



Law Society
of Scotland

Consultation Response

Prosecuting road traffic offences in Scotland Fixed
Penalty Notice reform

Moving Britain ahead

4 May 2018



Introduction

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.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Prosecuting road traffic offences in Scotland Fixed Penalty Notice reform. The committee has the following comments to put forward for consideration.

General

The Road Traffic Offenders Act 1988 (1988 Act) provides the legislative basis for the prosecution and punishment of many road traffic offences committed throughout Great Britain. A number of differences such as the level of alcohol in drink driving prosecutions exist between the road traffic laws in Scotland and England and Wales that go further than relating merely to procedure.

This consultation considers whether to allow an extension of on the spot fixed penalty notices to be issued to suspected offenders of what is described in the consultation as 'minor' road traffic offences. The exact intended meaning of 'minor' in this context is a point on which we comment below.

England and Wales permits this procedure (and differs from Scotland) where section 54 of the 1988 Act currently applies.

Do you agree that section 54 of the 1988 Act should be amended to allow the police traffic wardens and Driver and Vehicle Standards Authority (DVSA) vehicle examiners to issue fixed penalty notices to suspected offenders of road traffic offences committed in Scotland? Please explain your answer.

We understand why it is proposed that the operation of section 54 should extend to Scotland. There is merit in promoting consistency in respect of the prosecution of road traffic offences throughout England,

Wales and Scotland though, of course, the actual procedural applications, court structures and sentencing (Scotland does not have road traffic sentencing guidelines) differ.

We understand the arguments in favour of court efficiencies in reducing the number of road traffic cases that fall to be or require to be prosecuted in the actual courts. It is a matter for the Scottish Government to determine whether to extend these procedures to Scotland.

However, whatever the system, what must be preserved is the right for any person accused of any such offence, no matter how 'minor' it may appear, to opt into the justice system to have their case heard and determined according to the Scottish criminal evidential rules governing admissibility of evidence and in accordance with the burden of proof. That is essential.

A fixed penalty notice requires under section 54 (6) to give the particulars of the circumstances alleged to constitute the offence to which it relates, as are necessary for giving reasonable information about the alleged offence. Such form must set out clearly the procedure that can be understood if it is intended to request a hearing, how and the time limits that apply to making such a request. Language also must be clear and able to be understood. That would include languages other than English. We would note paragraph 5.4 of the revised Guidance of the Operation of the Fixed Penalty System for offences in respect of a vehicle where, for instance, language needs are reflected:

'All Welsh forces will need to take into account the provisions of the Welsh Language Act 1993. An officer at the roadside needs to establish in what language the offender wishes to receive the Fixed Penalty Notice'.

We would question what the intended procedure is to be in relation to those whose first language may not be English. There are a number of other commonly encountered languages in Scotland. Equally, how does this factor in handling those with 'protected characteristics' in terms of the Equality Act 2010?

The consultation is substantially silent on how the procedures that will operate if the change to section 54 of the 1988 proceeds. Some specific points arise:

Extent: We would also observe, for purposes of clarification, that Section 54 of the 1988 Act goes much further than just the question of permitting the issue of on the spot fixed penalty notices. Section 54 (1) and (2) of the 1988 Act deal with that aspect.

Section 54 (2) – (10) provides the detail of how to permit the issue of such notices to vehicle examiners, the requirements for production of licences and notices and the procedural requirements. It is assumed that it is intended for these aspects to apply to Scotland in due course and therefore will be set out in the

¹ https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/OD_000055.pdf

relevant primary legislation bringing in the change. It is the details of how the procedures will operate which are of most interest in ensuring fairness to the accused.

Number of offences: There will be circumstances where the present procedures will continue for instance when a licence cannot be produced and/or any person is liable for ‘totting –up’ disqualification. A fixed penalty notice may be given for more than one offence occurring on the one occasion but only one of these notices can be for an endorsable offence. Is this intended to be the practice here?

Traffic wardens: We note, in that regard, that the consultation intends to extend to traffic wardens. Section 54 of the 1988 Act does not extend to traffic wardens as far as England and Wales are concerned. We note that ‘vehicle examiner’ was included within the Road Safety Act 2006. Given that the extension of these provisions relates to criminal offences, we would question the inclusion of traffic wardens within the ambit of this section. Justification for any extension of their powers to fixed penalty notices would in our view need to be seen.

Guidance: Paragraph 9 of the consultation refers to where the driver does not have a licence to ‘*certain additional steps must be taken before a fixed penalty notice may be issued.*’ We would welcome clarification around this section and the details of how this is intended to operate. That is very important.

For reference², we note that guidance is set out in the Road Traffic Offences: Guidance on Fixed Penalty Notices.³

We assume that it is intended that similar Guidance under section 87 of the 1988 Act (which applies to Scotland) will be issued to support these changes in due course. Such guidance will not be legally binding but there is a need for the guidance to be adhered to unless there are compelling reasons not to.

Such guidance would be drawn up in tandem with Crown Office and Procurator Fiscal Service and Police Scotland. Such guidance must still require that the circumstances of any offences arising must be considered carefully before any penalty is issued. There may well be an existing prosecution policy on when the circumstances of an offence should merit a warning rather than a prosecution. For instance, we can envisage that there may be speed enforcement policies in place and/or alternatively, speed awareness courses (not yet available in Scotland) that may be offered. Any proposed extension of these powers should be exercised in accordance with such existing or future policies.

There is always discretion to those who are tasked with such fixed penalty notices. What is vital is that they act fairly, consistently and proportionately.

² Though we fully recognise that this may not be the most up to date guidance

³ <https://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-fixed-penalty-notice> (although this will not include information about new procedures introduced in 2009)

Proportionality: The issue of proportionality in relation to such offences needs to be considered. The interests of the State such as the duties of the police in enforcing penalties for such offences as opposed to the interests of the alleged offender is a careful balance that needs to be achieved.

Scope: Exactly which road traffic offences would fall under the new scheme is a further detail that is relevant. Offences for which fixed penalties may be imposed are set out in Schedule 3 of the 1988 Act. Would it be expected to apply to all offences set out under Annex A⁴ of the Guidance of the Operation of the Fixed Penalty System for offences in respect of a vehicle?

We trust that these observations are helpful and are happy to answer any questions in due course.

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⁴ https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/OD_000055.pdf

