



Law Society
of Scotland

Consultation response

Draft Environmental Protection (Single-use Plastic Products and Oxo-degradable Plastic Products) (Scotland) Regulations 2021

April 2021



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.

We welcome the opportunity to respond to the Scottish Government's consultation on *Draft Environmental Protection (Single-use Plastic Products and Oxo-degradable Plastic Products) (Scotland) Regulations 2021*¹ (the consultation). The consultation includes a copy of the draft Regulations- The Environmental Protection (Single-use Plastic Products and Oxodegradable Plastic Products) (Scotland) Regulations 2021 (the Regulations"). We previously responded to the Scottish Government's consultation *Introducing market restrictions on single-use plastic items in Scotland*². We have the following comments to put forward for consideration.

General comments

We note the comments at paragraph 8 concerning potential impacts of the UK Internal Market Act 2020 on the scheme. While the consultation document recognises the potential for impacts of lesser standards being applied elsewhere in the UK, the document gives no indication of what approach would be taken if that were to be the case. Given the potential impacts on the success of these proposed restrictions, there would be merit in having greater clarity and certainty in this regard before regulations are introduced, given the risk of the scheme being undermined.

We have considerable concerns with regard to the proposed reliance in the Regulations on criminal offences and sanctions. Regulations 3-8, Regulation 14, and Regulation 16 create criminal offences, while Regulations 17 and 18 provide related powers for enforcement and include the power of inspection.

At the outset, it is important to consider the policy intention in relation to the creation of a substantial number of criminal offences. Nowhere within the information supporting the consultation is it outlined why there is a decided policy that criminal offences should apply. Furthermore, we would expect that there should be some

¹ <https://consult.gov.scot/environment-forestry/draft-environmental-protection-single-use-plastic/>

² <https://www.lawscot.org.uk/media/370303/21-01-04-env-market-restriction-on-single-use-plastic-items.pdf>

quantification by way of financial information which is not included under Explanatory Notes as to the impact of prosecuting these new offences. This should consider the number of such offences which would require presumably to be prosecuted in the JP or Sheriff Court, given the sanctions are only noted as being at available at summary level. That projection must exist as there will be a resource impact on whoever is to report these cases which is unclear from the Regulations and, on the Crown Office and Procurator Fiscal Service (COPFS), as the prosecuting authority in Scotland, as to the public interest in prosecution and sufficient admissible evidence to justify prosecution.

There are consequences for the Scottish Courts and Tribunal Service (SCTS) on the number of cases to call and be progressed in the court. There are implications too, for legal aid as presumably anyone charged with this type of offence may seek advice and assistance and ultimately legal aid to defend any case.

We would be interested to see these projections of numbers and relevant financial impact and confirmation that the relevant discussion has been held with the criminal authorities as to the practical effect of these offences. This relates too to paragraph 18 which mentions the need for guidance – is this envisaged to include guidance to COPFS as to prosecution and satisfaction of the “public interest” test?

We note that the consultation states that “Full and comprehensive impact assessments will be published alongside the final regulations”. The lack of these assessments at this stage means that it is difficult to fully understand the impacts of the proposed regime, particularly in relation to the reporting and prosecution of offences.

There is a need to consider carefully, in our view, this approach to criminalisation of these offences to ascertain if this is justified and a proportionate response. Is criminal law the best way in which to ensure compliance with the Regulations? In the past there was little option but to rely on criminal enforcement, but the thrust of recent policy and legislation, especially in environmental contexts (for example, the Regulatory Reform (Scotland) Act 2014, Marine (Scotland) Act 2010 and the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, SSI 2015/383), has been to enable a wider range of options to be used. The offences here seem well-suited to this newer approach involving the potential of using civil sanctions rather than criminal prosecution.

The traditional approach to criminal law has been that a crime is an act that is morally wrong. The purpose of criminal sanctions is to make the offender give retribution for harm done and expiate their moral guilt; punishment was to be meted out in proportion to the guilt of the accused. Is this the effect which is envisaged?

By creating offences by means of Regulations³, and the use of secondary powers, we have concerns that the level of penalties or process has not been fully thought through. We are aware that substantial number of criminal offences are created by delegated legislation with criminal consequences carrying both the risk of conviction and the consequences and implications for those convicted with a criminal record which may affect professional career opportunities as well as their scope for foreign travel. This restricts the opportunity for scrutiny, and we consider that it is therefore important to consider the content of the criminal law and the

³ Section 140(9) of the Environmental Protection Act 1990 contains the relevant powers.

principles to which such offences should conform. In the absence of any information in the consultation, we have doubts as to required basic principles of fair notice and proportionality of penalty.

