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## Justice Committee Comataidh a' Cheartais

# The Drug Driving (Specified Limits) (Scotland) Regulations 2019



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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



[justicecommittee@parliament.scot](mailto:justicecommittee@parliament.scot)



0131 348 5047

# Committee Membership



**Convener**  
**Margaret Mitchell**  
Scottish Conservative  
and Unionist Party



**Deputy Convener**  
**Rona Mackay**  
Scottish National Party



**John Finnie**  
Scottish Green Party



**Jenny Gilruth**  
Scottish National Party



**Daniel Johnson**  
Scottish Labour



**Liam Kerr**  
Scottish Conservative  
and Unionist Party



**Fulton MacGregor**  
Scottish National Party



**Liam McArthur**  
Scottish Liberal  
Democrats



**Shona Robison**  
Scottish National Party

# Introduction

1. At its meeting on 19 February 2019, the Justice Committee considered the following instrument:
  - [Drug Driving \(Specified Limits\) \(Scotland\) Regulations 2019 \[draft\]](#)
2. The instrument was laid before the Parliament on 15 January 2019 and referred to the Justice Committee ("the Committee"). The Committee is required to report to the Parliament on the instrument by 4 March 2019. The Minister for Community Safety lodged motion S5M-15527 proposing that the Committee recommends approval of the instrument.
3. The above instrument was made in exercise of the powers conferred by sections 5A and 195(4A) of the Road Traffic Act 1988 ("the 1988 Act"). The instrument is subject to affirmative procedure.
4. These regulations provide for the controlled drugs and associated limits that apply for the offence of driving, or attempting to drive or be in charge of a motor vehicle on a road or other public place with a specified controlled drug in his or her body, if the proportion of the drug in blood exceeds the specified limit for the drug. This offence is contained in section 5A of the 1988 Act. Prior to these regulations coming into force, this offence does not operate in Scotland.

## Delegated Powers and Law Reform Committee's consideration

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 22 January 2019 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

## Justice Committee's consideration

6. At its meeting on 19 February, the Committee took evidence on the instrument from Ash Denham, Minister for Community Safety ("the Minister"); Philip Lamont, Criminal Justice Division; and Louise Miller, Directorate for Legal Services, Scottish Government. The Official Report [transcript](#) of the evidence session is available on the Committee's website.
7. The Committee sought written evidence from key stakeholders in advance of its consideration of the instrument. In response the Committee received nine written [submissions](#) from Brake, the Crown Office and Procurator Fiscal Service, the Law Society of Scotland, the National Police Chiefs' Council in England and Wales, Police Scotland, the Royal Pharmaceutical Society, Scotland's Campaign Against Irresponsible Drivers, the Scottish Courts and Tribunals Service and the Scottish Legal Aid Board. These submissions are available on the Committee's website.

## Key issues

8. During evidence taking on the regulations on 19 February, the Committee considered the following issues.

### Specified controlled drugs

9. The Committee considered the 17 drugs currently specified in the regulations for the purposes of an offence. It was noted that the submission from the Royal Pharmaceutical Society stated that various new psychoactive substances are not currently specified in the regulations. Use of these substances may impair a person's ability to drive safely. The Minister was questioned on how these substances would be detected, and how the law would keep pace as new psychoactive substances, or 'legal highs' are developed.
10. The Minister sought to reassure the Committee that the Scottish Government would keep the regulations under review and extend the list of specified drugs, or vary the prescribed limits of such drugs in a person's body, as needed. Such decisions would be based on evidence, and any further amendments of the regulations could be made by way of further subordinate legislation.

### Roadside detection

11. Based on the written evidence received, the Committee sought assurances from witnesses on various issues relating to the detection of drug driving by the police.
12. Concerns were raised in written evidence on the type of roadside screening devices which would be used by Police Scotland to detect the presence of specific drugs. It was noted that the testing devices currently used by police forces in England and Wales are only certified for the detection of two specific drugs, namely cannabis and cocaine.
13. Members also noted that the roadside screening devices were a single use device, and so could only be used once to test for the presence of drugs in a person's body before having to be disposed of. Concerns were expressed that the costs of the screening devices might make police officers reluctant to use them too frequently.
14. While acknowledging that decisions on whether or not to test a person for the presence of drugs while driving was an operational matter for the police, Scottish Government officials stated that officers were likely to continue to use field impairment tests as the basis for deciding whether to test for the presence of drugs. A field impairment test would continue to be the basis for deciding to test for the presence of any drug, including those not detected by roadside screening devices.
15. The Committee was told that whether the suspicion for testing a person is based on a field impairment test, or on the use of a roadside screening device, police would take a person to a police station where a blood test would be taken. Analysis from a blood test would be the basis for evidence used in court to prosecute someone. This testing process is capable of detecting for all 17 drug types specified in the regulations.

