

Welfare of Dogs (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by Scottish Parliament officials, on behalf of Christine Grahame MSP (the member who introduced the Bill), in accordance with Rule 9.4A of the Parliament's Standing Orders. It describes the purpose of each of the subordinate legislation provisions in the Welfare of Dogs (Scotland) Bill and outlines the reasons for seeking the proposed powers. It also outlines another delegated power in the Bill. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. This Bill makes provision to improve the overall health and wellbeing of dogs throughout their lives by strengthening the regulation of the activity of breeding, selling or transferring puppies; and by establishing a more responsible and informed approach to acquiring and owning a puppy or dog.

3. The Bill, which is arranged in four Parts, extends to 27 sections and one schedule:

- Part 1 relates to the licensing of the activity of keeping breeding establishments for dogs at premises; it requires Scottish Ministers to use their powers under section 27 of the Animal Health and Welfare (Scotland) Act 2006 to make licensing regulations. These regulations must include provision the effect of which will be to reduce the number of litters in a 12-month period that triggers a requirement for a dog breeding licence from five to three, and to

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broaden the requirement to hold a licence if puppies from such litters are in fact given away, as well as sold. It also requires a licensed breeder, when advertising puppies for sale or to be given away, to include the licence number in the advertisement.

- Part 2 relates to unlicensed litters; those litters not born as part of licensed dog breeding activity. It requires Scottish Ministers to set up and operate a Scotland-wide puppy litter register and makes it a legal requirement for the first owner of an unlicensed litter of puppies to register the litter before advertising, selling or giving away the puppies. This Part sets out the key aspects that are required to ensure the functionality of the puppy litter register as intended by the Member's policy, and leaves much of the operational detail to Scottish Ministers through delegated powers.
- Part 3 relates to good practice in the buying, selling and transfer of puppies and dogs. It requires Scottish Ministers to set up a Code of Practice to give effect to the schedule to the Bill, setting out good practice for a person to follow where they are considering acquiring a dog to keep as a pet; and for a person to follow when they are considering selling or giving away a dog to another person to keep as a pet.
- Part 4 covers general provisions, including a requirement that Scottish Ministers promote public awareness and understanding about the Bill.
- The schedule sets out the content that should be the basis of the Code of Practice.

4. Further information about the Bill's provisions can be found in the Policy Memorandum, Explanatory Notes and the Financial Memorandum, published separately.

Delegated Powers

5. The Bill contains a number of delegated powers, which are set out in detail below. With regards to all of these, section 24(1) of the Bill provides that a power to make regulations conferred by this Bill includes the power to make incidental, supplementary, consequential, transitional, transitory or saving provision and different provision for different purposes. This recognises that, as with any new body of law, this Bill may give rise to a

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need for ancillary provision, which the Scottish Ministers may need to address when making regulations. For example, consequential provision may be required to make necessary changes to related legislation. Furthermore, it recognises that the Bill leaves some of the detail for the Scottish Ministers to determine, for example on how the changes to the licensing regime that are set in Part 1 of this Bill sit with changes to the licensing regime that the Scottish Ministers are currently preparing, or some of the detail regarding the setting up and operating of the register in part 2 of the Bill. Without the power to make incidental, supplementary and consequential provision, it might be necessary to return to the Parliament with primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intention of the Bill. That would not be an efficient use of resources. Section 24(2) requires that the Scottish Ministers must consult such persons as they consider appropriate prior to making regulations under this Bill.

Section 8(1)(b) – Power to impose a fee for registering a litter

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

6. Section 8(1)(b) allows Scottish Ministers to make provision, by regulations, for a fee to be applied when registering a litter.

Reason for taking power

7. The member wishes to give the Scottish Ministers the ability to ensure that the register can be established and operated with minimal impact on public funds. For this reason, therefore, the Scottish Ministers have been given the option of charging a fee for creating an entry in the register. Most of the cost associated with the register will be incurred at the time it is first established, and it is envisaged that it will be set up in such a way that most first owners will create a register entry online, at negligible cost, with minimal oversight required. It is expected that offline registration

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would also be possible for example for those without online access, which would require some assistance from the register operator. The policy intention is that the Scottish Ministers should be enabled to cover the costs of setting up and running the register, if required, or to provide for different amounts (including zero) to be payable in different circumstances. Ministers must act reasonably and rationally in everything they do. Therefore, it was not deemed necessary to prescribe in detail how any fees for creating an entry in the register should be set. Rather, the member acknowledges that this is best left to the Scottish Ministers to decide.

