

Welfare Of Dogs (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers 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 ("the Bill") and outlines the reasons for seeking the proposed powers. It also outlines other delegated powers contained in the Bill.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 32–EN);
- a Financial Memorandum (SP Bill 32–FM);
- a Policy Memorandum (SP Bill 32–PM);
- statements on legislative competence made by the Presiding Officer and the Member who introduced the Bill (SP Bill 32–LC).

Outline of Bill provisions

3. The Bill aims to improve the health and wellbeing of dogs throughout their lives, by establishing a more responsible and informed approach to acquiring and owning a dog; and by making provision for the regulation of the selling or transferring of puppies from unlicensed litters.

4. The Bill, which is arranged in three Parts, extends to 14 sections:

- Part 1 relates to good practice in the buying, selling and transfer of puppies and dogs. It requires Scottish Ministers to make and publish a code of practice, setting out good practice for a person to follow when 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. In making the code, the Scottish Ministers are required to give effect to the key content set out in sections 2 to 4 of the Bill

The code will also set out the form of a certificate that must be filled in by the

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prospective acquirer and signed by both the prospective acquirer and supplier prior to the sale or transfer of a dog. Once the transaction is complete the certificate should be kept throughout the ownership of the dog and shown to a police officer or inspector on request.

Finally, the Scottish Ministers are required to take reasonable steps to ensure public awareness and understanding of the code of practice and its content.

- Part 2 relates to unlicensed litters. It enables Scottish Ministers to make regulations which would prohibit the sale, giving away or advertising of a puppy aged under 12 months except in circumstances in which the litter is subject to registration, or where the first owner of the litter holds a relevant breeding licence and/or is not a resident of Scotland at the time.

Part 2 also allows for Scottish Ministers to make provision via regulations for the establishment of a register of unlicensed litters of puppies and to ensure compliance with any such regulations. It provides a non-exhaustive list of what may be included in such regulations to ensure the functionality of a puppy litter register as intended by the Member. It includes a requirement that Scottish Ministers promote public awareness and understanding of the relevant regulatory regimes.

- Part 3 covers general provisions.

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

Rationale for subordinate legislation

6. The Member has, in deciding whether provisions should be in the Bill or in subordinate legislation, and in deciding on the appropriate level of scrutiny of subordinate legislation, given due regard to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make appropriate use of valuable parliamentary time;
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Delegated Powers

Section 1(1) and 5– Making and revising of code of practice, read with Section 6

Power conferred on: the Scottish Ministers

Power exercisable by: code of practice

Parliamentary procedure: none

Provision

8. Section 1(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.

9. Section 1(2) requires that the code of practice include provisions giving effect to what is set out in sections 2 to 4 of the Bill and any other matter that the Scottish Ministers consider appropriate. Section 2 sets out questions that anyone acquiring a puppy or dog should consider for themselves. These relate to how the dog would fit into the prospective acquirer's lifestyle and home environment and their ability to adequately care and provide for the dog throughout its life. The person selling or giving away the puppy or dog should ensure that the prospective acquirer is aware that they should consider these questions. Section 3 sets out that, in the case of a sale or transfer by a first owner (who is not a licensed breeder) as far as practicable, the acquirer and the supplier should meet, and the acquirer should see a puppy with its mother. 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 consider the circumstances in which either a dog breeding licence or a registration of the litter would be required. It is intended that the content of the code will clearly and simply advise dog owners about how best to acquire or sell/give away a dog.

10. Under section 4, the code will set out the form of a certificate that should be filled out and signed by the prospective acquirer prior to the sale or transfer of a dog. Filling out the certificate involves the acquirer answering the questions set out in section 2, and whether they have fulfilled the requirements under 3 (3) and 3(4) if they apply. The prospective supplier should also sign the certificate and both supplier and acquirer must provide their full name and address. Once the transaction is complete the certificate should be kept throughout the ownership of the dog and shown to a police officer or inspector on request. The Scottish Ministers may add additional content to the certificate, and it is for the Ministers to determine the design and layout of the certificate.

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11. The code must have taken effect on a date specified in it by the time (6 months after Royal Assent) when the main provisions of the Bill come into force. The code may be revised from time to time (under section 5). Ministers must consult before making the code for the first time, and again before revising it, and the code and any revised code must be published.

12. Failure to comply with the terms of a code does not, of itself, give rise to proceedings. But compliance or noncompliance may be taken into account in any proceedings for an offence under Part 2 of this Bill, or under regulations made under sections 26 or 27 of the Animal Welfare (Scotland) Act 2006, or Part 2 of this Bill.

Reason for taking power

13. The Scottish Ministers require this power in order to publish a code of practice to be followed by anyone considering acquiring or supplying a dog or puppy as a pet, to strengthen a culture of responsible dog acquisition and ownership in Scotland. 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.

14. A code is further considered the most appropriate tool as this allows for flexibility for it to be presented in the most user-friendly and accessible format tailored for its intended use. Flexibility is also necessary to respond to any changes in circumstance: whilst it is not possible to revise out provisions giving effect to sections 2-4, other adaptations may be required to ensure that the code remains an up-to-date resource for anyone wishing to acquire a puppy or dog.

