



Law Society  
of Scotland

# Consultation response

National litter and flytipping strategy consultation

March 2022



## Introduction

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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 welcomes the opportunity to respond to Scottish Government's consultation on *National litter and flytipping strategy*<sup>1</sup>. We do not seek to answer the consultation questions but have the following comments to put forward for consideration.

## General comments

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We note that while the consultation sets out a number of objectives and associated actions, there is limited detail provided on the proposed actions themselves. Recognising the proposed phased approach, we question whether there may be additional interim/short-term steps that could be taken to demonstrate that timely action is being taken while medium- and longer-term measures are planned and carried out. There are already a range of delegated powers in place which would enable actions to be taken forward more quickly than set out in the consultation document.

### Behaviour change

We recognise that a significant cultural and behaviour change will be required to tackle littering and 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.

Both littering and flytipping issues are visible to the public at large, and significant not just in terms of their environmental impacts, but also in terms of amenity and quality of living. This has been particularly significant in the context of the greater 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

<sup>1</sup> <https://consult.gov.scot/environment-forestry/national-litter-and-flytipping-strategy/>

international comparisons, including in relation to attitudes towards litter and flytipping, may be useful in understanding perceptions and behaviour (objective 1).

## **Services and infrastructure**

We note that 'services and infrastructure' is identified as a key strategic theme of the consultation. We consider that the absence of suitable infrastructure (including, at the most basic level, rubbish bins but also restrictions on use of waste disposal sites and other matters) will be a key factor in littering and flytipping activity. Research may be needed to help better understand the barriers.

## **Enforcement**

We note that enforcement remains a key challenge to tackling littering and flytipping, for example, with low levels of prosecution narrated in paragraph 3.3.3 of the consultation document. 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 support the proposed actions in relation to enforcement, including consideration of existing penalties and powers being given to local authorities to use civil penalties to enforce flytipping offences.

In relation to flytipping, it is not clear from the consultation document what the proposed review of existing powers for enforcing offences will involve (action 13.6). We understand that difficulties in achieving the standard of proof even on the balance of probabilities (lesser than the criminal standard of beyond reasonable doubt) and the required resources for effective enforcement, when compared to the potential benefits, can be barriers to effective enforcement. We note the potential impacts on innocent landowners who are subject to flytipping/illegal waste disposal, both in terms of the practical burdens and costs. 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.

The procedure under section 91 of the Environmental Protection Act 1990 to raise proceedings by summary application if aggrieved by litter can be burdensome, expensive and challenging evidentially. It is understood that since the introduction of the Act, there has only been one summary application made in Scotland<sup>2</sup>. In that case, the pursuer sought an order from Aberdeen Sheriff Court for Aberdeenshire Council to be issued a litter abatement order as a result of the state of the road verges on part of the A96 and the level of detritus on the carriageway. The Court refused to grant such an order following a proof before answer.

Although the Act appears at face value to offer a discreet solution to a member of the public to be able to challenge a local authority, that case highlighted the significant lengths a member of the public had to go through to seek such an order, including the time it can take for a summary application to be processed.

It is recommended that consideration be given to creating a simpler, faster system for members of the public to seek redress in connection with litter. In addition, we suggest that consideration be given as to how best the Scottish Government can provide support to local authorities to carry out regular litter picking and street

<sup>2</sup> *Niblock v Aberdeenshire Council* - unreported, Aberdeen Sheriff Court, 31 October 2018

cleansing to a consistent standard across Scotland so that these matters are not overlooked in what can be challenging budgetary and resource planning for local authorities. As referred to above, it is important to recognise the correlations between clean streets and roads with levels of social behaviour, wellbeing and self-esteem in communities, the environmental protection afforded by not allowing wildlife and water courses to become adversely affected by litter, and the negative images that may be conveyed to tourists and other visitors to Scotland as a result of litter in public spaces.

It is important that penalties, both civil and criminal, are proportionate and this basic principle will merit consideration when the review of existing penalties is undertaken. We suggest 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 welcome the work of the Scottish Sentencing Council in relation to environmental and wildlife crime<sup>3</sup> and look forward to seeing this work progressing in due course.

We also 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.

**For further information, please contact:**

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<sup>3</sup> <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/environmental-and-wildlife-crime-sentencing-guideline/>