Opinion on the consultation document on MEPA's Reform

The Kummissjoni Interdjocesana Ambjent (KA) would like to offer the following opinions regarding the document[i] on MEPA's reform which is currently going through a phase of public discussion. The KA favourably welcomes the fact that this long awaited reform is based on four pillars that it has consistently stressed over the years, i.e., consistency, efficiency, accountability and enforcement. KA's feedback will follow the document's structure.

CONSISTENCY

Ensuring a holistic approach towards sustainable development

KA agrees with the need for a holistic approach, and the need to have planning policy decisions integrated with environmental considerations in line with sustainable development considerations. But sustainable development requires a much wider perspective that includes social and economic policy making. Placing MEPA under the OPM's remit should go a long way towards achieving this holistic approach, but past experience has shown that placing offices in the same corridor does not always and necessarily lead to cross fertilization and coherent actions. If MEPA's reform is to lead towards a holistic approach towards sustainable development a way must be found through which some organic link would be established between policy-making in the economic, social and environmental sectors. MCESD, MEPA and the new entities proposed by this reform document, should feature prominently within this framework – each playing a complimentary and coherent role.

In its introductory "*snapshot of MEPA's structures, activities and workload*" (p.5), the document evidences the current biased situation at MEPA whereby too much effort and resources are dedicated to planning and far less to environmental management – a crucial component of sustainable development. Evidently, this is a reflection of the same bias fostered by several special interest groups, and perhaps even by the public at large. KA fears that this apparent sole preoccupation of MEPA with planning developments, at the expense of environmental protection and management, is so deeply rooted in our national psyche that the new legal framework proposed by the document (Single Legal Act) is not enough to rectify it.

The merger of planning and environmental responsibilities within MEPA in 2001 was supposed to lead to such holistic and balanced consideration between planning and environment. That worked on paper, but in reality it did not (as the same reform document admits). Good intentions will only be translated into a functional reality, if and when there is a genuine commitment to do so. Why should a legal merger of the two relevant Acts (the Development Planning Act and the Environmental Protection Act) be more successful?

Trying to learn from past experiences, the KA would have preferred if the planning and environmental regulators would have resided in two separate, well-resourced entities. This would not, by default, necessary lead to less cohesion between the two entities or an undermining of a holistic approach towards sustainable development. It would at least enable the environmental regulator, to mature and come of age, to attract more resources on its own merit and to achieve a comparable profile to that of the planning regulator.

Policy direction

The reform document states that the Government will assume the leadership of planning and environmental policy, allowing MEPA to act as the regulator and the implementer of such policies. This is politically correct since it is ultimately the government which is politically responsible towards the electorate and which has to translate its electorate programme through policy making. However at this stage it is crucially important to face the often painful reality of the past decades.

According to Jeremy Boissevain, our environmental resources have, over these past 50 years or so, "*have been and still are being raped … for private gain*" [ii]. In his opinion, the resolution of our problems requires "… *serious integrated long-term planning, not just ad-hoc sectoral solutions, often made to appease strong political and commercial lobbies.*" Evidently, in spite of well meaning efforts (such as the present reform document) our political community has in general failed us in protecting and properly managing our environmental resources. Environmental and development policy decisions need a longer timeframe than the limited 5-year political time-frame.

It is evident that the reform document fails to address this central issue and indeed is proposing that MEPA's role in long-term policy direction will be assumed by the political masters. Presumably this proposal was meant to address MEPA's lack of consistency and other failings. Nonetheless, past and quite recent incidents indicate that much of these failings could be, at least partly, blamed to the low level of independence of MEPA from its political masters. It is pertinent to point out that originally MEPA (know at the time as the Planning Authority) was conceived to safeguard Malta from ministerial whims, political obligations and favouritisms.

Consequently, the KA fully supports Din l-Art Helwa's objection[iii] to this shift and feels that while "*Government should provide general direction to the Authority in the light of national priorities and cross-ministerial initiatives, as well as, its commitment to the electorate*" (p.13), the actual development of planning policies and their implementation should not be entrusted to government/political entities.

