Law Society of Scotland

Consultation Response

Electricity Infrastructure Consenting in Scotland: Proposals for reforming the consenting processes in Scotland under the Electricity Act 1989

November 2024

Photo: Huntly, Aberdeenshire

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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 Planning Law Sub-committee welcomes the opportunity to consider and respond to the joint UK and Scottish Government consultation: *Electricity Infrastructure Consenting in Scotland: Proposals for reforming the consenting processes in Scotland under the Electricity Act 1989*.[1] It has the following comments to put forward for consideration.

Questions[2]

Pre-application requirements

9. Do you agree with the proposal for pre-application requirements for onshore applications?

Yes

Why do you agree or not agree?

We observe that these proposals are aligned to the approach for planning applications, which is welcomed.

We note the discussion regarding onshore developments. Clarity would be welcomed on whether applications under s.36C of the Electricity Act 1989 (the **1989 Act**) (variation of consents) would also be subject to the same pre-application consultation processes. We note that similar sorts of applications under s.42 of the Town and Country Planning (Scotland) Act 1997 (the **1997 Act**) are carved out of pre-application consultation obligations, although the position is unclear in the consultation paper regarding s.36C applications. If s.36C applications are not also carved out of the requirements, we suggest that a proportionate approach may be to allow for a shorter consultation period, or only

[1] Electricity Infrastructure Consenting in Scotland

[2] Questions 1-8 relate to information about the respondent.

require this when there is a material change proposed or it constitutes an Environmental Impact Assessment (**EIA**) application.

How might it impact you or your organisation?

We have no comments to make.

10. Do you agree with the proposal for pre-application requirements for offshore generating stations?

Yes

Why do you agree or not agree?

Please refer to our comments at question 9.

How might it impact you or your organisation?

We have no comments to make.

11. Do you agree that pre-application requirements should apply to all onshore applications for electricity generating stations, and for network projects that require an Environmental Impact Assessment?

Yes

Why do you agree or not agree?

Please see the comments above on whether applications to vary consents pursuant to s.36C of the 1989 Act should be subject to pre-application consultation.

How might it impact you or your organisation?

We have no comments to make.

12. Do you agree that a multistage consultation process may be appropriate for some network projects?

No

Why do you agree or not agree?

We do not consider that a prescribed multistage process is necessary. There will be circumstances where the complexity of a project means that a staged approach to consultation might be appropriate. However, we consider that, if required, this could be dealt with as part of the standard consultation process.

We consider it important that the level of consultation is proportionate, to ensure that meaningful stakeholder engagement is carried out at the appropriate point in the process; whilst also looking to mitigate against "consultation fatigue" if the

consultation requirements are too frequent or onerous on respondents. Nonetheless, it is important that interested stakeholders have access to information to give them an understanding of the cumulative effects and impacts of various development proposals.

How might it impact you or your organisation?

Please refer to our comments above.

13. Do you agree with the proposal for an 'Acceptance Stage' for applications?

No

Why do you agree or not agree?

We note the proposals regarding the "Acceptance Stage". We observe that the equivalent process from the Development Consent Order (**DCO**) process in terms of the Planning Act 2008 involves additional aspects beyond just considering whether pre-application consultation has been adequate. The DCO acceptance stage also requires consideration of:

- Whether all procedural application requirements (which are complex) have been met;
- Whether the applicant has had regard to statutory guidance on DCO applications;
- Whether legal requirements for EIA and habitats have been met;
- The content and overall quality of the application.

The purpose of the acceptance stage for DCO is therefore much wider than what is envisaged in the consultation paper for Electricity Act applications. We would therefore question whether the proposal is a proportionate approach. Further consideration should be given as to whether it is appropriate to import such a procedure, to ensure that it is not unduly legalistic or formal at this stage of the process.

