making powers are introduced, but this does not represent a major change since this is already the legislative position in most areas covered by the proposed powers.

Given the significance and extent of the intended overhaul of several major regulatory regimes, there is an argument for at least the first set of comprehensive

regulations being subject to the affirmative procedure in Parliament (as was the case in the Pollution Prevention and Control Act 1999, s.2(8),(9)).

It would also be preferable to have an express requirement for consultation with the public, not just those the Ministers think fit.

## **Chapter 2**

One general observation is that it is unsatisfactory for there to be a piecemeal introduction of new enforcement powers in different areas. Although having the one system across the major environmental areas is a very welcome step forward, there should be a standard model (or limited set of models) which can be adopted in any regulatory context, rather than being confined to environmental matters. The same model(s) should be available for use where appropriate for health and safety, consumer protection, food hygiene, etc. Is it intended to replace all of the existing environmental enforcement powers with this model (e.g. those introduced under the Marine (Scotland) Act 2010, ss.46-50 and the Wildlife and Natural Environment (Scotland) Act 2012, s.40)? Similarly, why is it only SEPA and not any other regulatory body (or the police) that is being empowered to recover enforcement costs?

A second general observation is that it is difficult to comment fully on the proposals in this section when some specific issues are dealt with in the Bill and others will be included in the regulations. In particular the absence of detail on appeal mechanisms makes it impossible to comment on the acceptability or ECHR-compliance of these provisions. Whilst I can appreciate the desire to have certain major provisions fixed in the statute, the result is that it is not possible to see the overall picture.

The issue of appeals is significant, not just to ensure ECHR-compliance, but also because the initial procedure and the appeal process must be viewed together to see if there is an appropriate balance between efficiency and due process. Moreover, we are currently undergoing major restructuring of the courts and tribunal system, and detailed consideration of appeal procedures at this stage might offer opportunities for a reallocation of functions between different judicial and administrative/ministerial appeal bodies (in this area and other regulatory regimes), affecting structures and workloads and ensuring the proportionate handling of cases by bodies with the appropriate expertise. (See also comment on s.40)

### *Sections 12-17*

The standard of proof required here, the balance of probabilities, is lower than one might expect for the imposition of penal sanctions by the state, but the acceptability of this depends largely on the appeal mechanisms that will be available, a feature on which the Bill does not provide details.

Many of the offences likely to be relevant here arise not from one-off incidents but are continuing offences. It should be made clear how the enforcement procedure works in relation to such continuing offences.

### *Sections 13 and 16*

It should be made clear in the Bill, or at least in the regulations, what the effect of an appeal is on any notice that has been served pending determination of the appeal and also the effect of a successful appeal on the potential to take further proceedings, whether by a second notice or by prosecution. Does a successful appeal against a notice preclude further action or mean that all options are again open to SEPA and the Crown Office? It is understood that the provisions in ss.13(6)(b) and 16(6)(b) are intended to prevent a successful appeal on one ground, namely that SEPA should not have issued a notice but instead have chosen another course of action, acting as a barrier to taking that further action, but this is just one example of the wider question of the effect of appeals on the ability to seek sanctions. There is a balancing act necessary between exposing operators to double jeopardy and risking technical flaws precluding necessary enforcement action.

### *Section 24*

Publicity for the enforcement action taken is an essential element for securing public confidence in the use of the new mechanisms.

## **Chapter 3**

### *Section 27*

This provision is welcome, but it does not appear that equivalent provisions in other areas of law make a striking difference to the fines imposed.

### *Section 28*

Again this provision is welcome and matches the provision for publicity in the event of the new sanctions being imposed by SEPA.

## **Chapter 4**

### *Sections 29 and 30*

The extension of vicarious liability is welcome and should avoid difficulties caused by the diverse management structures of companies and partnerships.

### *Section 31*

The relationship should be considered between this offence and the offence of keeping etc. waste in a manner causing pollution or harm – Environmental Protection Act 1990, s.31(1)(c). There may be merits in having both offences available, noting the different thresholds of harm (“significant” harm here as opposed to any harm in the 1990 Act), but if so this position should be the result of conscious consideration.

### *Section 32*

The introduction of a wide remedial power is welcome.

### *Section 33*

These powers are welcome.

### *Section 34*

The power to remove a special site from the register should not be given to the local authority acting merely in consultation with SEPA (proposed s.78TA(3)). Since the whole point of special sites is that they raise issues of a nature inappropriate for a local authority to deal with, SEPA's approval should be required, or the power should lie with SEPA.

## **Chapter 5**

### *Section 38*

The inclusion of a duty in relation to achieving sustainable economic growth is objectionable for the reasons pointed out above.

### *Section 40*

There has been a missed opportunity for joined-up thinking across government in relation to reform of the civil justice system, both courts and tribunals, and our compliance with the Aarhus Convention. The matter dealt with here is a symptom of a broader issue affecting the appropriate scrutiny of decision-making, the cost and speed of judicial review and the way in which appellate responsibilities are allocated between Ministers, planning reporters, courts and tribunals. This specific change should not preclude a more thorough consideration of how best to ensure genuine access to justice across a wide range of regulatory matters.

### *Section 41*

Although the threat of adverse financial consequences for the authority may help to concentrate the minds of those responsible for poor performance, reducing the resources available is unlikely to assist improvements. The exercise of this power should be a last resort after more positive engagement between Ministers and the authority, and this might be reflected in the statutory provision.