Law Society of Scotland

Consultation Response

Consultation on Proposals for an Integrated Authorisation Framework

April 2017

Introduction

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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): *Consultation on Proposals for an Integrated Authorisation Framework*.[1] The Sub-committee has the following comments to put forward for consideration.

General comments

The Law Society supports the objectives which SEPA is aiming to achieve with the proposals for an Integrated Authorisation Framework. We support steps to simplify the system, reduce regulatory burdens and encourage innovation and are keen to engage as constructively as possible throughout the process of introducing the new framework.

The new proposals, and in particular the potential for introduction of universal obligations, presents a significant change from the current system. In principle we consider that many of the proposals could offer benefits to multiple stakeholders but the obligations to be met must be clear so that the persons subject to them can be certain of their obligations. This will come down to how the principles will be implemented in practice and more detail of this is required. If the principles cannot be implemented in practice with sufficient clarity and simplicity, they should be reconsidered. The consultation is in some areas confined to the conceptual and it would be useful to see how the changes envisaged would work in practice, for example if a sample "marked up" permit could be produced to allow a more detailed analysis.

The response below therefore represents our initial view of the proposals and we look forward to providing further input when the proposals are at a more detailed stage.

[1] https://consultation.sepa.org.uk/communications/proposals-for-an-integrated-authorisation-framewor/

We also note that 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. It would be helpful if some more detail could be provided on how SEPA and the Scottish Government intend to "future-proof" the proposals against this eventuality.

Part 2: Policy Overview

Question 1: Do you agree with the benefits set out above?

Broadly speaking we agree that an integrated approach to authorisation framework has the potential to deliver the benefits identified.

Question 2: Are there any other comments you would like to make on Part 2?

There is not enough detail in the consultation document(s) to predict whether the Integrated Authorisation Framework would be able to deliver those benefits. While we understand and support the aim of simplicity, this must not be at the expense of comprehensibility and legal certainty. This applies in particular to the aim of flexibility: clarity and certainty must prevail over the desire for flexibility.

Question 3: How could SEPA better support the uptake of new technologies?

We do not offer any advice as to how SEPA might support the uptake of new technologies and indeed it is not clear what new technologies are envisaged in this or how the current system supports uptake of new technologies. In general terms, we are interested to know if the intention is that people will be "allowed to fail": in achieving innovation it is often necessary to carry out tests or trials which might fail to meet environmental obligations before a compliant solution can be found. This should be borne in mind in setting out the new regime.

Part 3: Key features of the new framework for authorisation holders

Question 4: Do you agree that the framework should include a set of universal outcomes?

Members report that from an operator perspective, this appears to be one of the most controversial aspects of the proposal. It is also a problem from a legal certainty and rule of law perspective. General conditions could lead to problems if people are not then clear as to what they can and cannot do. They run the risk of giving too much discretion to regulators. Introducing these outcomes is a move away from the "licensed pollution" system which operates at present. This move prompts questions as to what would happen if limits are wrong. There is no point in a permit if the permit-holders can comply with conditions and still face sanctions.

The status of the proposed universal outcomes needs to be made clearer – there is a question as to whether these are intended to be guiding principles or whether failure to achieve them could be used as grounds for bringing an enforcement action. We are of the strong opinion that failure to meet such broad outcomes should not be grounds for prosecution or enforcement action, civil or criminal: a regulated person must be able to predict with confidence what failure by them can incur prosecution or enforcement. We do not believe that the universal outcomes are sufficiently clear in this regard.

If they are to be introduced, legislation and/or guidance on what they mean and good practice[2] is essential. If they are intended to be enforceable then it is imperative that the guidance is sufficiently detailed to give certainty regarding the scope of obligations. This would also be necessary to address concerns around uncertainty and the level of discretion which might be given to the regulator. If proper detail and/or guidance is not given it will be impossible for companies to work out what they need to do to ensure compliance. They must have certainty so they can avoid being in breach of their obligations and ensure they are not liable to be subject to an enforcement action.

In particular a question arises as to the definition of "harm". If this is not clearly defined at the outset, the concept could end up evolving; it is not practical (and would be prohibitively costly) to expect regulated persons to retain consultants on a permanent basis to monitor such developments in order to avoid falling foul of the requirements. While we understand the desire to simplify the system avoid and permits which are too complex, it is similarly important that certainty is not compromised. It will not be necessary to set out what steps to take in a particular situation but it must be clear what harm is.

