Finance Committee

Public Services Reform (Scotland) Bill

Submission from Scottish Environment Protection Agency

Thank you for the opportunity that the Committee has made to make written representations on the Public Services Reform (Scotland) Bill. As a public body likely to be affected by the Bill, SEPA is pleased to provide its views in response to the questions posed by the Committee. Our evidence is set out in the attached annex. We have also been asked to contribute written representation to the Rural Affairs & Environment Committee on this bill and a copy of that response is appended for information.

As a public body committed to openness and transparency, SEPA feels it is appropriate that this response be placed on the public record.

Key Points

- Overall, SEPA welcomes introduction of the Bill and looks forward to engaging with the its development;
- SEPA has embarked on an ambitious programme of change aimed at establishing a modern, fit for purpose regulatory system that is proportionate, generates business benefits, public good or well being and, importantly, a sustainable environment in which to invest, live or visit. We consider that the order making powers in the Bill should help facilitate key aspects of that change;
- Opportunities to reform environmental regulation using the Part 2 order-making powers are substantial, and we consider these should be used to enable efficiency gains with no loss of environmental protection. Examples are provided.
- The Committee may wish to consider whether the re-organisation or elimination of independent regulators via secondary order-making powers, strikes the correct balance between efficiency and scrutiny/accountability.

1. Introduction

1.1 SEPA’s main role is to protect the environment and human health. We do this by controlling activities that can cause harmful pollution and by monitoring the quality of Scotland’s air, land and water; working to enable those we regulate to comply with the legislation; as well as delivering a number of services such as flood warning and environmental business advice.

1.2 In April 2009, SEPA published its first Annual Operating Plan (AOP)\(^1\) which sets out how the Agency will implement the high level objectives of the Corporate Plan during the 2009/10 financial year. The AOP has been developed with transformation in mind as it sets a clear and ambitious framework for major changes in the way that SEPA will operate in the future.

\(^{1}\) The AOP is available on SEPA’s website at: [www.sepa.org.uk/about_us/publications/annual_operating_plans.aspx](http://www.sepa.org.uk/about_us/publications/annual_operating_plans.aspx)
1.3 The AOP focuses on how SEPA can carry out its work as efficiently and effectively as possible. This will be achieved through implementation of 11 radical “change programmes” (see figure 1) to transform the organisation, whilst continuing excellence in our core work. The Public Services Reform (Scotland) Bill potentially offers significant opportunities for SEPA to perform its duties more efficiently and effectively through provision to more easily amend legislation that duplicates duties or which results in unnecessary burdens on either the regulator or the regulated. This is particularly the case with respect to pursuing our better regulation agenda, but also in other areas of delivery in the AOP, including local engagement, supporting enterprise, and future phases of the successful SEARS initiative.

<table>
<thead>
<tr>
<th>Figure 1 - SEPA Organisational Change Programmes</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Better Regulation</td>
</tr>
<tr>
<td>• Step Change in Service Delivery – Science</td>
</tr>
<tr>
<td>• Organisational Development</td>
</tr>
<tr>
<td>• Customer Focus</td>
</tr>
<tr>
<td>• Climate Change</td>
</tr>
<tr>
<td>• Improving Flood Resilience</td>
</tr>
<tr>
<td>• Scotland’s Environmental and Rural Services (SEARS)</td>
</tr>
<tr>
<td>• Planning Reform</td>
</tr>
<tr>
<td>• Local Engagement</td>
</tr>
<tr>
<td>• Supporting Enterprise</td>
</tr>
<tr>
<td>• Environmental and Clean Technology Sector Development</td>
</tr>
</tbody>
</table>

1.4 Better regulation is recognised by the Scottish Government as being crucial to a successful Scottish economy. The Better Regulation Change Programme is at the heart of our AOP. This will involve proposals for simplification of regulatory regimes, including a review and updating of regulation, for example in relation to Pollution Prevention and Control (PPC), waste and radioactive substances, whilst ensuring that we still comply with the requirements of the relevant European legislation. The order making powers under the Bill potentially offer significant opportunities for SEPA to deliver our better regulation agenda.

2. Views on Questions Posed by the Committee

2.1 SEPA is pleased to provide its view on some of the specific questions raised by the Committee. SEPA’s key interest is in the provisions of Part 2 of the Bill and accordingly, we provide views only on the questions relevant to this part.