Choice of procedure

8. Section 24(3) provides that regulations under section 8(1)(b) are subject to the negative procedure. The nature of this power is such that Scottish Ministers can decide whether a fee is required for registering a litter, and the level at which the fee should be set (including zero). As discussed, although there are no fixed limits on the level of fees, it is considered unlikely that the power would be used to set fees at a level that would be controversial, and the negative procedure is therefore considered the appropriate level of parliamentary scrutiny.

Section 8(2)(g) – power to specify additional registration information

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

9. Section 8 sets out how an entry is created in the register. Section 8(2) lists the required registration information, such as the name and address of the first owner of the litter (paragraph (a)) as well as specified details about any litter of puppies that is to be registered (paragraphs (b) – (f)). Section 8(2)(g) enables the Scottish Ministers, through regulations, to add to this list of required registration information.

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Reason for taking power

10. Section 7 of the Bill gives the Scottish Ministers responsibility for the establishment and ongoing operation of the register (although the Bill allows for this to be delegated through section 7(3)). Section 8(2)(g) enables the Scottish Ministers to adapt the register to changing circumstances, recognising that the register will in all likelihood be refined over time in the light of experience and an assessment of how it is operating. It thus enables further provision to be made in relation to this without the need for primary legislation.

Choice of procedure

11. Section 24(3) provides that regulations under section 8(2)(g) are subject to the negative procedure. The choice of the negative procedure reflects the context – that this is a narrow power confined to one aspect of an administrative process. It allows for administrative arrangements to be kept in line with changing circumstances and, within this context, it is considered that the chosen procedure is the appropriate use of valuable parliamentary time.

Section 11(1)(c) – Power to specify changes in registration information that trigger a requirement to update the register

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

12. Section 11 obliges the first owner of a registered litter to keep certain information in the register up to date. This obligation applies as long as there are still puppies left to sell or give away, and the litter is less than 12 months old.

13. Section 11(1)(a) and (b) require a first owner to update the register entry if there are changes to the first owner's name or address or to the microchipping information in relation to a puppy of the registered litter – that is, changes to information which had to be included in the register entry by

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virtue of section 8(2)(a) and (f). Section 11(1)(c) enables Ministers to specify other changes in registered information that are to trigger a requirement to update the register entry. This could not apply to the information which had to be included in the register entry by virtue of section 8(2)(b) to (e), as that information is incapable of subsequent change. But it could apply to any additional information that Ministers might require in regulations made under section 8(2)(g). Depending on what that information is, it will be for Ministers to decide how likely it is that the information might change after it has been included in the register entry and how important it would be for the register entry to be kept updated accordingly.

Reason for taking power

14. The power under section 8(2)(g) leaves it to the Scottish Ministers to determine what additional information may require to be included in a register entry. It cannot be anticipated what kind of additional information might be included, whether it might be subject to change and whether, if so, updating the register entry would be considered necessary. But there must be a possibility of this, and it is therefore deemed useful to give Ministers the power to specify changes to any such additional information which would then trigger a requirement on first owners to update their register entries.

Choice of procedure

15. Section 24(3) provides that regulations under section 11(1)(c) are subject to the negative procedure. The choice of the negative procedure reflects the context – that this is a narrow power confined to one aspect of an administrative process. Similar arguments as those made in relation to the power in section 8(2)(g) apply, as both these powers are closely connected.

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Section 15(1) – Provision for or in connection with the deletion from the register of old entries

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

16. Sections 13 and 14 detail when a register entry is to be marked as closed. Entries marked as closed can no longer be searched by members of the public. However, the marking of a register entry as closed does not remove the entry from the register. Section 15(1) allows the Scottish Ministers to make provision for or in connection with the deletion of “old entries” from the register. Section 15(2) sets out that an “old entry” is one that relates to litters more than 12 months old.

