

# Local authority fly-tipping enforcement powers

To: All Chief Executives, Main Contacts and APSE Contacts in Scotland

For information only to England, Northern Ireland and Wales

## **Key Issues**

As fly-tipping is a criminal offence under the Environmental Protection Act (EPA) the burden of proof in any action to be taken is a criminal burden of proof, which in Scotland needs to be corroborated by evidence to reach the standard of "beyond a reasonable doubt" that the alleged offender did in fact commit the breach of the EPA.

## **This briefing contains information on;**

- The existing powers available to Local Authorities
- Current limitations of the local authority powers
- Proposal to seek an amendment to the current powers

## **1.0 Introduction**

In November 2019, Scottish Government with Zero Waste Scotland and other key partners undertook a review of the 2014 "Towards a Litter Free Scotland: A Strategic Approach to Higher Quality Local Environments" and following a delay due to the global health pandemic the "[Five Years on: A review of Scotland's national litter strategy](#)" was published in March 2021. The 2014 strategy committed to taking forward wide-ranging action under three themes: -

- Information – improving sources, consistency and nature of messages
- Infrastructure – improving facilities and services to reduce litter and promote recycling
- Enforcement – strengthening the deterrent effect of enforcement

The third theme was to remind people that littering and fly-tipping are criminal offences and committing them carries a consequence.

Although the review highlighted that a wide range of collaborative work had been carried out across Scotland to tackle the issue of litter and fly-tipping, it also confirmed that both “are deep rooted problems that require a refreshed approach and further sustained, coordinated and collaborative action; and identified potential priorities for future strategy development”. It should also be noted that given the timing of the review it does not reflect the challenges which have arisen through the COVID-19 pandemic or provide details of action taken to address litter and fly-tipping since November 2019.

Members of the APSE Scotland Parks, Grounds and Streets advisory group and the Litter Managers Network have continued to discuss and debate fly-tipping, including considering how best to tackle this important issue, as well as sharing some of the best practice being undertaken across local authorities, along with collaboration with other organisations and partners. One of the key elements for discussion relating to fly-tipping has also been that of enforcement and as such it was agreed that a sub-group of the Litter Managers Network be formed. The purpose of the fly-tipping enforcement sub-group was to look in more detail at this issue, including the current enforcement powers available to local authorities, and other alternative approaches, which could potentially be taken forward to help combat this.

## 2.0 Current legal position

Fly-tipping is the common description for a breach of Regulation 33(1) of the Environmental Protection Act 1990 (the Act) – namely the illegal disposal or dumping of waste onto land that has no licence to accept it: -

- A breach of Section 33(1) of the Act is a criminal offence by virtue of Section 33(6) of the Act which states - **A person who contravenes subsection (1) above or any condition of a waste management licence commits an offence.**
- As a breach of Section 33(1) is a criminal offence any pursuit of an alleged offender can only be actioned where there is corroborated evidence which supports the criminal burden of proof – i.e. the evidence shows “beyond a reasonable doubt” that the alleged offender carried out the act of illegal deposition of waste.
- A Fixed Penalty Notice (FPN) under Section 33A of the Act may be served on the alleged offender (provided there is sufficient corroborated evidence to prove that the alleged offender was the person who committed the breach).
- A FPN served under Section 33A is a notice offering the alleged offender the opportunity, by paying a fixed penalty, of discharging any liability to conviction for the offence to which it relates.

- If a FPN is rejected or not paid within the notice period the issuing authority can then refer the case to the Crown Office and Procurator Fiscal Service (COPFS) who will make a decision in the case.
- If the decision is to take further action the case can be recommended for a fiscal fine or prosecution through the Scottish Court Service.
- Only the COPFS can recommend prosecution through the Scottish Courts.

### **3.0 Limitations to current local authority powers**

Service of an FPN or a report to the COPFS are currently the only legal options available to Scottish Local Authorities to deal with alleged breaches of Section 33(1) and (6) for the offence described as Fly-tipping. These powers are also available to authorised officers of SEPA, Police Scotland and Loch Lomond and Trossachs National Park.

