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Consultation Response

A consultation on Fireworks in Scotland: Your experiences, your ideas, your views

13 May 2019



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 Licensing Law sub-committee along with our Environmental Law sub-committee and Criminal Law Committee welcome the opportunity to consider and respond to the Scottish Government's: *A consultation on Fireworks in Scotland: Your experiences, your ideas, your views* (the consultation).

As the consultation recognises, displays of firework are enjoyed by many people in Scotland where they are associated with events where people want to have the opportunity to celebrate with fireworks. Firework displays are held by some community groups and charities as fundraising events. However, the use of fireworks seems to promote somewhat polarised views depending in part where people are located. When they live in cities or near to the "venue" hotels, there are deep-seated concerns. These include the level of noise that is generated, the potential impact on animals and also the frequency with which fireworks are being let off without what appears, at times, to amount to any effective controls or sanctions. In rural areas, this seems to present less of a problem.

Certainly, it is understood over the past few years that there have been concerns with events in both Glasgow¹ and Edinburgh regarding issues of public safety. It is against that background that this consultation appears to have been initiated.

For information:

- Our Licensing Law sub-committee is made up of solicitors who represent those responsible for licensing matters from the Local Authorities as well as those representing clients involved in the licensing trade.
- Our Criminal Law Committee is made up of solicitors representing the defence as well as those responsible for prosecution within the Crown Office and Procurator Fiscal Service (COPFS) and academics.

¹ It comes after an incident on 5 November 2018 where officers were called to Herriet Street and Albert Drive amid reports of 30 to 40 young people setting off fireworks and causing damage to windows and cars. <https://www.glasgowlive.co.uk/news/glasgow-news/pollokshields-residents-welcome-scottish-government-15775576>

- Our Environmental Law sub-committee is made up of solicitors from private practice who represent a range of client interests in both urban and rural areas, as well as solicitors from the Scottish Environment Protection Agency (SEPA) and academic members. Our comments are confined mainly to Part Two which deals with Legislation and Regulation. The committees have the following comments to put forward for consideration.

Part One: How are fireworks used in Scotland?

Question 1: What is the main way you typically enjoy and experience fireworks?

This question is not for us to respond as a Committee.

Question 2: Would you say that fireworks form an important part of celebration events for you?

This question is not for us to respond as a Committee.

Question 3: Have you been affected by fireworks being used in an irresponsible or unsafe way?

This question is not for us to respond as a Committee.

Part Two: Legislation and Regulations

We note that the legislation on the sale and storage of fireworks is reserved to the UK Government. There are a number of regulatory controls which currently apply and have been outlined in the consultation. The questions seem to be directed at whether there should be more controls.

Question 4: Do you think that there should be more controls over the sale of fireworks?

We refer to the technical annex of the consultation² which outlines the regulatory position. Under the Scotland Act 1998, the regulation of the sale and supply of goods and services to consumers and product safety and liability is reserved to the UK Government. The sale and supply of fireworks is regulated through

² <https://www.gov.scot/publications/consultation-fireworks-scotland-experiences-ideas-views-technical-annex/>

UK legislation by the Fireworks Regulations 2004, the Pyrotechnic Articles (Safety) Regulations 2015 and Article 9 of the Explosives Regulations 2014.

Licences to sell fireworks outside seasonal periods in Scotland is a matter that is administered by the relevant Local Authorities. The process for applying for a licence varies across local authority areas though the criteria for granting a licence is strict and the same. That includes checks on the premises, the types of fireworks to be sold and details of the operator including any previous convictions.

We refer to the Glasgow³ and Edinburgh⁴ local authority websites that show provision of different information and processes. Consideration might be given to the adoption of a more standard approach from a licensing perspective if feedback was to indicate that the practices were inconsistent, and this was contributing to any problems from the public perceptive.

As far as controls on sales are concerned, this involves two parties- those licensed to sell and those who purchase.

The sale of fireworks should only be made by a licensed seller. Should this require more controls on the person selling the fireworks as to sight of the proof of age and certification of identification? Should identification include proof of a valid address for the purposes of monitoring post-sale use of the fireworks? Should these requirements apply across the range/classification of fireworks that are sold i.e. from sparklers which are possibly less problematic certainly as far as noise is concerned to what comprise noisy fireworks? Would better records require to be kept by a seller to track those allowed to purchase and who do purchase fireworks? That could be relevant in considering if criminal prosecution is merited where fireworks end up in “the wrong hands” as that would allow them to be tracked back to the source (but there are significant evidential problems if all that remains by way of available evidence is a spent firework.)