Reason for taking power

17. Any data held for the purpose of the register must be handled in a way that is fully compliant with data protection legislation (the Data Protection Act 2018 and the General Data Protection Regulation). The member therefore considers it essential for the Scottish Ministers to be enabled to make provisions for deleting old entries in the register. She further acknowledges that it is best left to the Scottish Ministers to determine how long after entries are closed they may or must be deleted, or to specify circumstances in which information contained in entries may be retained for longer. This recognises that it may be advantageous, for animal welfare related purposes, to enable certain persons (such as agencies involved with animal welfare investigations) to be able to view information contained within old entries in the register. Section 15(1) allows the Scottish Ministers to determine for how long old entries may be usefully retained, thus providing the Scottish Ministers with further flexibility as to how the register is used.

Choice of procedure

18. Section 24(3) provides that regulations under section 13(5) are subject to the negative procedure. The low-level administrative nature of

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this power makes it suitable for the negative procedure. The choice of procedure also reflects the fact that the Scottish Ministers are already required to comply with data protection legislation, thus limiting the ways in which the power to set up a data-retention regime can be used.

Section 17(1) – power to authorise further access to the register information

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

19. Section 17(1) enables Ministers to allow certain specified persons or bodies with functions in relation to animal welfare to access the register directly or to be provided with the information contained in it. Section 17(2) allows the Scottish Ministers to specify the purposes for which this register information can be used.

Reason for taking power

20. Section 17 gives the Scottish Ministers the option to provide for specified third parties to be given access to the full personal information held on the register for specific purposes, or to be provided with this information if they consider it is necessary to do so. It is envisaged that these third parties might, for example, be local authorities or agencies involved with animal welfare investigations. The full personal information to which these third parties might be given access will include the addresses of registered first owners in addition to their names, which are already accessible via public search. The member considered that this may be necessary to ensure the effective enforcement of the Bill, and also in terms of wider enforcement needs (for example if there is a concern that a person might be evading the licensing regime, or if subsequent health issues with young puppies indicate concerns about breeding practices).

21. This power could, for example, be used to give relevant local authority officials the ability to search the register in ways that go beyond

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the public access as set out under section 16. The power might also be used to establish a means by which persons or organisations could apply to the register operator for information from the register, and to require the operator (subject to appropriate safeguards) to provide the information sought. Section 17(2) provides that regulations made can also set limits on the uses to which those authorised may put the information they obtain from the register.

Choice of procedure

22. Section 24(4) provides that regulations under this section are subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and decide whether to approve, any such draft regulations before they can be made. Given the broader nature of this power, it was considered appropriate that the higher level of scrutiny applies.

Section 19(1) – Enforcement generally, read with 19(2)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

23. Section 19(1) enables the Scottish Ministers, by regulations, to decide how the provisions related to the puppy litter register are to be enforced (i.e. the provisions in Part 2 of the Bill).

24. Section 19(2) provides a non-exhaustive list of provisions that could be included in such regulations. Accordingly, the regulations could: specify who is to have powers of enforcement; enable post-conviction orders to be made in relation to an offence under Part 2 of the Bill; allow for methods of enforcement other than criminal prosecution or the issuing of fixed penalty notices; give those tasked with enforcement powers of entry, search, inspection and seizure; and make it an offence to obstruct such a person (and specify the penalty for that offence). Where the regulations made under this section create an offence, the maximum penalty for the offence

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may be set at level 5 on the standard scale, which is currently £5,000, or at any lower point on that scale.

Reason for taking power

25. The Bill provides the Scottish Ministers with flexibility in deciding how the register is to be established and how it is to operate. It is therefore appropriate that the Scottish Ministers are also given the flexibility to decide how best to enforce the register, as this may be dependent on how the register is designed and who is responsible for operating it.

26. The member is aware that regulations are currently being developed for a variety of animal welfare policy areas, which includes an updated licensing regime for dog breeding. The details of the new licensing system are currently unknown. The member wishes to ensure as far as possible that Scottish Ministers have the ability to design the enforcement of the Scotland-wide puppy litter register in such a way as to fully complement the system being put in place for licensing dog breeding.

