



Law Society
of Scotland

Consultation Response

Ending the sale of energy drinks to children and young people

4 February 2020



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 Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Ending the sale of energy drinks to children and young people (the consultation). Our interest in the consultation stems round the question of implementation and enforcement of the policy considerations outlined in Question 3. We have also added some comments around question 9.

Question 3: Please comment on our proposals for enforcing any requirements that are implemented.

The Scottish Government is seeking to reduce the health risks associated with young people in Scotland consuming energy drinks.¹ Though there has been some success regarding a voluntary ban, the Scottish Government is seeking to extend such a ban by implementing restrictions on the sale of these drinks.

Certainly, there would seem to be much to commend consistency in policy terms similar to the approach being adopted in England and Wales regarding the imposition of a mandatory restriction of 16 against sales of such drinks.

Exactly how a mandatory age restriction might be imposed needs careful consideration. Paragraph 3.6 of the consultation states as local authorities are currently responsible for enforcing trading standards and environmental health legislation that they would be responsible for enforcing any requirements that are to be implemented. Presumably their role would be in policing the sales of such drinks.

A range of suggestions regarding ways in which mandatory age restrictions might be imposed and be enforced are set out in paragraph 3.7 of the consultation. It is the enforcement which seems to be the

¹ Paragraph 1.1 of the consultation

essential aspect to consider as the policy intention seems in principle to be one which we would support in so far as there is evidence about the potential harmful effects of such energy drinks.

The means to enforce range from raising awareness, education, advisory matters such as guidance, and civil remedies and criminal enforcement through to the potential creation of criminal offences.

The Committee has the following comments in relation to the various proposals:

Criminal:² The creation of criminal offences should be the final resort only after other possible measures have been tested out and are demonstrated to have failed to fully address the health issues. There needs to be a clear evidence base to demonstrate that such other measures that can be put in place are not working before we would suggest that the criminalization of the conduct of selling energy drinks should be adopted.

We understand the theoretical attraction and similarities that exist with the sale of alcohol which is heavily restricted and of longstanding practice and public acceptance. There would be many other knock-on consequences which would include a need to consider as well as the creation of offences to ban the sale; a ban on others buying energy drinks for those within the age prohibited groups, and the potential implications for any seller's licence under the licencing regime if found to be in breach. Could such a ban extend to drinking in public if in an age restricted category?

There are implications for retailers too in that they would require their staff to see identification where energy drinks were being purchased. That has training implications as far as establishing any potential due diligence offence (where there is a charge and the retailer establishes that they have exercised all due diligence to avoid the commission of an offence.)

Just how many prosecutions would follow would need to be assessed carefully as any increase in criminal offences would have an effect on the resources of the Scottish criminal justice system for Crown Office and Procurator Fiscal Service, the Scottish Courts and Tribunals Service, trading standards in reporting possible offences and Police Scotland.

Bear in mind that any criminal convictions may carry potential consequences regarding future employment and travel. There needs to be consideration if this is a criminal conviction is a proportionate response.

Fixed penalties and Compliance notices:³ These can be imposed either as part of the application of either criminal or civil sanctions.

² Paragraph 3.7(f) of the consultation

³ Paragraph 3.7(e) (b)

From the references in the consultation to the Food Standards Act 2015 (2015 Act),⁴ the fixed penalties would appear to relate to criminal offences. This ties in with our comments above regarding any need for enforcement to be backed by criminal sanctions.

Fixed penalties would also have the potential for any due diligence defence to be made out and which is a legal test which would mean that such cases would end up in court.

Where the offence would relate to the sale of energy drinks, it is hard to see how a compliance notice would apply or be appropriate. We suspect that the offence would need to relate to the sale of energy drinks on a specific occasion to an age restricted person.

In any event, there is a need to consider the purpose of a fixed penalty regime. It avoids prosecution costs, but regard needs to be had to the failure to pay or to comply with any such notice or continual failures as these would then require to be prosecuted in the courts with the resource implications mentioned above.

Powers of entry to obtain information: To enforce such powers would require the creation of criminal offences similar to those under section 29(3) of the 2015 Act.

It seems to us that the option of developing ministerial guidance to be issued to local authorities and/or an implementation guide for retailers would be the favoured approach. This can be combined with a proactive campaign when introduced to raise awareness and educate the public and influence the school curriculum and GIRFEC.⁵ That approach is preferable rather than resorting to criminal enforcement.

That approach can be seen very much as the first stage in the adoption of a more effective process of encouraging a ban than to single out energy drinks out which in some ways could make them more attractive to those in age-restricted categories in seeking to flout the law.

Question 9: Please outline any other comments you wish to make.

One of the methods of implementing the Scottish Government policy which has not been mentioned would be to consider taxation on the sale of such drinks which is relatively simple to administer.

Finally, it would be good to understand more by way of comparative work from other countries to understand what they have done by way of seeking to enforce such a ban. We understand that other countries such as France, Denmark, Norway, Uruguay, Canada and Germany⁶ have all acted to ban the sale of energy drinks. How are they seeking to enforce this? We also note that the UK Government held a

⁴ Section 36

⁵ <https://www.gov.scot/policies/girfec/>

⁶ <https://www.energydrinkslawsuit.com/countries-regulate-energy-drinks/>



similar consultation last year where it would be interesting as they analyse the results to understand how they intend to progress from a consistency perspective.⁷

⁷ <https://www.gov.uk/government/consultations/ending-the-sale-of-energy-drinks-to-children>



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