



Law Society  
of Scotland



# Consultation response

## Developing Scotland's Circular Economy

December 2019



## Introduction

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The Law Society of Scotland is the professional body for around 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 consider and respond to the Scottish Government's consultation on *Developing Scotland's Circular Economy* (the consultation)<sup>1</sup>. We have the following comments to put forward for consideration.

## General comments

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We welcome the proposals to develop Scotland's circular economy. However, we consider that the plans outlined in the consultation focus mainly on litter management, and while these are laudable targets, they do not fully represent the actions required to achieve a circular economy. We consider that deeper transformation is necessary to achieve the desired aims.

It is important to recognise that a number of existing and developing policies contribute to, and interact with, the circular economy. It is important that these proposals are therefore considered in light of other developing laws and policy, including the deposit and return scheme, the UK-wide extended producer responsibility (EPR) regime, and plastic packaging tax. We recognise the importance of these proposals and how they fit with the developing environmental programme, however, it is crucial that the details dovetail with other aspects of the programme.

We note that a strong focus on individual policies (for example, in relation to use of takeaway cups by individuals) should be considered transitional measures to deal with the immediate issues of littering etc. However, this focus does not represent the overall concept of the circular economy and could, potentially, have the result of taking away from the wider climate change and waste reduction agenda.

Issues of demand and design require to be addressed to ensure a truly circular economy, including facilitating optimising design of products (such as modular designs) and material flows to encourage or

<sup>1</sup> <https://www.gov.scot/publications/delivering-scotlands-circular-economy-proposals-legislation/>

require lower impact methods of product and service delivery. We note that alternative business models may also be able to play a role in achieving a circular economy and there would be merit in considering business models as a means of moving beyond a focus of consumption and disposal pricing.

We are aware of work carried out by Zero Waste Scotland<sup>2</sup> and others to identify opportunities to link waste streams with material demands, to repurpose returns or surplus materials, to work with alternative packaging and delivery methods and look at designs to lengthen productive use.

We suggest that it is important that consideration is given to the how the funds that are raised by the methods described in the consultation will be used to further support a circular economy. For example, this may include ‘circular’ innovation grants, investment tax reliefs, adaptation of public services, investment in technology and data analytics, and/or be used to address social inclusion issues arising from a changing economy. We suggest that further consultation is undertaken in relation to this.

## Consultation questions

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### 1: Reduce: tackling our throwaway culture

#### 1. Do you agree in principle that Scottish Ministers should have the power to set charges for environmentally harmful items, for example single-use disposable beverage cups?

Yes. There requires to be clarity around how “environmentally harmful items” will be defined and how the charge will be levied.

#### 2. Do you agree with the proposal to prioritise introduction of charges for single-use disposable beverage cups?

No comment.

#### 3. Are there any other items that these new powers for environmental charging should be applied to in the future?

No comment.

### 2: Reuse: encouraging use and reuse to prevent waste

We make no specific comments on these questions other than to note that:

- there requires to be a clear method of distinguishing between stock which is ‘waste’ from that which is ‘surplus stock’; and

<sup>2</sup> For example, see <https://www.zerowastescotland.org.uk/brokerage>

- all waste data tracking in Scotland should be coordinated with the larger project which has already been commissioned by DEFRA.

### **3: Recycle: maximising value of materials**

#### **8. Do you agree with the principle of enabling Scottish Ministers to place additional requirements on local authorities in order to increase rates and quality of household recycling? If yes, what should these “additional requirements” be?**

Yes, we agree with the principle. It remains important that consumers have good access to kerbside recycling facilities. We note however that there may be financial and resource implications of any further requirements and the necessary infrastructure will be required in order to support such a scheme.

#### **9. Do you agree with the principle of greater consistency in household recycling collections in different local authority areas?**

Yes, we consider there would be merit in greater consistency. While recognising the opportunities to unify arrangements across local authority areas, we note that funding is likely to be a challenge in achieving this. Nonetheless, we think this is something to be strived for.

#### **10. Do you consider that we should move away from the current voluntary approach to Scotland’s Household Recycling Charter towards a more mandated approach, whereby implementation of the Charter and its supporting Code of Practice becomes a statutory obligation?**

Yes. We note that not all local authorities are currently signed-up to the Charter and there are differences in arrangements across local authority areas. There would be merit in greater consistency.

#### **11. Do you consider that householders’ existing obligations are sufficient?**

No, we do not consider existing obligations are sufficient. However, we consider that improvements are required in relation to available data in order to allow matters to be explored further.

#### **12. Are there any other measures that you consider Scottish Government should take to help accelerate the rate and quality of household recycling in Scotland, taking account of experience and approaches elsewhere and existing householder behaviours?**

As referred to in our answer to question 11, we note that “there is evidence to suggest that rates of non-participation by householders in separating recyclable waste properly is high” (page 25), however we note that this is not detailed and we consider that a strong evidence base is required in order to explore the issues in relation to household recycling fully. If there is only currently evidence to *suggest* this, a better evidence base should be formed to inform the effective policy required for effect behavioural change.