27. The power in section 19 is therefore thought to strike the right balance between the importance and complexities of the issue and the need for flexibility. There are limits placed on the power, making clear that the power can only be used for or in connection with Part 2 of the Bill, which relates to the creation and operation of the register.

Choice of procedure

28. Section 22(4) provides that regulations under this section are to be subject to the affirmative procedure. This is considered the appropriate level of scrutiny, given the range of provision that may be made, and the significant nature of some of it, including possible powers for search, inspection and seizure in connection with breaches (and suspected breaches) of provisions of Part 2 of the Bill or the creation of criminal offences.

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Section 20(1) – Making of code of practice

Power conferred on: the Scottish Ministers

Power exercisable by: issuing and revising of a code of practice

Parliamentary procedure: none

Provision

29. Section 20(1) requires the Scottish Ministers to make a code setting out good practice that should be followed by anyone considering acquiring a dog or puppy as a pet, and by anyone selling or giving away a puppy or dog to another person, to keep as a pet. The code is intended to strengthen a culture of responsible dog acquisition and ownership in Scotland.

30. Section 20(2) requires that the code of practice give effect to the material in the schedule to the Bill. The schedule sets out questions that anyone acquiring a puppy or dog should consider for themselves. The person selling or giving away the puppy or dog should check that the prospective acquirer has considered these questions and can answer the six main questions in the affirmative. As far as is practicable, the acquirer and supplier should meet in person. The schedule also sets out that, in addition, in the case of a sale or transfer by a first owner of a dog aged less than 12 months, the acquirer should see a puppy with its mother where practicable. No puppy should be acquired, sold or transferred before it is 8 weeks old. It also sets out that anyone acquiring a puppy from a first owner in Scotland should check that they are either licensed breeders or have registered the litter. It is intended that the material in the schedule will clearly and simply advise dog owners about how best to acquire or sell/give away a dog.

31. The code must have taken effect by the time the main provisions of the Bill come into force (6 months after Royal Assent). The code may be revised from time to time (under section 21). Ministers must consult before making the code for the first time, and again before revising it, and the code and any revised code (unless the revisions are very minor) must be published.

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32. Under section 22, failure to comply with the terms of a code does not, of itself, give rise to proceedings. But compliance or non-compliance may be taken into account in any proceedings for an offence under Part 2 or under regulations made under sections 26 or 27 of the Animal Welfare (Scotland) Act 2006.

Reason for taking power

33. A code of practice is an appropriate tool for the specific set of measures in the Bill, given the member's intention to achieve behavioural change without placing formal legal obligations on the parties involved and without penalising well-intentioned and generally law-abiding citizens.

Choice of procedure

34. Given the nature of the provisions of such a code, the need to revise it from time to time in light of developments and the implications of section 22, the code is not well-suited to a statutory form. Accordingly, the code will not be made by statutory instrument. This will give the Scottish Ministers flexibility to decide on its style and format. It also allows the code to be presented in the most user-friendly and accessible format tailored for its intended use.

35. The code is not subject to any Parliamentary scrutiny (that is, it does not require to be laid before the Parliament, either for approval by resolution or so it can be subject to annulment for a specified period). Section 20(2) requires that the code of practice give effect to the material in the schedule to the Bill. As the substantial elements of the code will therefore have been scrutinised by the Parliament during the passage of the Bill, it was felt not a good use of valuable parliamentary time to also require Parliament to approve the code itself at a later point. In this respect, the Bill differs from the provisions of the 2006 Act related to codes of practice, which require that they are to be laid before, and then approved by resolution of the Parliament.

Provisions in the Bill that require existing delegated powers to be used

36. Sections 1(1) and 18(1) require Ministers to use, in particular ways, regulation-making powers they already have under the Animal Health and Welfare (Scotland) Act 2006, or will have under the 2006 Act through

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Section 46A, to be inserted into the 2006 Act by the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill, which is expected to have become law by the time this Bill is passed. As these provisions of the Bill do not confer power to make subordinate legislation (or directions, guidance or a code of practice), they are not covered by Rule 9.4A, and so do not need to be set out in detail here.

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