RURAL AFFAIRS, CLIMATE CHANGE AND ENVIRONMENT COMMITTEE

AGENDA

18th Meeting, 2013 (Session 4)

Wednesday 22 May 2013

The Committee will meet at 9.30 am in Committee Room 1.

1. **Regulatory Reform (Scotland) Bill**: The Committee will take 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, and George Burgess, Deputy Director for Environmental Quality, Scottish Government;

   and then from—

   Calum MacDonald, Executive Director, Jo Green, Corporate Support Manager, and Bridget Marshall, Head of Legal for Operations, Scottish Environmental Protection Agency.

2. **Crofting (Amendment) (Scotland) Bill**: The Committee will take evidence on the Bill at Stage 1 from—

   Paul Wheelhouse, Minister for Environment and Climate Change, Richard Frew, Policy Adviser, Kenneth Htet-Khin, Senior Principal Legal Officer, David Barnes, Deputy Director, Agriculture and Rural Development, and Joseph Kerr, Head of Crofting Services, Scottish Government.

3. **Crofting (Amendment) (Scotland) Bill (in private)**: The Committee will discuss the evidence heard earlier in the meeting.
The papers for this meeting are as follows—

**Agenda item 1**

Note by the Clerk

PRIVATE PAPER

**SPICe briefing on the Regulatory Reform (Scotland) Bill**

**Agenda item 2**

Note by the Clerk

PRIVATE PAPER
Regulatory Reform (Scotland) Bill

Introduction

1. The Regulatory Reform (Scotland) Bill\(^1\) was introduced in the Scottish Parliament on 27 March 2013. The Parliamentary Bureau designated the Economy, Energy and Tourism Committee (EET) as lead Committee and the Rural Affairs, Climate Change and Environment Committee as secondary Committee for Stage 1 scrutiny, on 16 April 2013.

2. The Committee agreed its approach to its Stage 1 scrutiny of the Bill at its meeting on Wednesday 24 April 2013. A call for views\(^2\) was subsequently published by the Committee, with a closing date for submissions set for 20 May 2013. Written submissions received to date are attached at the Annexe.

3. The Scottish Parliament Information Centre (SPICe) has published a briefing on the Bill which can be accessed at this link—


Background to the Bill

General

4. The Policy Memorandum\(^3\) accompanying the Bill 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.”

5. The Bill covers a diverse range of policy areas under the broad headings of Better Regulation and Better Environmental Regulation and it is anticipated RACCE, as secondary committee, will wish to focus its scrutiny on matters specifically related to environmental regulation.

Scottish Government consultation

6. 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\(^4\). An

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\(^1\) Regulatory Reform (Scotland) Bill. All documents available at: [http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61582.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61582.aspx)


\(^3\) Regulatory Reform (Scotland) Bill. Policy Memorandum [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)

analysis of responses\textsuperscript{5} was published in December 2012; however the 89 individual responses have not been published online.

7. Additionally, it appears that one of the key parts of the Bill, namely Chapter 5: General Purpose of SEPA has been included in a further Scottish Government and Scottish Environmental Protection Agency (SEPA) joint consultation on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency\textsuperscript{6}. This was held between October 2012 and January 2013, and 23 formal responses were received. On 2 May 2013, the Minister for Environment and Climate Change wrote\textsuperscript{7} to the Committee, attaching an analysis of those consultation responses.

8. 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\textsuperscript{8}. An independent analysis\textsuperscript{9} and summary analysis\textsuperscript{10} of the 80 responses\textsuperscript{11} was also carried out. The Scottish Government has also recently published a response\textsuperscript{12} to the analysis.

Contents of the Bill

9. 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);


\textsuperscript{7} Correspondence from the Minister for Environment and Climate Change, to the Rural Affairs, Climate Change and Environment Committee (2 May 2013). Available at: http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/2012.01.01_Letter_from_the_Cab_Sec_Agriculture_and_Fisheries_Council_December_2012(2).pdf

\textsuperscript{8} Scottish Government (2012). Consultation on Proposals for a Better Regulation Bill. Available at: http://www.scotland.gov.uk/Publications/2012/08/8403

\textsuperscript{9} Scottish Government (2013). Independent Analysis of the Better Regulation Bill Consultation Responses. Available at: http://www.scotland.gov.uk/Publications/2013/03/6019

\textsuperscript{10} Scottish Government (2013). Independent Analysis of the Better Regulation Bill Consultation Responses - Executive Summary. Available at: http://www.scotland.gov.uk/Publications/2013/03/1930

\textsuperscript{11} Scottish Government (2012). Consultation on Proposals for a Better Regulation Bill – Responses. Available at: http://www.scotland.gov.uk/Publications/2012/12/4140/0

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.

Part 1
10. 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 to encourage regulators to adopt practices that are consistent with regulatory principles. The Committee may wish 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.

Part 2
11. Part 2 focuses on environmental regulation and is where the Committee may wish to focus its scrutiny as we understand the EET Committee is not including this part of the Bill in its call for evidence or evidence sessions. This part is divided into 6 Chapters.

12. 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.

13. 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.

14. 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 they have been convicted of the offence and details of the offence.

15. Chapter 4 deals with miscellaneous provisions including vicarious liability for certain offences 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.

16. 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.

17. Chapter 6 defines terms for the purposes of Part 2.

Part 3
18. Part 3 deals with miscellaneous provisions including those in relation to appeals regarding marine licensing decisions, charges and fees payable to planning authorities and applications for street traders licenses for mobile food businesses.

Part 4
19. Part 4 of the Bill contains general provision such as subordinate legislation, ancillary provision, crown application and commencement along with a provision delegating powers to Scottish Ministers to make orders for consequential provision as necessary.

Schedules
20. Schedule 1 lists regulators for the purposes of Part 1 of the Bill. Schedule 2 sets out the purposes for which regulations under section 10 may be made and schedule 3 makes minor and consequential modifications of other legislation.

Financial Memorandum
21. The Finance Committee will be scrutinising the Financial Memorandum of the Bill, which is contained in the Explanatory Notes, and will report to the EET Committee accordingly.

RACCE Committee scrutiny

Evidence-taking
22. The Committee takes oral evidence on the Bill as follows—

Wednesday 22 May
- Scottish Government Bill team; and then
- SEPA.

Wednesday 29 May
- Scottish Natural Heritage, Food Standards Agency, and Dr Sarah Hendry University of Dundee; and then
- a roundtable discussion with stakeholders: Scottish Environment Link, Royal Society for Protection of Birds, UK Environmental

Wednesday 5 June
- Minister for Environment and Climate Change.

Stage 1 report
23. The Committee will consider a draft Stage 1 report to the EET Committee at its meetings on 19 and 26 June, with a view to sending its final report to EET before the summer recess.

Clerks
Rural Affairs, Climate Change and Environment Committee
Annexe

Written submissions received to date

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.
Crofting (Amendment) (Scotland) Bill – Stage 1 scrutiny

Introduction

1. The Crofting (Amendment) (Scotland) Bill\(^1\) was introduced in the Scottish Parliament, by the Scottish Government, on Thursday 9 May 2013. The Parliamentary Bureau designated the Rural Affairs, Climate Change and Environment (RACCE) Committee as lead Committee, on Tuesday 14 May.

2. The Scottish Government is seeking an expedited procedure in Parliament which would see the Bill complete all three legislative stages, subject to Parliamentary approval, by the end of June 2013.

3. The Committee agreed its approach to its Stage 1 scrutiny of the Bill at its meeting on Wednesday 8 May 2013. A call for views\(^2\) was subsequently published by the Committee, with a closing date for submissions set for 17 May 2013. The six written submissions received to date are attached at the Annexe.

4. The Scottish Parliament Information Centre (SPICe) has published a briefing on the Bill which can be accessed at this link—


Background to the Bill

5. On Thursday 28 March 2013 the Minister for Environment and Climate Change announced\(^3\) in Parliament the Scottish Government’s intention to bring forward a bill to deal with the difficulties owner-occupier crofters face when decrofting their croft land.

6. The Minister told the Chamber—

“I am grateful for this opportunity to inform Parliament of the Scottish Government’s intentions to address a particular issue that has come to light in relation to crofting legislation—specifically, the Crofting Reform (Scotland) Act 2010. The issue concerns owner-occupier crofters’ ability to apply to the Crofting Commission to decroft their croft land.

Decrofting, which is provided for in sections 23, 24 and 25 of the 2010 act, means removing the land in question from crofting tenure and the provisions of the 2010 act. It can be applied for in relation to all or part


of a croft and might be used, for instance, to allow for a house to be built on decrofted land, which can help to facilitate the handing down of a croft from one generation of a crofting family to the next, or it may enable the building of a dwelling for a new entrant to crofting, on a croft that does not currently have such provision.

The 2010 act was the first crofting act to make specific reference to owner-occupier crofters, even though crofters had, for many years, enjoyed the right to buy their crofts. The 2010 act rectified that situation by explicitly distinguishing between tenant crofters and owner-occupier crofters.

Unfortunately, a flaw has come to light in the way in which that distinction applies in the case of decrofting of land. It was the Scottish Government’s intention that tenant and owner-occupier crofters should be treated equally, and we believe that that was also the Scottish Parliament’s intention during the passage of the 2010 act. However, as some members will be aware, the Crofting Commission has received legal advice that sets out that, in fact, the 2010 act inadvertently limits the circumstances in which owner-occupier crofters can apply to decroft land. That being the case, the Crofting Commission has decided to suspend the processing of such applications from owner-occupier crofters—a decision which was, of course, not taken lightly … I inform Parliament that the Scottish Government intends to introduce a bill as soon as possible after the Easter Recess to address the issue. I intend to propose a timetable for the bill that will enable Parliament to consider carefully the proposed changes, while ensuring that the matter is resolved quickly.”

Contents of the Bill

7. The Bill amends the Crofters (Scotland) Act 1993, and the Crofting Reform (Scotland) Act 2010 as outlined above by the Minister, and contains 6 sections and a schedule.

8. The Bill deals with the single purpose of providing for owner-occupiers to be able to decroft all, or part of, their crofts. The Bill is also makes retrospective provision in relation to applications which have been made by owner-occupiers to decroft but which have not yet been decided upon when the issue was identified.

Financial Memorandum

9. The Bill is accompanied by Explanatory Notes which includes a Financial Memorandum (FM). However, given the timescales involved it seems unlikely that the Finance Committee will be able to complete scrutiny of any FM in the way it would normally would. Scrutiny of the FM will therefore probably be conducted by the RACCE Committee.
Evidence-taking

10. The Committee took oral evidence on the Bill on Wednesday 15 May from Scottish Government officials, and then from a panel of the following stakeholders - Scottish Crofting Federation, National Farmers Union Scotland, Crofting Commission, and the Crofting Law Group.

11. The Committee will conclude its oral-evidence taking on Wednesday 22 May by hearing from the Minister for Environment and Climate Change.

Consideration of a Stage 1 report

12. The Committee will consider its Stage 1 report to the Scottish Parliament on the general principles of the Bill at its meeting on Wednesday 29 May, with a view to publishing its report no later than Friday 31 May 2013.

Clerks
Rural Affairs, Climate Change and Environment Committee
Written submissions received to date

Written submission from Brian Inkster, Inksters Solicitors

I would initially point out that I have, from the outset, been somewhat sceptical as to the need for the Crofting (Amendment) (Scotland) Bill (“the Bill”) as I believe that the existing law can be interpreted in such a way to allow owner-occupier croft decrofting (Vacant and ready, Journal of the Law Society of Scotland, March 2013, available online at www.journalonline.co.uk/Magazine/58-3/1012343.aspx#).

