

An advisory Council to the
Department of the Environment

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Prof. Gabriel Cooney BA MA PhD
Chairman

Via email

22 June 2009

Ruth Murphy
Better Regulation Team
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Belfast BT7 2JA

Dear Ms Murphy,

CONSULTATION PAPER ON DRAFT REVISED NIEA ENFORCEMENT POLICY

Preamble

The Historic Monuments Council would like to welcome the Draft Revised NIEA Enforcement and Prosecution Policy and the opportunity to comment on it. Council also notes the commitment of the NIEA, following initial consultation, to issue a further consultation paper in Autumn 2009.

As a general comment Council would draw attention to Section 1.4 (p.4), here the aim of NIEA to protect the natural and built environment and help safeguard human health is clearly stated and to Section 1.2 (p. 4) with its commitment to clear, fair and firm enforcement. Council would suggest that it is important to link these points by emphasising the value to society and quality of life of the environment – it is a social asset - and the social damage caused by offenders who present a risk to the environment.

The Historic Monuments Council would suggest that there would be a value in clearly articulating the important role of individuals and voluntary bodies in monitoring the environment and reporting potential incidences of environmental crime.

It is not always clear in the document that NIEA is not the only regulatory authority in Northern Ireland vis-a-vis environmental crime. This is particularly important in the context of environmental crime that affects our built heritage. NIEA is the principle regulatory authority concerned with the archaeological resource, statutorily protected monuments, reporting of artefacts, treasure, historic shipwrecks, licencing of searches for archaeological material. However, enforcement authority involving listed buildings or structures, Conservation Areas and other areas of designated architectural, townscape or streetscape importance is exercised by Planning Service.

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Special recognition should be given to the roles of Field Monument Wardens in monitoring and helping owners to manage statutorily protected historic monuments on private lands. These Wardens provide an important service to the general public, and help encourage owners and occupiers of these monuments to avoid activities that would be classed as environmental crime. As well as encouraging owners, the regular inspection of monuments ensures that where an offence has been committed it is likely to be detected at an early stage.

Recognising the value of supporting the regulated community to meet their obligations and prevent environmental damage through advice and guidance NIEA also recognises the necessity in some case to take formal action. On reading the document however the determination of NIEA in following through to formal action is not always clear and is expressed in quite general tones. To be effective the Enforcement Policy should be clear and unequivocal in detailing the determination of the NIEA to deliver clear, fair and FIRM enforcement.

Introduction and Scope (Section 1) – Questions 1 and 2

HMC considers that it might be useful here to clearly articulate the social value of the natural environment and built heritage and the need to sustain the quality of both.

The scope of the revised policy is clear and linked to the NIEA's Environmental Legislation and Service Standards document.

HMC welcomes the setting up of the new Office of Environmental Enforcement.

In relation to the final paragraph of Section 1, the HMC would recommend that given the state commitment to clear, fair and firm enforcement and in Section 2 to transparency as a principle of enforcement, there should be a periodic independent, external review of the implementation and effectiveness of the policy as well as the oversight of the Chief Executive, who after all is the accounting officer for the policy itself. In this context it would also be appropriate that in the annual enforcement report (p.16) there would be a report from the Chief Executive on the monitoring of the policy's implementation and effectiveness.

Relating the final paragraph of Section 1 to the Equality Issues section of the introduction of the draft policy (p.4) the HMC would recommend that the NIEA should ensure that the implementation of the policy is monitored in line with the Section 75 requirements to ensure that no unanticipated adverse impacts arise.

Principles of Enforcement (Section 2)

Question 3 – Do you have any comment on these principles

Consistent – HMC agrees with the need for a consistent approach but needs to be demonstrable and rigorous.

Proportionate - In the first sentence it is not clear to whom the 'risks' apply – to the environment? To the NIEA?

HMC would recommend that the second sentence should read ...The action taken to achieve compliance will be.... As this is currently phrased this sentence might give the impression of a reluctance to take action.

Proportionality should be no more than that which is necessary to achieve a legitimate aim. Hence the focus should be on the NIEA acting proportionately to ensure protection of the natural and built environment.

Transparent – HMC welcomes the commitment to this principle. It is right that it should include the commitment to provide written confirmation of any rights of appeal against formal enforcement action. HMC welcomes the commitment to publish an Annual Enforcement Report (see comment above about role of the Chief Executive and Section 75 monitoring). To be effective this report must provide details of the cases and the nature of the enforcement action. To complement this report and to achieve a deterrent effect HMC would suggest that there needs to a consistent policy of publicity when cases are decided.