16. In relation to concerns about the cost of single-use roadside screening devices, Scottish Government officials told the Committee that the cost of each device is estimated at £20.50. Therefore, if Police Scotland decided to purchase 3,000 devices for use across Scotland, the total cost would be £61,500. Scottish Government officials believed it extremely unlikely, therefore, that the cost of roadside screening devices would deter their use by police officers where this was judged to be required.

## **Prosecution and testing**

17. Members also considered issues around members of the public using prescription medication. Some concerns were expressed about the potential for the regulations to result in a person being charged as a result of the use of prescription medication they were taking.
18. The Minister stated that the use of medical defence, where a person claims a defence based on the valid use of prescription medication, has operated successfully in England and Wales for a number of years. She confirmed that this would also be the case under the operation of the regulations in Scotland.
19. Scottish Government officials clarified that a person in the position of claiming a medical defence in Scotland would need to provide evidence that they were following the instructions of a medical professional in terms of the use of prescription medication. In such a situation, officials indicated that a person will not have committed an offence under the regulations.
20. Members questioned the witnesses on the potential for a false positive result to arise as a result of the way in which an individual may metabolise a prescription drug. Concern was also expressed around whether any possible stigma around the use of certain prescription medication may make people reluctant to provide information to the police about the medication they are taking.
21. Members also raised questions in relation to the concerns about the integrity of forensic drug testing services. Recent media report highlighted problems with the integrity of forensic analysis of drugs driving tests provide to police forces in England and Wales by Randox Testing Services, a privately contracted forensic testing company engaged to test blood samples taken from those suspected of drug driving. These issues have led to a number of convictions for drug driving in England and Wales being overturned.
22. Addressing the issue of false positive results, both the Minister and Scottish Government officials sought to provide reassurance that such situations are very unlikely to occur in Scotland. Experience from England and Wales suggests that the use of prescription medication has not resulted in reluctance of people to provide evidence to the police on medication they are taking.
23. Regarding the integrity of the testing system, the Committee was told that drug testing services in Scotland would be the responsibility of the Scottish Police Authority (SPA). The Minister stated that the service provided by the SPA forensic testing service is robust, and a formally accredited service which provides forensic testing to Police Scotland in a range of areas. In light of this, she felt the situation



which had arisen with Randox Testing Services in England and Wales would not be an issue in Scotland.

## Penalties and sentencing

24. The Minister confirmed that the criminal penalties applying to a person convicted of a drug driving offence are reserved to the UK Parliament under the provisions of the 1988 Act.
25. On conviction, a person could receive a maximum penalty of up to six months in prison and/or a fine of up to £5,000 and a mandatory minimum 12-month driving ban. A person's driving licence would also be endorsed for 11 years with details of any conviction.
26. Some members expressed concern regarding the Scottish Government's policy of a presumption against short custodial sentences (that is sentences of under 12 months in duration), and how this presumption would impact on the use by Scottish courts of the maximum six-month custodial sentence for drug driving offences.
27. In response the Minister confirmed the Scottish Government's intention "to move away from short sentences as part of the wider justice setting". However, she stated that the "six-month sentence would be available, because a presumption is not a ban. It would be up to the court to make that decision".<sup>1</sup>

## Public awareness campaign

28. The Committee questioned the Minister on the public information campaign which would accompany the coming into force of the regulations in October 2019. Concern was expressed regarding persons failing to take certain medication prescribed either for fear of "falling foul" of the new regulations, or as a result of embarrassment/social stigma associated with the taking of certain medication.
29. Members also asked how a person on repeat prescription would be informed of the regulations if the nature of their prescription would mean they would not need to visit a GP regularly, but simply collected the medication via a pharmacist. Members questioned how such a person would be informed if the nature or dosage of their medications might constitute an offence under the regulations.
30. Responding to these questions, the Minister set out the Government's plans to publicise the introduction of the regulations and their impact for drivers. This will include a public information campaign, as well as specific information on the regulations provided to medical professionals, such as doctors and pharmacists.
31. Scottish Government officials accepted the need to ensure that patients on repeat prescriptions are made aware of the new regulations. The Committee was told that the guidance to be issued to medical professionals on the new regulations would make clear the need to ensure "that patients are reminded about any previous guidance that should have been offered about whether to drive or not" while taking their prescribed medication.<sup>2</sup>

## Conclusions

32. The Committee draws the attention of the Parliament to the responses from the Minister for Community Safety and her officials in relation to the issues raised by the Committee relating to the introduction of drug driving offences in Scotland.

33. The Justice Committee recommends to the Parliament that it approve the Drug Driving (Specified Limits) (Scotland) Regulations 2019.

[1] Justice Committee. (2019, February 19). Official Report, cols 15-16.

[2] Justice Committee. (2019, February 19). Official Report, col 10.

