

Consultation Response

Installation and Maintenance Licences for Heat Networks

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Property and Land Law Reform sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Installation and maintenance licences for heat networks. The sub-committee has the following comments to put forward for consideration.

Questions

Question 1: Do you agree that Scottish installation and maintenance licences should be opt in, meaning only organisations who want the associated rights and powers need apply?

Mostly agree.

We note that the Energy Act 2023 superseded significant parts of the Heat Networks (Scotland) Act 2021 but did not wholly replace it and recognise these proposals as an attempt to mould these Acts together into something practical.

We presume that the compulsory rights within the proposed rights here will operate in a similar fashion to statutory undertakers under the Electricity Act and the Gas Act, alongside being subject to the same level of scrutiny and oversight.

In general, we consider that the arguments around cost and efficiency are appropriate. We consider the consultation's assessment that not every scheme will require access to the proposed statutory powers is realistic, as new build developments will look to develop a self-contained scheme.

From a rural perspective, we highlight that heat network projects are developed and operated entirely within a single estate or farm.

With reference to our response to question 2, we question how long the opt in is to last for. For example, once an organisation has opted into the licence scheme, can it subsequently opt out of the licence scheme, whilst retaining the rights

acquired by virtue of being in the scheme? We welcome clarity on this point from the Scottish Government.

We query whether a licence be required in order to undertake works or gain access in local authority-maintained spaces, such as roads. We highlight that the existing model for current statutory undertakers may be a useful template.

Question 2: Do you agree that installation and maintenance licences should be granted at organisation level rather than to individual networks, meaning that organisations with multiple heat networks only need to apply for one licence?

We have responded “Mostly disagree” because we consider that the consultation lacks the required detail to fully understand how the licensing will operate in practise. .

Diagram 2 set out the purpose of the licence as a vehicle to carry out proportionate fitness checks, covering market experience and financial suitability.¹ The examples of an individual include special purpose vehicles (SPVs). These companies are typically set up for a specific purpose and are separated from the group of companies that they initially form part of. This means that there is no guarantee that the management team, ownership and funding will remain the same during the period of construction or maintenance of the heat network. As such, this raises questions about the utility of granting licences on an organisational basis.

However, we also consider that if the high-level approach that the licence will be used to test the suitability of the licence holders, rather than testing the design of the proposed heat network, then it is difficult to see the value in linking the licence to an individual scheme, rather than to an entity.

We highlight that it may be appropriate for organisations to be required to apply for a licence for each network and if that network is then expanded, it would then require an additional licence. We consider that there could be a scenario where a company constructs multiple heat networks under one licence but then goes bankrupt or otherwise cease operating. The people served by the heat network need to have reliance on the licence and the stringent application process and regulatory backstop.

Given the significance of the rights that licence holders would possess, the conditions for becoming a licence holder should reflect the significance of the rights they will hold.

¹ [Installation and Maintenance Licence for Heat Networks - Public Consultation](#)

We seek clarification on how the licence interacts with the operational licence at a UK level. To give example, how a residents' association would be assessed should it need licence powers, in a situation where ownership of a heat network has passed from the developer to the operating management company. How does an operator access the rights granted under the licence if they were not the original licensee? Ultimately, we consider it important to avoid a situation that enables ongoing commercial exploitation by the original licence holder or any gaps in the rights benefitting the operating company between the two legislative regimes.

Question 3: Do you agree that licences should be applicable to any type of heat network in Scotland irrespective of size or technology?

Mostly Disagree

The consultation refers to the licence being based on experience and financial viability for the licensee. If this is what the licence is to be based on, then the size of or technology used in the network is not relevant.

We consider it appropriate if consideration is given to the public benefit of the scheme, given that compulsory powers are proposed as a potential right in terms of the licence. As such, we consider that a consideration of the scheme is necessary, not only limited to size or technology.

Question 4: Are there any other considerations for the scope of licensing you wish to highlight?

We refer to our previous comments in our answer to question 2 regarding the consequences of a company opting out.

Question 5: Do you agree with the additional rights and powers which will be available to licence holders?

Strongly agree

We consider that the rights set out the core rights would be required.

If the licence were to set out the rights that are to be available to the licence holder, then this allows for control over the extent of the rights to be available. We consider this appropriate as it allows for a wider array of rights to be available to licence holders.

We note that the proposal is to provide necessary wayleaves, which if aligned to the Heat Networks (Scotland) Act 2021 would constitute a real right. If wayleaves are intended to provide real rights, we would welcome clarity around;

- the precise nature of these rights?
- who benefits from these rights?
- how these rights are transferred?
- what happens if there ceases to be a licence holder?

Question 6: Are there any other rights and powers you feel should be considered for installing and maintaining heat networks?

We consider that for the purposes for clarity:

- it would be beneficial to expand the meaning of apparatus to include further items, such as telemetry and monitoring equipment;
- it would be beneficial if the rights could extend to upgrading the network, as well as repairing or replacing apparatus.
- we would recommend making specific provision in relation to mineral titles. Whilst it is often clear who owns the minerals in land, sometimes there are successive layers of mineral reservations, and it may not be clear who all the owners are.

