



Law Society
of Scotland

Consultation Response

Proposals for an Integrated Authorisation
Framework: Consultation on draft Guidance

December 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Environmental Law Sub-committee welcomes the opportunity to consider and respond to the consultation from the Scottish Government and the Scottish Environment Protection Agency (SEPA) *Proposals for an Integrated Authorisation Framework: Consultation on draft Guidance*.¹ We previously responded² to the related *Proposals for an Integrated Authorisation Framework: Consultation on draft Regulations*.³ The Sub-committee has the following comments to put forward for consideration.

General comments

We welcome SEPA's objectives of simplifying the existing authorisation framework and ensuring consistency so far as possible across regulation in different areas.

However, generally speaking we are concerned that the Regulations and the guidance accompanying them go too far in simplifying the Regulations at the expense of legal certainty. The proposals would grant SEPA extremely wide discretion throughout the regime, for instance allowing it to serve an enforcement notice, breach of which is a criminal offence, even where a permit holder is wholly compliant with the terms of the permit granted to it by SEPA.

At the previous consultation stage, assurance was given that more definition of the circumstances in which

¹ <https://consultation.sepa.org.uk/regulatory-strategy/iaf-draft-regulations/>

² https://www.lawscot.org.uk/media/359228/env_lss-response_consultation-on-draft-regs_integrated-authorisation-framework_nov-17.pdf

³ https://consultation.sepa.org.uk/regulatory-strategy/iaf-supporting-guidance/supporting_documents/Consultation%20on%20draft%20Regulations%20for%20an%20integrated%20authorisation%20framework.pdf

SEPA could exercise its various wide discretions would be provided in the guidance. However, the draft guidance provided alongside the draft Regulations offers little or no assistance on that front. Without certainty, the regulated person cannot properly plan its business activities; furthermore it fails the test of certainty necessary for good law. Further consideration is therefore necessary to ensure that a better balance can be struck between allowing SEPA a degree of the flexibility which it is calling for while protecting the regulated person. We are confident that SEPA is already aware of the types of the circumstances where it needs to exercise its powers: the balance would be better struck by specifying those circumstances, rather than granting SEPA inappropriately wide powers to act wherever it sees fit. Where Government is conferring powers to limit the actions of individuals, it is right that the onus should be on Government to specify the circumstances in which the delegated authority can do that.

It is also important that uniformity does not stifle creativity and that the authorisation regime continues to drive innovation, allowing Scottish businesses to lead, or at least keep pace with, the rest of the UK, Europe and the wider international community while also ensuring robust environmental protection.

A particular concern raised in our previous consultation response was the impact of integrated permits and CAS. If there is a risk that non-compliance in one area will render the whole permit invalid, this will be a significant disincentive to companies to combine applications for all elements of their operations within one permit.

As noted in our previous consultation response, the outcome of negotiations regarding the UK's withdrawal from the EU may have an impact on environmental law and in turn on the proposals here. We consider it would be helpful to have some information as to how SEPA and the Scottish Government intend to "future-proof" the proposals against this eventuality.

Response to questions

Public participation statement

Question 1 - Is our public participation statement clear and understandable?

Generally speaking the statement is clear.

Question 2 - Are there any parts of the public participation statement you particularly agree or disagree with?

It will be essential for the proper operation of the public participation mechanisms that sufficient resources are put in place at the Scottish Government to consider whether to call in, given this could apply to many more applications than are currently caught under CARs. Applicants should not be forced to wait for the

expiry of the period for determination by Scottish Ministers as a result of lack of resources, where the request for call in has little merit.

Question 3 - Is there anything missing that you would have expected the public participation statement to have covered?

The statement should include more detailed information as to how the consultation/participation process operates – in particular how they can find out what is happening and how they can get involved. It might be possible to generate some kind of update or alert system which interested individuals could sign up for. There should also be an indication of what will be available on the website or any other ways in which material would be available to be accessed. For a statement at this high level of generality full details would be inappropriate, but it would be useful to have some indication of where the onus will lie to find out what is happening and when there are opportunities to participate.