I have also been vocal in expressing the opinion that the legal advice sought and obtained by the Crofting Commission on this subject should be made public (Top Secret Crofting Law, Crofting Law Blog, www.croftinglawblog.com/top-secret-crofting-law).

To date crofting lawyers have had to operate in a vacuum over this issue as in the absence of sight of the legal opinion on what exactly the ‘flaw’ is in the Crofting Reform (Scotland) Act 2010 (“the 2010 Act”) it is difficult to know what is being amended by the Bill and why.

On 28 March 2013, when Paul Wheelhouse MSP, Minister for Environment and Climate Change, announced in the Scottish Parliament that the Bill would be introduced after the Easter recess, Rhoda Grant MSP asked whether the Government would “publish its legal advice, so that solicitors can properly advise clients”. Paul Wheelhouse responded:-

“As far as legal advice is concerned, I am sure that Rhoda Grant knows the constraints that exist in that regard. In progressing the Bill, we will try to make it as clear as possible why we think that the legislation is flawed and what we need to do to rectify that. We will try to give as much clarity as possible on the rationale for the action that we propose to take.”

I had hoped that such clarity and the rationale would appear in the Explanatory Notes to the Bill. Unfortunately, not a lot on this area is actually there to add to the scant information that was previously made available. In particular no mention is made of the interaction between section 23(12A) of the Crofters (Scotland) Act 1993 (“the 1993 Act”) and section 23(1) of the 1993 Act and their relationship with section 23(10) and/or section 24(3) of the 1993 Act. This is something I have specifically asked the Crofting Commission to address in correspondence but they have simply ignored me and not responded on this point. I can only assume that they do not actually know what the position is.

With section 23(12A) of the 1993 Act being amended but not removed by the Bill some explanation as to the purpose and intent of that section, as it now stands, would be useful. If the purpose of that section (as I saw it) was to deem an owner-occupied croft to be vacant but it did not in fact do so (if the
legal advice sought and obtained by the Crofting Commission, which has not been disclosed, actually covers this point) then what is the continuing purpose of the said section 23(12A) when the Bill becomes an Act?

Paragraph 5 of the Explanatory Notes to the Bill acknowledge that prior to the introduction of the 2010 Act “owner-occupiers” could apply to decroft under section 24(3) of the 1993 Act and we are told to “see section 23(12) of that Act”. Section 23(12A) was introduced by the 2010 Act to the 1993 Act to extend the same provisions to “owner-occupier crofters”. However, no mention of this or the reason why the said section 23(12A) does not actually do this is given.

Paragraph 6 of the Explanatory Notes to the Bill states that:-

“For the purposes of the decrofting provisions of the 1993 Act, section 23(10) was amended by the 2010 Act to provide that a croft is not vacant if it is occupied by the owner-occupier crofter.”

That statement is not quite correct and is possibly misleading. The clause in question says that:-

“…a croft shall be taken to be vacant notwithstanding that it is occupied, if it is occupied otherwise than by… the owner-occupier crofter of the croft”

That does not mean (in my opinion) that an owner-occupied croft can never be vacant and that other provisions of the 1993 Act cannot make such a croft vacant for the purposes of decrofting.

If, however, that interpretation can be put on the said section 23(10) and this is the ‘flaw’ that Paul Wheelhouse has been referring to then is there not a simpler way to amend the legislation rather than the rather convoluted way it has been presented in the Bill? Would it not be the case of simply having one clause (say a new section 23(10A) to the 1993 Act) along the following lines:-

“Notwithstanding the terms of subsection (10) above an owner-occupied croft will always be vacant for the purposes of decrofting under section 24(3)”.

This one sentence could in effect replace the proposed new sections 24A, 24B, 24C and 24D to the 1993 Act (section 1(2) of the Bill) and make the reading and understanding of it so much easier.

Paragraph 6 of the Explanatory Notes to the Bill goes on to state:-

“Other owner-occupiers of crofts, who were not owner-occupier crofters were unaffected and they could still, and still can, apply to decroft as if they were landlords of vacant crofts.”

This is another potentially incorrect and misleading statement. The Crofting Commission issued on 18 February 2013 the following statement:-
“Decrofting and Letting applications where a croft is owned by more than one person

There was uncertainty in situations where the owners hold separate title to distinct parts of a croft, whether an application to decroft or let could be:

- Made separately by an individual owner in respect of the distinct part of the croft they own, or

- If such an application has to be made by all the owners of the croft in their capacity as, collectively, the ‘landlord’ of that croft.

The Crofting Commission took the view that it was essential to have clear policy on this issue. The Commission therefore, in order to clarify the situation, sought and obtained legal opinion on the practice of accepting applications submitted by only one of the croft owners where the croft is held in multiple separate ownership ‘parcels’.

The matter was discussed at their Board meeting on 14 December 2012 and Commissioners agreed to adopt a policy that all decrofting and letting applications in respect of crofts with multiple owners, must be submitted by all the owners, in their capacity collectively as the ‘landlord’ of the croft, even in those cases where the application related to a part of the croft held in title by only one of their number.

Any application received in future from one of the owners, where a croft is held in multiple ownership, will be considered invalid and returned on the basis that the application was not submitted by the landlord of the croft.”

It is submitted that this was not the intention of the 2010 Act (i.e. to change the position of owner-occupiers as opposed to owner-occupier crofters in respect of the right of an owner-occupier to decroft land belonging to them). In effect if there are several owner-occupiers of distinct parts of what was originally one croft why should one of those owner-occupiers require the consent of the other owner-occupiers to decroft land that only they own. The policy introduced by the Crofting Commission means that one neighbouring owner-occupier can in effect prevent another from decrofting. Thus, contrary to what the Explanatory Notes to the Bill state, owner-occupiers of crofts, who are not owner-occupier crofters, are affected and cannot (in certain circumstances) apply to decroft as if they were landlords of vacant crofts.

My own view is that the Crofting Commission may have got it wrong again and that decrofting by owner-occupiers is, as it always has been, fully covered by section 23(12) of the 1993 Act. This was not altered in any way by the 2010 Act. However, if the Crofting Commission are correct then the Scottish Government needs to do something about it at the same time as fixing the ‘flaw’ for owner-occupier crofters. It would be inequitable to treat the two differently. Furthermore, if the Crofting Commission are correct then it follows that decrofting directions granted by them to owner-occupiers after 1 October...
2011 (possibly arguably before that date) and 18 February 2013 could be invalid. The Scottish Government would need to seek to remedy that situation retrospectively as it has done in the Bill in respect of owner-occupier crofters. Not doing so leaves owner-occupiers and their lenders exposed in a similar way as owner-occupier crofters and their lenders currently find themselves pending the Bill becoming an Act.

Jamie McGrigor MSP asked, in the Scottish Parliament, on 28 March 2013:-

“Will the legislation clarify the legal position on decrofting a croft that has been divided? The Crofting Commission say that people who own part of a croft cannot decroft in that part without the concurrence of the neighbours who own the remainder of what was the original croft.”

Paul Wheelhouse MSP did not have an immediate answer to this question but the Minister promised to write a letter to Mr McGrigor to provide clarity on this point and undertook “to address the matter”. This letter was not written until 10 May 2013 (the day after the Bill was introduced). It reads:-

“Dear Jamie

Thank you for your e-mail of 9 May 2013 seeking the clarification that I undertook to write, after my statement to Parliament on 28 March 2013 on decrofting by owner-occupier crofters, on the issue of “divided” crofts. I am extremely sorry that it has not been possible to provide a much earlier response.

The issue you raised relates to situations where a croft has a number of owners, rather than where a croft has been divided through regulatory application to the Crofting Commission. In that latter situation, a croft would have essentially become two, or more, crofts with a separate identifiable tenant or owner-occupier for each. In such a situation, a tenant would be able to apply to decroft and the Bill to be introduced is designed to empower an owner-occupier crofter to also be able to apply to decroft.

In instances of joint ownership of a croft that has not been formally divided, the Crofting Commission decided, at its Board meeting on 14 December 2012, that in order to regulate crofting properly and ensure the integrity of the crofting unit, an application to decroft should be from the landlord of a croft. As it has been relayed to me the Crofting Commission took legal advice, and based upon that advice has concluded that where a number of individuals own different parts of a croft, which has not been formally divided by the Commission, they together constitute the “landlord” of the croft for regulatory purposes.

As such, an application in respect of an undivided croft affects a number of persons who, taken together, are the “landlord”. In order to properly consider an application relating to such an undivided croft, the Commission feels it necessary, on legal advice it received, to seek the views of all the joint owners of the croft.
I hope this is helpful.

PAUL WHEELHOUSE

Unfortunately, Paul Wheelhouse avoids the actual question asked by Jamie McGrigor and simply sets out the Crofting Commission’s policy which was already known. Reference by Paul Wheelhouse to “divided” crofts requires some greater understanding and explanation. It was only by the 2010 Act (section 34 which introduced inter alia a new section 19D to the 1993 Act) that an owner-occupier crofter was, for the first time, compelled to seek the consent of the Commission to divide their croft. Prior to this new provision coming into force no such consent was required.

I do not believe that it could have been the intention of the Scottish Parliament to create two separate types of divided crofts with different rules applying to each. There is no good reason why pre-2010 Act ‘divided’ crofts should be treated differently from post-2010 Act ‘divided’ crofts.

As a result of the Crofting Commission’s legal interpretation of the position, and as already stated previously by me above, decrofting directions already granted by the Crofting Commission to owner-occupiers (as opposed to the newly defined owner-occupier crofters) could be invalid. Furthermore, the Crofting Commission are now effectively preventing owner-occupier decrofting in circumstances where they believe a neighbour’s consent may be required (something that the 2010 Act and previous crofting legislation certainly does not spell out).

The focus of the Bill is resolving ambiguities created by the 2010 Act in connection with decrofting but this has been specifically limited by the Scottish Government to ‘owner-occupier crofters’. It is completely inequitable not to include ‘owner-occupiers’ in this focus as they are, in certain circumstances, also being prevented from decrofting land that they own. The tweaks required to the Bill (especially if a simplified drafting approach was taken) to resolve this anomaly would be minor and I would urge the Scottish Government to actually consider the potential problem at hand and the consequences of doing nothing about it.

I have already stated that the Bill could be condensed dramatically in size and complexity by a more straightforward and simple approach to the drafting of it. Arguably, what has been created is a sledge hammer to crack a nut. Crofting Law is complex at the best of times. The Scottish Government should be seeking where possible to make it easier to understand and thus avoid the need for amending legislation due to the different interpretations that can be given to complexly drafted provisions.

If, however, the will of the Scottish Parliament is to stick with the unnecessarily complex approach I would comment on the clauses in the Bill, as currently drafted, as follows:-
Clause 1(2) – inserting 24A

There is no definition of “decrofting direction” in section 61 of the 1993 Act. Should we have a definition distinctly for owner-occupier crofters and not one for others who can legitimately seek a ‘decrofting direction’? Again good reason for linking owner-occupied croft decrofting with the existing decrofting provisions rather than creating new ones.

Clause 1(2) – inserting 24B

Reference is made in the new section 24B(2) to section 26J of the 1993 Act. However, I believe there to be a possible flaw in the 2010 Act (yes another one) in that there is no link between section 26J and section 19C of the 1993 Act. This could cause general problems for the Crofting Commission in any event and specific ones with regard to the Bill now linking a further clause to a section in the 1993 Act that possibly makes no sense in the first place.

Clause 1(2) – inserting 24C

The proposed new section 24C to the 1993 Act is a very contrived provision. The simplified approach to drafting already suggested would dispense with the need for this. The alternative is to set out in full the provisions that apply rather than chopping and changing the existing section 25 of the 1993 Act.

