

Justice Committee

Drug Driving (Specified Limits) (Scotland) Regulations 2019 [draft]

Written submission from the Law Society of Scotland

Our Criminal Law Committee welcomes the request from the Justice Committee to comment on the draft The Drug Driving (Specified Limits) (Scotland) Regulations 2019 (the Regulations). We have the following comments to put forward for consideration in relation to the questions on which the Justice Committee has asked for views:

Question 1: The decision by the Scottish Government to select a zero-tolerance approach to eight controlled substances most commonly associated with illegal drug misuse (with limits set high enough to rule out accidental exposure), and a road safety risk approach to controlled substances associated with medical use – effectively replicating the approach taken in England and Wales in 2015?

The intention is to bring these Regulations into force on 21 October 2019. It will then become an offence¹ in Scotland to drive, attempt to drive, or be in charge of a motor vehicle on a road or other public place with a specified controlled drug in their body if the proportion of the drug in blood exceeds the specified limit for the drug.

The Regulations identifies the proposed specified controlled drugs and the limits to apply for each drug as a concentration in blood. The Regulations replicate those controlled drugs specified in The Drug Driving (Specified Limits) (England and Wales) Regulations 2014² and **The Drug Driving (Specified Limits) (England and Wales) (Amendment) Regulations 2015³ (which added in amphetamine), making a list of 17 specified controlled drugs.**

The Regulations support the introduction of the new criminal offence in Scotland which is the same offence as has existed in England and Wales since March 2015. In the first year after the offence was introduced in 2016, there were over 8000 arrests⁴.

We fully support legislation which assists in making Scotland's roads safer. The changes that were made with the introduction of the new offence in England and Wales certainly seem to have had an impact in numbers of arrests. What actual percentage have resulted in successful prosecutions would be interesting to note.

The Crime and Courts Act 2013 devolved to the Scottish Government powers to bring forward regulations specifying what controlled drugs and associated limits should be included in the operation of the new offence in Scotland.

¹ Section 5A(91) and (2) of the Road Traffic Act 1988

² <http://www.legislation.gov.uk/ukxi/2014/2868/regulation/2/made>

³ <http://www.legislation.gov.uk/ukdsi/2015/9780111128824>

⁴ <https://www.bbc.co.uk/news/uk-36421367>

We welcome consistency in practice in relation to the enforcement of road traffic law across England, Wales and Scotland⁵ both in relation to the introduction of the offence and the specified controlled drugs and limits being the same.

Scotland suffers from the same difficulties that England and Wales have experienced in seeking to enforce the offence of “driving while impaired through drugs”⁶. Though prosecutions can still continue to be brought for “driving when impaired through drugs.”⁷ Following the introduction of the new offence in Scotland and the Regulations, there will be greater clarity for all concerned about when drivers are over the specified controlled drug limit. Drivers will know what they can and cannot do rather than the current test which requires impairment to be demonstrated.

The public will need to understand that the new offence is a strict liability offence which is committed once the specified limit for any of 17 specified controlled drugs is exceeded. The 17 drugs include both illegal drugs and drugs that may be medically prescribed:

- The limits for the illegal drugs have been set in line with a zero-tolerance approach but ruling out accidental exposure.
- The limits for drugs that may be medically prescribed are set in line with a road safety risk-based approach, at levels above the normal concentrations found with therapeutic use.

This is different from the approach taken when the limit for alcohol was set where the effect of the alcohol would be expected to have impaired a person’s driving ability.

The specified 17 controlled drugs that appear in the Regulations have been the subject of advice from the relevant expert group.⁸ The list has been working effectively in England and Wales since the implementation of the new offence and the relevant Regulations.

Drink- driving offences have set out for some time the relevant limits of alcohol over which prosecution for drink-driving will follow⁹. The 2013 Act has addressed this anomaly by introducing the new offence of driving under the influence of a specified controlled drug over a specified limit.

We note that in the joint UK and Scottish Government consultation in 2013 and the analysis of the Scottish responses referred to in paragraphs 7 and 8 of the Policy Note,¹⁰ that various options were explored for policy implementation. Option one

⁵ Paragraph 5 of the Policy Note referring to the Regulations

⁶ Section 4 of the Road Traffic Act 1988

⁷ As outlined in paragraph 17 of the Policy Note when drivers have drugs in their system in certain cases

⁸ <https://www.gov.uk/government/publications/driving-under-the-influence-of-drugs--2>

⁹ And of course, are set out different levels from England and Wales

¹⁰ Policy Note to the Regulations

suggested the adoption of a zero- tolerance approach which commanded most support.¹¹ That approach is what the Regulations are seeking to implement.