As outlined above Local Authorities can only pursue fly-tipping offences via a Fixed Penalty Notice or a report to the COPFS under Section 33(6) of the Environmental Protection Act. SEPA are also able to use these powers, however, SEPA also have another suite of enforcement powers issued under The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015. This is whereby SEPA's authorised officers can serve Fixed or Variable Monetary Penalties (FMPs or VMPs) under the Order for various breaches of Environmental Protection offences including offences under Section 33 (6) (Fly-tipping) of the Environmental Protection Act 1990. These powers were introduced via the Regulatory Reform (Scotland) Act 2014 and under these powers given to SEPA in 2015, the offences need only be proven under the civil burden of proof which is described as being on "the balance of probabilities" and not the criminal burden of proof described as being "beyond a reasonable doubt". The latter being that which would be required to be proven in any Prosecution via the COPFS. Again, the latter is currently the only option available to local authorities (if they can gather sufficient corroborated evidence to identify an alleged offender).

Also, and perhaps more significantly in terms of a more robust and effective sanction against fly-tippers who are identified under the civil burden of proof (balance of probabilities) necessary for sanctions issued under the 2015 Order, where FMPs or VMPs are not paid by the offender the fines are recoverable as a civil debt via Sheriff Officers. It is important to note that under the terms of the Order, SEPA can either choose the civil route or the COPFS route to deal with an offender but once either route is chosen, they cannot then also pursue them via the alternative route.

During discussions as part of the fly-tipping enforcement sub-group and from information gathered from the wider Litter Managers Network, it was agreed that the criminal burden of proof and assembling corroborated evidence to the standard necessary for formal action via the COPFS was extremely time consuming and challenging for local authorities with no guarantee that further action would follow.

#### **4.0 Proposal to seek amendment to the current local authority powers**

Given the limitations of the current powers outlined previously, the sub-group as well as members of the wider Litter Managers Network and APSE would like to seek to explore whether or not Local Authority powers dealing with fly-tipping (Breaches of Section 33(1) of the Act) could and should be brought into line with those given to SEPA via the 2015 Order in order to provide a more flexible suite of options.

#### **5.0 APSE Comment**

Given the challenges faced by local authorities in relation to reduced budgets and resources as well as more recently dealing with the impact of COVID-19, APSE would welcome the exploration of potential alternatives to the current limitations with regards to local authority powers. Over the past 18 months, we have seen how important our outdoor landscapes are in helping to maintain the health and wellbeing of local communities, as well as the “Blue Planet” effect, declarations of climate emergency and the increased attention on Scotland as host of COP26, all of which provide a sharper focus on this important issue and potential ways of helping to eradicate it.

The public have an expectation that council teams are able to tackle fly-tipping effectively in local areas. At present the system is time consuming, burdensome and costly with limited prospects for successful prosecutions. This often leads to negative publicity for councils and damages their reputation despite their best endeavours. APSE welcomes the examination of further powers for councils in this area which will support the eradication of this problem.

As a way of opening these discussions, Zero Waste Scotland are currently working with Scottish Government and SEPA on developing some of the content for the refreshed National Litter and Fly-tipping Strategy which Scottish Government confirmed their commitment to in March 2021. One of the areas Zero Waste Scotland are keen to engage on in order to help inform these developments, relates to the use (or otherwise) of EPA section 59 powers requiring the removal of waste from land. Zero Waste Scotland therefore invited members of the fly-tipping enforcement sub-group to discuss this area in more detail at a meeting at the end of October and further information will be provided to APSE and the Litter Managers Network as these discussions progress.

In addition, at the recent Keep Scotland Beautiful Local Environmental Quality Seminar (21 October 2021), Andrew Forsyth of Scottish Government confirmed that as part of the refreshed Litter and Fly-tipping Strategy there would be a separate review of legislation for litter and fly-tipping. This will look at a number of areas including: -

- The types of powers
- Who has those powers
- The barriers that exist that mean existing powers are not currently being fully utilised

APSE welcomes all of these developments and will continue to support our membership in any discussions regarding this important issue.

Members of APSE Scotland Parks, Grounds & Streets Advisory Group and the Litter Managers Network will continue to discuss and receive updates on this important issue during our upcoming meetings. For more information on the upcoming meeting dates please [click here](#) or alternatively contact the APSE Scotland on [Lmelville@apse.org.uk](mailto:Lmelville@apse.org.uk) for more information.

**Reminder: APSE has set up a COVID-19 Information Hub to deal with frontline service issues as they arise, ensuring greater resilience and learning between each other during this difficult time. You can access this hub by [clicking here](#) and you can also join our WhatsApp Support Network by [clicking here](#).**

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