Major policy revisions

In 2006, the KA[iv] had opposed the extension of the development boundaries into ODZs on the premise that the proposed changes would ultimately result in further depletion of our natural resources. It had also suggested the wiser use of space in development zones as a sustainable alternative to the scheme proposed. At the time, KA was criticised because it was purportedly just criticising the policy without coming up with tangible proposals. Just less than three years later, the reform document is:

- admitting that "… *less than 40% of these* (ODZ) *applications were of a nature that could have technically been executed within existing boundaries*" (p.14). This is equivalent to about 2160 applications that have eaten up another chunk of our limited land resources. To these one might add an unknown percentage, from the reported 29.51% ODZ applications for development of an agricultural nature, that have furtively changed their *proposed use* to a non-agricultural function once the permit was issued;
- in hindsight, questioning "… *whether such developments* (in ODZs) *could have been housed within the development boundaries*" (p.14); and

- proposing a manner in which guidelines will be developed to achieve the Government's commitment towards adopting a zero tolerance approach in respect of 'urban compatible' development applications in ODZs.

Considering that this is the strategy it has already suggested three years ago, the KA can only support this initiative, albeit a lot of the irreparable damage has already been done.

An issue, however, that still remains is the loose definition of 'urban compatible' development. The KA agrees with the proposed guidelines only if they will serve to significantly limit the rampant development frenzy in ODZs. If these proposed guidelines will loosely define 'urban compatible' developments giving space for ad-hoc interpretations based on the discretion of political policy makers, then God help us!

The KA agrees with the proposal to develop and publish guidelines on how MEPA should operate internally, in implementing the various policies.

MEPA Board composition and DCCs

The KA agrees with the proposal to include a representative of civil society and an expert on cultural heritage as this will help strengthen and broaden the base of the Board's expertise – although one might argue that one representative for civil society might be considered as tokenism rather than true empowerment. However, beyond the issue of composition, there is an equally important issue of how such members are appointed "*in order to avoid potential conflicts of interest*" (p.15). One sensible suggestion made during the discussion phase for MEPA's reform and prior to the publication of this reform document, was for all members of the Board, as well as of the DCCs, to be subjected to scrutiny and endorsement by a Parliamentary Committee. The KA supports this idea and proposes its inclusion in the final reform document.

The changes being proposed with respect to the DCCs, including the idea that they operate on a full-time basis, are commendable. However increased consistency in the manner in which such DCCs operate will ultimately depend on the integrity of the persons to occupy such delicate and onerous positions. Therefore their appointment should also be subject to parliamentary scrutiny and endorsement.

On the other hand, irrespective of who constitutes the boards, the most important factor that would ensure that the appointees perform their role responsibly is to institute mechanisms that would hold board members individually and directly accountable for decisions taken that are proven to be irregular. This principle has already been first proposed and discussed in some detail by KA in its most recent appeal for more accountability and transparency.

Improving the proposed development application process, participation of third parties and appeals process

The reform document pays particular attention to the streamlining of the development application process, the participation by third parties and in the appeal process. Although KA agrees with most of these suggestions, it however wishes to make the following observations:

The improved streamlining of the assessment of a development proposal should not be made at the expense of safeguarding the environment resources which are often at stake, nor at limiting the role of third parties in the process. As such, the assessment process should also provide for the outright rejection of the development proposal if it manifestly goes against the stated and clearly defined planning and environment policies. Such rejection should be possible at the earliest possible stage in the application process, in order to limit the financial hardship on the developer, ensure better utilization of MEPA's internal resources, and

facilitate the meaningful role of the third parties objectors (especially that of the civil society which often has to act as a watchdog on such developments, with very limited resources at its disposal). In fact this need is addressed later on in proposal B1.14 of the reform document. Also the KA supports the idea that all applications will be scrutinized when presented so that, within a stipulated short period of time, the developer will have the necessary first feedback to proceed with the application process without too much waste of resources.

As regards the Planning and Review Tribunal's area of competence within which it will need to function, the reform document makes some exceptions. It stipulates that developments which are of strategic significance or national interest, arising from any EU obligations, affect national security or affect the interests of other governments will be excluded from the Appeal's process. While most of these exclusions are quite rational, it is important to guard against the possibility of a loose interpretation of such exceptions. It is therefore proposed that such exceptions, whenever they are made by MEPA, will be endorsed by a Parliamentary Committee. Alternatively, the proposed new legal framework (Act), that would re-establish MEPA, will need to make the required provisions to guard against such the misuse of such exceptions

EFFICIENCY

MEPA's core functions

Except for its role in long-term policy direction, the KA agrees with all efforts to streamline the role played by MEPA in development and planning and for a clearer distinction and re-deployment of functions of the various entities referred to in the reform document. Nonetheless, this should not simply be looked at as another cost-cutting exercise. Very often MEPA's own resources (especially in the EPD) are very limited indeed and the stated "… *transfer of resources (human, financial, technological) from one entity to another*" (p.22) should not lead to a reduction of EPD's available resources – which would render this entity incapable of functioning as required.

