



Law Society
of Scotland

Consultation Response

Consultation on decriminalising TV licence evasion

1 April 2020



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 UK GOVERNMENT: Consultation on decriminalising TV licence evasion (the consultation). The committee has the following comments to put forward for consideration.

General

At the outset, it is disappointing to note that this UK wide consultation does not consider in depth the Scottish prosecution position. We note that it makes one scant reference to Scotland and the role of the Crown Office and Procurator Fiscal Service (COPFS) at Page 101 of the consultation which cross refers to the Perry Report.¹ This is in contrast to Annex E of the consultation which sets out in considerable detail the prosecution position for England and Wales though of course similar, there are a number of differences such as the relevant figures for criminal prosecutions² which quote those only for England and Wales. The enforcement procedures though purportedly UK based in fact refer only to England and Wales.

The TV Licence affects the UK as a whole and section 363 of the Telecommunications Act 2003 applies equally to Scotland in that:

“A person with a television receiver in his possession or under his control who (a)intends to install or use it in contravention of subsection (1), or (b)knows, or has reasonable grounds for believing, that another person intends to install or use it in contravention of that subsection, is guilty of an offence.”

¹ 2015 'TV Licence Fee Enforcement Review', led by David Perry QC (the Perry Review). The Perry Review, which was required under section 77 of the Deregulation Act 2015, looked at whether TV licence evasion should be decriminalised and replaced with a non-criminal alternative enforcement scheme.

² In 2018, there were 129,446 prosecutions for TV licence evasion, resulting in 121,203 convictions Chapter 6 of the consultation headed Impact on the Justice system

The penalty is the same on summary conviction of a fine not exceeding level 3.³

Since criminal law is devolved to Scotland, in our view, there is a need to reflect that system so that consideration is given to how the criminal processes operate in Scotland when undertaking a UK consultation. After all what is sought to be brought in post consultation would presumably affect the whole UK.

Though we are supportive of what is being proposed, of a civil enforcement scheme, we feel that it is important to ensure that the comparative perspective is reflected. Irrespective of the outcome of the consultation, what is required is consistency in practice across the UK.

Funds being “collected from payment of the licence fee [are] given primarily to the BBC in order to fund the BBC’s UK television, radio and online services, as well as the World Service.”⁴ The stress is on it being a national service. That is important. Debates as to the actual funding of the BBC are political matters lying outside the scope of this consultation.

All prosecutions are undertaken in Scotland by the COPFS. Any cases involving section 363 of the Communications Act 2003 would be reported to them for consideration of prosecution in terms of their Prosecutorial Code.⁵ Decisions would be taken on the basis that there was sufficient admissible evidence according to Scottish evidential rules including corroboration to justify prosecution in the public interest. Thereafter, any decision as to proceedings would be taken at their discretion. Such decisions could involve a decision not to prosecute, the issue of a warning letter, Fiscal Fine or indeed, prosecution on summary complaint. As the offence is triable only under summary procedures, such cases would be competent and most likely to be heard at the JP court though they could also be prosecuted in the summary court with a sheriff.

There is a reference in the consultation to Sentencing Guidelines which apply in England and Wales but please note that there are no sentencing guidelines regarding the evasion of TV licences in Scotland. The issue of Sentencing Guidelines in Scotland is entirely the responsibility of the Scottish Sentencing Council.⁶

The only information that we have tracked publicly regarding the number of prosecutions in Scotland include:

- In 2012, 60 prosecutions were taken for an offence with 38 convictions resulting and the issue of 15 804 Fiscal Fines.⁷

³ Section 363 (4) of the Telecommunications Act 2003

⁴ Chapter 1 of the Consultation -The TV Licence

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

⁶ <https://www.scottishsentencingcouncil.org.uk/>

⁷ <https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/41-responses2013/536-using-tv-without-a-licence>

- In 2016-17, 4761 Fiscal Fines were issued (divided by gender- 1414 (Male) and 3347 (Female)). There were 5 convictions in the JP Court resulting in 3 fines and an admonition. The average fine was £60.⁸

This can be compared with “In 2018, 121,203 people [in England and Wales] were convicted and sentenced for evasion of the requirement to hold a TV licence. The average fine to these offenders was £176.”