In relation to paragraph 3 (p.15) HMC would suggest that the paragraph begins
In dealing with those we regulate we will:
Endeavour, as far as possible, to provide.....

Targeted – HMC understands the prioritisation of effort and resources in regulatory effort to those who activities cause the greatest damage to health or the natural or built environment and who benefit financially. However, HMC would be concerned that given that there is a European legislative basis and programme for the protection of many aspects of the natural environment and human health, for example the Water Framework Directive (WFD), that there might a greater prioritisation of these areas vis a vis the built heritage in the assessment of what constitutes the ‘most serious risks’ or the ‘greatest risk’. In this context HMC would welcome greater clarity on the statement of targets and commitment to the protection of the built heritage in this regard.

Accountable – HMC welcomes the commitment to accountability. However, referring back to the final paragraph of Section 1 the demonstration of independence and accountability requires external review and audit.

Question 4 - Other principles to be included

Effective time response

HMC recognises and fully supports the principle that the enforcement policy is a central aspect of the commitment of the NIEA to control pressures on the environment by fulfilling statutory and international obligations. To measure the effectiveness of the policy in delivering enforcement, HMC would recommend that there should be a clear statement of how NIEA will respond promptly to violations and events which in many cases can cause very significant damage or risk very quickly.

Supporting Compliance (Section 3) - Question 5

HMC welcomes the measures being taken by the NIEA on compliance assistance and would suggest that it would be valuable to highlight the social loss caused by damage to the environment and the determination of the NIEA not just to provide advice but when and where necessary to take appropriate enforcement action.

Enforcement Powers (Section 4) – Questions 6 and 7

This section outlines in broadly sequential terms the range of enforcement powers available to the NIEA.

4.2 – HMC welcomes the clear statement about the consequences of failure to comply with an enforcement notice.

4.4 – HMC would suggest that fixed penalties need to be financially punitive to the offender to be effective. This principle should underly any broader use of fixed penalties.

4.6 and 4.7 – HMC welcomes the strong and clear language in which Prosecution and Injunction Proceedings are outlined.

Factors determining prosecution (Section 5) – Question 8

5.1

Given the role of the Public Prosecution Service and the heading of this section (circumstances likely to lead to prosecution) the HMC would suggest that the introductory sentence should read more strongly, for example...

Where there is sufficient evidence, the presumption will be that we will submit a case to the PPS...

Bullet point two, HMC is of the opinion that the wording of this circumstance is weak. Could the use of the word 'knowingly' be used as a get-out excuse by an offender?

5.2 – Given the statement in the general introduction about policy being clear, fair and firm and in the introduction to Section 5 on the independent role of the Prosecution Service and the inclusion of Section 5.3 on the Evidential Test and Section 5.4 on the Public Interest Test HMC would question whether it is appropriate or necessary to include this section in the policy – what does it add?

Court Action (Section 6) – Question 9

HMC welcomes this clear statement of the power of the courts underlying the enforcement policy.

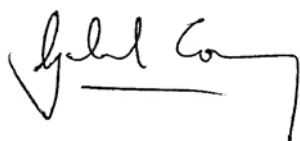
Working in Partnership (Section 7) – Questions 10 and 11

Question 10 – HMC welcomes the articulation of the need to work with other enforcement agencies to ensure coherent regulation. For this inter-agency co-operation to be effective HMC would suggest that there needs to be regular communication, exchange of information and a framework to ensure best practice and regulation. For example, offence under one aspect of environmental regulation should automatically debar the offender from grant aid/financial support from another government/public agency.

Question 11 – HMC welcomes the commitment to develop co-operation with equivalent law enforcement agencies in the Republic of Ireland. This is particularly relevant to the illegal movement of items of portable heritage. In this context it should be noted that the National Museum of Ireland has statutory responsibilities under the Republic of Ireland National Monuments Act.

As a final comment the HMC would like to suggest that as a background to drawing up the next iteration of the consultation document that there would be consideration of the potential impact of the RPA process and outcomes on the NIEA enforcement and prosecution policy.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gabriel Cooney', with a horizontal line underneath the name.

Professor Gabriel Cooney
Chair