As well as the policy implementation, we would emphasise that there is a need to plan in advance for a co-ordinated approach to be taken towards “training, awareness raising and advice”¹² which will introduce the new offence and highlight the specified 17 controlled drugs included in the Regulations. This need for an approach is mentioned in Paragraph 8¹³ with the analysis of the Scottish responses which considered the business impact of the change on a number of groups.

One such group that was discussed was the role of the healthcare professions. This role which includes doctors and pharmacists is critical.

Some of the controlled drugs specified in the Regulations will not be capable normally of being prescribed such as Lysergic Acid Diethylamide (LSD). However, some may well be prescribed in the normal course of medication.

There is a need where what is being prescribed is a listed medicine within the Regulations that the doctors should provide the patient with a brief explanation of the effect of the medication and their relevance as far as the Regulations are concerned and driving.

The patient can make an informed decision about whether they wish to take the medication as well as the risks if they drive. However, patients (particularly those who are vulnerable) may not always remember the information given to them by their doctor. Therefore, there is a role for the pharmacists to repeat the information given by the person who prescribed the controlled drugs.

There may be a need too for consideration as to when the Regulations come into force of the implications for those that may be on repeat prescriptions. Raising awareness of the potential implications of driving and the effects of the controlled drugs will be required.

All these circumstances outlined above will require careful explanations and are time consuming for the medical and pharmacy professionals. Inevitable challenges will arise in court when drivers seek to establish a defence to the charge. That defence¹⁴ is set out as:

- (3) It is a defence for a person (“D”) charged with an offence to show that—
- (a) the specified controlled drug had been prescribed or supplied to D for medical or dental purposes,
 - (b) D took the drug in accordance with any directions given by the person by whom the drug was prescribed or supplied, and with any accompanying

¹¹ Paragraph 10 of the Policy Note

¹² <https://www2.gov.scot/Publications/2015/02/2924/9>

¹³ <https://www2.gov.scot/Publications/2015/02/2924/9>

¹⁴ Section 5A (3) of the Road Traffic Act 1988

instructions (so far as consistent with any such directions) given by the manufacturer or distributor of the drug, and

(c) D's possession of the drug immediately before taking it was not unlawful under section 5(1) of the Misuse of Drugs Act 1971 (restriction of possession of controlled drugs) because of an exemption in regulations made under section 7 of that Act (authorisation of activities otherwise unlawful under foregoing provisions).

The issue of directions from those prescribing is likely to be crucial and may well be subject to scrutiny in court. The manufacturer or distributor's instructions may tend to be vague along the lines of:

"Drowsiness may persist the next day and affect performance of skilled tasks (e.g. driving); effects of alcohol enhanced"¹⁵

This probably emphasises the point in the response around the need for clear direction from prescribers, reinforced by pharmacists.

Effective enforcement of the new offence should involve those healthcare groups in particular. They will be instrumental in providing useful information such as talking to a patient about whether they should drive if they have been prescribed any of the 17 controlled drugs specified in the Regulations.

There is also a need to ensure that the public are fully aware of the significance of the changes being made with the introduction of this new offence and the 17 controlled drugs which are included in the Regulations. The UK Government has a relevant fact sheet which could be amended to include Scotland once the Regulations and offence come into force¹⁶.

We would also highlight the role of solicitors as far as providing advice to their clients are concerned. The judiciary under the Judicial Institute for Scotland will have similar responsibilities for judges with regard to the introduction of the new offence and the Regulations.

Question 2: The resource implications of the new offence, including whether these are accurately reflected in the Scottish Government's financial impact assessment?

The draft Financial Impact Assessment on the Regulations refer to the potential increase in prosecutions and costs. We would not seek to comment in relation to the quantification of such costs.

We would however anticipate that there may well be an increase in the number of trials potentially with the increased use of expert witnesses as the Regulations and the introduction of the new offence may be challenged.

¹⁵ <https://bnf.nice.org.uk/drug/diazepam.html#prescribingAndDispensingInformations>

¹⁶ <https://www.gov.uk/drug-driving-law>

There were problems in England and Wales in relation to Randox Testing Services reports¹⁷ where forty drug driving case convictions were quashed as there was “evidence of manipulation was found in the forensic testing process”. Scotland should be able to learn from that experience.

Question 3: Whether the planned implementation of the new offence from 21 October 2019 will create any difficulties?

We would highlight our comments in relation to Question 1 with regard to the importance of raising awareness of the changes to the law by the introduction of the new offence and the Regulations.

Question 4: Any lessons to be learned from the implementation of the same offence in England and Wales?

We refer to our comments above in relation to the problems encountered by the Forensic Testing Service in England and Wales which can now benefit Scotland. We assume that such problems have now been resolved.

Question 5: Any other matters concerning the regulations you may wish to raise?

We have no further comment to make.

¹⁷ <https://www.bbc.co.uk/news/uk-england-manchester-46466710>