The proposed new section 24C(2) to the 1993 Act appears to be new law in that I cannot see why the existing section 25(1)(b) cannot equally apply as it stands to owner-occupied crofts. There should be no place for new law in the Bill rather than a necessary fix of existing legislation. Any new law requires careful consideration and should not be rushed through as part of this particular legislative process. Thus I would submit that the proposed new section 24C(2) should be removed from the Bill.

With regard to the proposed new section 24C(3) to the 1993 Act there should be nothing to prevent the legislation declaring the croft to be vacant notwithstanding the terms of section 23(10) of the 1993 Act. Why create two classes of possible outcome i.e. vacancy or revocation rather than just the one?

Clause 1(2) – inserting 24D

A simplified drafting approach to the Bill would avoid the need for the proposed section 24D to the 1993 Act with reliance being given to the existing section 24(3) of the 1993 Act.

I am unsure whether the proposed new section 24D(3) to the 1993 Act reflects existing legislation in the 2010 Act in respect of existing decrofting procedures. I have been unable to readily locate such provisions and there is no indication of the position in the Explanatory Notes to the Bill. If it does, then fair enough, although again linking the new legislation to the existing provisions would be preferable to stand alone clauses. If it does not then the
Bill is no place for new law for reasons already given above in respect of the proposed new section 24C(2) to the 1993 Act.

Clause 2

A simplified approach to the drafting would avoid the need for most, perhaps even all, of the proposed consequential modifications in the Schedule to the Bill as referred to in clause 2 of the Bill.

Clause 3

It is good to see retrospective effect and application in the Bill given that the Crofting Commission’s staff were telling potentially affected parties that they had nothing to worry about because previously granted decrofting directions were granted in good faith and so would be valid. However, as one commentator on the Crofting Law Blog has pointed out the drafting of clause 3 could be clearer:-

“That’s the sort of Sir Humphrey Appleby nonsense that gives the law and legislative process a bad name. Go ahead with this short bill in these terms now to correct the problem in the short term (so long as they’re SURE that gobbledygook actually does correct it) but only on the strict understanding a comprehensible bill to consolidate crofting legislation will be introduced asap.”

[Neil King commenting on Crofting (Amendment) (Scotland) Bill Published at the Crofting Law Blog: www.croftinglawblog.com/crofting-amendment-scotland-bill-published/#comment-834]

I would tend to agree and would have thought that a simple statement along the following lines would have sufficed:-

“All decrofting directions granted by and applications made to the Commission in respect of applications to decroft made by owner-occupier crofters from 1 October 2011 until the coming into force of this Act are valid and enforceable.”

Clauses 4, 5, 6 and 7

I have no particular comments to make on clauses 4, 5, 6 and 7 of the Bill.

Other Problems with the 2010 Act

There are other problems created by the 2010 Act which I will not go into in any great detail here but merely highlight:-

- The 2010 Act did not provide for the purchase of a tenanted croft being a trigger that induces first registration in the Crofting Register.
- Many issues and conflicts were created regarding owner-occupier crofters when compared with owner-occupiers (some have been
referred to in these submissions but others exist that also require a resolution).

- No equivalent of sections 5(3)-(6) of the 1993 Act was provided for owner-occupier crofters creating difficulties for developments proposed on owner-occupied crofts and in particular wind farm developments.

There is a need for legislation to resolve these issues. It is appreciated that the Bill may not be the place to do so given the need for that particular legislation to be progressed with all due haste. However, the Scottish Government should give a commitment to introduce a further bill dealing with all of the other anomalies created by the 2010 Act as soon as possible following the Summer Recess.

**Summary**

My views on the Bill can be summarised as follows:-

- The Bill as drafted is a sledge hammer to crack a nut and could be simplified in its drafting to a huge extent.

- There appears to be attempts to introduce new law via the Bill. That should not be the purpose of the Bill which is to fix ‘flaws’ in the existing legislation created by the 2010 Act.

- The problems associated with decrofting by owner-occupiers (as opposed to owner-occupier crofters) should also be addressed in the Bill.

- A commitment should be given by the Scottish Government to introduce a Bill following the Summer Recess to deal with the various other anomalies in crofting law created by the 2010 Act.

**Written submission from David Balfour**

As a crofter in Shetland I would like to lend my support to Tavish Scott in his efforts to bring clarity to this defunkle that has left so many especially young people in Scotland that have committed them self's to live on and work their crofts in a state of very probably expensive limbo. After going through the rigors of the planning laws,

Gaining a mortgage in what is a difficult time only to be gazumped at the foundations.

**Written submission from Jack and Dorothy Rendall**

**Section 28**

Whilst welcoming equality with landlords of vacant crofts and tenant crofters, they are very concerned that the Crofting Commission is the only body to have the power to make the decision and have the final say. They find it an obsolete organisation and suggest that Crofting Commission matters be
brought together with the Scottish Smallholders' Association under RIPD/AFRC, thereby enabling greater access to grants for smallholders and crofters.

Sections 32 & 33

The Rackwick land on Hoy which they own is not a typical crofting area. The location is part of a walkers’ paradise and includes the Old Man of Hoy access. They are used to walkers going all over their land and are very happy to share it with them.

Mr and Mrs Rendall's daughter, Lucy, lives in Kirkwall with her family, and will inherit their land. Therefore she lives out with the current 32 kilometre radius. If anything happens to the Rendalls, will the Crofting Commission insist that she puts a tenant in to Glen? If the CC insists on this, Mr and Mrs Rendall suggest that the tenant might be within their rights to close off access to the Old Man of Hoy.

They would like consideration to be given to extending the current stipulated distance, which might not cause problems for those in the Western Isles, but certainly does given the geography of Orkney and indeed Shetland, as in their daughter’s case.

Written submission from Eilidh I.M. Ross, Inksters Solicitors

The perceived need for, and the technical detail of, the draft Crofting Amendment Bill has been covered by my colleague Brian Inkster in his own submission, which I fully support.

For my own part, I will make a few comments on the limitations of the draft bill, and the need for further, radical, improvement of crofting legislation. I note the Scottish Government’s position that the bill will only be used to address one of the specific (perceived) problems with decrofting of owner-occupier crofts by owner-occupier crofters, namely the issue of whether such crofts can ever be vacant.

Not only are there many anomalies, hiccups, and unforeseen consequences of the provisions currently contained in the Crofters (Scotland) Act 1993 caused by the Crofting Reform (Scotland) Act 2010, but the 1993 Act itself is, in my view, a mess.

Matters are now to be exacerbated by the addition of yet another layer of incomprehensible extra sections and consequential amendments to an Act which was consolidated 20 years ago, and which has been (badly) amended numerous times. If the Act which my fellow crofting solicitors and I work with on a daily basis, and on which we must advise our clients, is in such a poor state of repair, that has serious implications for our profession (not to mention for crofters and landlords).

It is, in my view, now imperative that further steps are taken by the Government to address the wider problems of the 1993 Act. Further
amendment is not sufficient, nor even perhaps consolidation, if that would not result in an act which was understandable. The Government know what people want from crofting legislation (that was established by Mark Shucksmith quite recently and, although some do not support his findings, I am not aware of calls for a new committee of enquiry), and the 1993 Act tries to achieve those objectives that but fails in almost countless ways. The Act should be deconstructed and then redrafted in a way which is simple, understandable, and which clearly sets out the rights and obligations of all those whom it regulates (and affects in other ways).

The crofting act is important not simply from a historical perspective (although in my view that element is important); it is an essential part of the economic and social fabric of the Highlands and Islands and it is simply not acceptable that the legislative framework which supports that system is such a shambles. It is now incumbent upon the Scottish Government, once this single problem amongst many has been addressed (albeit in my view doing so complicates matters still further), to address the 1993 Act without delay. It is no exaggeration to say that the future of the crofting system as a legal entity depends upon it.

Written submission from Neil King

As well as the decrofting problem the bill is designed to correct, there’s another equally serious decrofting problem which has attracted no media attention (perhaps due to being overshadowed by the first problem).

It also arises due to legal advice received by the Crofting Commission on an unintended consequence of the wording of the legislation and could be corrected by the addition of a few words to the present bill (see below).

The issue I’m referring to is described in a note (which I’ve included as an appendix to this submission for ease of reference) released by the CC on their website on 18 February 2013 - see http://www.crofting.scotland.gov.uk/news.asp?firstitem=5 (You’ll note it affects letting as well but this submission is only concerned with its application to decrofting.)

What it means is that, supposing the landlord of a crofting estate sold a croft to its tenant, Mr A, under the right to buy. Then Mr A sells a part of the croft to Mr B. The CC’s legal advice is that Mr B has no right to apply to decroft his part without Mr A’s consent.

Where I think this could have great potential for injustice is when land (typically a small area, perhaps part of a garden) is bought in good faith without it being realised that it is croft land. Due to the fact that, hitherto, there has been no map-based crofting register, this can, in my experience as a rural property lawyer (now retired), happen very easily. When the crofting status of the land subsequently comes to light, the purchaser’s remedy – to apply for decrofting – is dependent on the goodwill of a neighbouring owner.
In short, the CC’s interpretation means that a neighbour – who may, of course, have an ulterior motive – can effectively pre-empt the “due process” of a decrofting application.

Solution

Fortunately, I think there’s a simple solution to this in the context of the present bill.

Proposed new s.24A of the 1993 Act to be inserted by s.1(2) of the bill only needs to be reworded with the addition of the words underlined below:-

24A Applications to decroft by owner-occupier crofters

(1) An owner-occupier crofter may apply to the Commission for a decrofting direction in respect of the whole or any part of a croft (or in respect of a part of such whole or part) owned by him.

(2) In this section and in sections 24B to 24D, a “decrofting direction” is a direction that the owner-occupier’s croft land it relates to is to cease to be a croft.

Wider issues going forward – consolidation

Crofting legislation is now in such a mess, what with all the amendments of amendments, that it brings the Scottish legislative process into disrepute.

How long till the next time the CC announces it has taken legal advice with the consequence that it can no longer process a certain type of application – either at all or in the way we had been used to hitherto?

If I were a member of the RACCE committee, I’d be recommending acceptance in principle of this bill (subject to the amendment suggested above) only on the strict understanding the Scottish Government launches, within a very short timescale, a consultation to identify the numerous other glitches in the crofting legislation and then publishes a bill to (a) correct these glitches; and (b) consolidate all crofting legislation into a single, comprehensible Act.

Appendix

Crofting Commission: Decrofting and Letting applications where a croft is owned by more than one person

There was uncertainty in situations where the owners hold separate title to distinct parts of a croft, whether an application to decroft or let could be:

- Made separately by an individual owner in respect of the distinct part of the croft they own, or

- If such an application has to be made by all the owners of the croft in their capacity as, collectively, the ‘landlord’ of that croft.
The Crofting Commission took the view that it was essential to have clear policy on this issue. The Commission therefore, in order to clarify the situation, sought and obtained legal opinion on the practice of accepting applications submitted by only one of the croft owners where the croft is held in multiple separate ownership ‘parcels’.

The matter was discussed at their Board meeting on 14 December 2012 and Commissioners agreed to adopt a policy that all decrofting and letting applications in respect of crofts with multiple owners, must be submitted by all the owners, in their capacity collectively as the ‘landlord’ of the croft, even in those cases where the application related to a part of the croft held in title by only one of their number.

Any application received in future from one of the owners, where a croft is held in multiple ownership, will be considered invalid and returned on the basis that the application was not submitted by the landlord of the croft.