Are sales to those of relevant age to purchase effectively monitored? It would be useful to be aware of any statistics for criminal prosecutions where fireworks have been sold under-age. We suspect that it may be hard to track back evidentially from the complaint about the firework to who set it off and who was responsible for selling it. There is also a need to be aware of the requirements of corroboration in relation to the proof of criminal offences.

There may be more that can be done without the need for increased regulation/legislation to control sales and purchases jointly. This would include information and publicity campaigns (at times other than for Bonfire night) targeting those groups and communities where there may have been issues in the past.

We wonder too about the need for equality and diversity implications to be considered as it is not only traditional UK festivals where fireworks are let off; there are other cultures whose festivals are associated with the letting off of fireworks.

³ <http://www.glasgow.gov.uk/CHttpHandler.ashx?id=1848&p=0>

⁴ https://www.edinburgh.gov.uk/directory_record/626083/firework_displays_licence

The letting off of fireworks irresponsibly may well attract criminal offences. Ensuring that those purchasing are aware of the safety requirements and the potential implications if they do not let them off under control is very important. That too would form part of any publicity campaign.

We would also mention that the question of criminal prosecution lies solely with the COPFS in their discretion and in accordance with their prosecutorial code⁵. Not only are there offences to consider at common law such as assault and culpable and reckless conduct but there may be statutory health and safety offences to consider. In the worst-case scenario of death resulting, there are potential charges that may be considered such as culpable homicide⁶ and/or arising under the Corporate Manslaughter and Corporate Homicide Act 2007. There, a company and organisation can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care. This charge could be relevant in respect of public displays and those being operated by professional companies.

Before any creation of additional offences would be considered, it would be useful to ascertain if the criminal law at present does not adequately protect the public from irresponsible actions with fireworks. However, views could best be obtained from Police Scotland as we understand, at least anecdotally, that the scale of the problem around Bonfire Night may be that the irresponsible use is so widespread, a perception exists that it is not possible to prevent or intervene effectively.

There is no suggestion of which we are aware that where criminal offences arise and are prosecuted that the range of sentencing options is not appropriate.

Question 5: What are your views on banning the sale of fireworks to the public in Scotland?

Please see more generally our answer to Question 6 below.

There may be a view that outdoor fireworks being a dangerous explosive product should be banned except in relation to regulated public displays. That is probably too extreme a view given the cultural association made between fireworks and celebrations. There may well be scope for tighter controls.

However, with more regulation comes additional expense and resources which would need to be supported by the local authorities and potentially, require an increased cost in licences as well as additional staff time. Increased in regulation may drive the sale of fireworks further under the radar as far as effective enforcement is concerned. It could be challenging to secure evidence for prosecutions.

⁵ http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

⁶ The case of Jason McAnally who let off a firework at his friend <https://www.scotsman.com/news-2-15012/man-died-after-friend-set-off-firework-in-flat-1-832071>

It would also increase the potential for online sales or sales from outside Scotland and the UK. In particular, there is the potential that such controls being introduced in Scotland may lead to an increase in purchases from businesses in northern England. That would also render enforcement challenging and there may be greater benefit in strengthening controls on the use of fireworks. However online sales or sales from abroad do provide scope for greater regulation as well as enforcement.

Question 6: Do you think there should be more controls on how fireworks should be used in Scotland?

Yes.

The current controls could benefit from review in specific areas to address where problems arise. However, a balance does need to be maintained between individual rights to enjoy fireworks and the public interest in having the sale and display of fireworks more tightly controlled. This would not be achieved by imposing an absolute ban on the sale of fireworks as that would, as already suggested above, tend to drive the sale of fireworks underground allowing sales to be conducted through unregulated means of the internet and from abroad. That could worsen any problems.

Being clear where and why there are problems is vital.

We identify some areas of which we are aware that might benefit from review. We would emphasise that in making any proposals for change, there should be an evidence base provided either by examples/cases to show how the current legislation is not working. What might be interesting is to see comparative figures and statistics and also to understand if similar issues are arising in England and Wales for the purpose of comparison.

The following points might be worth considering:

(1) Noise levels

The consultation talks about categorisation of fireworks as far as noise is concerned. That seems to be the focus of most complaints. Currently, we understand that these complaints will tend to go to Environment Services and exactly how these are dealt with would be for them to consider. There may be scope for complaints to be referred to a Licensing Board in respect of displays at venues, such as those used for weddings or other celebrations. As highlighted above, letting off fireworks now arises much more frequently at the times of birthdays and weddings which may, as well as their frequency, flout the rules of setting them off after 11pm. The frequency may mean weekday nights and every weekend in the prime wedding season.

It is hard for residents to take any action as any action at common law for nuisance may be unlikely to be successful to prove as well as time intensive and costly to pursue. We note too with interest that the

Scottish Government does produce information for the public regarding level of noise and nuisance⁷ but that does not refer to fireworks. Would there be some scope to refer there to fireworks?

