



Law Society
of Scotland

Consultation response

Land Rights and Consents for Electricity Network Infrastructure: A Call for Evidence

September 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

Our Planning Law, Property and Land Law and Energy Law Sub-committees welcome the opportunity to respond to the UK Government's Call for Evidence on *Land Rights and Consents for Electricity Network Infrastructure*¹. We have the following comments to put forward for consideration.

General remarks

We note that generally, processes around electricity network infrastructure are fragmented and would benefit from modernisation. For example, it often takes a long period of time to arrange electricity connections for substations in new developments and there appears to be a lack of clarity and evidence base around electricity network infrastructure and the imposition of rights – the location of infrastructure is often not supported by material to clarify the rights and so many zones exist where nothing can be built.

Improvements to and greater streamlining of the legal processes surrounding consents for electricity network infrastructure would be welcome. We consider that there is scope for greater use of standardised processes and documentation which is appropriately balanced to reflect parties' interests. While we are aware that some utility providers use standardised documentation, these are not widely known about among the legal community and coupled with differences between utility providers as well as expectations of parties, means that the benefits of standardised documentation are not fully realised.

In a development context, a developer is required to pay for infrastructure installation to take forward its development but, in the experience of our members, is often unable to secure engagement from the utility provider to help frame that infrastructure documentation in a manner compatible with its development. For example, if a developer has paid for substation infrastructure on a site designed with a 30-year lifetime, it appears that it is inappropriate for this to be subject to a lease of a longer duration in favour of the utility company with no 'lift and shift' provisions that protect that developer's land investment. A full review of the

¹ <https://www.gov.uk/government/consultations/land-rights-and-consents-for-electricity-network-infrastructure-call-for-evidence>

documentation that needs to be put in place and its fitness for purpose would be helpful in this regard. The delay in negotiating these arrangements has knock-on impacts on the lead-in times for housing and other commercial developments. We recognise that there may be resource and internal process constraints for utility providers which impact on these processes.

Consultation questions

1. Should anything else be included, or excluded, from the scope of this review of the land rights and consents processes for electricity network infrastructure, and why?

We have no comment.

2. Questions on specific processes will be asked below. What has been your overall experience of the land rights and consenting processes for electricity network infrastructure?

We have no comment.

3. What is your experience of, and what are the pros and cons of, the current voluntary negotiation process for wayleaves and easements? For example, this could include consideration of time and cost, impact on landowners, communication between parties.

We have no comment.

4. How do you expect your experience of the voluntary negotiation process for wayleaves and easements to change given a rapid increase in network build will be required to meet net zero and energy security objectives?

There is a risk that landowners/occupiers will view the increasing need for utility companies to enter into voluntary wayleaves, easements and servitudes in order to meet demand of building the network as an opportunity to negotiate favourable commercial terms. This could lead to protracted negotiations.

5. How do you think the voluntary negotiation process for wayleaves and easements could be improved?

We refer to our general comments above, in particular, we consider that there is scope for greater use of standardised processes and documentation.

6. What is your experience of, and what are the pros and cons of, the necessary wayleave process? For example, this could include consideration of time and cost, and the mechanism for determining compensation.

A pro of the process is that members of the public, development companies and utility companies all have a voice to be heard.

The cons include:

- i) in the experience of our members, the process often takes a substantial amount of time to progress through the procedure (usually a minimum of 6 months until a hearing). Part of this time may be due to a lack of staff at BEIS to process the applications and the number of Reporters who can govern the hearings and make site visits to the relevant land as required.
- ii) the cost to utility companies of the process can be high as they are required to prove to the Reporter why it is necessary and expedient to keep the apparatus on the land in question, with the onus on the utility company. As a result, utility companies often instruct external legal counsel who have experience of attending necessary wayleave hearings, are familiar with the necessary wayleave procedure and have the ability to guide the utility company through the process. This can lead to significant costs unless the parties are able to agree a settlement/way forward at an early stage. There is no cost to the applicant or the landowner or occupier who may trigger the necessary wayleave process. In some instances, this could lead to landowners/occupiers starting the necessary wayleave process when it might not be appropriate to do so. A review of the procedure involved may be merited to ensure that the expectations on parties involved in the process are appropriately balanced.

7. How do you expect your experience of the necessary wayleave process to change given a rapid increase in network build will be required to meet net zero and energy security objectives?

We consider that resource pressures may be exaggerated given the additional work which will be required.

8. How could the necessary wayleave process be improved?

Where a landowner has issued a notice to remove, it would be helpful if this could be investigated at an earlier stage.

9. What is your experience of, and what are the pros and cons of, the voluntary negotiation process for purchase or lease of land?

We refer to our general comments above.

In Scotland, the voluntary negotiation process requires a developer to contract to sell land and provide access rights for cables with either a utility company or an independent district network operator. In order to achieve

energisation of an asset such as a sub-station, the IDNO must also contract with the utility company to lease the land to them. Our members report practical difficulties with this process.

In practice, developers will generally contract with company A which designs the electrical system. The developer also contracts with company B, which purchases the land. The developer and company B negotiate a contract for purchase which often takes some months. Once this contract is agreed, company B then starts the process of negotiation with the utility company. While competition in the energy market was encouraged by permitting IDNOs to provide connections to the network, SSE and Scottish Power control the connections as no action can take place without a contract with them. Our members report that the process of negotiating a contract between company B and a utility company frequently takes 12 months or more. In practical terms, this significantly impacts on the timeline of delivering housing and commercial developments as while buildings are built, a sub-station cannot be connected until negotiations between company B and the utility provider are concluded.