Written submission from Cyril A Annal

I welcome the attempt to rectify the narrow difficulty arisen with the legislation in respect of owner-occupier crofters but this only goes a small way to it resolve the difficulties with the Act.

It does not address other aspects causing concern. I feel time should be taken after the Parliamentary recess to amend the act and I echo Mr Inkster’s statement that “A commitment should be given by the Scottish Government to introduce a Bill following the Summer Recess to deal with the various other anomalies in crofting law created by the 2010 Act.”

An act that is a readable document and can be easily understood is essential and a simplification of the 1993 Act should be considered by Parliament. The present Act is a rehash of older Acts, amendments to Acts and does not address the true issues of modern crofting.

A single approach does not suit the different characteristics of the different areas and the same criteria should not be applied to all the situations.

For example in Orkney, Caithness and Shetland there are more owner occupied crofts than in the Western Isles and the characteristics of crofting is different. The crofts in Orkney, Caithness and Shetland are larger units. In Orkney it is easy for a crofter to productively farm his croft while living or working more than 32 kilometres away from the croft. The 32 kilometres distance should not be considered in these areas. Also owner-occupied crofts are heritable property with a valid and proper title with the area of land clearly defined on a map or by measurement. Crofts often do not have title deeds and on many occasions the crofter does not have any means of defining the area of his croft other than by hearsay, landlord’s records or agreements. This clearly separates owner-occupied crofts from crofts and, for example, the differences in inheritance issues have not been properly addressed.
The Regulatory Reform (Scotland) Bill was introduced in the Scottish Parliament on 27 March 2013.

This briefing provides background information on existing regulatory regimes, and the consultation exercises that preceded the introduction of the Bill. It goes on to describe the general principles and main provisions contained therein.
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EXECUTIVE SUMMARY

Regulation is a key part of Scotland’s business and environmental landscape, and it can help to enhance or hinder growth in the economy and competitiveness, as well as protect and improve the natural environment; having a good environment is integral to having a healthy economy.

The Regulatory Reform (Scotland) Bill aims 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.”

For the purposes of Stage 1 scrutiny, the Economy, Energy and Tourism Committee has been designated as the lead Committee, with the Rural Affairs, Climate Change and Environment Committee acting as secondary Committee.

At least three separate consultations have taken place on different aspects of the Bill. These relate to: Regulatory functions, marine licensing decisions and planning authorities’ charges and fees; Environmental regulation; and Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency. Some aspects of the Bill have not been consulted on.

Part 1 of the Bill relates to Regulatory Functions and has three main elements, as follows:

- encouraging and improving consistency in the exercise of regulatory functions – at present, many areas of regulation, such as environmental health, are implemented locally, leading to differences in approach and local variation. The Bill allows for the implementation of national regulation systems, although there remains scope for regulators to make a case for local variation.
- a duty on listed regulators to exercise functions in a way that contributes to achieving sustainable economic growth.
- provision for a code of practice in relation to the exercise of regulatory functions

Part 2 of the Bill relates to Environmental Regulation and has five main chapters, as follows:

- Chapter 1 allows Scottish Ministers to bring forward secondary legislation which will simplify and update the objectives and duties of SEPA’s diverse regulatory framework into one statutory purpose, i.e. that all of its functions are for the purpose of “protecting and improving the environment”
- Chapter 2 allows for regulations to be made which will give SEPA additional powers relating to enforcement, as follows: fixed monetary penalties, variable monetary penalties, non-compliance penalties, enforcement undertakings, and cost recovery
- Chapter 3 relates to court powers, and sets out provision for compensation orders, fines and publicity orders
- Chapter 4 allows for a new and broad range of miscellaneous provisions such as: vicarious liability, offence relating to significant environmental harm, contaminated land and special sites, waste management authorisations – offences by partnerships, and air quality assessments
• Chapter 5 amends the Environment Act 1995 by inserting a general purpose for SEPA to ensure that it contributes to improving the health and well-being of people in Scotland and achieving sustainable economic growth.

**Part 3** of the Bill makes provision for amendments to three miscellaneous regulatory regimes, as follows:

• **Section 40** extends statutory appeal mechanisms to decisions by Scottish Ministers relating to offshore marine energy projects of 1MW and above within Scottish waters. At present, decisions made by Ministers in these cases can only be challenged by way of judicial review.

• **Section 41** allows Scottish Ministers to make provision in planning fee Regulations for different fees to be levied by different planning authorities where Scottish Ministers are satisfied that the performance of the Planning Authority is not, or has not been, carried out satisfactorily.

• At present, mobile food vans have to comply with separate food hygiene regimes in each local authority area in which they operate. **Section 42** amends the Civic Government (Scotland) Act 1982 to allow street traders who operate mobile food businesses to trade in more than one area in Scotland, using a certificate from the same registering authority for each licence application.
INTRODUCTION

Regulation is a key part of Scotland’s business and environmental landscape, and it can help to enhance or hinder growth in the economy and competitiveness, as well as protect and improve the natural environment; having a good environment is integral to having a healthy economy. The independent Regulatory Review Group\(^1\) who advise the Scottish Government (2012) note that:

> […] it is not so much the regulations themselves that help or hinder competition but how they are implemented and managed and it is there that we can achieve real advantage. The vast majority of businesses realise that in the world we live in today regulation is something that society wishes, to control issues they have concerns over, and that is accepted. Where we have shown to industry that we can supply greater certainty in time and process in how regulations are implemented or managed then we can increase our competitive advantage over other countries.

The Regulatory Reform (Scotland) Bill [as introduced] (the Bill) was introduced in the Scottish Parliament on 27 March 2013. On 16 April, the Parliamentary Bureau referred the Bill to the Economy, Energy and Tourism Committee (EETC) as the lead Committee, with the Rural Affairs, Climate Change and Environment Committee (RACCE) acting as secondary Committee; it is anticipated that RACCE will focus its scrutiny on Part 2 of the Bill, as well as certain aspects of Part 1 (those that relate to the Scottish Environment Protection Agency (SEPA) and Scottish Natural Heritage (SNH)).

The Regulatory Reform (Scotland) Bill: Policy Memorandum (Policy Memorandum) 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.

CONSULTATIONS

The Bill covers a diverse range of policy areas under the broad Better Regulation, and Better Environmental Regulation agendas, therefore a number of separate consultations have taken place. The main exercises are summarised as follows:

**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 (Scottish Government 2012a). An independent analysis (Scottish Government 2013a) and summary analysis (Scottish Government 2013b) of the 80 individual responses (Scottish Government 2013c) was also carried out. The Scottish Government has also recently published a response (2013e) to the analysis.

**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 (Scottish Government & SEPA 2012a). An analysis of responses was published in December 2012 (Scottish Government & SEPA 2012b); however the 89 individual responses have not been published online.

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\(^1\) Chaired by Professor Russell Griggs of the CBI, with additional members from other business organisations, the National Farmers Union of Scotland, and the Scottish Trade Union Congress.
Additionally, one of the key parts of the Bill, Chapter 5: General Purpose of SEPA has been covered 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 January 2013 (Scottish Government & SEPA 2012c). An analysis of responses was published in May 2013 (Scottish Government & SEPA 2013); however the 23 individual responses have not been published online.

Both the EETC and the RACCE launched calls for evidence on Stage 1 of the Bill on 29 April 2013 (Scottish Parliament EETC 2013a & RACCE 2013). These consultations close on 6 June and 20 May respectively.

Whilst the policy areas of this Bill are largely devolved, it should be noted that Scotland is not alone in pursuing an agenda of improved regulatory development and application. The UK Department for Business Innovation and Skills (2013) recently consulted on Non-economic Regulators: Duty to Have Regard to Growth. This recognises that a balance is needed between the role that regulation can play in enabling growth and ensuring sufficient accountability of regulators to fulfil this role adequately. It seeks views on a statutory duty to require regulators to have regard to the impact of their actions upon growth. Also, the recent Queen’s speech to the UK Parliament (UK Government 2013) undertook to introduce a draft Deregulation Bill “to reduce the burden of excessive regulation on businesses”.
PART 1 – REGULATORY FUNCTIONS

Background

Businesses in Scotland must comply with regulations from the EU, the UK and Scottish Governments and local authorities. Most of these, including employment, tax, company law, competition and trading standards, and health and safety, are reserved to the UK Government. However, in relation to devolved and local government responsibilities there is still wide-ranging regulatory activity in Scotland which impacts on business (see Table 2).

The Scottish Government acknowledges that regulations “play an essential role in fostering a prosperous, fair and safe society”, but also that they “carry costs, and sometimes unintended consequences”. It aims to manage the balance between the two and has set out its view that “better regulation is crucial to delivering sustainable economic growth and providing a favourable business environment in which companies can grow and flourish.” (Scottish Government 2012a).

According to the Federation of Small Businesses (FSB) (2012), “around 30 per cent of FSB members in Scotland have cited regulation as the biggest barrier to growth. In addition, 62 per cent of our members report that the costs of complying with regulation have increased over the past four years.”

The Proposals for a Better Regulation Bill consultation (Scottish Government 2012a) included questions on both implementing national standards (consistency in national regulation systems and policies) and a duty to promote economic and business growth in regulatory activity, with some key areas of interest arising from the responses highlighted below. The consultation also covered a number of issues that were not taken forward in the Bill. These include:

- regulatory reviews and sunsetting (where each new regulation is regularly reviewed and in instances where regulation is no longer needed, or where it imposes disproportionate burdens, it is removed)
- common commencement dates for future business-related legislation
- prompt payment

While there was some support for these proposals from respondents, it was not generally felt that regulatory steps should address these issues.

Defining and implementing national standards: Businesses report difficulties in dealing with inconsistent regulation across Scotland, together with variation in how primary legislation is interpreted. For example, in their response to the Proposals for a Better Regulation Bill consultation Co-operative Food (2012) stated:

When regulations, aims and methods vary from one area to another it requires extra time and effort being spent by retailers to ensure compliance with each individual regime rather than directly addressing the needs of consumers (price / availability / store standards and service etc).

There was large support from business and industry associations in relation to new enabling powers to impose duties on local authorities and other regulators to implement national regulation systems and policies. The purpose of this is to encourage and improve consistency in the exercise of regulatory functions. However, local authorities were fairly evenly divided on this proposed enabling power and largely opposed to mandatory national standards.
The majority preference was for a flexible approach which includes the capacity to impose national standards and systems, where justified. Over two thirds of respondents were in favour of local authorities or other regulators having the capacity to opt-out from national standards on the grounds of exceptional local circumstances. However, opinion was evenly split between opt-out decisions being solely the responsibility of Ministers (which tended to be favoured by local authorities) and them being the responsibility of Ministers based on advice from the RRG (which tended to be favoured by businesses and trade associations).

There was overwhelming support from all respondent groups for the exploration of non-legislative approaches to the achievement of better regulation (Scottish Government 2013a).

**Duty to promote economic and business growth in regulatory activity:** Of the consultation responses, 41% were against introducing the new economic duty – largely driven by responses from local authorities, the third sector and individuals. These respondents tended to see it as a diversion from the main purpose of regulation and potentially confusing. Almost a third (29%) of respondents were in favour of introducing the new economic duty - largely driven by responses from businesses and trade associations. A further third (31%) of respondents had mixed views on the matter. There was over-whelming cross-sectoral support for the view that non-legislative approaches could also be used to encourage regulatory activity to help promote sustainable economic growth (Scottish Government 2013a).

Given the low level of support for the proposed economic duty identified by the independent analysis of consultation responses (Scottish Government 2013a), the Scottish Government invited the 18 stakeholders classed as “undecided” to a meeting in March 2013. According to the Scottish Government (2013e):

Subsequently a further seven of those stakeholders signalled support for the proposed economic duty. In addition, COSLA have formally revised their position opposing clauses on regulatory consistency and the economic duty on regulators, following the development of an associated Memorandum of Understanding.