Fiscal Fines are (as with warning letters) issued at the discretion of the Procurator Fiscal and if the offer is accepted, allows someone the opportunity to pay a sum of money of between £50 and £300 following acceptance of which they will avoid the imposition of a criminal conviction as they cannot then be prosecuted for the alleged offence.⁹

There are some concerns that arise that include:

- If the offer of Fiscal Fine is accepted and they were to be prosecuted before a court for another similar offence within two years of accepting an offer, and they are convicted or plead guilty, the court can be told before passing sentence about the offer that was previously accepted. This may be factored into any sentence that is imposed.
- The imposition of a Fiscal Fine may not consider any relevant financial ability to pay as the financial means may not have been included in the original report made of the offence either as it was not provided, or it was withheld. Ability to pay a fine if court imposed does require for a sheriff or JP to take that into account. Frequently those to whom Fiscal Fines is issued, may not have the financial means to pay.
- If an offer of a Fiscal Fine has been accepted, it will be treated as if it had been imposed by a court. Action will be taken to recover the money if they do not pay.
- There is very little likelihood that legal aid will be provided for advice on a contested Fiscal Fine which may result in unfairness on some accused arising with the commission of this offence.

In cases being prosecuted, failure to pay any fine imposed will be dealt with by fines enforcement action. Ultimately, this could be treated with a custodial result though with the advent of the presumption against short sentences in Scotland ¹⁰ of a year, this would be extremely unlikely.

We note that the consultation states that “TV licence evasion in and of itself is not an imprisonable offence and will not lead to a criminal record in most cases” (our emphasis). It can result in a criminal conviction or the required disclosure of a Fiscal Fine as outlined above which have implications for employment and otherwise.

⁸ <https://www.gov.scot/publications/foi-18-01153/>

⁹ <https://www.scotcourts.gov.uk/taking-action/pay-a-fine/fiscal-fines>

¹⁰ <http://www.legislation.gov.uk/sdsi/2019/9780111042281/contents>

Where there is a conviction for a TV licence evasion, it carries the same stigma as for any conviction which may affect them applying or being considered for jobs and with other jobs such as the professions having additional tests such as for a solicitor under “fit and proper person” criteria.¹¹ There may be further implications arising in these cases. The requirements of disclosure under the Rehabilitation of Offenders Act 1974¹² that apply to the UK are highly complicated and complex – and in Scotland, there may be further implications arising from the Disclosure (Scotland) Bill¹³ which is passing through the Scottish Parliament at the moment.

The Consultation

In deciding whether to decriminalise TV licence evasion and considering how this could happen, the background to the Government’s objectives and determining factors include:

- whether an alternative, non-criminal enforcement scheme is fairer and more proportionate;
- the cost and difficulty to implement any alternative scheme;
- the potential impact on licence fee payers, particularly the most vulnerable and those with protected characteristics; and
- the overall impact on licence fee collection.

With that background in mind, we answer the consultation questions as follows:

Question 1: Should TV licence evasion (the use or installation of a television receiver without a TV licence) no longer be a criminal offence? Why do you consider that TV licence evasion should no longer be a criminal offence?

We understand that the 2015 ‘TV Licence Fee Enforcement Review’ led by David Perry QC (conducted under section 77 of the Deregulation Act 2015) considered the decriminalisation of TV licence evasion by replacing that scheme with a non-criminal alternative enforcement scheme. Various factors need to be considered regarding on how to enforce the current scheme of collecting funds for the broadcasting services.

We are firmly of the view that the application of any criminal sanction is both unfair and disproportionate for such offences. The current scheme targets those that are less well off and frequently catches them in a trap of non-payment to be followed by the consequences of a criminal sanction by way of the imposition of a Fiscal Fine or prosecution. They then cannot pay followed by further reports for non-payment of the licence and/or the consequences of means enforcement. It is a poverty trap which spirals and adds to what

¹¹ <https://www.lawscot.org.uk/media/359166/fit-and-proper-guidance-november-2017.pdf>

¹² <https://www.legislation.gov.uk/ukpga/1974/53>

¹³ <https://www.parliament.scot/parliamentarybusiness/Bills/111895.aspx>

is already a difficult situation. The cost in 2019/20 of a colour/black and white TV licence is £154.50 and £52.00 respectively. For the vulnerable in society and those on low incomes, they are inevitably subject to adverse discrimination which will be exacerbated by the suggestion in the future, though suspended meantime for COVID-19 until August 2020, that those over 75 may now be required to pay the licence fee.

Our view is on many occasions that the evidence to justify prosecution and therefore satisfying the burden of proof in criminal cases of beyond reasonable doubt may not exist. The ability of those accused to seek legal advice and access to justice may be difficult if not impossible as we have highlighted that legal aid would be infrequently if not at all impossible to access in such situations.

While we agree that “imprisonment, where there has been a default in the payment of a fine, will only occur following a formal inquiry into the offender’s ability to pay” and is less than likely to arise, we consider that the consequences of criminal sanctions being applied are so important that these cannot be ignored. The possibility that these sanctions can arise is simply not proportionate by way of a penalty.

Were criminal sanctions still to apply in respect of any non-payment of any television licence fee, it is important that there is clarity on what exactly is deemed to amount to be criminal activity. There is certainly considerable doubt in view of recent and other technological advances such as streaming exactly what one can or cannot do with/without a television licence. That will continue to arise in the future as other means of accessing content arises.