Choice of Procedure

15. The making of 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 1(2) requires that the code must include provision giving effect to sections 2-4 of the Bill, which set out the key elements of the code. The scope of the power is therefore narrowed by provisions set out on the face of the Bill. The Scottish Ministers can add further matters to the code that they consider relevant. However, this has to be tied to the purpose of setting out good practice for people to follow when acquiring or supplying a dog to keep as a pet. Also, there is a protection there in that consultation is required prior to making as well as revising the code of practice. Section 5(2) ensures that this content as set out in Bill provisions cannot be changed or removed through later revisions of the code. The Member considers that the core content of code will stand the test of time and that it is therefore appropriate to include it in this way. As the substantial elements of the code will 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 Animal Health and Welfare (Scotland) Act 2006 related to codes of practice, which

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require that they are to be laid before, and then approved by resolution of the Parliament.

Section 8(1) with (3)– Power to require registration of unlicensed litters of puppies

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

16. Section 8(1) provides for Scottish Ministers to make regulations which would prohibit the sale, giving away or advertising of a puppy aged under 12 months except in circumstances in which the litter is subject to registration, or where the first owner of the litter holds a relevant breeding licence and/or is not a resident of Scotland at the time. Section 8(2)(a)(i) catches anything that has been regulated under section 27(1) and (2) of the Animal Health and Welfare (Scotland) Act 2006, and therefore regulation under section 8(1) must except those matters from any prohibition imposed.

17. Section 8(3) allows Scottish Ministers to make provision, by regulations, for the establishment of a register of unlicensed litters of puppies for the purposes of section 8(1). Section 8(4) provides a non-exhaustive list of what may be included in such regulations. This includes provision for or in connection with the establishment and operation of a register (including a provision enabling the Scottish Ministers to delegate the power to arrange the establishment and operation of such a register to another person (section 8(5)). If they do, they must publish details about the arrangements made except information about how much the third party is paid), provision about steps to occur in order to register including the information that must be provided by the first owner and for the updating or deleting of information contained in the register, provision regarding public or other access to the register and provision allowing Scottish Ministers to apply a fee or other charges in relation to the register.

Reason for taking power

18. It is the Member's intention that the Scottish Ministers should set up a register in which any person resident in Scotland who owns a bitch that produces a litter which is not covered by a dog breeding licence must register the litter in a Scotland-wide database before advertising, transferring or selling puppies from it. Whilst it is noted that section 27 of the Animal Health and Welfare (Scotland) Act 2006 provides Scottish Ministers with broad powers concerning the licensing etc. of activities involving animals, these powers are very general and do not specify the creation of such a register for unlicensed litters of puppies and how it would function. There are, as far as the Member is aware, no plans by the Scottish Government to establish such a register to ensure that every puppy sold or transferred in Scotland would transparently be either covered by a breeding licence or subject to registration in the way the Member envisages. She believes that the establishment of a register would be a means of

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regulating the activity of those breeding puppies who do not fall to register for a dog breeding licence under existing legislation, which in turn would make it much more difficult for those breeding puppies irresponsibly without care for animal welfare.

19. Accordingly, there is detail set out on the face of the Bill on what the Member believes should be included by the Scottish Ministers in any regulations to set up a register. An example is section 8(4)(b) which makes provision about information to be provided to the first owner of the litter following registration. The Member intends that the establishment of a register as provided for in section 8 of the bill complements the code of practice established under Part 1, and strengthens the ability of the code to have the desired dual effect of ensuring someone does not acquire a dog when they are not in a position to own one responsibly, whilst also ensuring the acquirer is sufficiently questioning of the way in which the puppy has been bred, including where a lack of licence or register details could point towards irresponsible breeding. Provision via regulations may include provision for or in connection with public or other access to registration information (subsection 4(g)). The intention here is that people wishing to acquire a puppy can search the register for litter information. Further, specified third parties (local authority animal welfare officers or animal welfare organisations) might be given access to the full information held on the register for specific purposes in order to fulfil wider enforcement needs, i.e. if there is any concern that a person might have registered more than 2 litters in a 12-month period and therefore might be evading the licence regime, or if subsequent health issues with young dogs after acquisition suggest concerns over breeding practices / animal welfare.

20. The Member considers that Scottish Ministers require this power as it provides a sufficient level of flexibility and an ability to future proof the legislation. Further, the Member believes that it should ultimately be for the Scottish Ministers to determine if and when to make such regulations. Whilst it is not possible to cover everything that the regulations may include, setting out these provisions in primary legislation serves a number of purposes, including ensuring the detail of the register envisaged receives thorough parliamentary scrutiny. In addition, key stakeholders contributing during Stage 1 written and oral evidence taking will ensure the perspectives of those with valuable expertise can contribute and make suggestions which will further inform and strengthen the provisions for creating a register. The Member welcomes all such contributions, which have proved very valuable thus far in informing Part 2 of the Bill on introduction. Full scrutiny including Stage 2 and 3 amendments that are based on the experience and views of these stakeholders will doubtless strengthen and improve the provisions further. The power to cover in regulations matters not specified on the face of the Bill is strictly limited as it can only be used for or in connection with Part 2 of the Bill, which relates to the creation and operation of the register of unlicensed litters. Finally, it is worth noting that the Scottish Ministers are required to consult appropriate stakeholders prior to the making of any regulation under this part of the Bill.