2.2 Comments on the Scottish Government’s overall policy objectives in introducing the Bill.

SEPA welcomes the policy objectives of the Bill, particularly those relating to streamlining decision making, improving transparency, stopping activity that no longer contributes to the public purpose and bringing together bodies with
similar skills, expertise and processes. All of these are consistent with the objectives set out in our 11 change programmes. Accordingly, we consider that there are considerable opportunities to use the provisions in the Bill to streamline legislation simply and easily to afford better environmental protection whilst also delivering efficiency gains and removing unnecessary burdens. Examples of the sorts of improvements that could be made are provided in paragraph 2.5 below.

2.3 *Is the Bill likely to "help simplify and improve the landscape of Scottish public bodies, to deliver more effective, co-ordinated government that can better achieve its core functions for the benefit of the people of Scotland"?*

SEPA considers that it is for Scottish Ministers, working with the Scottish Parliament, to make decisions on the appropriate balance to be struck between a system which allows for a public sector landscape to be adjusted via order-making powers, and the scrutiny of those changes via parliamentary procedure.

SEPA was established under the Environment Act 1995, bringing together duties performed by 64 previously separate bodies in order to deliver an efficient and effective environmental protection system for Scotland. This includes a requirement to report and advise on the state of the Scottish environment; to operate an environmental protection system on behalf of the people of Scotland and to discharge specific regulatory requirements on behalf of Scottish Ministers.

An important element of this founding legislation was to impart a degree of independence in discharging the reporting and regulatory functions to ensure appropriate governance and to provide public reassurance that decisions will be taken independent of political considerations. The legislation that SEPA enforces has in-built accountability and reporting requirements, usually including an appeal mechanism for regulated businesses and affected parties.

Accordingly, the Committee may wish to consider whether the proposals in section 10 strike the correct balance between flexibility and scrutiny in delivering a responsive public sector, and further, whether such general provisions are appropriate and should be applied to regulatory bodies established under statute to operate in an independent, transparent and accountable manner.

2.4 *In light of the current financial situation, is this the appropriate time to be pursuing both the Bill in particular and the wider public services reform programme?*

Given the Bill’s policy objectives of improving effectiveness and efficiency, we consider that this is, in fact, exactly the time to pursue such a programme. SEPA considers it vital for the public sector to deliver its duties effectively and in a way that provides value for money for the Scottish taxpayer. Given the
current financial situation and the impact it will have on public sector finances, we believe it is imperative that efficiencies are made whilst continuing to provide (in SEPA’s case) effective environmental protection. Accordingly, SEPA’s own reform programme as set out in our AOP is directly aligned to achieving many of the objectives of the Bill.

Ultimately, an effective and efficient public sector that delivers value for money will help the Scottish economy through the current period of recession. Being able to quickly reform bad or outdated legislation will enable public bodies like SEPA to deliver their reform agenda.

2.5 Are the order-making powers proposed in part two of the Bill appropriate in seeking to deliver a “public sector landscape and public sector functions that are proportionate, responsive and efficient”?

2.5.1 Public Functions: Efficiency, Effectiveness and Economy

As noted above, SEPA considers it is for Ministers and Parliament to consider the appropriate balance to be struck between the flexibility such order making powers allow and the scrutiny required of use of those powers.

In principle, however, and acknowledging the preconditions and safeguards, SEPA considers that the order making powers – particularly those aimed at reducing or removing burdens – provide significant opportunities to simplify the regulatory landscape to promote efficiency and effectiveness.

2.5.2 Preconditions

Section 12 and 14 set out the preconditions that must be met in order for Scottish Ministers to make provision to modify etc. any public function (section 10) or remove or reduce burdens (section 13). Generally, these preconditions appear appropriate, although we consider that it would be useful to the Parliament to consider whether there are additional safeguards necessary and/or to support some of these with additional guidance to assist interpretation.

For example, the precondition that “the provision does not remove any necessary protection” (in Section 12(2)(b)) and Section 14(2)(d)) would, in SEPA’s view, cover necessary environmental protection, although this should be clarified. It is important we feel, for the relevant public bodies to have a specific opportunity to formally advise on its view about whether the necessary protection precondition was being met prior to any change being formally brought forward. This would make the process both more robust through the taking of expert advice and more transparent. The provisions in section 21 for consultation cover this to a degree. Clear guidance on interpretation of “necessary protection” will also be required to support decision making under this provision.