We appreciate that criminal penalties are an essential part of the justice system to back up enforcement such as section 143 of the Road Traffic Act 1988 (no insurance where there are consequences in accidents if there is no insurance in the sense that there is a victim.) There are no victims in effect from TV licence evasion except for shortfall in the revenue of the public broadcasting service, the BBC. Any penalty that is imposed must be appropriate and are perceived by the public “as a fair punishment for the offence committed.”

We fully support the view that there should not be any “proliferation of unnecessary criminal offences.” We would encourage the viewing of an alternative as under consideration in this consultation that:

“the concern that the criminal nature of the current regime is not a proportionate response to the problem of licence fee evasion. In particular, it was suggested that the availability of a criminal prosecution, with a financial penalty on conviction, and the possibility of imprisonment in default of payment, was not comparable to the sanctions for non-payment of utility service bills, such as water, gas and electricity.”¹⁴

Question 2: If, alternatively, you consider that TV licence evasion should remain a criminal offence, why is this the case?

We refer to our answer to Question 1.

Question 3: If you have a view, what alternative enforcement scheme models do you consider to be most appropriate? Why?

There are precedents for the imposition of civil penalties such as parking charges. We recognise that these may not have the same effective powers of enforcement that is available from the application of criminal sanctions.

The imposition of civil penalties may still adversely affect those who cannot pay due to limited financial resources.

Question 4: What steps could the Government take to mitigate any impacts that may result from decriminalisation of TV licence evasion?

If there are categories or groups that are more adversely affected, then exemptions from payment of any TV licence fee should be applied. Clearly the economic modelling of what is required financially to fund the broadcasting services is vital to balance income received against the resources from which it is to be obtained. One category that has attracted much publicity is the over 75 but we recognise that there may be other vulnerable groups.

Question 5: Please provide any evidence you consider appropriate in answering these questions and any other information that you believe the Government should consider, especially where there is an impact on those with protected characteristics or the most vulnerable.

We refer to our General Comments which set out the position in Scotland where we accept that the issues are not that different from those arising in England and Wales.

However, there does seem to be a disproportionate number of convictions arising regarding women that may indicate and support the disproportionate effect of the criminal sanction for evasion of the TV licence fee on certain groups. This is supported in the consultation where it refers to “women and those on low incomes andthe Perry Review found that:

“there is strong evidence demonstrating that the majority of the factors contributing to this disparity are driven by circumstances which are outside TV Licensing’s control.”

'We also refer to our answer to Question 4. Has any modelling been applied to “protected characteristics” within the Equality Act 2010 to ascertain outside of the social-economic factors how these various identified groups are impacted by the imposition of criminal sanctions?

We have the following observations to make:

1. Implementation

We note that the UK Government expects that any changes to the enforcement of the TV licence would take effect in the upcoming licence fee settlement period that is due to begin in April 2022 and last for a five-year period.

Just how any changes to the TV licence fee regime are brought into effect need to be communicated effectively to the public. As indicated above, there seems a lack of understanding and public awareness of the activities which can /cannot be carried out without the need for any licence. This is equally applicable in the future as there will presumably still require to be a fee; though the imposition of any civil sanctions may lack the “bite” of criminal enforcement but in the interests of justice, it still is unfair to impose civil penalties if there is any lack of understanding of what is/is not covered.

The UK Government has indicated that it intends to work closely with the BBC and TV Licensing to ensure that any changes will be delivered in a manageable and efficient manner and that it will consider the future of the TV licence model ahead of the next Charter. That Charter requires the BBC Board to make sure that arrangements for the collection of the licence fee are ‘efficient, appropriate and proportionate.’

We would suggest that should include effective communication of exactly what the licence fee covers and the justification and basis for collection of the licence fee.

2. Warrants

We are aware that a court can grant a warrant to enter and search premises under certain circumstances regarding the investigation of TV licence evasion. We would suggest that there is information lacking on how many and how this power is exercised as it does represent a balance to be maintained of the interests of the State and privacy under Article 8 (right to private life) of the European Convention on Human Rights.

Consideration needs to be given to what powers to inspect would be required under the creation of any civil regime.

Though some information is included on the TV Licensing website, it does not contain much on how it investigates TV licence evasion.¹⁵

3. Cost of prosecution

¹⁵ <https://www.tvlicensing.co.uk/>

By introducing any civil regime, there would be no recourse to criminal prosecution utilising the current resources of the prosecution and court services. Exactly who and how the civil enforcement provision would work is unclear but no doubt some of the funding from the costs saved from the criminal enforcement could be utilised.

For further information, please contact:

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