Choice of procedure

21. Section 9(3) provides that regulations under part 2 of the Bill are subject to the affirmative procedure. There is substantial detail set out on face of Bill, which will be subject to full parliamentary scrutiny, nevertheless recognising that whilst the scope to make regulations is narrowed in the sense that the regulations are made for the reasons set out in 8(1), 8(3) and to an extent 8(4), it is considered appropriate for the affirmative procedure to apply in respect of the detailed elements of any regulations made. For example, section 8(4)(f) refers to provision requiring or permitting registration to be suspended, and for suspended registration to resume, in particular circumstances. The concrete circumstances are not known, and it would be for the Scottish Ministers to set these out. Once regulations are made these circumstances would be subject to the highest level of scrutiny. As commented on above, information sharing may be included via public access to registration, and it is appropriate that regulations which potentially make provision for information to be shared with the public are subject to the affirmative procedure.

Section 10(1) and (3) – Power to make regulations to secure compliance with regulations made under section 8, read with 10(2)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

22. Section 10(1) enables the Scottish Ministers, by regulations, to decide how to secure compliance with any regulations made under section 8.

23. Section 10(2) provides a non-exhaustive list of provisions that could be included in such regulations including setting out requirements, prohibitions (such as provisions that would place certain requirements on the first owner of a litter of puppies), means of enforcement; enabling post-conviction orders to be made in relation to an offence under regulations enabled by Part 2 of the Bill or giving those tasked with enforcement powers of entry, search, inspection and seizure.

24. Section 10(3) enables the Scottish Ministers to, by way of regulations, make it an offence to breach a prohibition or requirement set out in regulations under section 10(2)(a), and to make it an offence to obstruct a person tasked with enforcement in exercise of a power conferred by 10(2)(e).

25. Where the regulations made under this section create an offence, section 10(4) sets limitations through setting out that they may only be punishable by summary conviction and setting a maximum penalty and fine.

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Reason for taking power

26. Section 8 of the Bill provides the Scottish Ministers with a power to establish a puppy register and then sets out parameters for how such a register might be established. It is therefore appropriate that the Scottish Ministers are also given the flexibility to decide how best to ensure compliance with such a register, as this may be dependent on how the register is designed and who is responsible for operating it.

27. The Member wishes to ensure as far as possible that Scottish Ministers design compliance with any Scotland-wide puppy litter register in such a way as to fully complement the system being put in place for licensing dog breeding.

28. The power in section 10 is therefore thought to strike the right balance between the importance and complexities of the issue and the need for flexibility. Again, 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 power to make provision for a puppy register.

29. As part of ensuring compliance, the Scottish Ministers require a power to make provision for the creation of relevant offences. Section 10(3) however provides strict limits on scope by limiting it to the two scenarios in which it is envisioned that an offence would be created, set out in section 10(2)(a) and (e). As highlighted above, section 10(4) provides further limitations on the power.

30. Section 10(2)(c) creates a catch-all provision in case it is needed in future. Section 10(2) is not an exhaustive list and provision can be made so long as it is for or in connection with securing compliance with the regulations made under section 8, so it may be that creation of offences is needed for those unforeseen circumstances. Again, there are clear limits on the scope of any such offences. Any regulations are further subject to prior consultation and to detailed parliamentary scrutiny.

Choice of procedure

31. Section 9(3) provides that regulations under Part 2 of the Bill are to be subject to the affirmative procedure. This was 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 regulations made under the Bill or the creation of criminal offences.

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Section 9 (1) – Ancillary Provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

32. Section 9(1) of the Bill provides that powers to make regulations conferred by Part 2 of the Bill include the power to make incidental, supplementary, consequential, transitional, transitory or saving provision and different provision for different purposes. Section 9(2) requires that the Scottish Ministers must consult such persons as they consider appropriate prior to making regulations under this Bill. Section 9(3) details that all regulations under Part 2 are subject to the affirmative procedure.

Reason for taking power

33. As with any new body of law, this Bill may give rise to a 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. The power to make incidental, supplementary and consequential provision might be needed to deal with technical, operational or implementation matters clearly within the scope and policy intention of the Bill. Without such a power it would be necessary to return to the Parliament with another Bill to deal with minor matters to properly give effect to a Bill already passed by the Parliament. The power is restricted in that it can only be used to make provision ancillary to provisions under Part 2 of the Bill. As detailed in Section 9(2), the Scottish Ministers must consult prior to making regulations under this Part of the Bill.

Choice of procedure

34. As set out in section 9(3), regulations made under Part 2 of the Bill are subject to the affirmative procedure. Regulations subject to affirmative procedure cannot be made until they have been laid in draft before, and approved by resolution of, the Scottish Parliament. 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 the powers included in Part 2 of the Bill, it was considered appropriate that the higher level of scrutiny applies.

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