

**Consultation Title: REGULATORY REFORM (SCOTLAND) BILL
STAGE ONE WRITTEN EVIDENCE**

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To: racce.committee@scottish.parliament.uk

**The Clerk to the Rural Affairs, Climate Change and
Environment Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP**

**From: Anne Gray
Policy Officer (Environment)
Scottish Land & Estates
Stuart House
Eskmills Business Park
Musselburgh
EH21 7PB**

Telephone: (0131) 653 5400

E Mail: anne.gray@scottishlandandestates.co.uk

About Us

Scottish Land & Estates represents land owners, managers and rural businesses across Scotland with wide ranging interests including agriculture, forestry, moorland management and tourism. As such environmental regulation affects nearly all of our members' day to day business activities. Scottish Land & Estates therefore welcomes the opportunity to provide comments on the relevant sections of Part One and on Part Two (Environmental Regulation) of the Regulatory Reform (Scotland) Bill to the Rural Affairs, Climate Change and Environment Committee.

Overview

Scottish Land & Estates acknowledges that a level of environmental regulation is necessary for the responsible governance of a modern economy, and further that access to good quality environmental functions and services are necessary for sustainable economic activity. We are supportive of the Government's Better Regulation agenda generally, and see this Bill as an important part of that agenda. We would wish to see that regulation is proportionate and that it is

streamlined such that it does not place an undue burden on rural business interests. In this respect, we are supportive of the intentions of the Regulatory Reform (Scotland) Bill to ensure that regulatory functions are exercised in a consistent manner and in such a way as to contribute to sustainable economic growth. Further we support the proposal to introduce a Code of Practice in relation to the exercise of regulatory functions. With specific reference to Part 2 of the Bill, we are supportive of the overarching purpose of the provisions which is to enable environmental regulation to be delivered in a manner which is more risk-based, joined up and outcome-based. There are nevertheless some aspects of the Bill as it currently stands about which Scottish Land & Estates has concerns and these are noted below.

Part 1 (Regulatory Functions)

We have a general concern about the lack of a defined outcome for failure by a regulatory body to comply with the Code of Practice, and wonder whether this may dilute the benefit of the Code from the perspective of a regulated person or business. Some mechanism to hold a regulated body to account where it fails to adhere to the standards expected in the Code may be worth considering.

Part 2 (Environmental Regulation)

We acknowledge that this is largely an enabling Bill, as are so many Bills of the Scottish Parliament. As business representatives, we acknowledge the need for flexibility on the Government's part but would reiterate the message that businesses need stability and certainty in order to plan and grow.

As a regulated person or business it is impossible to know how this Bill will impact in practice because so much of the detail is yet to come in secondary legislation or codes of practice. This in itself creates uncertainty.

We would note our appreciation of the Government Bill team's commitment to consultation and their willingness to discuss the proposals with business interests such as Scottish Land & Estates. We appreciate the policy intentions behind the Bill but any assurances that can be obtained on the record by the Committee during the Parliamentary stages surrounding proportionality and transparency in the intent behind this Bill would be useful, as well as reinforcement of Ministers' commitment to continue to consult with businesses as the detail of the provisions are developed. It would be very useful to have an indication at the outset of the proposed timescales for the secondary legislation. Ideally draft Orders should be available before the Bill completes its passage through Parliament so that scrutiny can be as full as possible.

Relevant Offences

The definition of "relevant offence" is fundamental to how Part 2 of the Bill will impact so it would be very useful to have sight of the Government's proposals for this definition as early as possible. As it stands relevant offence could be anything, not even limited to offences which result in environmental harm. The reference to environment only appears in the explanatory documentation and Bill headings which imply that the offences will relate to the environment but this is not actually stated in the Bill's provisions. A link to environmental harm in the definition of relevant offence would be useful.

Variable Monetary Penalties

Scottish Land & Estates is concerned about the unspecific and open nature of the provision. While there is an upper limit penalty of £40,000, this might apply to any, as yet unspecified, relevant offence. The issue is to some extent further compounded by the broad nature of the terms “environmental activities” and “environmental harm” which mean in turn that relevant offences could be extensive and very wide-ranging in type as well as in scale of impact. The examples given in the explanatory notes which accompany the Bill of the type of offence this provision is designed to cover include failure to comply with a general binding rule, carrying waste without a registration or carrying out minor engineering activities in water without appropriate authorisation. The notes on costs indicate that it is estimated most variable penalties will be between £1,500 and £3,000. This indicates that offences at the more serious end of the spectrum are not at all common and that drawing from the same experience that enabled the costs analysis to be produced, it should be possible to develop indicative bandings.