Once again KA would like to stress that appointing people to serve on the various boards being proposed needs to be coupled with mechanisms that promote accountability for actions and decisions taken. It is pertinent to point out that the criticism of the DCCs, referred to in p.24 of the reform document, was because of instances of conflict of interest of certain component members and faulty decision making that did not mirror MEPA policies.

Strengthening the Environment Protection Directorate

As already pointed out, ever since the merger between the planning and environment directorates into a single MEPA, the environment component was treated as the Cinderella of this fusion. The reform document itself is proof of such a bias. While most of the public (and the document's) attention is focused on the need to improve our planning capabilities, only lip service is paid to the need for better environmental management of our natural resources. Even when reference is made to the role of the EPD, it is evident that it is seen as a subservient arm of the main development application process. The reform document in fact states that "… *the EPD is also regarded as a cause of delay in the development application process*" (p.24). This is indeed a short-sighted view of what EPD's real role should be about. Its role is to "… *focus on the execution of core measures related to environmental protection and regulation*" (p.25). The "*management of the permitting process*", albeit an important role, should not be envisaged as EPD's main role.

In an attempt to address the problem of unbalanced status and capacity between planning and environment within MEPA, the reform document devotes a mere four paragraphs of proposals. These mainly refer to the need to divest EPD from environmental policy function and enforcement, as well as from other responsibilities dealing with climate change, the regulation of minerals, and others. Air quality monitoring is to remain within the EPD's remit. And what about other equally important aspects, such as noise and marine monitoring?

EPD is currently responsible for the implementation of the EU's noise directive. This includes the development of noise maps as well as the formulation and implementation of action plans to reduce noise where necessary. Due to lack of resources and expertise within the EPD, the EU Commission may take legal action against Malta on this matter.

As regards the monitoring of the state of the marine environment, one common misconception in Malta is that this should only relate to bathing waters. Hopefully this misconception is not shared by the drafters of the reform document. It may be pointed out that the Water Framework Directive generally aims at providing protection for the quality status of fresh water and of the marine environment. While it is evident that no single entity in Malta will be able to deal with these multidimensional issues, the role of EPD in monitoring of at least the marine quality status should be considered as an onerous one, which goes well beyond the need to monitor bathing waters (currently carried out by the Department of Public Health). It is evident that the EPD's current resources are not adequate to ensure the implementation of its role in the Water Framework Directive. Should we wait for an EU Commission infringement procedure, before we wake up to reality?

The reform document states (Proposal B1.4) that the Government intents to invest in MEPA's environmental arm. That intention is good enough. It will be even better if it is translated into practice.

However, if one looks at the broad perspective of environmental management and protection in Malta, it becomes evident that through successive phases of organizational developments, which happened in response to perceived needs often of a sectoral nature, the end result is that the environment is now the remit of a myriad of entities and authorities under the auspice of different ministries. This is certainly not a healthy prospect and does not augur well for a holistic, strong and effective response for our national needs in environment management and protection. It may be that one day we will realize the need for a central and overarching **Environmental Protection Authority** which would play second fiddle to none. The KA feels that by having such a separate Environmental Protection Authority, the management of our limited environmental resources will be greatly improved. Consistency and coherence in such matters will thus be safeguarded.

Improved customer care and other matters

The reform document makes a number of sensible proposals to improve customer-care at MEPA. This will include improved public communication skills. The document expresses its hope that the reform process will foster trust among society in MEPA's mission and operations (p.26). It is worth pointing out that the roots of the public's mistrust in MEPA, i.e. faulty and irregular decisions, inconsistencies with policies and nepotism in the assignment of permits, will not be erased simply by "*effective communications*", but through a visible and sustained effort to rectify these wrongdoings.

The document also includes a whole series of commendable recommendations to improve the processing of applications. In particular, the reform document highlights the potential abuse of the current system of issuing outline development permits, and how the current situation may be improved through the granting of a Planning and Environmental Brief.

