



Law Society  
of Scotland

# Consultation Response

Proposals for an Integrated Authorisation  
Framework: Consultation on draft Regulations

November 2017



## Introduction

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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 Regulations*.<sup>1</sup> The Sub-committee has the following comments to put forward for consideration.

## General comments

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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 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 However, the draft guidance provided alongside the draft Regulations offers little or no assistance on that front.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

<sup>1</sup> [https://consultation.sepa.org.uk/regulatory-strategy/iaf-supporting-guidance/supporting\\_documents/Consultation%20on%20draft%20Regulations%20for%20an%20integrated%20authorisation%20framework.pdf](https://consultation.sepa.org.uk/regulatory-strategy/iaf-supporting-guidance/supporting_documents/Consultation%20on%20draft%20Regulations%20for%20an%20integrated%20authorisation%20framework.pdf)

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**

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### **Q1 Do you have any comments regarding the approach we have taken to these general aims in the draft Regulations?**

We welcome SEPA's decision to replace the universal outcomes proposed in the previous consultation with the general aims in the draft Regulations, in the context of a duty to have regard to them. However, it remains imperative that further guidance is given on what is intended to be contained within each of the general aims. The obligations to minimise environmental harm and use resources in a sustainable way, for instance, could be extremely onerous without clarity that the costs benefit assessment of doing so must also stand up.

We consider that the stated core purpose of the regulatory framework could be improved by a specific reference with regard to the need to foster innovation. This means that businesses must also be "allowed to fail" without incurring such severe penalties that they would be deterred from seeking to innovate.

### **Q2 Do you have any comments regarding the approach we have taken to cost recovery in the draft Regulations?**

We note the introduction of cost recovery notices. We assume that the notice would fall away if the underlying charge was successfully appealed. This should be clarified in the Regulations.

There should be clearer provision for the reimbursement of any costs recovered by SEPA in the event that enforcement action proves to have been taken without just cause or such enforcement action is withdrawn. It is worth noting that many operators incur significant costs in defending enforcement action and where that action proves to have been false or inaccurate or unjust, there is currently no scope for the operator to be compensated for such costs.

### **Q3 Do you have any comments regarding the approach we have taken to the duties and functions of SEPA in the draft Regulations?**

We note that Regulation 64 brings together a number of existing regimes which is helpful in demonstrating consistency.

Again, we note the importance of ensuring that it is possible for businesses to innovate. We would also emphasise the potential importance of site-specific consultations which could assist innovation in particular cases.

As mentioned in our general comments, a key concern is the level of discretion accorded to SEPA under the Regulations. Neither the Regulations nor the draft guidance accompanying them offer any clarity on how SEPA might exercise that discretion and there is not much comfort in terms of checks and balances which could be built into the system to narrow the scope of discretion. As such, we do not believe that the Regulations meet the requirements of legal certainty, so important to those businesses which are seeking to comply with the regime. In parts, the lack of certainty could render the Regulations unenforceable: this is an outcome which should be avoided.

We are also concerned that Regulation 40 seems to make no provision for legal privilege.

### **Q4 Do you have any comments regarding the approach we have taken to accelerated applications in the draft Regulations?**

No.

### **Q5 Do you have any comments regarding the approach we have taken to offences and defences in the draft Regulations?**

We note that these are broadly the same offences as are currently contained in the CAR.

### **Q6 Do you have any comments regarding the approach we have taken to third party call-in in the draft Regulations and Policy Statement?**

Our concern is that this mechanism has the potential to delay any application. We would welcome further details as to what work will be done to ensure that the relevant Scottish Government team has the necessary resources to deal with the predicted number of requests for call in. Applying this mechanism to



all of the other environmental regimes - many of which will be significantly more controversial than applications under the CARs - has the potential to significantly increase the number of requests.

A similar point arises in relation to the appeals mechanism under Regulation 57. If the much wider discretions given to SEPA are retained as currently drafted, many more appeals will be made to the Scottish Ministers. What provision has been made for the resources required in the DPEA for the efficient and effective resolution of such appeals? Even with such provision, 'regulation by appeal' is not better regulation. The aim of the Regulations and the guidance accompanying them should be to avoid appeals, by providing sufficient definition of the circumstances in which SEPA can exercise its various discretions. At the moment, they fail to do so.