Consideration could also be given to whether an analogous approach to that in sections 39(1A) and (1B) of the 1997 Act would be a more appropriate and proportionate approach (perhaps replicating or dovetailing with this approach), noting that this includes a mechanism to require further consultation.

How might it impact you or your organisation?

We have no comments to make.

14. How long do you think an acceptance stage should be (in weeks)?

We have no comments to make.

15. Do you agree that the Scottish Government should be able to charge fees for pre-application functions?

Neither agree nor disagree

Why do you agree or not agree?

Whilst we do not seek to comment on policy principle of charging fees, we note the importance of the system being appropriately resourced and consideration given as to how to ensure that the charging of fees will directly benefit how the system functions. Any fees should also be proportionate.

How might it impact you or your organisation?

We do not have any comments to make.

16. Do you agree that our proposals for pre-application requirements will increase the speed of the end-to-end project planning process overall? Why do you agree/not agree?

We consider that changes to streamline and modernise the requirements may have a beneficial impact on the speed of the end-to-end project planning process. We highlight, however, that the timescales will be dependent on practical points, and also ensuring that all relevant parties are engaged at the appropriate stage of the process.

We note the proposals and discussions regarding the applicant sending to the Scottish Government and making available to the public a Preliminary Information Report (**PIR**). We highlight the importance of the requirements being proportionate and reflective of the stage the application is at.

We note that the information to be included in such a report could be detailed and onerous to prepare, potentially requiring the application to be at an advanced stage by the time of consultation. Members have highlighted analogous considerations and challenges arising in respect of the Preliminary Environmental Information Report (**PEIR**) requirements in England where the required content of PEIRs can give rise to uncertainty, dispute, and delay.

We would welcome greater detail and guidance on the proposed approach regarding PIRs, e.g. what is to be included and at what stage in the process. This would also be welcomed to avoid any disputes about what should be included, which could potentially lead to applications not being accepted.

We observe more generally that the requirements relating to the statutory consultees can add delays to the process, depending on the speed at which the consultees are able to respond.

Application procedures: application information requirements

17. Do you agree with the proposal for increased information requirements in applications?

Yes

Why do you agree or not agree?

We welcome these proposals, noting that they could helpfully provide consistency in this area.

How might it impact you or your organisation?

We have no comments to make.

18. Do you agree with the proposal to set out detailed information requirements in regulations?

Neither agree nor disagree

Why do you agree or not agree?

We note generally the importance of there being clarity and certainty in the law. The use of appropriate delegated powers within the legislation could allow for a degree of flexibility to include such detailed information and update this from time-to-time. For example, the validation requirements for planning applications are detailed in the Development Management Procedure Regulations 2013 (SSSI 2013/155), Regulation 9.

We note the need for flexibility to be appropriately balanced against ensuring there is clarity in the law, appropriate levels of parliamentary scrutiny underpinning legislative and policy developments, and meaningful stakeholder consultation.

We would welcome the opportunity to comment on the detail of draft regulations.

How might it impact you or your organisation?

We do not have any comments to make.

Application procedures: application input from statutory consultees

19. What are the reforms that would be most impactful in enabling your organisation to provide timely input on section 36 and section 37 applications?

We welcome these proposals in principle and consider that there are benefits to this approach. We highlight some concerns, pertaining to practical points or potential unintended consequences.

The ability of statutory consultees to provide timely input will, to some extent, depend on ensuring sufficient resourcing. It is important that such resourcing is in place to accommodate the proposals. We note that fixed timescales for response could, in theory, lead to shorter or poorer-quality responses which don't allow the developer to fully understand the consultee's views.

In relation to resourcing, we note the position in England whereby developers can make payments to consultees where necessary in order for them to commission evidence/reports; and that this is assisting in speeding up the response times from statutory consultees. Consideration could be given to whether an analogous approach in Scotland would complement these proposals.

20. What are the advantages and drawbacks of the options set out under Proposed Changes? How might your organisation benefit from the proposed forum and framework?

We have no comments to make.