The KA feels that ensuring proper filtering of the submitted applications is an effective way of reducing the backlog of applications and channelling resources where needed. MEPA should prepare and widely disseminate (particularly among architects) clear guidelines that define what "*applications that are evidently non starters in terms of MEPA's policies*" (p.28) are. Applications should include a signed declaration that the applicant has read and understood these guidelines. Applicants who nevertheless table these 'unacceptable applications' could then be fined and their application immediately discarded.

Reforming the EIA process

The reform document rightly points out the need to reform the EIA process. In the opinion of KA, this is mainly due to the 'apologetic' nature of many EIAs in favour of the developers. The nature of an EIA document is spelt out by its very name, namely that it is meant to objectively assess the environmental impacts of a proposed development at the various stages of its implementation. Such assessment should be based on, as much as possible, quantitative considerations of the perceived risks to the environment and to human health. Any limitations and levels of uncertainties in the establishment of such risks should be clearly indicated in the report. This will allow reviewers of the EIA document (including MEPA assessors in this case) to reach their own conclusions as regards the assessment being made on the nature and degree of impacts indicated by the authors of the report. Recent experience with EIAs of several development projects considered by MEPA proves that EIA documents often contain a series of conclusions often unsupported by the relevant data and lacking in information as regards the forecast methods used to assess such data. The KA itself has publicly reviewed and openly criticized the manner in which such impacts have been assessed in a number of well-know EIA cases of proposed developments in Malta, since 2004.

The reform document also suggests that there is a need to improve on the EIA process since this may be viewed as an unnecessary cost on the part of the developer since it is often "*more onerous than minimum international requirements*" (p.30). The KA disagrees with this allegation presumably made by the developers lobby group. The KA has often reviewed EIAs which are exhaustively long documents which are not worth the weight of paper required to produce them. This is because they often lack the basic requirements of a good EIA as identified above. In other words, the length of an EIA document is not a measure of its scientific reliability and validity and certainly not a proof that it may be more "*more onerous than minimum international requirements*". At times, considering the amount of unnecessary repetitions contained in some reports, one is led to believe that the production of excessively lengthy documentation is done intentionally, i.e. to discourage reviewers from reading the whole document or to overstretch the limited resources of objectors. In other words, the length of an EIA document (or its cost) is not a measure of its scientific reliability and validity and certainly not a proof that it may be more 'onerous than minimum international requirements'.

The proposals by the reform document to amend the current EIA regulations, to introduce a "*scoping stage*" (p.30) and to produce EIA guidelines, will not go much to improve the current level of EIA process. EIA and risk assessment are by now reasonably well developed scientific methods which should be pretty well known to scientific consultants who are worth their salt! Furthermore, the reform document claims, as a significant change, the introduction in the EIA process of "*additional accountability expected of consultants*" (p.31). All the various requirements of consultants, namely to demonstrate the level of consultation carried out, to present the results obtained from such consultation, and to provide an exposition of the EIA and defend his/her conclusions during MEPA Board hearings, are in effect already normal practice in the local EIA process.

One more sensible proposal is for EIA consultants to develop indicators on the basis of which predicted impacts can be compared to actual outcomes… after the development has received approval and the project is operational. Such indicators will be verified by independent consultants commissioned by MEPA at the developer's expense. In effect this will be a 'post-mortem' examination to verify the accuracy of the impacts originally identified. While this proposal is quite rational, it has its own limitations. Very often, impacts on biological systems take a long time to appear and to reach a significant level which could be scientifically verified, above a certain level of natural and background fluctuations of the indicative parameter. Therefore the verification process may need to take 5-10 years after the project reaches full level of operation – by which time it will be too late to do anything about it.

The KA is proposing that the EIA consultants will themselves be independent from the developer, in that they will be commissioned by MEPA in the first instance and paid by the developer. Such consultants will be responsible only towards MEPA and efforts should be made to limit the interaction between them and the developer to a minimum level that would be required to obtain the required information about the project. In this way, there will be no need to commission other independent consultants for surveillance purpose after the project is in operation. The KA is fully aware that its proposal will entail a more onerous task on MEPA, but given the right level of resources where required, it is this proposal which will really ensure independent EIAs.

The proposal for an official register of consultants is sensible, and one which has been in the pipeline for some time now. Also, sensible is the proposal to ensure that the EIA process commences at the earliest possible stage (B1.21).