Scottish Land & Estates would urge the RACCE Committee to recommend the inclusion of indicative bandings within the primary legislation, so that a clear steer is provided when secondary legislation is being developed and to provide comfort to the many businesses across Scotland that might be concerned about the current lack of clarity.

Fixed and Variable Monetary Penalties

Scottish Land & Estates note that both fixed and variable monetary penalties can be imposed on a person where SEPA, on the balance of probabilities, suspects that person has committed an offence. Although the person may make representation against the notice of intent to serve the penalty and can also appeal the penalty, there is no option for the person to choose prosecution instead of the penalty. A person may feel they have a decent defence in a criminal court when judged to the criminal standard of proof. We appreciate that the aim is to remove cases from the criminal courts where it is unnecessary for them to proceed there, and in the vast majority of cases the fixed or variable penalty will be useful in this respect, but we feel that removing completely the option to proceed to court may mean there is a gap in access to justice for the occasional case where a person may well succeed in defending themselves in a criminal court.

Cost Recovery

Scottish Land & Estates appreciates the “polluter pays” principle which sits behind the cost recovery provision in the Bill. We do however have concerns about the indicative levels of cost recovery of variable monetary penalties that are given in the costs notes which accompany the Bill. These notes suggest that “*on average they are expected to be in the region of £10,000 to £20,000 per case.*” Since the estimated average variable penalty is £1,500 - £3,000, it seems grossly disproportionate that cost recovery is around six-times higher than the fine. For the business concerned the breakdown of the total amount payable between fine and cost recovery is perhaps less relevant than the impact the total cost will have on the business. This would seem to indicate a level of deterrent which is out of step with the seriousness or otherwise of the offence.

We appreciate that the intention behind these provisions is for proportionality in their implementation but there is no assurance of this in the Bill itself nor in the accompanying documentation. In the interests of transparency and proportionality it would be useful to have an explanation of how costs might be calculated or indeed whether there might be a policy of full or partial cost recovery for differing situations.

Publicity Orders

Scottish Land & Estates would like to see the circumstances around when publicity orders will be used more tightly defined. At present publicity orders could apply to any, as yet unspecified, relevant offence. As noted above, the offences could be very wide-ranging in type as well as in scale of impact.

Publicity Orders are relatively rare in UK legislation, and rightly so given this is a fairly draconian measure. However we can appreciate it could act as a deterrent in extreme cases of flagrant and repeated serious breaches of environmental regulation. Once again there is no assurance given in the Bill as to when these Orders might be used so some indication of the intention behind the provisions would be helpful. A similar provision for publicity orders appears in corporate homicide legislation. In that case the offender is given an opportunity to make representations to the court before the conditions of the order are decided. A similar safeguard is not present in the Bill and it would be useful to know why this was considered not to be necessary.

Scottish Land & Estates appreciates that at the most serious end of the environmental harm spectrum there are parallels to be drawn with corporate manslaughter and corporate homicide. Scottish Land & Estates ask the Committee to consider how this provision might be tightened in the primary legislation to ensure it is used only for appropriately serious offences. A possible solution is to develop the banding of offences we suggest above.

Vicarious Liability

Having acknowledged the Government's commitment to consult above, we note that this is one of the few provisions in the Bill that has not been consulted upon yet the introduction of criminal vicarious liability is a significant provision which reverses the historic principle of Scots criminal law in requiring intent to convict a person of a criminal offence. This is the third incursion into criminal vicarious liability by the Scottish Parliament and this is the first time it has appeared in a Bill at introduction (previously having been inserted as a stage 2 amendment). Scottish Land & Estates has similar concerns in relation to the vicarious liability provisions that we have already expressed above in relation to the undefined list of offences to which this provision can apply. It is impossible at this stage to ascertain the likely impact on regulated persons or businesses.

The new offences relate to non-natural persons which we understand to include corporate bodies and Scottish partnerships. Many Scottish farms are operated through family partnerships so this provision could potentially affect many farming businesses. It would be useful to know whether Trusts are also intended to be targeted.

From the regulated business perspective some guidance as to what might be expected by "all reasonable precautions and all due diligence" would be very useful. For novel and potentially draconian provisions such as criminal vicarious liability there is a risk of "over-compliance" which can often impose an unnecessary burden on business. Guidance could alleviate this risk.

Further Information

Scottish Land & Estates hopes this evidence is useful to the Committee in its deliberations on the Bill and we would be happy to provide further information or elaborate on any of the points made above.