### **Q7 Do you have any comments regarding the approach we have taken to off-site conditions in the draft Regulations?**

We are concerned that the power to impose off-site conditions is too wide and there is not sufficient transparency as to how this would be used in practice. We understand that one potential use would be to install monitoring instruments: in our view this would be a legitimate purpose for imposing conditions but the scope of the power should specifically reflect this. At the moment, as with the rest of the Regulations, the discretion is given to require off-site conditions in any circumstances. This fails to strike the right balance between flexibility for SEPA and predictability of regulation for the regulated person.

Also, since this procedure effectively amounts to a form of compulsory purchase, we are concerned that there is no recognition of the well-established, very restricted circumstances in which expropriation of property is justified. The test of establishing a compelling case in the public interest before land or rights are acquired compulsorily should apply equally here. Moreover, steps should be taken to ensure that the procedure is human rights compliant, if it is to be enforceable.

## ***RADIOACTIVE SUBSTANCES – TECHNICAL PROVISIONS AND GBRS***

### **Q8 Do you have any comments on the radioactive substances provisions at Schedule 8 of the draft Regulations?**

Given the restricted time available for review, we have confined our review to the general provisions of the Regulations, given that these will apply to all regimes to come. It appears that a number of other consultees are not aware that the scope of the consultation and draft Regulations is much wider than just radioactive substances. This will need to be borne in mind in future consultations on bringing other regimes within the scope of the Regulations: further amendments to the general provisions applying to all regimes may be needed at that stage. Similarly, since so much depends on the guidance if the Regulations will not spell out the restrictions on SEPA's discretion, further amendments to the Regulations may be required coming out of the ongoing consultation on the guidance accompanying them.

## Q9 Do you have any comments on the draft General Binding Rules at Schedule 9 of the draft Regulations?

Please see our comment above. We welcome the requirement for Ministerial oversight in setting the GBRs. We note that at present SEPA is consulting in relation to radioactive substances only but that other areas will be phased in over time.

## Other issues

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### Authorised person

We welcome SEPA's objective of ensuring that the Authorised Person should be the person who has control over compliance. However, we note that 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.<sup>2</sup>

<sup>2</sup> 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

## Enforcement/improvement notices

There is a fundamental concern around the idea of serving an “enforcement notice” on a company which is already compliant. This relates back to the importance of legal certainty. Regulation 47(1)(b)(i) and (ii) should be separated out to form criteria for variation of a permit, subject to normal representation and appeals procedures. SEPA has to stand by the terms of the permit that *it* imposes, rather than have the power to simply depart from them eg wherever *any* (not just significant) environmental harm (which is not defined) is in SEPA's view likely or, more worryingly, in circumstances where SEPA believes the environment should be improved. The concept of forcing improvement of the environment departs from the well-established principle that any operator should be liable to return a site to the condition it was in when the operator acquired it. The contaminated land regime takes a significant chunk of legislation and many pages of guidance to set out the restricted circumstances where someone might be forced to go beyond that principle. By contrast, the draft Regulations simply hand out the power in a single line, with no suspension on appeal and a criminal sanction for non-compliance. This requires a great deal further thought and development if the concept is to be applied equitably.

## Fit and proper person test

We support 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 transparency 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”.

In addition, much as innovators should be allowed to fail, criminals should be allowed to reform.

The criteria against which an individual will be assessed need to be set out clearly and transparently. They should also be objective. Furthermore, this should be done in a way that ensures legal enforceability and guidance alone seems insufficient to achieve this.

### For further information, please contact:

Carolyn Thurston Smith

Policy Team

Law Society of Scotland

DD: 0131 476 8205

[carolynthurstonsmith@lawscot.org.uk](mailto:carolynthurstonsmith@lawscot.org.uk)

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was being committed and they had taken all reasonable steps and exercised all due diligence prevent the offence being committed.