It is also unclear who will decide what the outcomes will be.

Question 5: If so, are the outcomes proposed the right ones?

Yes, as far as they go, but at present they are too wide and lack precision. In practical terms their success will depend upon further detail as to what they will actually mean. Significant effort will be required to develop that detail and ensure that they are achieved. If sufficient certainty and clarity cannot be achieved, the principles must be reconsidered.

Question 6: Do you see any opportunities within your sector for industry-led guidance to be produced to support this approach and how could it support you to deliver better?

Not applicable.

Q.7 – Do you understand the descriptions of the regulated activities in Annex 2?

Yes.

[2] The standard of "best practice" would be too high a threshold – see further our response to question 9.

Q.8 – Do you agree that these are the right factors for SEPA to consider?

Broadly speaking we consider these to be the right factors, however, we note the following concerns:

- In relation to public consultation, whether or not consultation is required would not necessarily affect the form of authorisation. Consultation may establish that there is little concern regarding the activity in question.
- Furthermore, there is no provision for reassessment of the level of authorisation required. If, for examples, problems are recurring in a particular area, it might be appropriate for that type of authorisation to be moved to a "higher" tier of authorisation.
- The concept of risk is still quite broad – further clarity is needed as to how risk will be determined. We would expect that this would be set out in more detail in the guidance as it is vital that risk should be assessed consistently.

Q.9 – Do you agree that SEPA should consult on the guidance setting out the likely tier of authorisation for particular activities?

We agree that SEPA should consult on the guidance.

In particular, as noted in our response to question 4, if it is not set out in legislation, detailed guidance will be required around universal outcomes if these are to be introduced.

We also welcome indications from SEPA that this would be industry led.

It is important to note that guidance should be framed around the idea of good practice. It should not be best practice as there should be potential for regulated persons to go "above and beyond". "Best practice" at all times is too high an obligation. It could be prohibitively expense to meet this standard and might constrain regulated persons from taking the best approach for their own circumstances.

Q.10 – Do you agree that standard rules will deliver the benefits we have set out?

Standard rules have the potential to deliver benefits in terms of standardisation but the rules will need to be clear and accessible if the aims of consistency and certainty are to be achieved.

Certain practical issues will also need to be considered and clarified in the guidance. Questions such as the following will need to be addressed: What will happen if part of the site is complying well with the guidance and another is not? What happens if a permit is granted for multiple sites and some are compliant and others are failing to reach requirement?

On the one hand a requirement to ensure that all parts of the site/all sites listed on a permit are compliant could act as an incentive. However, this could also result in unfairness if non-compliance at one site results in the entire permit being marked down, for example in the CAS score of the regulated person. If that were to be the case, it would generate an incentive to apply for multiple permits, detracting from the potential

efficiency of the new system. Similarly enforcement actions should only apply to the parts of the site(s) which a permit covers.

Q.11 - Do you agree with the procedure for making standard rules? If not, why not?

We are content with the procedure for making standard rules but there should be provision for them to be updated.

Q.12 – Do you agree that SEPA and Scottish Ministers should have the ability to make GBRs?

We welcome the fact that SEPA can take initiative but endorse maintaining the requirement for approval by the Scottish Ministers, given their potentially wide reach.

We also note that GBRs are not always sufficient to catch an incident (for example pollution) before a problem arises. Where there are numerous incidents of non-compliance in a particular area or along similar lines, it may be necessary to amend the rules.

Authorised Person

Q.13 – Do you agree that all regulated activities should have an authorised person responsible for overall compliance and that this person should be named in a permit and registration? If not why not?

Yes, but it is not clear what would happen to the regulated person if something goes wrong. As explained further in our response to question 16 below, there may not be a single person who automatically appears appropriate to take on the role of authorised person.

Q.14 - Do you think it is proportionate to require the person in control to be the person that notifies an activity in the notification tier?

Yes.

Q.15 – Do you agree that SEPA should include more than one person as the authorised person where appropriate?

This could be helpful but see also answers to questions 13 and 16.

Q.16 – Do you have any views on how SEPA should decide if a person is in "control"?

The rules need to reflect the reality of the situation. More detail is needed as to how you assess culpability and assurance is required that action will only be taken where a certain matter was within the relevant person's control.

