



Law Society
of Scotland

Consultation response

Proposed Fly-tipping (Scotland) Bill

May 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 Environmental Law Sub-committee and Criminal Law Committee welcome the opportunity to respond to Murdo Fraser MSP's consultation on a *Proposed Fly-tipping (Scotland) Bill*¹. We have the following comments to put forward for consideration.

General comments

We previously responded² to the Scottish Government's consultation on *National litter and flytipping strategy* and many of our comments in that response are relevant to the matters addressed in this consultation.

As highlighted in our earlier consultation response and in our detailed comments below, we consider that there are a number of matters affecting fly-tipping which require consideration such as societal attitudes towards disposal of litter and fly-tipping, the difficulties of disposing of waste particularly on a smaller scale from domestic use and business (for example, costs, availability of sites, booking systems), and challenges with enforcement including resourcing. We consider that a multi-faceted approach, including tackling these matters, will be needed in order to resolve the issues around fly-tipping.

Behaviour change

We recognise that a significant cultural and behaviour change will be required to tackle flytipping. Steps to alter the public acceptability of litter may need to be taken, in a similar way to actions which have been taken in relation to dog-fouling. This is likely to require both public education and strong enforcement.

Flytipping is visible to the public at large, and is significant not just in terms of its environmental impacts, but also in terms of amenity and quality of living. This has been particularly significant in the context of the greater

¹ <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/murdo-fraser-consultation-document-final.pdf>

² <https://www.lawscot.org.uk/media/372577/22-03-31-env-consultation-national-litter-and-flytipping-strategy.pdf>

focus on use of green spaces during the Covid-19 pandemic.

We consider that it is important to consider how waste interacts with existing and planned rights, such as the right to healthy environment, the right to human health, and land rights and responsibilities. Wider cultural and international comparisons, including in relation to attitudes towards flytipping, may be useful in understanding perceptions and behaviour.

Resourcing

We consider that responsible behaviour in relation to waste disposal should be encouraged and improvements which can be made to infrastructure and resourcing may help to encourage such behaviour – for example, by making it easier for individuals and business to dispose of waste in an appropriate manner such as at local disposal sites (for example, altering/removing booking requirements, extending opening hours, altering/adding locations), by facilitating bulky uplifts, and considering financial or other incentives. Research may be needed to help better understand the barriers to appropriate disposal of waste.

We suggest that consideration should be given as to how enforcement may be encouraged and potentially incentivised, for example, by public campaigns, opportunities for engagement with communities and businesses with associated incentives, and by local authorities retaining revenue accrued from enforcement. Funding for remedial works would also merit consideration.

We recognise that flytipping is an issue which would merit being tackled from a number of difficult angles and we consider that resourcing is key to tackling the problems. We note the ongoing DEFRA consultation on *preventing charges for DIY waste at household waste recycling centres and call for evidence on booking systems at household waste recycling centres*³, in particular proposals to allow householders to deposit DIY waste for free.

Enforcement

We note that enforcement remains a key challenge to tackling flytipping, for example, with low levels of prosecution. Effective and active enforcement is necessary in order to tackle the issues, and this requires adequate resourcing for law enforcement agencies and for other parties involved, including for joint agency working.

We note that the Scottish Government consultation proposed reviewing existing powers for enforcing offences (action 13.6), although it is not clear what this will involve. We understand that difficulties in achieving the standard of proof (even on the balance of probabilities for a civil penalty) and the required resources for effective enforcement, when compared to the potential benefits, can be barriers to effective enforcement. We note that there may be opportunities for greater use of technology as an enforcement tool.

³ <https://consult.defra.gov.uk/waste-and-recycling/consultation-on-diy-waste-and-call-for-evidence/>

Consultation questions

1. Which of the following best expresses your view of the proposed Bill? Please note that this question is compulsory.

Neutral (neither support nor oppose)

Please explain the reasons for your response.

Please see our comments below.

2. Do you agree that legislation is required, or are there are other ways in which the proposed Bill's aims could be achieved more effectively? Please explain the reasons for your response.

We refer to our general comments above in relation to tackling issues around fly-tipping and encouraging responsible waste disposal.

3 Which of the following best expresses your view of the proposal to place new duties on the Scottish Ministers in respect of reporting mechanisms on the collection of data?

Partially supportive

Please explain the reasons for your response, including on how a streamlined system to collate and report data could work in practice.

We consider that improved data collection, co-ordination and reporting could assist in helping to understand the nature and extent of fly-tipping across Scotland and thereby help to target actions and resources appropriately.

4 Which of the following best expresses your view of the proposal that legal liability should be removed from the person who has the waste deposited on their property without their permission?

Partially supportive

Please explain the reasons for your response.

We recognise the potential impacts of waste disposal on innocent landowners who are subject to flytipping/illegal waste disposal, both in terms of the practical burdens and costs of removing waste. While there is a defence available under section 59 of the Environmental Protection Act 1990, there are potential regulatory risks to landowners who are targeted by flytipping. That said, consideration will be required as to how this fits with the integrated authorisation framework under the Environmental Authorisations (Scotland) Regulations 2018.

5. Which of the following best expresses your view of the proposal that strict liability should be introduced to shift liability to the person responsible for generating waste that is fly-tipped?

Neutral (neither support nor oppose)

Please explain the reasons for your response.

We are of the view that this proposal requires careful consideration. We note that introducing such a requirement could present difficulties, such as resulting in prosecution, for householders or waste generators who act in good faith in instructing and paying a third party to dispose of waste which is then fly-tipped.