2.5.3 Power to Remove or Reduce Burdens

Section 13 provides wide ranging powers to remove or reduce burdens resulting in a financial cost, an administrative inconvenience, an obstacle to efficiency, productivity or profitability, or a sanction which affects the carrying
out of a lawful activity. The provisions in this section, as suitably safeguarded by the preconditions in section 14, represent a considerable opportunity to change legislation quickly where it is no longer working to best effect due to unforeseen circumstances, the passing of time or unintended consequences of drafting. While there are some ways to get round this – eg amending guidance or reworking internal processes – it is far preferable to have an effective means to quickly address legislation that is not working or not needed.

Accordingly, as an environmental regulator with duties in over 100 pieces of legislation, SEPA supports this part of the Bill as an important means of being able to implement some of the radical changes proposed in the AOP. Some examples are provided below to show how the Bill would be helpful:

1. Dissolution Of SEPA Regional Boards

Under the Environment Act 1995, Schedule 6, paragraph 16(1) SEPA is required to have Committees known as 'Regional Boards'. The legislation as it stands, and the accompanying guidance provided by Scottish Ministers, places a duty on SEPA to establish and operate these Boards strictly in line with the Act and guidance. Through our AOP, SEPA is reviewing stakeholder engagement (or "local engagement") to ensure that the right people at the right level in the organisation can effectively engage on local issues and can hear directly from, respond to, and influence SEPA's customers and partners across the country.

The intention is to broaden and deepen SEPA's direct engagement with its stakeholders and their understanding of the environment and SEPA. It is our view that fixed and statutory Committees do not permit the flexibility and responsiveness necessary to allow SEPA to meet customer expectations and we find ourselves confined to a form and function that is no longer appropriate. We intend developing a mechanism for local engagement activity which will better meet the needs and requirements of SEPA, its stakeholders and customers and enable improved efficiency. The Public Services Reform (Scotland) Bill provides an opportunity for the achievement of such efficiencies through the repeal of this legislation.

2. Powers of Entry

Given the nature of SEPA’s role, SEPA’s employees often require to exercise powers of entry and investigation. The ability of SEPA’s officers to exercise such powers ordinarily stems from section 108 of the Environment Act 1995. A number of recent pieces of environmental legislation have, however, included their own powers of entry and investigation rather than using the standard powers contained in section 108. As a result SEPA's staff require to receive training on the often minor differences in powers of entry under the different legislative regimes and require to be issued with fresh authorisation cards. This increases costs for SEPA and the potential for confusion amongst staff and customers alike. SEPA considers many of the pieces of environmental legislation presently having their own specific powers of entry
should be amended to stem from section 108 instead, and this would seem more in keeping with the principles of better regulation. The provisions of the Bill would provide a swift mechanism for addressing such concerns.

3. Regulation of Fish Passes and Screens

It has become clear that the provisions of the Salmon (Fish Passes and Screens) (Scotland) Regulations 1994 are now entirely covered by the provisions of the Water Environment (Controlled Activities) (Scotland) Regulations 2005. Indeed, the 2005 Regulations go further by identifying SEPA as the enforcing authority with powers to take enforcement action and to bring about improvements, other than through the courts. SEPA may approve the design of screens or fish passes and require that such structures are adequately maintained. Thus, presently there is concern regarding dual regulation and the possibility of a conflict between the two legislative requirements and consequently there is a strong case to repeal the provisions of the 1994 Regulations. The Public Service Reform (Scotland) Bill would enable this to be addressed quickly.

4. Better Regulation - Waste

(a) Licence Boundary Flexibility - Under current legislation, the boundary of fixed sites licensed under the waste management regime cannot be changed. If an operator wants to expand a site, it is necessary to obtain a new licence to cover the new area of ground, or to surrender the original licence and apply for a new licence for the larger area. Under the Pollution Prevention and Control (PPC) regime, on the other hand, the site boundary can be changed. Scottish case law clarifies that SEPA cannot modify waste management site boundaries using the existing provisions of The Environmental Protection Act 1990 (EPA 1990). In order to provide for such boundary changes, an amendment to the EPA 1990 would probably be required. Such a change would be of significant benefit in terms of administration and cost to both SEPA and the regulated industries.

(b) Duty of Care and Shipments of Waste - The Duty of Care in Section 34(1) of the EPA1990 relates to those who import, produce, carry, treat or dispose of controlled waste or, as a broker, have control of such waste. At present, there is no reference to those involved in exporting waste from the UK and so the Duty of Care does not apply to people engaged in that activity. This ‘loophole’ makes securing a prosecution against those making illegal exports much more difficult. Introducing additional subparagraph into section 34(1) to place a duty on persons to take reasonable measures to prevent a contravention of the Waste Shipment Regulation by any other persons would require amendment of the EPA 1990.