Deciding who has “control” in terms of the proposals could prove difficult. Particularly in larger companies, there may be someone who is responsible for environmental compliance but is not able to exercise control in the sense of finances or investment decisions. A threshold might be needed to determine who the appropriate person would be in such circumstances. This requires further consideration, we suggest in concert with industry and persons familiar with corporate governance structures. We would be happy to assist further with this.

There also need to be clear rules on what is to happen when an authorised person ceases to be in a position to exercise responsibility as envisaged. .The individual may die or be otherwise incapacitated, (s)he may (voluntarily or not) cease to hold an appropriate post in the body undertaking the relevant activity or that body may itself cease to exist (e.g. if a company is wound up). There should be provision for substitution or specifying whether and when responsibility comes to an end.

We recognise the potential for designating a responsible individual within a company resulting in further escalation of environmental issues to a “board level issue”. However this needs to be proportionate.The requirements placed upon that person would need to recognise the level of control that (s)he could reasonably be expected to personally exercise.

Q.17 – Do you think the core requirements set out above will deliver the right approach to FPP for the integrated authorisation framework?

We would favour a statutory definition of FPP to give greater legal certainty as to who may be appointed as an authorised person. We do not consider that reference to SEPA’s statutory purpose is helpful in this regard.

Q.18 – Do you think that the criteria set out above will achieve the stated purpose of the FPP test?

It is important to make sure that the test is effective and not impossible to implement in practice. It is not at all clear what “good repute” would mean. We understand that the term is used in a security context and in a road transport context. However, the fact that there is a lot of case law in this area suggests that it the concept is not conducive to the clarity and simplicity that is at the heart of better regulation.

We are further concerned that “any other grounds” gives an incredibly wide discretion to SEPA. This goes back to the issue of legal certainty. The new framework needs to take a much more targeted approach to identifying the mischief which these proposals are intended to resolve, so as to avoid compromising legal certainty.

Q.19 – Do you agree with the proposed application processes?

Whilst we appreciate that applicants are responsible for ensuring that the application forms and information supplied are correct and in compliance with the applicable legislation and guidance, it would be useful if SEPA could agree to include a mechanism for ensuring that applications are given an initial check (i.e. for matters of form such as incomplete information, minor inaccuracies or missing signatures) within a fairly short timescale from receipt and that applicants are then informed if, as result of such initial check, their

application is ‘duly made’. The current practice, in some cases, to refuse applications on the basis of such minor errors but often after some time has passed is not helpful to the overall application process and does not improve confidence and transparency in the system. SEPA needs to be careful to ensure that any new process is as user-friendly and consistent as possible.

Q.20 – Do you agree with the proposal to have a statutory determination period of four months for the majority of permit applications? If not, what do you think the determination period should be?

It is a good idea to have a target date so that all parties have an idea of the timeline they are working to. In particular this would develop parties which are engaged in development to plan more efficiently.

Q.21 – Should the legislation make a clear distinction for applications for “non-standard” activities?

There is already a way to deal with “non-standard” activities – agreeing to extend the four month period – and we feel this is sufficient. However, guidance ought to set out a default procedure that would apply to such projects and the types of projects to which it would apply, to give users the requisite clarity in these cases. There is already precedent for different specific procedures applying to projects over a certain threshold: see for example the planning procedure applying to major projects in Scotland and nationally significant infrastructure projects in England and Wales.

Q.22 – What other alternative arrangements would you suggest for managing non-standard applications?

As noted above, we would expect that the default procedure should be outlined in the guidance setting out timescales of what should happen and when various milestones will be reached.

Q.23 – Do you agree with the proposals for variations? If not, why not?

Yes.

Q.24 – Do you agree with the proposals for transfer? If not, why not?

Provision should be made for the position when the authorised person dies or is no longer able to act and specifying where responsibility lies when a company enters liquidation or otherwise ceases to exist as a distinct entity.

See also comments at question 16.

Q.25 – Do you agree with the proposals for surrender? If not, why not?

Where there is a lower risk, there should be a simpler process; as with registration the procedure should be proportionate to the activity in question. Again the guidance is key and we assume that this will be consulted on.

Q.26 – Do you agree with the proposed approach to enforcement notices set out above?

Where environmental harm is identified in a situation where the permit-holder is complying with the conditions of the permit and a notice is to be served, this should not be regarded as an enforcement notice, or subject to any sanction or other negative consequences. We anticipate that in many cases the proportionate course of action would be to vary the authorisation and a notice of variation should be sufficient.