We note the duty of care currently provided for by section 34 of the Environmental Protection Act 1990. It would be helpful to better understand the experiences of these provisions (noting that there are differently worded provisions in the Act for Scotland and for England and Wales) which impose duties on domestic and other waste producers - what lessons are there for a wider duty on waste producers? Existing provisions criminalise a waste producer in circumstances where the waste is then fly-tipped, unless the party removing the waste is deceiving the waste producer. It would be helpful to understand how the existing law in this area is anticipated to fit with any new provision.

In the event that such a measure is introduced, we consider that a large-scale public awareness campaign would be required so as to ensure that members of the public and businesses are aware of their responsibilities in this regard, and how to evidence any requirements for a defence, for example, how to carry out relevant checks to ensure that a third party has a valid licence. Depending on the requirements, this in itself could be a fairly high burden for certain groups in society, for example if the responsibility falls on the waste generator to check a centralised online system for the existence of a valid licence, this could present difficulties for those who are digitally excluded.

In addition, consideration is required as to how the waste generator would be protected if, for example, steps were taken to check for a valid licence, but the third party had been dishonest.

6 Which of the following best expresses your view of the proposal that the level of fines issued by local authorities and national park authorities should be higher?

Neutral (neither support nor oppose)

Please explain the reasons for your response, including your views on my suggested increase of fines to £2,000.

We note that consideration is required as what is appropriate for direct civil sanction and what requires and/or deserves the treatment as a criminal offence. We suggest that this question should be considered in the light of other penalty regimes and not in isolation.

It is important that penalties, both civil and criminal, are proportionate. We suggested in our response to the Scottish Government's consultation that consideration be given to a clear scheme of escalating penalties, for example, including use of fixed penalties for one-off instances building up to more robust sanctions where there is a course of conduct or repeated instances involved. We also welcomed the work of the Scottish Sentencing Council in relation to environmental and wildlife crime⁴.

7 Which of the following best expresses your view of the proposal that the level of fines issued by SEPA should be higher?

Neutral (neither support nor oppose)

Please explain the reasons for your response, including your views on my suggested increase of fines to £2,000?

Please see our comments at Q6.

8 What are your views on the potential to introduce a waste duty of care system, similar to that in England and Wales? [see pages 12, 13 and 18 of the consultation document]

Neutral (neither support nor oppose)

Please explain the reasons for your response, including how a duty of care system might operate in Scotland.

Similar to our comments at Q5 above, we are of the view that this proposal requires careful consideration. The existing duties under section 34 of the Environmental Protection Act 1990 and associated Code of Practice for

⁴ <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/environmental-and-wildlife-crime-sentencing-guideline/>

Scotland⁵ merit consideration. It does not appear to be clear from the consultation what the relationship is between the scope of the duties referred to here and at Q5, and with other existing duties such as that under section 34 of the 1990 Act. The consequences of breach and how they are enforced also requires consideration.

We note that there would need to be clarity as to the meaning and extent of 'all reasonable measures' and what would be expected of householders in this regard. The current Code of Practice in relation to the duties under the 1990 Act sets out guidance in this regard. Further requirements could present difficulties for certain householders, particularly vulnerable individuals.

In the event that further measures are introduced, we consider that a large-scale public awareness campaign would be required so as to ensure that members of the public are aware of their responsibilities in this regard, and how to take measures (and evidence these) to ensure that waste is only transferred to an authorised person. Certain measures could present a burden for certain groups in society, for example if a householder is required to check a for the existence of a valid licence.

Greater burdens in the disposal of waste by individuals could negatively impact consumer behaviour.

9 What are your views on the potential for additional criminal sanctions being applied for instances of fly-tipping? [see page 14 of the consultation document]

Neutral (neither support nor oppose)

Please explain the reasons for your response, including what the additional criminal sanctions might be.

Please see our comments at Q6.

10 What are your views on the proposal to review the system for the corroboration of evidence? [see pages 12, 17 and 18 of the consultation document]

Partially opposed

Please explain the reasons for your response, including any suggestions on what a different threshold for proof could be.

We have concerns about the proposed removal of the requirement for corroboration.

⁵ <https://www.gov.scot/publications/duty-care-code-practice/pages/1/>

The need for criminal charges generally to be proved by corroborated evidence has been the subject of extensive scrutiny in recent years. It is recognised that corroboration is one of a number of essential safeguards that combine to provide a fair and Convention-compliant criminal justice system. Were it to be removed, there would be a need to consider other elements of the system.

It is important to understand what corroboration means in practice. In essence, a person cannot be convicted of a crime on the word of another alone. There needs to be an independent check on the witness's testimony. That does not necessarily mean the evidence of another eyewitness.

It is understood that fly-tipping is often committed covertly. There may be issues in identifying the responsible party, however, proof may come from CCTV footage, or from an eyewitness who takes a photograph of the event.

There is clearly a significant difference between the number of incidents and the number of cases ultimately actioned by COPFS. It is not clear, however, whether that is a product of evidential difficulties. Reporting agencies presumably only report cases where it appears to them there are grounds to act; yet less than one in ten reports end in prosecution. There may instead be issues around prioritisation or resourcing. These should be investigated before systemic change is considered.

11. Financial implications

Any new law can have a financial impact which would affect individuals, businesses, the public sector, or others. What financial impact do you think this proposal could have if it became law?

Skip to next question

Please explain the reasons for your answer, including who you would expect to feel the financial impact of the proposal, and if there are any ways you think the proposal could be delivered more cost-effectively.

We have no comments.

12. Equalities

Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation.

What impact could this proposal have on particular people if it became law? If you do not have a view skip to next question.

Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.

We have no comments.

13. Sustainability

Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?

Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts.

We refer to our general comments above and note that the effects of any new law will only be felt in the wider context of culture and resources relating to flytipping. We consider that any new law in isolation will do little to resolve the issues.

14. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?

Please see our general remarks above.

For further information, please contact:

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