10. How do you expect your experience of the process for voluntary purchasing and leasing of land to change given a rapid increase in network build will be required to meet net zero and energy security objectives?

We have no comment.

11. How could the process for voluntary purchasing and leasing of land be improved?

We refer to our general comments above, in particular, we consider that there is scope for greater use of standardised processes and documentation.

Consideration could also be given to a system of self-certification, which we understand is the model adopted by Scottish Water for most of their utility work. This could work on the basis of the developer confirming that they own the ground and own/control/have access right for the cables. The utility company could then provide power and any checks can take place afterwards. If there are found to be issues, the utility companies could use their statutory powers to fix these.

12. Are there any specific issues with the compulsory purchase process in England and Wales relating to its use by network operators, beyond those addressed in the current Bill, which need to be considered, and what is the impact of the specific issue(s)? For example, this could include consideration of any issues around determining compensation.

We have no comment.

13. How could the compulsory purchase process be improved further to address the issue?

We have no comment.

14. What is your experience of, and what are the pros and cons of, obtaining Section 37 consent for overhead lines?

We have no comment.

15. How do you expect your experience of the consenting process for overhead lines to change given a rapid increase in network build will be required to meet net zero and energy security objectives?

We have no comment.

16. How could the Section 37 process be improved?

We have no comment.

17. Is the 29m³ size threshold for substations (Part 15, Class B (B.1.(a)(ii))) suitable for a future electricity system? If not, what would be a suitable size threshold? What evidence do you have to justify this change?

We have no comment.

18. What would be the benefits and impacts of increasing the threshold beyond 29m³? Are there any locations where an increased size threshold beyond 29m³ would be inappropriate?

We have no comment.

19. Recognising that there are differences between electricity network infrastructure and the infrastructure of other utilities, how could the electricity industry learn lessons from the comparable processes in the telecommunications and water industries?

The balance of opinion appears to be that the Electronic Communications Code as introduced in the Digital Economy Act 2017 reforms has caused significantly more disagreement and litigation between Code operators and occupiers of land than the previous version of the Code. The Product Security and Telecommunications Infrastructure Bill's amendments come less than five years following the reforms. Prior to 2017, the former iteration of the Code had not required substantial amendment in approximately 30 years. We would therefore suggest caution be applied to use of the Code as a comparable.

In relation to water services, we note that The Water Industry Act 1991/Ofwat and the approved code of practice are not applicable to Scotland.

20. Is there any additional information or evidence that you would like to submit?

We note that meeting the challenges outlined in the consultation, for example of meeting peak demand, will require significant investment in all of Great Britain. While many powers that relate to energy infrastructure are

devolved (for example, planning) the generation, transmission, distribution and supply of electricity are reserved matters under the Scotland Act 1998. It is therefore a vitally important objective of any proposed reform of the reserved matters that they take account of the important differences in law and practice in Scotland.

Unfortunately, it appears this consultation has fallen short of that objective. For example, page 16 of the consultation states:

“Section 37 of the Electricity Act 1989 establishes the statutory consenting process to install and keep installed overhead electric lines. This consenting process typically covers lines less than 132kV or lines less than two kilometres long. Consent is granted by the Secretary of State in relation to England and Wales, save for certain cases. Consent is granted by Scottish Ministers in relation to Scotland. As described at page 10, lines which are considered to be Nationally Significant Infrastructure Projects are out of scope of this review.”

The Nationally Significant Infrastructure Projects (NSIPs) legislation, and development consent orders, do not apply to Scotland. Therefore the above statement is incorrect, with respect to Scotland. For example, the Scottish Ministers are currently dealing with the East Coast 400kV OHL Upgrade, which involves around 168km of overhead lines. In considering whether amendment of section 37 is necessary it must not be assumed that such consents are for smaller/lower voltage lines only.

While there may be useful amendments that could be made to section 37 in its applicability across Great Britain, to the extent that amendments are proposed on the basis that the section ought to be simplified because more complex projects are dealt with as NSIPs, those amendments should be restricted in their extent to England and Wales only.

Generally, the content in the consultation paper appears to give little recognition to the differing regimes in Scotland. As further examples:

- There is a section on voluntary wayleaves and easements that makes no reference to the different law in relation to land rights in Scotland (for example, that easements are not a term of art in Scots law).
- While it is correctly recognised that the general law of compulsory purchase is devolved, this must be considered in the context that energy law is reserved. When an Electricity Act licence holder exercises compulsory purchase powers they will, typically, do so using the powers contained in Schedule 3 to the Electricity Act. Any amendments to Schedule 3 as consequence of (for example) the Levelling up and Regeneration Bill will need to take into account that the procedures in Scotland may differ.
- As noted above The Water Industry Act 1991/Ofwat and the approved code of practice do not apply to Scotland.
- The consultation does not take into account the point at which the Transmission system starts in Scotland compared to England. Transmission voltages in Scotland are 132kV, 275kV and 400kV. Larger generation schemes usually connect to the Transmission system. The lower voltage parts of the system,

distribution networks, operate below 132kV in Scotland whereas in England the distribution network includes 132kV.

We would encourage the Government to ensure that differences in legal practice and procedure across the UK are fully taken into account in any reforms.

For further information, please contact:

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