The KA is against any curtailment of the need for additional studies as may be required by MEPA and the need for which may have arisen as a result of the EIA process itself (and therefore they could not have been foreseen at the very beginning of the EIA process). Therefore, the KA is against proposal B1.22. Evidently the intention of such a proposal is only to limit the financial burden of the developer, rather than to ensure protection of the environmental resources which is often at stake. As pointed out by the reform document itself, Malta's environmental resources are already too limited, to allow for any greater level of uncertainty in the final judgment on the validation of the EIA conclusions. Such additional studies should therefore be allowed if deemed important at any point prior to the final approval of the development. The setting up of a Committee, as proposed in B1.22, will only serve as an additional pressure on the part of MEPA employees in order to prevent them from delivering their duties as they deem fit. It is crucially important to protect MEPA employees from such administrative as well as any other types of pressures.

ACCOUNTABILITY

The KA[v] has already expressed its position for a greater level of accountability and responsibility to be required by all stakeholders and actors in the process of environmental management, planning and development. Therefore any proposals to increase such a level of accountability will be supported by KA. These include all the seven proposals (C1.1 to C1.7) included in the reform report.

The KA fully supports proposal C1.1, for the migration of the current Audit Office within MEPA to the Ombudsman's Office. Furthermore, it has taken note of and fully agrees with the various suggestions made by the present Ombudsman as reported in the media[vi]. These include: that the official should carry the title of Planning and Environment Commissioner; that he should have jurisdiction on all planning and environmental matters which may arise

from the operation of MEPA or of any other official public body that is responsible for such matters. Such a Commissioner should report to Parliament.

Another positive step forward is the greater accessibility to information being proposed in the reform document.

ENFORCEMENT

Given the present organizational framework, the KA fully supports the proposal for the setting up of an independent Enforcement Directorate within MEPA (D1.1) which works more closely with Local Councils (D1.2). Nonetheless, the KA would prefer an independent Environmental Protection Authority (as indicated above) with its own enforcement capabilities.

Regarding monitoring and the flagging of irregularities, the KA would like to make two further suggestions:

- people, although indignant about unlawful/irregular development, might still refrain from reporting such cases because they fear retribution from the developer. In order to encourage citizens to share in the enforcement process, one could introduce a system of anonymous reporting.
- monitoring is an essential feature of enforcement. There is an urgent need for on-site monitoring inspections, particularly when permits have been issued, to ensure that conditions are adhered to and development briefs have not been changed.

CONCLUSION

Since its initial conception, MEPA's role has been crucial in limiting the unsustainable use of our limited resources. Nevertheless, with time, the regulatory practices have become familiar and have encouraged people who profit from environmental degradation to discover ways of circumventing the law and continue unabated with their plans … as long as they can get away with it. The KA favourably acknowledges the current MEPA reform process and sees in it the potential to rectify these wrongs and safeguard the sustainable development of our islands … provided the commitment from the Government and the citizens is maintained. Therefore, to conclude, the KA is of the opinion that the proposed reform of MEPA should go a long way towards achieving the desired results. However, there are some fundamental issues which have not been sufficiently addressed. If left unresolved, these issues may, in the long run, prove to be the undoing of any sensible and lasting reform. These issues have been identified in the present opinion paper.

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[i] Office of the Prime Minister (2009) A Blueprint for MEPA's Reform. 9th July 2009. On line: https://opm.gov.mt/file.aspx?f=1221. Accessed on July 2009. All page references are made to this document.

[ii] Boissevain, J. (2006) *Malta: Taking Stock after Fifty Years. Where to now?* Online: http://www.ambjentahjar.org/articles/jeremyboissevain.htm. Accessed on July 2009

[iii] Din l-Art Helwa (2009) *DLH disagrees with moving planning policy back into the hands of politicians*. Press Release - 14 July 2009. Online: http://www.dinlarthelwa.org/content/view/544/69/. Accessed on July 2009

[iv] Kummissjoni Ambjent (2006) *Stqarrija tal-Kummissjoni Ambjent dwar it-Tibdil fil-Konfini tal-Iżvilupp*. Uffiċċju Stampa. Kurja tal-Arċisqof, Floriana. 8 June 2006.

[v] Kummissjoni Interdjoċesana Ambjent (2009) *Appeal for more Accountability and Transparency*. Uffiċċju Stampa. Kurja tal-Arċisqof, Floriana. 12 June 2009.

[vi] Ombudsman welcomes MEPA audit officer reform proposals. *Times of Malta*. 23rd July 2009.