Question 4 - Do you think any groups of people may be advantaged or disadvantaged by this statement?

We are not immediately aware of any particular groups, subject to the comment above on the potential prejudice to applicants if sufficient resources are not made available to deliver the Scottish Government's role in the process.

Guidance on who can hold an authorisation

Question 5 - Do you find the guidance on who can hold an authorisation clear and understandable?

As noted in our response to the regulations, we are concerned that the Regulations and the guidance accompanying them go too far in simplifying the Regulations at the expense of legal certainty.

We also noted our support for the objective of ensuring that only fit and proper people are responsible for operating businesses which could have serious negative impact on the environment if the relevant regulatory regimes are not properly complied with. However, there is not enough detail or specification at present as to the kind of criminal behaviour which SEPA would consider relevant in assessing whether someone is or is not a "fit and proper person". The consultation states that more detail on this will be contained in the guidance accompanying the relevant technical schedule but the draft radioactive substances guidance contains no further detail. This effectively leaves the fit and proper person test as vague as it was in the previous consultation, where the test of "of good repute" was proposed. Left as vague as this, this is unacceptably uncertain and gives what seems an unjustifiably wide breadth of discretion to SEPA, with little or no check or balance on its exercise.

In addition, further clarification should be given in relation to division of responsibility between parent and subsidiary companies where neither exercises sufficient control in its own right to meet the authorisation requirement. This is a point we raised in our response to the consultation on the regulations themselves.

There could be practical problems and time/cost implications if SEPA is forced to spend a significant amount of time working out who they should be pursuing for particular compliance failings. This is particularly likely in dealing with complex corporate group structures. The provisions are currently drafted also have the potential to result in significant administrative burden for regulated persons in assessing who may be responsible for any site. This is also likely to make transactions dealing with regulated sites or businesses more difficult as buyers, seller and funders will wish to understand who may be liable for any breach or other action brought by SEPA. The provisions may, for instance, result in selling holding companies retaining liability for the acts or omissions of a subsidiary after it or its business has been sold. It will not be possible to contract out of the criminal liability that might result.

It is also important to ensure that the allocation of responsibility under the framework produces a fair outcome in principle. If it were to produce an unjust result, it seems unlikely that a Procurator Fiscal would pursue an enforcement action. It would not be unreasonable to expect a company to put mechanisms in place in contracts to monitor performance and compliance from time to time but any obligation to do so has to be proportionate, subject to exercising reasonable due diligence. It would be unfair to impose vicarious liabilities on a company which has acted reasonably in relying on contractors or sub-contractors to carry out specific tasks.

In particular we note that it is not possible to contract away criminal penalties so there should be careful consideration of where those could be incurred. One way to achieve a workable system in this context could be to impose vicarious liability on the basis of rebuttable presumptions or defences. This would allow innocent parties to prove that they had been diligent and responsible in ensuring compliance by third parties.⁴

Question 6 - Are there any parts of the guidance on who can hold an authorisation you particularly agree or disagree with?

Please see out comments above. In our response to the regulations, we also noted that there should be potential for those who have previously received a criminal conviction to reform and this should be taken into account in assessing who should be able to hold an authorisation.

⁴ In this context the Wildlife and Natural Environment (Scotland) Act 2011 may offer a helpful comparison. Under the act landowners are able to avoid conviction under vicarious liability provisions if they can show that they did not know the offence was being committed and they had taken all reasonable steps and exercised all due diligence prevent the offence being committed.

Question 7 - Is there anything missing that you would have expected the guidance on who can hold an authorisation to have covered?

It would be helpful to provide cross references to the guidance with compliance assessment and charging schemes so that operators have a fuller picture of the interaction between these schemes and the authorisation framework.

Authorisation guide for radioactive substances

Question 8 - Is our authorisation guide clear and understandable?

Question 9 - Are there any parts of the authorisation guide you particularly agree or disagree with?

Question 10 - Is there anything missing that you would have expected the authorisation guide to have covered?

We have no specific comment in relation to radioactive substances at this stage beyond those general points addressed above.

For further information, please contact:

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