Q.27 – Do you agree a notice used in the way set out in 3.7.10 to 3.7.12 is a different type of notice and should be therefore be called something different, such as an improvement notice?

We agree that such cases should be dealt with separately. As above, where the permit-holder is not at fault, the notice should have a neutral name. We consider that a term like 'environmental protection notice' might be a better way to refer to these notices and similarly improvement notice seems to be a more appropriate label than enforcement notice for such situations.

Q.28 - What benefits and drawbacks do you foresee from SEPA using enforcement notices in the way set out at 3.7.10 to 3.7.12?

See responses to questions 26 and 27. In addition, this is one of the areas where it would be useful to see a worked example and to have an indication of the circumstances in which such notices would arise.

Q.29 – Do you agree we should retain suspension notices for use in circumstances where we wish to suspend an activity in order to protect the environment, but the authorised person is not being 'enforced' against?

These should continue to be used but they should not be used in place of enforcement notices and it should be clear that there is no suggestion of non-compliance. Our understanding is that the general premise of this type of notice is to deal with matters which are out with the control of an operator (rather than relating to the operator's non-compliance) such as a wider or adjacent pollution incident, where temporary suspension of activities which could aggravate an environmental problem is justified. Currently, that is not always the premise on which such notices are issued. Our view is that going forward, that is the basis on which they should be issued. Scottish Ministers should also consider incorporating compensation for loss of business, profit etc (resulting from such temporary suspension) into the use of such notices.

Q.30 – Do you agree SEPA should have the power to revoke authorisations in these circumstances?

We emphasise that revocation is only appropriate in the most serious of circumstances: all other means of dealing with a problem should be exhausted before resorting to revocation. Again, we note that the detail of the guidance is essential: parties need to know exactly what will be required of them in particular circumstances.

Q.31 – Do you agree that appeals against SEPA decisions should continue to be heard by the DPEA on behalf of Scottish Ministers? If not, which alternative body do you think should hear such appeals and why?

In our response in June 2016 to the Scottish Government's consultation paper on *Developments in Environmental Justice in Scotland*, we noted the need for a thorough review of how environmental matters are handled, seeking to improve on the present fragmented and piece-meal approach which allocates appeal jurisdiction to a range of different bodies. Although we appreciate the need for an initial decision to be taken on how appeals within this regime are handled, we remain of the opinion that there should be a review of environmental appeals across a wider canvas, rather than persisting with a piece-meal approach.

Q.32 – Do you have any views on the proposed policy principles for transitional arrangements?

Specific questions have not been posed on part 6 of the consultation in relation to waste but one issue which arises in relation to this question and is likely to require some further (industry-specific) consultation relates to the transition arrangements for waste licensing exemptions. Whilst the proposal appears to be that some exemptions will simply transfer to the lowest tier of the new framework, that is not intended to be the case for other exemptions. Clarification, including by way of additional consultation, would be welcome to ensure that the balance between lighter regulatory control (in some cases) and the need for stricter regulatory control (in other cases) is struck appropriately.

Q.33 – Do you have any suggestions for how SEPA might manage the workload to implement integrated, and corporate, authorisations?

It may be helpful if this is customer-led: SEPA should consult stakeholders to gauge the likely uptake. An industry or sector-specific approach may be appropriate in this regard.

Part 4: Key features of the new framework for the public

Q.34 – Do you support SEPA having more flexibility in how information is made available to the public?

Yes, but the same amount of information should be ultimately available to members of the public. Also it is important that there should be transparency around what information SEPA will make available. Similarly, it needs to be clear where original/detailed data can be found if summaries are published.

Q.35 – Do you agree that a consistent, flexible and proportionate approach to public participation should be adopted?

Yes, but the criteria for such participation must be clear.

Q.36 – Do you agree that the procedural arrangements for third party call-in under CAR should be extended to all regulated activities?

We do not consider that the arrangements should be extended. The approach is appropriate for CAR because of the frequency of third party users but it is not needed in other situation.

Part 5 - Pollution Prevention and Control

Q.37 - Do you consider that the provisions of the universal outcomes contain equivalent protection as BAT in relation to domestic activities?

As matters stand, we do not think that these are reasonably comparable. There is nothing comparable to the BREF process. More detail on the proposals would be required to allow a meaningful comparison.

Q.38 - Do you have any comments on the potential impact of this change for other industrial pollution risk activities?

We have no comment on this question.

Part 7 – Radioactive Substances

We have no comment on the chapter relating to radioactive substances at this point.

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