As far as penalties are concerned, has consideration been given to the imposition of civil or enforcement penalties as an initial response to any breach? That would allow action to be taken but not have the criminal consequences which automatic prosecution would entail? It would be interesting to understand the policy consideration as to why this might not be a satisfactory approach as this would be simpler and presumably less resource intensive to achieve compliance.

There seem to be some issues centring around enforcement. Who is going to carry out inspections and who is going to report the cases to COPFS? There are resource implications for local authorities. Have these been considered – again in line with the financial questions outlined above?

Moving onto criminal consequences, it would seem that there may be merit were this definitely to justify the imposition of criminal penalties to lie in the lower end of the prosecution armoury. There may be consideration given to the issue of a warning letter or fixed penalty. Again, as highlighted below we have concerns that this may result in one supply potentially leading to many possible offence breaches. It may be helpful to outline some scenarios to illustrate how it is envisaged cases will be instigated and then prosecuted.

Looking to the creation of the offences, we note that there is no inclusion of either a reverse burden of “without reasonable excuse” or a “due diligence” defence. We wonder what the policy justification for that exclusion might be. “Without reasonable excuse” allows a party charged with an offence to outline why they should not be guilty if the offence and a due diligence defence states that the accused took all reasonably practicable steps to avoid the breach.

We have the following specific observations:

Regulations 4, 6, 8, and 15: Given the need to use up previous supplies, depending on the timescale from passing the Regulations to implementation, 3 months seems rather short. This ties in with the criminal considerations above as to potential offending when there are large supplies to use up and financial consequences for those may have to throw away unused quantities of items. Is 3 months a proportionate period?

Regulation 16: Regulation 16 contains powers to prosecute at corporate level. We can understand why that may be appropriate, but it is necessary in considering these offences to outline how prosecution is to work. Again, developing some scenarios may help as would they propose prosecuting the person who hands over the item as well as the manager and director who allowed this to happen. In a licensing context, there is of course the right to prosecute the person who supplied alcohol in contravention of the licence as well as the manager responsible. Is this supply of a plastic cutlery comparable to that level of offence?

Regulation 17: We have questioned enforcement above. With enforcement comes reporting and while the local authorities are familiar with reporting breaches for instances of trading standards and licensing, this is carried out by relevant and trained officials. We are interested to ascertain what consideration has been given

to training with regard to these measures. This also ties in with the publication of guidance as outlined in paragraph 18.

We would suggest that there is a need to outline who will be responsible for enforcing the powers and what form that authorisation will take. That is especially relevant when looking to Regulation 18 on powers of entry.

Regulation 18: Paragraph 1(c) (i)-(iii) should include “acting reasonably” as paragraph 1(d) does.

Paragraph (5) we can see no justification of an open-ended warrant – see section 23(3) of the Misuse of Drugs Act 1971. It is common to include a time period.

We note that it will be important for a strong awareness raising campaign to be undertaken to make the general public and businesses aware of these Regulations and in particular, the criminal offences, before these come into force.

Consultation questions

Question 1 Do you have any comments you would like to make regarding the scope of the provisions proposed in these draft regulations?

In relation to the definition of “food containers” as set out in regulation 2(d)(ii), we note that “typically” is not commonly used as a basis for definitions within legislation. It is important that the law is clear and certain in order that individuals and businesses may guide their conduct appropriately. This is of particular importance where criminal offences are being created. We question whether an alternative basis for defining “food containers” than “typically” may be more suitable.

In relation to “supply” of the relevant products, we consider that appropriate guidance will need to be developed to understand where a “supply” is undertaken. For example, could distance-selling businesses be liable to enforcement action and prosecution in each local authority area and jurisdiction that it sends items to? This could have significant and/or inconsistent results. It would also be unfair as this could result in multiple prosecutions as the enforcement authorities would report only locally on instances and would not tie up multiple reports across prosecuting jurisdictions.

Question 2 Do you have any comments you would like to make regarding the scope of the exemptions to provisions proposed in these draft regulations?

We support the exemptions.



Question 3 Do you have any other comments on the draft regulations that you would like to make?

In relation to transitional and coming into force arrangements, we previously noted the apparent increased use of disposal and single use plastic items as a result of COVID-19. We understand that a number of businesses are not currently accepting use of reusable beverage cups and there may have been an increase in single use food packaging and disposable materials to accommodate take-away food. We remain of the view that these matters ought to be considered in transitional and coming into force arrangements for these measures.

For further information, please contact:

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