## 4: Improving enforcement

### 13. Do you agree that Scotland should have the power to seize vehicles suspected of waste crime, similar to the rest of the UK?

Yes. We support in principle the consultation's objectives that include strengthening SEPA's powers<sup>3</sup> in relation to their responsibilities to prevent and tackle the harms associated with waste crime. Organised crime knows no boundaries; it is clear that there are links with environment crime such as in the disposal of waste where offenders can avoid the implications of health and safety costs and tax in relation to the legitimate disposal of waste<sup>4</sup>.

If the Scottish Government is committed to taking steps to ensure compliance with legislative provisions supporting the circular economy, it is essential that there are effective enforcement provisions in place. That will need to include the enhancement of the available criminal sanctions such as forfeiture of vehicles. There are already similar criminal provisions that allow for forfeiture of vehicles in connection with the commission of road traffic offences<sup>5</sup>.

We understand the argument that enforcement provisions in connection with waste crime should be similar across the United Kingdom. Since we note that these powers appear to have been in existence in England and Wales since the Clean Neighbourhoods and Environment Act 2005 came into force, it would have been useful to have been provided with evidence to support the proposals to introduce such measures in Scotland, including statistics that set out the extent of the use that have been made of such provisions in England and Wales such as how many vehicles have been successfully seized in connection of the commission of such offences and their value. This would have helped to establish a case for their introduction in Scotland. We would also consider that this may have an impact on businesses and should be included in the business impact assessment as a deterrent if businesses consider that their vehicles may be seized if they are involved in the illicit disposal of controlled waste as well as other criminal sanctions that may apply, such as fines.

The only reference to incidents in the consultation is somewhat general where there is an indication that SEPA has responded to "around 8,000 waste and resource management related environment incidents." Greater specification would be of assistance so as to ascertain the advantages of the introduction of such provisions.

We have the following observations in relation to the introduction of such provisions:

**Extent of powers:** Section 6(1) of the Control of Pollution (Amendment) Act 1989 sets out the provisions to obtain a warrant in connection with the seizure of vehicles. The seizure of vehicles requires reasonable grounds for believing:

<sup>3</sup> One Planet Prosperity – A Waste to Resources Framework

<sup>4</sup> See comments from Detective Chief Superintendent John Cuddihy at SEPA's 2014 conference on environmental waste crime: <http://media.sepa.org.uk/media-releases/2014/scotlands-first-conference-on-environmental-waste-crime.aspx>

<sup>5</sup> Section 33 33A of the Road Traffic Offenders Act 1988

- (i) that an offence under section 3 of the Control of Pollution Act 1974 or section 33 of the Environmental Protection Act 1990 has been committed and
- (ii) that that vehicle was used in the commission of the offence.

We assume that the offences for which seizure of a vehicle would relate would be identical to this as, in effect, what is being removed is the absence of a requirement to obtain a warrant.

The offences to which these provisions will relate must be set out clearly given the operation of the criminal law. Similarly, there is a need to ensure that all affected are fully aware of the provisions through an awareness raising campaign for the public and the courts.

**Use of regulation making powers:** We note that the majority of the powers in England and Wales are contained in the Control of Waste (Dealing with Seized Property) (England and Wales) Regulations 2015. Is the intention to reserve similar regulation making powers? We would strongly support the details in relation to forfeiture of vehicles being set out in primary legislation.

The detail of how these confiscation processes are proposed to operate in Scotland will require to be considered to ensure that they are transparent and fair.

#### **14. Do you agree Scottish Ministers should have powers to introduce a new fixed penalty regime for littering from vehicles?**

Yes. The consultation sets out a useful evidential basis for introducing a new fixed penalty regime in connection with littering from vehicles. Better enforcement seems important to ensure compliance with section 87 of the Environment Protection Act 1990 (1990 Act).

Section 88 of the 1990 Act contains provisions in relation to fixed penalties. An extension of these provisions appears to be intended. We consider it important that any extension of the fixed penalty regime is integrated with existing fixed penalty regimes.

The issuing of fixed penalties is certainly a method to support compliance with the legislation. However, that needs to be linked to raising awareness of the importance of not littering from vehicles as well as the costs of removal, as highlighted in the consultation. This should be carried out in tandem with any strengthening of the fixed penalty regime as proposed.

#### **15. Do you agree with the introduction of a new system that stipulates that the registered keeper of a vehicle is ultimately responsible for criminal offences such as littering from or in relation to their vehicle (for example by passengers or people using that vehicle at that time)?**

We agree that there should be better enforcement of section 87 of the 1990 Act. As described in the consultation, there appears to be a gap in enforcement where a person who has littered from a vehicle cannot be identified. Where there is any commission of a criminal offence, it is essential that the person responsible can be identified by means of sufficient admissible evidence.

We have concerns about the proposal to impose liability on the registered keeper of the vehicle where the vehicle is presumably identified by means of sufficient corroborated and admissible evidence as having been involved in the commission of any littering offence.