We further consider that for large schemes, the rights to form compounds and bund soil may also be useful.

We would also suggest that consideration be given toward granting rights to bring services to the heat network facility. We interpret the proposed rights as focusing on the network from the heat generating facility, rather than services to the heat generating facility.

We note that heat networks may also chose to utilise the ability to have pipeline servitudes as provided for in terms of section 77 of the Title Conditions (Scotland) Act 2003.² We highlight that section 77 can be useful for the installation of networks, but these provisions are underpowered in relation to the range of rights that clearly fall within the ambit of that section. We consider that section 77 could be more effective if it was expanded and updated, which would then allow it to become a useful alternative vehicle for documenting rights by agreement.

We highlight that it would be beneficial for the Scottish Government to detail in-depth whom is eligible to apply for a licence.

² [Title Conditions \(Scotland\) Act 2003](#)

Question 7: Do you have any views on who the licence regulator should be?

We have no specific views, beyond the need for proper resourcing for the regulator.

Question 8: Do you agree that the licence application process should focus on industry expertise and financial stability?

Slightly disagree

We refer to our answers to questions 2, 3 and 9. We highlight that there needs to be a real capability test on the licensee, and this includes other aspects such as insurance arrangements.

Question 9: Do you agree that fuel poverty, greenhouse gas emissions and Just Transition are not appropriate requirements for an opt in installation and maintenance licence?

Mostly disagree

We believe these are appropriate requirements as part of a wider public benefit assessment. We highlight that if the licence does not consider the quality, effectiveness and public benefit of the proposed heat network (on whatever range of criteria are proposed), then the licence creates a situation where:

- the licence is granted in favour of an organisation which (particularly in the case of an SPV) may not retain the same expertise and financial backing; i.e. these elements are able to fluctuate;
- the licence would allow land to be compulsorily purchased and wayleaves creating real rights to be granted. These are permanent.

We highlight also if the licence also considered the nature of the heat network, then there would be a more permanent element tested as part of the grant of the licence, that would help justify the permanence of the rights that could be obtained through the licence.

Question 10: Do you agree licences should be subject to general and specific conditions, and limitations, which may be modified after the licence has been granted?

Strongly agree.

Heat networks are complex, and technology in the energy sector is constantly changing. We therefore consider that retaining flexibility makes sense, assessed on the same basis as the original grant of licence

We stress however that there has to be consistency for both the licensee and those who will be ultimately benefitting from the heat network. Any changes made to the licence have to be proportionate and in the event the licensee is looking for wider specific powers, it would be inappropriate to grant them a carte blanche.

Question 11: Do you agree licences should not have an end date unless revoked or surrendered?

Strongly agree

The consultation document refers to the licence being “surrendered” in which case “In doing so they would surrender their access to the associated rights and powers of the licence”.

We would welcome more detail here. For example:

- if land has been compulsorily acquired, what does it mean for the licensor to surrender their “access” to that land? Who would own it, and who would be able to use it for the provision of the heat network?
- we think that heat networks have particular issues when it comes to the operation and maintenance of the heat network, and the failure of a particular operator. If a particular operator fails, then the customers served by that network are very unlikely to be able to be served by another operator from a different network.

Furthermore, we consider that the surrender of a licence should not absolve the licensee of the obligations under it.

If wayleaves were to benefit only an organisation, we consider that arrangements need to be made to ensure that the heat network may continue to benefit from the wayleaves, regardless of any particular organisation continuing to be licensed. We highlight that where the particular licensee no longer exists, if the rights belong to an individual and not a particular heat network, they may no longer be attached to the heat network specifically.

Question 12: Do you agree there should be a public register of installation and maintenance licences?

Strongly agree.

Question 13: Is there any other information you think we should include on the public register of installation and maintenance licences?

We refer to our comments regarding the assessment criteria for licence holders in our answer to question 3. There should be a clear understanding of the public benefit throughout all aspects of the licence and its administration.

Question 14: Do you agree that there should be fees associated with recovering the costs of administering installation and maintenance licences?

Strongly agree

We consider this appropriate as many heat networks are likely to be set up as commercial ventures with the intention of creating a profit generating business. We highlight that it may be appropriate to place these fees on a sliding scale, equivalent to the rights which are sought or the size of the project.

Question 15: Please provide any further comments on the proposals set out in this consultation.

In general, we are very supportive of the aims of these proposals and would welcome further engagement with the Scottish Government regarding both these proposals and the Buildings (Heating and Energy Performance) and Heat Networks (Scotland) Bill.

We highlight that these proposals cannot be assessed without details of how pricing of heat networks supplies are to be regulated.

Our expectation of the spread of heat networks is that consumers are unlikely to be able to “shop around” and switch heat networks suppliers, as is possible with more traditional forms of energy supplies.

If that is the case then by creating heat network zones and mandating the connection into a heat network, may result in the success of business and the value of buildings within such zones being vulnerable to the quality of the heat networks that they are required to join and the quality of the operators.



For further information, please contact:

Reuben Duffy
Policy Team
Law Society of Scotland
DD: 0131 476 8150
reubenduffy@lawscot.org.uk