21. What specialist or additional support could the Scottish Government's Energy Consents Unit provide to facilitate the statutory consultees' ability to respond?

We have no comments to make.

22. Would new time limits help your organisation to prioritise its resources to provide the necessary input to the application process?

We have no comments to make.

Application procedures: amendments to applications

23. Do you agree with implementing a limit for amendments to applications?

No

Why do you agree or not agree?

We express a degree of reservation about these proposals.

We note that, particularly for large-scale schemes, there can be circumstances where the need for change may only become apparent at a later stage in the process, and we highlight the benefits of there being flexibility in this regard. We would question whether it is proportionate to require an application to begin again rather than building in sufficient flexibility in the system to deal with necessary changes to a project. It is acknowledged there may be circumstances where changes may emerge too late to allow for necessary consultation to be accommodated or where the changes are so extensive that it is effectively a new scheme. However, we do not think there should be artificial procedural barriers to proposing changes.

Consideration should also be given to accommodating events beyond the control of the applicant, e.g. a World Heritage Site being designated after the application has been submitted; and the potential detrimental impact if the application has to be withdrawn and an amended scheme submitted. In this circumstance a project would, in effect, have lost its place on the queue, e.g. other projects will be ahead of it when considering cumulative landscape and visual impacts.

We also note the interaction here between the proposals and related timescales for statutory consultees. It would be inappropriate and inconsistent with the purpose of consultation for the applicant to need to make decisions on amendments before consultees have responded. Consideration could be given as to whether such a decision (e.g. by Scottish Ministers, as discussed at q.24) would be contingent on statutory consultees having responded to the consultation.

How might it impact you or your organisation?

We have no comments to make.

24. Do you agree the limit should be determined by Scottish Ministers on a case-by-case basis?

Neither agree nor disagree

Why do you agree or not agree?

We highlight that this could give rise to issues and result in a lack of certainty for those involved. For example, this could risk being counter-productive, for example if the process for making a simple change could lead to further delays to the

delivery of infrastructure. This may be inconsistent with the overall timescales and create unintended consequences.

How might it impact you or your organisation?

We have no comments to make.

Application procedures: public enquiries

25. What is you or your organisation's experience of public inquiries?

Please refer to our comments at question 26.

What are the advantages?

Please refer to our comments at question 26.

What are the disadvantages?

Please refer to our comments at question 26.

26. Do you agree with the proposed 'examination' process suggested?

Yes

Why do you agree or not agree?

We note that these proposals reflect the direction of travel in the planning system, and that it seems appropriate to have a consistent approach. We observe the general trend following the previous planning reforms in Scotland that the number of appeals determined by means of an inquiry session have reduced. For example, we refer to the Planning and Environmental Appeals Division (DPEA) Annual Review 2023 to 2024, which notes "there were no appeals determined by means of inquiry session this year".[3]

We agree with the proposed examination process, i.e. moving to a discretionary model whereby the Reporter could take the parties' preferences into account. We cannot see a justification for why an objection by a local authority should trigger a mandatory public inquiry for Electricity Act applications when such inquiries are not mandatory for other types of application. We would, however, welcome the publication by the DPEA of clear guidance/a practice note for Reporters on when inquiries would be considered appropriate, to support the decision-making process. For example, this could address scenarios where cumulative Habitats Regulations Appraisal (HRA) and complex cumulative landscape and seascape effects are in play.

We would highlight, however, that there are a range of benefits to having oral evidence sessions in relation to these forms of developments. For example, we note that this can be more efficient depending on the circumstances, e.g. when there would otherwise be several rounds of further written information requests. A further benefit of holding public inquiries is that they provide an opportunity to test the robustness of the evidence, noting that there might be circumstances where a particular issue is best dealt with through cross-examination.

[3] Planning and Environmental Appeals Division (DPEA): annual review 2023 to 2024, page 7.