Table 1 shows the final balance of opinion taking this later survey into account:

**Table 1 – Updated responses to consultation question about the new economic duty**

<table>
<thead>
<tr>
<th>Respondent Groups</th>
<th>For</th>
<th>Against</th>
<th>Mixed or Query</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Local Authorities</td>
<td>2</td>
<td>12</td>
<td>4</td>
<td>18</td>
</tr>
<tr>
<td>2. Public Bodies</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>3. Businesses and Trade Associations</td>
<td>12</td>
<td>2</td>
<td>0</td>
<td>14</td>
</tr>
<tr>
<td>4. Professional Firms and Bodies</td>
<td>8</td>
<td>2</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>5. Third Sector</td>
<td>0</td>
<td>4</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>6. Individuals</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td><strong>Overall Total</strong></td>
<td><strong>24</strong></td>
<td><strong>24</strong></td>
<td><strong>11</strong></td>
<td><strong>59</strong></td>
</tr>
<tr>
<td><strong>Overall Percentage</strong></td>
<td><strong>41%</strong></td>
<td><strong>41%</strong></td>
<td><strong>19%</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

The economic duty and how it would sit amongst existing responsibilities
Specifically, with regard to the economic duty, the Bill proposes that:

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

The Bill also proposes that the duty does not apply to a regulator to the extent that the regulator is, by or under any enactment, already subject to a duty to the same effect (note that SEPA is given a similar duty under Section 38 of the Bill and so the economic duty in this part will not apply to SEPA).

It is important to recognise that this duty would sit alongside a range of other objectives and duties that public bodies in Scotland have regard to; including the Scottish Government’s Purpose, statutory objectives, balancing duties and general duties. Consultation responses (Scottish Government 2013b) highlighted some concerns relating to the economic duty, how it would fit amongst existing duties and what it could add. This is considered in some detail below.

The Scottish Government’s Purpose: The Purpose of the Scottish Government, as set out in its Economic Strategy (2011) is:

To focus the Government and public services on a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

The Purpose is underpinned by a series of objectives and outcomes, including targets on economic growth, productivity and sustainability. The Bill seeks to more closely align the functions of regulatory bodies with delivering the Government’s central purpose. The Policy Memorandum (Scottish Parliament 2013a) sets out how the Bill will contribute to the Government’s purpose:

By providing a more supportive business environment, improving the efficiency and affordability of the public sector and protecting and enhancing Scotland’s natural assets to support our long-term competitiveness.

Statutory objectives: Each public body has statutory objectives specific to its remit. For example, under the Housing (Scotland) Act 2010, The Scottish Housing Regulator has one statutory objective, to:

Safeguard and promote the interests of current and future tenants of social landlords, people who are or may become homeless, and people who use housing services provided by registered social landlords (RSLs) and local authorities.

Other bodies have a number of statutory aims and purposes. For example, under the Natural Heritage (Scotland) Act 1991, SNH has to:

- secure the conservation and enhancement of; and
- foster understanding and facilitate the enjoyment of, the natural heritage of Scotland; and
- have regard to the desirability of securing that anything done, whether by SNH or any other person, is undertaken in a manner which is sustainable.
- further the conservation, control and sustainable management of deer in Scotland, and keep under review all matters, including their welfare, relating to deer.
Balancing duties: These statutory duties are qualified by balancing duties, and reflect the Government’s aim of achieving an integrated approach in which particular objectives are not pursued without reference to other interests. They are designed to ensure that, where appropriate, organisations do not focus upon primary aims and purposes to the exclusion of all other considerations. However, they do not override the statutory duties of each organisation. At present both SNH and SEPA have balancing duties. However, it should be noted that under Schedule 3 (Part 3) of the Bill SEPA’s balancing duties are proposed to be repealed.

SNH’s balancing duties are stated in the Natural Heritage (Scotland) Act 1991:

It shall be the duty of SNH in exercising its natural heritage functions to take such account, as may be appropriate in the circumstances, of:

a) actual or possible ecological and other environmental changes to the natural heritage of Scotland;
b) the needs of agriculture, fisheries and forestry;
c) the need for social and economic development in Scotland or any part of Scotland;
d) the need to conserve sites and landscapes of archaeological or historic interest;
e) the interest of owners and occupiers of land; and
f) the interests of local communities.

In addition, the Deer (Scotland) Act 1996 states:

It shall be the duty of SNH, in exercising its deer functions, to take such account as may be appropriate in the circumstances of:

a) the size and density of the deer population and its impact on the natural heritage;
b) the needs of agriculture and forestry; and
c) the interests of owners and occupiers of land.

General duties: In addition to statutory objectives and balancing duties, public bodies have general duties. They can be statutory or non-statutory, depending on the public body. For example, the Scottish Executive (2004) outlines that the duty of Best Value requires bodies to:

make arrangements to secure continuous improvement in performance (while maintaining an appropriate balance between quality and cost); and in making those arrangements and securing that balance, to have regard to economy, efficiency, effectiveness, the equal opportunities requirements and to contribute to the achievement of sustainable development.

This is a statutory duty for all Local Authorities as per the Local Government in Scotland Act 2003, and a non-statutory duty applicable to all bodies accountable to the Auditor General Scotland, as set out by the Scottish Public Finance Manual. Other general duties include those relating to climate change, biodiversity and equal opportunities.

Duties relating to the Public Services Reform (Scotland) Act 2010: In addition to these duties, Section 32(1)(a) of the Public Services Reform (Scotland) Act 2010 provides that as soon as is reasonably practicable after the end of each financial year certain public bodies, including SEPA, SNH, the Accountant in Bankruptcy, the Scottish Housing Regulator, VisitScotland and Social Care and Social Work Improvement Scotland, must publish a statement of the steps it has taken during that financial year to promote and increase sustainable growth through the exercise of its functions.
Proposals in the Bill

The Policy Memorandum states that the Bill aims “to improve further the way regulations are applied in practice across Scotland” and “to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment”.

Part 1 of the Bill has three main elements:

- encouraging and improving consistency in the exercise of regulatory functions – at present, many areas of regulation, such as environmental health, are implemented locally, leading to differences in approach and local variation. The Bill allows for the implementation of national regulation systems, although there remains scope for regulators to make a case for local variation
- a duty on listed regulators to exercise functions in a way that contributes to achieving sustainable economic growth
- provision for a code of practice in relation to the exercise of regulatory functions

The provisions in Part 1 aim to improve regulatory consistency across Scotland and to ensure that regulatory functions are exercised in a way which contributes to sustainable economic growth. As Table 2 below indicates, the consultation on these provisions identified a number of regulatory bodies in Scotland, whilst Schedule 1 of the Bill identifies a narrower list of bodies deemed to be regulators for the purposes of Part 1 of the Bill. Historic Scotland, Marine Scotland and Transport Scotland are not included in the list of regulators covered by Part 1 of the Bill because they have no legal identity separate from that of Scottish Ministers. As such, the Scottish Government have taken the decision that it is more appropriate to effect by administrative means the results that would have flowed from listing these parts of the Scottish Administration in Schedule 1 of the Bill.
### Table 2: Scottish Regulatory Organisations

<table>
<thead>
<tr>
<th>Regulatory Organisations identified in the consultation</th>
<th>Regulatory organisations identified in Schedule 1 of the Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Accountant in Bankruptcy</td>
<td>• Accountant in Bankruptcy</td>
</tr>
<tr>
<td>• Local authorities</td>
<td>• Local authorities</td>
</tr>
<tr>
<td>• Scottish Charity Regulator</td>
<td>• Scottish Charity Regulator</td>
</tr>
<tr>
<td>• SEPA</td>
<td>• SEPA</td>
</tr>
<tr>
<td>• The Scottish Housing Regulator</td>
<td>• The Scottish Housing Regulator</td>
</tr>
<tr>
<td>• SNH</td>
<td>• SNH</td>
</tr>
<tr>
<td>• Social Care and Social Work Improvement Scotland</td>
<td>• Social Care and Social Work Improvement Scotland</td>
</tr>
<tr>
<td>• VisitScotland</td>
<td>• VisitScotland</td>
</tr>
<tr>
<td>• The Food Standards Agency (Scotland)</td>
<td>• The Food Standards Agency (Scotland)</td>
</tr>
<tr>
<td>• Historic Scotland</td>
<td>• Healthcare Improvement Scotland</td>
</tr>
<tr>
<td>• Marine Scotland</td>
<td></td>
</tr>
<tr>
<td>• Transport Scotland</td>
<td></td>
</tr>
</tbody>
</table>

**Section 1** gives Scottish Ministers the power to make regulations containing provisions that they consider will encourage or improve consistency in the exercise of regulatory functions by one or more regulators. As indicated above the regulators affected are listed in Schedule 1 (introduced by Section 1(5)). Regulations must specify the regulators to which they apply, and may specify the specific regulatory functions and the arrangements for their implementation. They may also require regulators to co-operate or co-ordinate with other regulators. Before making these regulations Scottish Minister must consult with regulators, representatives of those substantially affected and any others as appropriate.

This section also defines “consistency” as including the ways in which regulators impose, set, secure compliance with or enforce regulatory requirement.

**Section 2** clarifies that Section 1 may require regulators to impose or set new regulatory requirements, or secure compliance with them. The regulations may include provision requiring a regulator to amend or remove an existing regulatory requirement (although where an enactment requires a regulatory requirement to be imposed or set by the regulator, that requirement can only be modified or removed if the regulations otherwise make provision having an equivalent effect). In addition, it states that Scottish Ministers may direct that any provision of the regulations, for a temporary period of up to 6 months, is not to apply to a particular regulator or that it is to apply with modifications. Regulations can be amended for adjustments to be in place for a longer period. The detail of any criteria to be used to assess any request to opt-out from national standards has not been set out in the Bill.

**Section 3** goes on to explain that, if a regulator fails to comply, it may be directed to remedy the breach, failing which Scottish Ministers may do so or arrange for another person to do so (including through an application to the Court of Session if necessary). This section also makes provision for costs to be recovered from offending regulators as a civil debt.
Section 4 places a duty on listed regulators to exercise its regulatory functions in a way that contributes to sustainable economic growth, “except to the extent that it would be inconsistent with the exercise of those functions to do so”. The duty does not apply to a regulator to the extent that the regulator is, by or under any enactment, already subject to a duty to the same effect.

Scottish Ministers may provide guidance to regulators about this, and the regulators are required to “have regard to” this guidance.

Sections 5 and 6 provide for Scottish Ministers to issue a code of practice in relation to the exercise of regulatory functions by specified regulators (from the list at Schedule 1). The code itself must be consistent with the principles of better regulation – transparency, accountability, proportionality, consistency and targeted only at cases where action is needed. The code should also support the principle that regulation should be consistent with supporting sustainable economic growth (other than where this is considered to be inconsistent with the exercise of the regulatory functions). Ministers must consult on the code, and cannot issue the code of practice unless a draft has been laid before and approved by Parliament. Each regulator must have regard to the code.

Section 7 enables the Scottish Ministers to (by order) amend the list of regulators set out in Schedule 1, either adding to the list, removing bodies from the list or amending entries. This section also allows Ministers to amend the regulatory functions of the specified regulators. Any proposals to add a regulator to the list, or extend the regulatory functions of existing regulators are subject to affirmative procedure; other changes are subject to negative procedure.