Stricter controls regarding categorisation of fireworks would no doubt assist. Again, we would question exactly how these issues are being considered in England and Wales.

(2) Air quality

The current regulatory process gives little recognition of the potential the impact of fireworks on air quality. While there are conflicting opinions on the seriousness of the effect of fireworks on air quality, it is a matter which would merit further consideration.

We appreciate that the issues arising both in relation to air quality and similarly to noise levels, are impacted by the concentration, frequency and predictability of the use of fireworks.

(3) Greater controls over more limited periods⁸ when fireworks can be let off

There is a general consensus, for instance, that a three-week window for sale of fireworks does seem to be too long in advance of Bonfire Night.

(4) Grading/Classification of Fireworks

There is a suggestion that there should be better controls on the types of fireworks that can be sold to the public. If fireworks are classified as "industrial grade fireworks", sales should be confined to professional users at organised displays. The general public should be able to purchase only "domestic grade fireworks." Whether sellers need to be licensed for selling domestic grade fireworks could be an issue as this could require all sellers to be have undertaken some basic awareness raising as well as communicating safety information.

There is a degree of complexity as to the types/classification of fireworks. Reclassification of fireworks with regard to noise may well be worth considering.

We understand that fireworks may be sold at reduced prices or offered in packages such as "two for one offer" to attract purchasers. This practice, in so far as it exists, should be outlawed.

(5) Licensed Seller

Consideration could be made as to restriction the locations from which sales could be made. This may have the propensity though to drive sales underground. If the public want fireworks and they are not available locally, they will no doubt buy online or elsewhere. Being aware of the discount stores may be worth considering as one discount store was fined for its unsafe practices in storing fireworks, following a

⁷ <https://www.gov.scot/policies/pollution/noise-nuisance/>

⁸ Regulation 9 of the Fireworks Regulations 2004 (as amended)

prosecution by Staffordshire County Council for its failure to store fireworks on sale in safe containers on 4 November 2014.

(6) Enforcement of existing provisions

We consider that it would be helpful to review the framework for enforcement of existing legislative provisions and the extent to which enforcement action is undertaken. For example, while the Pyrotechnic Articles (Safety) Regulations 2015 prohibit the sale of certain categories of fireworks, to what extent are these Regulations enforced? Are the Regulations sufficiently clear in their terms to support enforcement?

Part Three: Prevention and Community Involvement

Question 7: What do you think could be done by national and local partners to further prevent the misuse of fireworks?

We refer to our answer to Question 6.

Question 8: What ways do you think communities could be involved in supporting the safe use of fireworks?

We refer to our answer to Question 6 when we talked about the need for publicity and education campaigns. Informing the public and school children as to the risks of fireworks is essential.

What would be useful is to scrutinise exactly where the problems with abuse of fireworks is coming from and what categories of the public are affected.

Question 9: What do you think could be done to raise awareness of the risks of fireworks abuse among the public?

We refer to our answer to Question 6 and 8 above.

Part Four: Animal Welfare

Question 10: Do you think that there should be more controls to make sure animals are not caused unnecessary suffering because of the use of fireworks?

It would be useful to obtain the criminal statistics to review the number of cases reported involving animals and fireworks. That would allow the effectiveness of existing legislation to be considered.

We note that as referred to above in relation to noise and air quality matters, animal welfare is also impacted to some extent by the concentration, frequency and predictability of the use of fireworks.

We are aware that the review of the Animal Health and Welfare (Scotland) Act 2006⁹ was subject to consultation that closed on 26 April 2019 and to which we have responded.¹⁰ This consultation considered an increase in penalties in respect of various offences relating to cruelty to animals. There may be scope to consider if there could be some overlap between the scope of both consultations in respect of animals. That may present a future opportunity to make changes if and where there is evidence to suggest that the current provisions are not working.

Local Examples of Practice

We would like to hear any examples of how you or your community acts to reduce the impact of fireworks on animals

We did wonder about the call for posting warnings¹¹ to ensure that all firework packaging includes mandatory graphic warning notices, similar to those found on cigarette packaging about the injury potential of fireworks.

For further information, please contact:

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⁹ <https://www.gov.scot/publications/consultation-amend-animal-health-welfare-scotland-act-2006/>

¹⁰ <https://www.lawscot.org.uk/media/362508/26-04-2019-crim-amendments-to-the-animal-health-welfare-scotland-act-2006.pdf>

¹¹ <https://www.independent.co.uk/news/uk/home-news/bonfire-night-2018-fireworks-display-events-injuries-graphic-pictures-warning-doctors-a8618646.html>