More generally, we consider that there are important considerations about the role of public participation, particularly since these are major projects. Oral evidence sessions allow for greater levels of public participation for interested stakeholders and increased transparency for them to see aspects of the process. We note that DCO examinations in terms of the Planning Act 2008 almost always include one or more public hearing sessions (usually held in the evening) where members of the public are able to express their views on the merits of a project. We consider that such open sessions are helpful in making the process more open and allowing for public participation.

How might it impact you or your organisation?

We have no comments to make.

Variations of network projects

27. Do you agree with the proposal to prescribe a clear statutory process under which variations to network projects may be granted?

Yes

Why do you agree or not agree?

We welcome there being a clear system for variations. We consider an analogous approach taken in the context of planning would be appropriate. This includes, for example, modification without consent being on the same basis as in the planning system.

We agree that variations should be permissible when made at the request, or with the consent, of the applicant.

How might it impact you or your organisation?

We have no comments to make.

Variations of consents without an application

28. Do you agree with the proposal to give the Scottish Government the ability to vary, suspend or revoke consents, without an application having been made in the circumstances set out above?

Neither agree nor disagree

Why do you agree or not agree?

As above, welcome there being a clear system for variations; and we consider that modification without consent should be on the same basis as in the planning system.

However, we express concern that the proposals give the Ministers the scope to change the consent retrospectively, without requiring the consent of the operator. Whilst the principle of the correcting of errors in consents doesn't seem controversial, we highlight that this could have a greater impact if the error is significant. It is important for there to be legal certainty in relation to the terms of a consent, and that any uncertainty can have knock-on impacts (for example, issues regarding funding).

We note the discussion on page 28 regarding section 37 consents. We highlight that there is a mechanism for correcting errors on decisions at s241A-D of the 1997 Act, which has never been commenced (as inserted by s.29, Planning etc. (Scotland) Act 2006).

In relation to revocations, we note that in the planning context a revocation is rarely used, and if used, would encompass compensation rights. We highlight that compensation proposals are not mentioned in the consultation paper and we consider that the availability of compensation would be an essential part of any revocation procedure where the application has not consented to the revocation, suspension, or variation. We would welcome greater information on this point.

How might it impact you or your organisation?

We have no comments to make.

29. Do you believe there should be any other reasons the Scottish Government should be able to vary, suspend or revoke consents?

We have no comments to make.

Fees for necessary wayleaves

30. Do you agree with the principle of introducing a fee for the Scottish Government to process necessary wayleaves applications?

Neither agree nor disagree

Why do you agree or not agree?

As noted above, whilst we do not seek to comment on policy principle of charging fees, we note the importance of the system being appropriately resourced and consideration given as to how to ensure that the charging of fees will directly benefit how the system functions. Any fees should also be proportionate.

How might it impact you or your organisation?

We have no comments to make.

31. Do you agree that the fee amount should be based on the principle of full cost recovery, in accordance with Managing Public Money and the Scottish Public Finance Manual?

Neither agree nor disagree

Why do you agree or not agree?

We have no comments to make.

How might it impact you or your organisation?

We have no comments to make.

Statutory appeals and judicial proceedings

32. Do you agree that a statutory appeal rather than a judicial review process should be used for challenging the onshore electricity consenting decisions of Scottish Ministers?

Yes

Why do you agree or not agree?

We refer to our comments below at question 33.

How might it impact you or your organisation?

We have no comments to make.

33. Do you agree there should be a time limit of 6 weeks for initiating a challenge to a consenting decision of Scottish Ministers for onshore electricity infrastructure?

Yes

Why do you agree or not agree?

We generally agree with this change. We welcome the consistency with the challenge time limits in other areas of the planning system.

We consider that a further benefit of the change is that this will provide greater certainty. We note that the timescales for judicial review can extend beyond the three month limit when a challenge would be in the public interest. The six week time limit would provide a clearer cut-off point and increase certainty.