Primary Authority Partnerships

A number of respondents to the Proposals for a Better Regulation Bill consultation (Scottish Government 2012c) noted the Primary Authority (PA) principle as an effective means of delivering consistency of enforcement. It currently applies in Scotland on regulatory matters reserved to the UK Government.

Further information on existing Primary Authority principle is available via the Better Regulation Delivery Office (BRDO) (2012). The BRDO provides some background to the scheme as follows:

Primary Authority was introduced to address businesses’ concerns about how local authorities apply environmental health, licensing and trading standards legislation, including contradictory advice, wasted resources and duplicated efforts, and the lack of effective dispute resolution when councils disagree.

The scheme gives businesses the right to form a statutory partnership with one local authority, which then provides robust and reliable advice for other councils to take into account when carrying out inspections or dealing with non-compliance.

This entails a fundamental shift in the relationship between the regulated and the regulator to the benefit of both parties

There were some positive remarks on the Primary Authority principle in the consultation responses, for example, the Scottish Retail Consortium (2012) stated:

Rather than imposing national standards on regulators, the requirement to abide by agreed standards is only relevant where the business has committed to the scrutiny and control of the PA, delivering confidence that there is a willingness to comply.
In a letter to the EETC (2013b) Fergus Ewing MSP indicated the Government’s intention to lodge a Stage 2 Amendment, setting out the reasons as follows:

The Bill as introduced does not feature a specific and additional proposal which emerge from the consultation in 2012: that some equivalent of Primary Authority Partnerships should be adopted in Scotland. A further consultation will be initiated shortly, focused on establishing whether there is broad support for a Scottish equivalent of the current UK Government scheme, and what that would involve. Subject of course to stakeholder responses, I am keen to have the option of adopting Primary Authority Partnerships at the earliest opportunity, by introducing Stage 2 amendments to the Regulatory Reform (Scotland) Bill.

Thus, this proposal is not currently included in the Bill as the Scottish Government wishes to consult formally on this first, with a view to including it as a Stage 2 amendment subject to consultation responses.

PART 2 – ENVIRONMENTAL REGULATION

CHAPTER 1 – REGULATIONS FOR PROTECTING AND IMPROVING THE ENVIRONMENT

Background

As Scotland’s principal environmental regulator, SEPA’s objectives, general duties and legal powers are wide-ranging; with 33 pieces of primary and secondary legislation\(^2\) implementing 29 separate regimes.

Much of SEPA’s business relates to giving advice and support, carrying out inspections, reviews, variations, and revocations of licences which manage the use of water, land and air; and controlling pollution (which in turn might harm the environment and human health) from waste and radioactive materials (known as the 4 Main Regimes – all have different permissioning structures). Other principal responsibilities include monitoring, analysing and reporting on the state of Scotland’s environment; running Scotland’s flood warning systems; and helping implement the National Waste Strategy.

The consultation on Proposals for an Integrated Framework of Environmental Regulation (Scottish Government & SEPA 2012a) set out a refined general purpose for SEPA and aimed to structure the objectives of its wide ranging legislative regimes around creating a new legislative framework for environmental regulation and enforcement. The outcomes sought from this new framework are a single proportionate and risk-based permissioning structure (i.e. integrating the requirements of the 4 Main Regimes), a single consistent regulatory procedure (which will include common terminology) and a flexible approach to permissioning.

Broadly, the consultation sought agreement on SEPA moving “from being a process and role driven organisation concentrating on separate implementation of individual regulations, to one that is more risk based […]”.

Individual consultation responses for this part of the proposed legislation have not been published online, however the Scottish Government has made them available in hard copy from

\(^2\) Particularly the Environment Act 1995 and the Water Environment and Water Services (Scotland) Act 2003, as well as other EU and international obligations.
its library. The analysis of responses (Scottish Government & SEPA 2012b) indicated that there was strong agreement for some of the proposals, and more general agreement for others, in particular:

- stakeholders felt that the proposals would provide SEPA with increased flexibility to escalate or de-escalate broader environmental risks than they currently do
- several respondees commented on the need for SEPA to demonstrate the highest levels of consistency in its delivery and enforcement
- the introduction of common terminology across the 4 Main Regimes to support the new permissioning hierarchy was welcomed. This was seen as making it easier for regulated business to understand what type of permissions they need and why, particularly those requiring more than one permission.
- many stressed that the proposed approach would be simpler, easier to understand, fairer, more integrated, more proportionate and, overall, more effective. The outcome based approach and closer working between SEPA and other public bodies and industry sectors was also welcomed
- there were a small number of strong and conflicting views with some viewing the proposals as being too focused on environmental protection rather than encouraging business growth, whilst others were concerned that cost savings and business growth were the main drivers and that this would be to the detriment of the environment

Proposals in the Bill

Broadly, Chapter 1 gives Scottish Ministers powers to bring forward secondary legislation, under the negative procedure\(^3\), for the purpose of protecting and improving the environment, known as the “general purpose”.

Section 8 sets out the “general purpose” as “to enable provision to be made for or in connection with protecting and improving the environment”. This extends to “regulating environmental activities” and “implementing EU obligations, and international obligations, relating to protecting and improving the environment”.

Section 9 defines “environmental activities” as:

> activities that are capable of causing, or liable to cause, environmental harm [and connected activities]

These activities might be of any nature, e.g. industrial, commercial or otherwise and include “the production, treatment, keeping, depositing or disposal of any substance”.

This section further defines “protecting and improving the environment” as:

> preventing deterioration (or further deterioration) of, and protecting and enhancing, the status of ecosystems, and promoting the sustainable use of natural resources based on the long-term protection of available natural resources.

A further definition of “environmental harm” is included, which covers human health and other living organisms, as well as harm to the quality of the environment as a whole, or its constituent parts i.e. air, land or water.

\(^3\) Unless they add to, replace or omit of the text of an Act.
Section 10 enables the regulation of a wide range of relevant activities (e.g. emissions, regulators, permits, and charging schemes), as specified in Schedule 2, which it also allows for. These powers might be used to consolidate, in one instrument, environmental protection measures made under different enactments including those of the Water Environment Controlled Activities, and the Pollution Prevention and Control regimes.

Section 11 requires Scottish Ministers to consult “any regulator on whom the proposed regulations would confer functions”, and any other persons as they think fit e.g. local government, industry, agriculture; before making regulations relating to protecting and improving the environment.

CHAPTER 2 – SEPA’S POWERS OF ENFORCEMENT

Background

SEPA currently uses a variety of tools to pursue compliance with environmental legislation, e.g. writing advisory/warning letters to confirm requirements; serving prohibition notices; ensuring compliance through environmental licencing; and reporting breaches of environmental legislation to Procurators Fiscal. However, they currently have relatively limited powers to impose penalties, for example:

- €100 can be imposed for every tonne of carbon dioxide for which allowances have not been surrendered under the Greenhouse Gas Emissions Trading Scheme
- A civil penalty for failures relating to registration and record keeping/reporting can be made under the CRC Energy Efficiency Scheme
- A non-compliant operator can voluntarily issue an enforcement undertaking to SEPA to repair environmental damage under the Reservoirs (Scotland) Act 2011

SEPA’s costs of enforcement are currently funded by grant-in-aid, whereas equivalent agencies in the UK can recover the costs of investigation from operators who have been successfully prosecuted. However, the Marine (Scotland) Act 2010 includes a requirement that the marine license fee is based on full cost recovery. The Reservoirs (Scotland) Act 2011 also includes provision for SEPA to recover costs associated with issuing stop notices or imposing further enforcement measures.

SEPA currently tends to issue a press release when a criminal case that it has been engaged in is concluded. In some jurisdictions regulatory regimes include sanctions which require the non-compliant individual or business to publicise their non-compliance and the nature of the sanction imposed. Adverse publicity orders have been used as a penal sanction in New South Wales and other Australian jurisdictions for over a decade (Law Reform Commission 2003).

Discussions on SEPA’s powers of enforcement have been on-going since the 2006 consultation entitled The Way Forward for the Enforcement of Environmental Law in Scotland (Scottish Executive 2006). More recently, the consultation on Proposals for an Integrated Framework of Environmental Regulation (Scottish Government and SEPA 2012a) noted that:

The current options to deal with environmental offences are limited […]. In most regimes there is a gap between the ability of SEPA to serve some sort of notice to require an operator to do something and a referral of a report to the Procurator Fiscal. This gives rise to a disproportionate use of criminal sanctions.
The consultation proposed that SEPA should have the power to

- impose fixed and discretionary financial penalties in a greater range of circumstances
- accept enforcement undertakings in a greater range of circumstances
- require non-compliant operators to publicise the damage they have undertaken and action they are taking to address this
- recover the costs incurred in investigating and enforcing environmental legislation

Furthermore, the consultation proposed that SEPA be given powers to use fixed penalties for minor offences of £500 for an individual and £1k for companies and a £40k cap for a discretionary penalty. Of those that responded 76% agreed that SEPA should have the power to use fixed and discretionary financial penalties, 43% of those that responded agreed with the level of penalty proposed; those that disagreed (39%) with the level of both fixed and discretionary penalties were divided as to whether they felt these were too low or too high.

In relation to whether SEPA should be given the power to accept enforcement undertakings in a greater range of circumstances 91% of those that responded supported SEPA having this power. On the proposal that SEPA be able to require non-compliant operators to publicise the damage they have caused and action they are taking to correct things 49% of those that responded agreed and 41% disagreed (Scottish Government & SEPA 2012b).

Proposals in the Bill

Section 12 enables Scottish Ministers to make provision for SEPA to impose a fixed monetary penalty on a person in relation to a relevant offence:

…where SEPA is satisfied on the balance of probabilities that the person has committed the relevant offence

The Bill specifies that:

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

(Level 4 on the standard scale of fines as provided by the Criminal Procedure (Scotland) Act 1995 is currently £2.5k)

Section 13 requires that any order about a fixed monetary penalty

- requires SEPA to issue a notice of intent prior to issuing a fixed monetary penalty
- enables the person served with a notice to make written representations to SEPA
- requires SEPA to have regard to any representations
- enables the person served with the fixed monetary penalty to appeal against the decision to issue it
- requires SEPA to serve a final notice

This section also enables an Order to allow someone served with a notice of intent:

…the opportunity to discharge the person’s liability for the fixed monetary penalty by payment of a sum specified in the notice of intent […].
Section 14 avoids a person being subject to a fixed monetary penalty and criminal proceedings for the same offence.

Section 15 enables Scottish Ministers to provide for SEPA to impose variable monetary penalties up to a maximum of £40k on persons where SEPA is:

….satisfied on the balance of probabilities that the person has committed the relevant offence

Sections 16 details the procedure for the imposition of a variable monetary penalty and includes a requirement for SEPA to serve on the person a notice (a “notice of intent”), have regard to written representations made by the person served and to allow them to appeal.

Section 17 details the process to avoid a person being sanctioned by both monetary penalties and criminal proceedings.

Section 18 enables Scottish Ministers to issue a non-compliance penalty where an undertaking offered in response to a variable monetary penalty has been accepted by SEPA but not complied with. The Bill states that this provision may also:

- specify the amount of the non-compliance penalty
- provide for the amount to be calculated by reference to criteria specified by order by the Scottish Ministers
- provide for the amount to be determined by SEPA

Section 19 enables Scottish Ministers to make provision by order for an “enforcement undertaking”, details the process for pursuing such an undertaking and specifies that the action set out in the undertaking should secure that the offence does not “continue or recur”, and that “so far as possible [the site should be] restored to what it would have been if the offence had not been committed”.

Section 20 prevents both a fixed and variable monetary penalty to be issued for the same act or where criminal proceedings have commenced.