Section 154 of the Anti-social Behaviour, Crime and Policing Act 2014 introduced regulation-making powers regarding section 88A of the 1990 Act in relation to littering from vehicles so that the registered keeper of the vehicle may be responsible for paying the penalty. Such penalties in England and Wales appear to be civil penalties<sup>6</sup>.

It is not made clear in the consultation if the proposed fixed penalty regime under section 87 of the 1990 Act is intended to form part of a fixed penalty regime **and** be subject to criminal prosecution and sanctions. We assume that in serious cases of littering from vehicles, criminal prosecution at the discretion of the Crown Office and Procurator Fiscal Service would follow – and no fixed penalty notice would be issued.

We refer to the system which operates currently in relation to speeding whereby a notice is served on the registered keeper of a vehicle requiring them to specify who was responsible for the vehicle at the time of any alleged speeding offence. They can direct the fixed penalty to the person responsible for the vehicle at the time. We suggest that similar provisions could be included in this proposed fixed penalty system, providing that the fixed penalty could be directed either to the person responsible for littering from the vehicle if known or the person in control of the vehicle at the time. That seems a more appropriate method of imposing a sanction.

We would favour the details of the regime being set out on the face of the Bill. If the intention is to provide for these provisions by means of regulation-making powers, these should be subject to the affirmative process. The legislation would require to deal with the amount of any fixed penalty notice. It should be noted that those on lower incomes may not be in a position to pay a fine in one instalment and this has implications for the enforcement of any penalty.

The consultation does not detail exemptions which might apply. For instance:

- would it be intended that where the vehicle has been hired to someone else, or the keeper can prove that the vehicle had been stolen at the time the littering offence was committed, that they should continue to be responsible for any fixed penalty?
- Would keepers of public service vehicles, taxis and private hire be exempt?

Similarly, with ongoing consultation on automated vehicles<sup>7</sup>, how is it intended that the regulation deal with that scenario? There may be merit in futureproofing of the regulations.

We suggest that consideration is required as to what compliance means. Should there be a defence of reasonable excuse? It may not be reasonable where the littering was accidental, or cannot be proved from the circumstances that it was deliberate.

<sup>6</sup> “We proposed to bring this power into force and introduce new regulations to allow councils outside London to issue a civil penalty notice to the keeper of a vehicle from which litter is thrown, requiring the keeper to pay a civil penalty. The keeper would not assume any criminal liability for the littering offence: failure to pay the civil penalty would result in a civil debt, not prosecution for the littering offence.”  
Review of Fixed Penalties for Environmental Offences and Introduction of Civil Penalties for Littering from Vehicles Outside London

[https://consult.defra.gov.uk/environment/litter-penalties/supporting\\_documents/Reducing%20litter%20%20Consultation%20on%20penalties%20for%20environmental%20offences.pdf](https://consult.defra.gov.uk/environment/litter-penalties/supporting_documents/Reducing%20litter%20%20Consultation%20on%20penalties%20for%20environmental%20offences.pdf)

<sup>7</sup> <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/joint-projects/automated-vehicles/>

## 5: Assessing impact of bill proposals

No comments.

## 6: Proposals for secondary legislation

### 19. Do you agree with the proposal that procurement strategies published by relevant public bodies should include consideration of activity which supports the circular economy and action on climate change?

Yes. We consider that it is essential that the approach to procurement strategies puts activity which supports the circular economy, action on climate change and the role of public sector bodies in tackling climate change<sup>8</sup> at its core, and is consistent across those policies. These procurement strategies are a major opportunity to influence the behaviours of the many and varied businesses servicing the public sector, in a single step. We consider that there would be merit in detail being provided in relevant procurement strategies, such as details of the challenges and opportunities in relation to climate change and the circular economy, rather than simply a general approach being presented, while at the same time being careful not to overly complicate existing procurement requirements.

### 20. Do you agree with the proposal to increase the minimum charge on single-use carrier bags from 5p to 10p?

No comment.

### 21. Do you agree that the initial 5p minimum charge on single-use carrier bags has had a positive impact on the environment?

No comment.

## Conclusion

### 22. Do you have any other comments that you would like to make, relevant to the subject of this consultation that you have not covered in your answers to other questions?

As we refer to above, we consider that the consultation could go further towards bringing the concept of the circular economy into law, including consideration of the following additional measures which are missing from the consultation:

- facilitating the optimisation of design of products and material flows to encourage such products, and their production methods, to have a lower impact on the environment and a longer productive use;

<sup>8</sup> <https://consult.gov.scot/energy-and-climate-change-directorate/role-of-public-sector-in-decarbonising/>

- amending the legislation which could encourage opportunities for different waste streams and the demand for materials to be married up (for example, aggregates and surplus construction materials);
- better links to the wider EPR agenda;
- carbon taxation; and
- proposals for grants or tax reliefs to encourage circular innovation measures.

**For further information, please contact:**

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