Consideration should be given as to whether those who could initiate a challenge under the previous regime would also be in a position to do so under the new statutory provisions. If there are changes regarding those who would, or would no longer, have standing to initiate a challenge, this should be made clear.

How might it impact you or your organisation?

We have no comments to make.

Transitional arrangements

34. Do you agree with the proposal for transitional arrangements?

No

Why do you agree or not agree?

We do not agree with the proposed transitional arrangements, and consider it would be more appropriate for the revised process to apply to new applications once the changes come into effect. It is important that there is clarity and certainty.

The reforms are a package, and changes are proposed covering various stages of the consenting process. We do not consider that it would be appropriate for an application to have been submitted on the basis of one regime, and then for the process to be changed following its submission. Some of the reform proposals are interrelated, and we note that procedures at a later stage in the process will have been guided and informed by the steps taken at an earlier point. It does not seem appropriate for applications to be subject to the requirements at the later stage of the process, when they were not informed by those at the earlier stage prior to its submission.

If transitional provisions are to be introduced, we would suggest that limiting these to some of the more discrete elements of the proposals, for example limiting the right to request a public inquiry, would be more appropriate. We also note our comments above regarding the benefits of moving to a statutory appeal rather than a judicial review process. Since this applies at the end of the application process, it may be appropriate for this to apply to in-process applications too rather than being limited to new applications only.

How might it impact you or your organisation?

Please refer to our comments above.

The package of reforms

35. Having read the consultation, do you agree with the reforms as a package?

Yes

Why do you agree or not agree?

We generally welcome the proposals and attempts to modernise the legislation and processes in this area. We refer to our comments above for specific areas of concern or points whether clarity or further consideration would be welcomed.

When considering the proposals, we assessed these against three overarching principles. These were:

1. We consider that the reforms should replicate the procedures under the planning system in the 1997 Act in Scotland, unless there is a clear reason to depart from this. We consider that this would provide consistency and make the system easier to understand.
2. We note that the proposals make a distinction between onshore and offshore projects. We consider that it would be more helpful and aid clarity and certainty if the procedures were consistent across both types of projects, unless there is a clear reason to depart from this approach.
3. Where possible the changes should reduce, or avoiding adding, bureaucracy in the process.

We consider it is important that the proposals are reflective of these overarching principles.

How might it impact you or your organisation?

We have no comments to make.

36. What steps could we take to ensure the project planning process (including the pre-application stage) can be completed as fast as possible?

Consideration could also be given to procedures elsewhere in the UK which may result in time-savings. For example, we observe that the system in Wales has recently been amended to allow applications for developments of national significance to be delegated, which may help speed-up the process. We also note the DCO procedure where there are fixed timetables for completing the examination process, with timetables set early on. We highlight there are benefits to this approach, including certainty for those involved; although note that consideration would need to be given to resourcing and the deliverability of this approach.

Large scale electricity development often requires a compulsory purchase order, which is usually promoted alongside the relevant application made pursuant to the Electricity Act. Although we are aware that there is a separate workstream on

compulsory purchase reform, we would take the opportunity to raise two specific points on compulsory purchase which are particularly relevant to electricity projects. First, where a compulsory servitude right is to be acquired, a dominant and servient tenement needs to be identified for these purposes. The identification of a dominant tenement is not straight-forward for lengthy linear electricity projects and we would suggest that consideration is given to reviewing the legal requirements for establishment of servitudes in these circumstances. Second, there needs to be clear statutory authority for the compulsory acquisition of rights of temporary possession. We would be pleased to provide more information on these considerations if they would be within the scope of the current reforms.

A related piece of work which would be welcomed is consideration of modernising the statutory provisions regarding wayleaves, some of which date back to 1967, e.g. The Electricity (Compulsory Wayleaves) (Hearings Procedure) Rules 1967.

Evidence and analysis

Questions 37-44

We have no comments to make.

For further information, please contact:

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