Section 21 enables early payment discounts, interest or other penalties for late payments to be applied and for recovery of any monetary payment to be pursued if it were a civil debt.

Section 22 allows Scottish Ministers to include in an order to enable SEPA to recover investigation and administration costs from a person issued with a variable monetary penalty.

Section 23 provides the Lord Advocate with powers to issue and revise guidance to SEPA relating to fixed and variable penalties and enforcement undertakings, requires SEPA to comply with such guidance and requires SEPA to publish guidance on enforcement measures.

Section 24 enables that where the Scottish Ministers make an order for the imposition of a fixed or variable monetary penalty and acceptance of an enforcement undertaking may require SEPA to publish information on these cases.

Section 25 provides for the interpretation of expressions used in Chapter 2 relating to penalties and enforcement, for example “late payment penalties” which “means a requirement to pay interest or other financial penalties for late payment of a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty included in an order under this Chapter”.
CHAPTER 3 – COURT POWERS

Background

Court convictions for environmental crime in Scotland typically result in the imposition of a fine. The SEPA Enforcement Report 2011/2012 (SEPA 2013) notes that 26 convictions were made following cases instigated by SEPA. Twenty-one of these cases resulted in a fine, four resulted in admonishment, and one resulted in a community service order. In 2011-2012 the fines associated with these 21 cases totalled £124,450, with an average fine of £5,926.

Currently the Water Environment (Controlled Activities) (Scotland) Regulations 2011 and The Pollution Prevention and Control (Scotland) Regulations 2000 give courts the power to order an offence to be remediated – either in addition or instead of imposing any punishment.

The joint SEPA and Scottish Government consultation on Proposals for an Integrated Framework of Environmental Regulation (Scottish Government and SEPA 2012a) built on an earlier consultation (Scottish Executive 2006) and sought views on proposals that:

- criminal courts should be given a wider range of sentencing options (including publicity orders)
- the principles on compensation orders (as set out in the Criminal Procedure (Scotland) Act 1995) should be extended so that “loss or damage” includes the cost to SEPA, or other third parties, of restoring the position to what it would have been had the offence not occurred
- the courts could apply a power currently available to them under the Controlled Activities and Pollution Prevention and Control Regulations to order an offence to be remediated, in addition to or instead of imposing any punishment more widely
- in determining the level of any fine the Courts should consider any financial benefit that may have accrued as a consequence of an environmental offence

The analysis of responses (Scottish Government & SEPA 2012b) highlighted that:

- of those that responded to the question about publicity orders 64% agreed that the courts should also have this power. Some respondents felt that only the courts and not SEPA should have this power, others felt that the courts would have no need for this power if they were given to SEPA. A number of responses identified the need for an appeal. Of the respondents 28% disagreed with the courts having this power and some opposed both SEPA and the courts having these powers
- in relation to the question about the extension of powers relating to remediation and compensation 76% of those that responded agreed that these powers should be extended with many respondents noting that setting a proportionate punishment for causing significant damage to the environment was consistent with the principle of the polluter pays. Of those that responded to the proposal that courts should be able to consider any financial gain that had accrued in setting the level of fine 71% agreed

Proposals in the Bill

Section 26 sets out provision for compensation orders. The Bill states that:

[...] compensation to a relevant person for costs incurred or to be incurred by the relevant person in preventing, reducing, remediating or mitigating the effects of –
(a) any harm to the environment resulting directly or indirectly from the offence,
(b) any other harm, loss, damage or adverse impacts so resulting from the offence.

Compensation of up to £50k may be paid to SEPA, a local authority or an owner or occupier of the land where that harm or impact has occurred for restoring the position to what it would have been before any offence took place.

Section 27 requires that criminal courts have regard to any financial benefit which has accrued or is likely to accrue to a person convicted of a relevant offence as a consequence in determining the amount of fine.

Section 28 enables the criminal courts to make a publicity order alongside or in place of other sentences that would require a person convicted of a relevant offence to publicise details of the offence. A “publicity order” made by the court would include:

- the fact that the person has been convicted of the relevant offence
- specified particulars of the offence
- specified particulars of any other sentence passed by the court in respect of the offence

This section of the Bill makes it an offence for a person not to comply with such a publicity order and is liable:

- on summary conviction, to a fine not exceeding £40,000
- on conviction of indictment, to a fine

CHAPTER 4 – MISCELLANEOUS

Background

This chapter makes provision for a new and broad range of enforcement tools which the Policy Memorandum states aim to allow SEPA “the right range of interventions to tackle poor performance, and better protect the environment for the benefit of all”. Some of the following provisions were consulted on in Proposals for an Integrated Framework of Environmental Regulation (Scottish Government & SEPA 2012a).

Proposals in the Bill

Sections 29 & 30 relate to a new offence of vicarious liability. At present, there is no regime in place for the vicarious liability of employers or principals for environmental offences committed by their employees or agents; however the principle of extending liability to employers has recently been adopted in other Scottish regimes e.g. in alcohol sales and licensing, and in relation to the killing or taking of wild birds on behalf of owners or managers of land.

The development of a regime of this nature was not specifically proposed in the consultation; however the analysis of responses (Scottish Government & SEPA 2012b) notes that:

Stakeholders highlighted a number of potential implementation issues relating to the flexibility of the proposals. In a situation involving multiple activities and different contractors SEPA would need to clearly identify and assign responsibility.
Sections 29 & 30 therefore provide that, where an employee or agent commits a relevant offence (as set out under s.39) while acting for or employed by someone else (e.g. an individual, corporate body or partnership), then that person may also be guilty of the offence and punished accordingly.

Sections 31 & 32 relate to new offences where **significant environmental harm** is caused. Under current licensing regimes, if the environment is damaged due to a deliberate decision e.g. failure to maintain equipment or negligence in maintenance systems, the offence considered by the courts is one of failure to comply with a permit condition, and the level of environmental harm caused is secondary to the breach. The consultation notes that:

> It is sometimes difficult for the courts to appreciate the significance of environmental cases which are based mainly on breaches of regulatory requirements. We therefore intend to create an offence which relates to knowingly causing significant environmental harm.

The analysis of responses (Scottish Government & SEPA 2012b) recognises that:

> The majority of respondees wanted to see an increase in penalty levels to target, in particular, irresponsible operators. They argued that setting a proportionate punishment for significant damage to the environment was consistent with the polluter pays principle.

Nevertheless:

> Some felt that the current system through the courts is enough of a deterrent and that the level of damage should include costs incurred by SEPA or third parties of restoring the position to what it would have been if the offence had not taken place.

A new offence of causing or permitting significant environmental harm is therefore proposed in Section 31. Acting in a way that is likely to cause harm, failing to act in a way that such failure is likely to cause such harm, or permitting another person to act (or fail to act) in a way that is likely to cause such harm, also constitutes the offence. This aims to allow for courts to take more effective and appropriate action in line with SEPA’s new integrated approach to regulation.

The Explanatory Notes state:

> Environmental harm (as defined in section 9) is ‘significant’ if it has serious adverse effects whether locally, nationally or on a wider scale, or it is caused to an area designated by an order made by the Scottish Ministers. Different areas may be designated for different purposes and different types of harm.

On summary conviction, this criminal offence invites a fine not exceeding £40k, imprisonment for up to 12 months or both or, on conviction on indictment, for an unlimited fine or imprisonment or both. Under Section 32, an order can also be made to require the offender to remediate or mitigate the environmental harm that they have caused; failure to comply with this “remediation order” can invite a fine not exceeding £40k on summary conviction and, on conviction on indictment, with an unlimited fine.

The analysis of responses to the consultation (Scottish Government & SEPA 2012b) shows that these sanctions were largely supported, albeit to varying degrees. Only 49% of respondents agreed that “SEPA should be able to require non-compliant operators to publicise the damage they have caused and the action they are taking to put things right”.

Section 33 amends the Criminal Procedure (Scotland) Act 1995 to allow the Lord Advocate, or the prosecutor in summary proceedings, to appeal against any decision of a court not to make a publicity order or remediation order which Sections 28 and 32 allow for.
Section 34 relates to contaminated land and special sites, and amends the Environmental Protection Act 1990 by proposing the following provisions:

- enabling a local authority, if satisfied that land is no longer contaminated, to issue a non-contamination notice. This means that the land is no longer subject to the relevant regime in the 1990 Act. However, some actions e.g. monitoring could still be required
- enabling the local authority or SEPA to remove from a register of contaminated land a notice designating a special site⁴; if it considers that the land in question should no longer be specified as such. The effect of this is that the designation is terminated and any remediation notices cease to have effect

These provisions were not consulted on formally.

Sections 35 & 36 relate to waste management and offences by partnerships. At present, it is an offence under the Control of Pollution (Amendment) Act 1989 to transport controlled waste without being registered by SEPA. An application may be refused or a registration revoked where the applicant, the holder or a “relevant person” has been convicted of an offence. The Environmental Protection Act 1990 sets out that a waste regulation authority must determine whether an applicant or holder of a waste management licence⁵ is “fit and proper” i.e. convicted of a relevant offence. Sections 35 therefore:

- amends the 1989 Act so that the definition of “relevant person” includes a partnership
- amends the 1990 Act to allow a waste regulation authority when granting, revoking, suspending or transferring a waste management licence, to determine whether an applicant or holder, including a partnership, is “fit and proper”

No formal consultation has taken place on these provisions.

Section 37 relates to air quality assessments. The Environment Act 1995 currently requires local authorities to conduct a review of the air quality within their area, and an air quality management area must be designated where it appears that a relevant standard or objective is not being achieved. Thereafter, the Act requires further reporting and assessment of air quality in that area.

This section proposes to repeal the requirement for a local authority to undertake further air quality assessments. At present, this has not been consulted on, and it is not clear from either the Explanatory Notes or the Policy Memorandum why this repeal is necessary. However the Scottish Government (2013f) clarifies as follows:

We will be consulting on proposals for a comprehensive review of the Local Air Quality Management system later in 2013, and it is intended that this will be one of the proposals.

We wish to reduce the air quality reporting burden on local authorities in order to free up more time and resources for taking action to improve air quality. This is the only type of report that is specified in legislation, but is generally viewed as the least useful. All other reporting requirements are covered by guidance only hence the inclusion of this in the Bill before the formal consultation exercise later in the year.

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⁴ This is a specific designation for land where e.g. oil has been extracted, purified, or refined; or explosives processed or manufactured. Therefore it is likely that serious harm or serious pollution of land or the water environment might be caused.

⁵ This authorises the treatment, keeping or disposal of waste on land, or the treatment or disposal of waste by means of mobile plant.
CHAPTER 5 – GENERAL PURPOSE OF SEPA

Background

SEPA was established by the Environment Act 1995. This Act transferred a number of functions of the previous river purification authorities, waste regulation authorities, disposal authorities, chief inspector for Scotland, local authorities and the Secretary of State. The Act also provided SEPA with a number of duties with respect to pollution control, water, Natural Heritage Areas and sites of special interest and with powers including to purchase land compulsorily, obtain information about land and promote or oppose private legislation.

The Act does not specify a statutory purpose or objectives for SEPA although SEPA’s pollution control powers are stated as being:

[...] exercisable for the purpose of preventing or minimising, or remedying or mitigating the effects of pollution of the environment.

The 1995 Act also requires Scottish Ministers to give guidance to SEPA “with respect to aims and objectives which they consider it appropriate for SEPA to pursue in the exercise of its functions.” This guidance must also set out the contribution to attaining the objective of sustainable development that it is appropriate for SEPA to make.

The Scottish Government and SEPA jointly consulted on Future Funding Arrangements for SEPA (Scottish Government & SEPA 2012c) which proposed to:

[...] provide that SEPA’s functions are exercisable for the purpose of protecting and improving the environment, including the sustainable management of natural resources and that, in exercising its functions in pursuit of that primary purpose, SEPA should contribute to improving the health and well-being of the people of Scotland and the achievement of sustainable economic growth.

Scottish Ministers would be able to give guidance to SEPA on the implementation of the statutory purpose.

The analysis of responses (Scottish Government & SEPA 2013) highlights that 62% of those that responded agreed with the proposed statutory purpose for SEPA and 33% disagreed. The analysis notes that several responses were particularly positive about incorporating the sustainable use of natural resources into SEPA’s remit. The document notes that the three main areas of concern that were raised relate to replacing provisions in the Environment Act 1995 relating to sustainable development with provisions referring to sustainable economic growth, potential overlap and duplication resulting from the widening of SEPA’s responsibilities and the level of justification provided for making changes to the Environment Act 1995.

Proposals in the Bill

Section 38 of the Bill amends the Environment Act 1995 to insert the following general purpose of SEPA:

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

(2) In carrying out its functions for that purpose SEPA must, except to the extent that it would be inconsistent with subsection (1) to do so, contribute to-
(a) improving the health and well being of people in Scotland, and
(b) achieving sustainable economic growth.

Under Part 4, however with relevance to this section, **Section 43** repeals sections 32 and 34 of the 1995 Act which relate to general environmental and recreational duties, and general duties with respect to water.

**CHAPTER 6 – INTERPRETATION OF PART 2**

**Section 39** defines “relevant offence” as an offence “specified in an order made by the Scottish Ministers”, and SEPA as the “Scottish Environment Protection Agency”.

**PART 3 - MISCELLANEOUS**

**MARINE LICENSING DECISIONS**

**Background**

In relation to decisions on most infrastructure projects such as roads, harbours and ports, the planning system allows people or bodies with sufficient interest to a statutory right of appeal to the courts against Scottish Ministers’ decisions. The procedure for challenging decisions on wind farms is different, as there is no express right of appeal to the courts, and

The Scottish Government’s consultation on Proposals for a Better Regulation Bill (Scottish Government 2012a) concedes that this “gives rise to a confusing and complex picture, particularly in relation to projects that may require more than one form of consent”.

Currently, an applicant wishing to challenge Scottish Ministers’ decisions in respect of a marine licence may appeal to the sheriff against the refusal to grant a licence or the conditions attached to a licence. The sheriff may direct that Ministers must grant a licence or grant it subject to certain conditions.

The consultation (Scottish Government 2012a) asked whether there would be merit in “extending the express right of appeal to the Court of Session for people or bodies with a sufficient interest in the project to those classes of decision made by Scottish Ministers under legislation governing infrastructure projects”; i.e. allowing for a statutory right of appeal.

There were a relatively small number of responses to this issue; 13 in total (16% of those that responded to the consultation); however, only eight included comments. Independent analysis of the responses (Scottish Government 2013a) shows that there was “overwhelming support […] for the proposal to extend access to the statutory review mechanism to people or bodies with sufficient interest in the legality of Ministers’ decisions in relation to the granting of a marine licence”. There was also a “two to one overall majority in favour of a common review procedure across all legislation.” Views were however divided amongst local authority respondents.

Some respondents, in particular the Royal Town Planning Institute Scotland (2012), and the UK Environmental Law Association (2012) considered that all circumstances where infrastructure projects are to be approved by Scottish Ministers should incorporate an express right of appeal by relevant parties.
Proposals in the Bill

Section 40 adds to the Marine (Scotland) Act 2010 by extending statutory appeal mechanisms to decisions by Scottish Ministers relating to offshore marine energy projects of 1MW and above within the Scottish territorial sea.

The appeal will be to the Inner House of the Court of Session with a six-week time limit, ultimately appealable to the Supreme Court. Because of the complex nature of UK energy policy, and the significant overlaps between devolved and reserved competencies, the Policy Memorandum explains how this will work in practice:

To maintain and apply that approach, consequential provision would require to be passed following the passage of the Bill by the UK Parliament in relation to energy consents under the Electricity Act 1989 and marine licensing decisions beyond 12 nautical miles, which fall within reserved matters (though in practice are decisions made by the Scottish Ministers under the devolution settlement). This would require an order to be made under section 104 of the Scotland Act 1998 providing for consequential modifications to be made to the 1989 Act and to the Marine and Coastal Access Act 2009 in consequence of legislation passed by the Scottish Parliament. The section 104 order would be laid before the UK Parliament and would be debated in both houses.

PLANNING AUTHORITIES’ FUNCTIONS: CHARGES AND FEES

Background

Section 252 of the Town and Country Planning (Scotland) Act 1997 allows Scottish Ministers to make Regulations that establish a system of fees payable to planning authorities by applicants for planning permission. These Regulations must be approved by the Scottish Parliament under the affirmative procedure.

The current fees system, including the amounts payable, is established by The Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations 2004, as amended. The fees system is fairly complex, basing the amounts payable on the type and the size of a proposed development. Applications for alterations to an existing dwelling currently cost £192, while the maximum amount that can be paid for any type of development is currently £28,800.

The Scottish Government (2012b) consulted on Fees for Planning Applications between March and June 2012, and proposed the following:

- the fee maximum is raised to £100k
- fee levels are linked to performance
- new categories are introduced for retail and leisure and energy generation
- increases in fees for the following:
  - cost of a single house
  - retail and leisure developments
  - energy generation
- the revised fees are intended to be inclusive of neighbour notification advertising costs. The present requirement to recoup such costs from the applicant will be removed
This consultation stated that Scottish Ministers maintain that any increases in fees must be inextricably linked to sustained improvements in performance and that Ministers are prepared ultimately to take steps to reduce the fee levels in an authority where improved performance is not maintained.

The consultation on Proposals for a Better Regulation Bill (Scottish Government 2012c) welcomed evidence and views on the most effective mechanism for introducing the proposed link between fees and performance on the basis that planning legislation would be amended via the Better Regulation Bill, to give to Scottish Ministers powers to set the level of fee payable in each authority based on an assessment of performance.

There were 154 responses to the Fees for Planning Applications Consultation (Scottish Government 2012b), and the analysis of consultation responses (Scottish Government 2012c) outlined a number of main themes raised by respondents, summarising the responses to the proposals to link planning fees to planning authority performance as follows:

While there was general agreement with this principle, some worried that it may in fact be counter-productive. The predominant concern from across the respondent groups was that linking fees to performance would encourage rushed decisions by rewarding speed rather than quality. Others also expressed concern that withdrawing funds from poorly performing authorities would only result in those authorities being under-resourced.

Responses to the section on planning fees in the consultation on the Proposals for a Better Regulation Bill (Scottish Government 2012a) were submitted by many of the organisations that responded to the first consultation and did not raise any substantive new issues.

The full proposals in the fees consultation paper (Scottish Government 2012b) were not implemented. As approved by the Scottish Parliament the Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2013 increased planning fees by approximately 20% on 6 April 2013. In addition a high level group led by the Scottish Government and COSLA is currently reviewing planning performance and examining the wider reform of planning fee levels linked to performance (Scottish Government 2013g).

Proposals in the Bill

Section 41 amends section 252 of the Town and Country Planning (Scotland) Act 1997 to:

- allow Scottish Ministers to make provision in planning fee Regulations for different fees to be levied by different planning authorities where Scottish Ministers are satisfied that the performance of the Planning Authority is not, or has not been, carried out satisfactorily
- remove the requirement for planning fees Regulations to be approved by the affirmative procedure

The consultation on Fees for Planning Applications (Scottish Government 2012d) stated that “The Planning Performance Framework, developed by the Heads of Planning Scotland and the Scottish Government, will provide the foundation for assessing authority performance. The Planning Performance Framework (Heads of Planning Scotland 2012) (PPF) was developed by Heads of Planning Scotland, representing Scotland’s most senior local authority planners, after discussion with key stakeholders, including the Scottish Government. The PPF deals with performance across the development management, development planning and enforcement activities of a planning authority. The details of how performance will be assessed and defining what constitutes satisfactory performance are currently being discussed through the high-level group on performance (Scottish Government 2013g).
STREET TRADERS LICENSES

Background

The Civic Government (Scotland) Act 1982 requires a licensing authority to only issue a Street Trading Licence to a person if the local authority has issued a 'Certificate of Compliance’ in respect of the vehicle from which the applicant will be trading. The Act requires the certificate to state that the vehicle, kiosk or moveable stall complies with such requirements as the Scottish Ministers may make by statutory order. The current compliance requirements set by Scottish Ministers are those specified in Schedule 2 of the Food Hygiene (Scotland) Regulations 2006. As a result mobile food vans have to be inspected separately by each authority in which they operate (Scottish Government 2012a).

This practice has led to some complaints from businesses of inconsistent application of standards. In particular, the Consultation on Proposals for a Better Regulation Bill (2012a) highlighted a case study involving a bakery van operating across two local authority areas which illustrated the inconsistencies and difficulties faced:

One Council used a risk based case-by-case approach and was satisfied with the van which has hand washing facilities and procedures in place to ensure hygiene and quality is maintained (keeping a supply of utensils in the van and returning to the bakery if all utensils have been contaminated). However the other Council asked that a utensils sink be installed in the van at a total cost estimated at £1000.

As a result, the consultation included questions in this area. There was a very high level of support for the development of national standards and a change in legislation requiring moveable food businesses to be inspected only by the local authority in which the business is registered/based. This would mean that local authorities would have to accept certificates of compliance issued by their counterparts in other areas. There was a majority of support from all the respondent groups making submissions with the exception of public bodies where views were divided.

However, a number of qualifications and recommendations on how the system could work were also put forward. The Royal Environmental Health Institute of Scotland (2012) raised concerns that it could result in businesses operating within other local authority areas practicing poor food handling, highlighting:

For example, what is being suggested would mean that moveable food businesses could operate at a major event such as ‘T in the Park’ serving tens of thousands of people without their food handling and hygiene practices being open to inspection.

Proposals in the Bill

Section 42 proposes to amend section 39(4) of the Civic Government (Scotland) Act 1982 to make it clear that the certificate to be produced for the purposes of a street trader’s licence application for a mobile food business is to be from a food authority that has registered that establishment. If a mobile food business wishes to trade in more than one local authority area in Scotland it can use a certificate from the same registering food authority for each street trader’s licence application.
PART 4 - GENERAL

Parts 43 to 48 introduce schedule 3 which makes provision for a number of minor and consequential modifications. These parts also repeal spent provisions, and make provision in respect of subordinate legislation, as well as Crown application, commencement and the short title.
SOURCES


Civic Government (Scotland) Act 1982 c.45


Control of Pollution (Amendment) Act 1989 c.14

Criminal Procedure (Scotland) Act 1995 c.46


Environment Act 1995 c.25

Environmental Protection Act 1990 c.43

Electricity Act 1989 c.29


Food Hygiene (Scotland) Regulations 2006 No.3


Marine (Scotland) Act 2010 asp.5

Marine and Coastal Access Act 2009 c.23


Reservoirs (Scotland) Act 2011 asp.9


Scotland Act 1998 c.46


Scottish Government (2013g) Personal Communication. [Unpublished].


Town and Country Planning (Scotland) Act 1997 c.8

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Regulations 2004 No.219

Town and Country Planning (Fees for Applications and Deemed Applications) (Scotland) Amendment Regulations 2013 No.105

Pollution Prevention and Control (Scotland) Regulations 2000 No.323


The Water Environment (Controlled Activities) (Scotland) Regulations 2011 No.209
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