DOG FOULING (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Dog Fouling (Scotland) Bill introduced in the Scottish Parliament on 11 June 2002. It has been prepared by the Parliament’s Non-Executive Bills Unit on behalf of Keith Harding, the member in charge of the Bill in accordance with Rule 9.3.3A of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 55–EN.

POLICY OBJECTIVES OF THE BILL

2. The objective of the Bill is to tackle the problem of dog fouling that exists in Scotland today. Dog fouling, especially in places such as playing fields, public parks and on pavements, is generally resented by people who are not dog owners and can generate an “anti-dog” feeling. As well as being unpleasant, it can also pose a health hazard to humans.

3. Existing law contained in section 48 of the Civic Government (Scotland) Act 1982, makes it an offence for a person to allow a dog to foul certain specified places, including footpaths, footways and grass verges maintained by local authorities irrespective of whether the excrement is immediately removed by the person in charge of the dog. Strictly speaking, therefore, an offence is committed even although a person clears up after their dog. The Bill aims to amend the offence so that the focus is moved to failing to clear up after a dog has defecated.

4. The 1982 Act specifies the areas of land to which the existing offence applies. In practice this means that the application of the Act is limited to these specified areas and as a result many areas of land such as communal areas, where dog fouling is a problem, are excluded. In relation to recreational or sporting areas, the local authority is required to erect signposts to show that the 1982 Act applies to the land before any offence can be committed. This can be difficult to apply to areas that are accessible from several access points. To overcome these problems, the Bill applies to any public open space. In particular public open place includes communal areas around flats, including back gardens, common passages, closes, courts, stairs, back greens, gardens, yards or any other similar area whether or not such places are open to the air.

5. Under the existing legislation, enforcement is also problematic, as only police officers are able to take action against offenders. Competing priorities mean that police officers do not always have sufficient time to enforce the existing provisions.
6. Under the existing law, a blind person in charge of a guide dog and a stock person in charge of a working dog are exempt from the offence. The Bill maintains these exemptions but also seeks to add exemptions for other appropriate classes of people who are in charge of a dog.

7. As well as amending the offence, the Bill also aims to improve enforcement provisions in relation to dog fouling. It is not an aim of the Bill to facilitate an increase in the number of people against whom action is taken in relation to the amended offence however, this may be inevitable in the short term.

8. The Bill should also raise an awareness of the issues and concerns that exist around dog fouling while at the same time attempting to change the attitudes of dog owners and encouraging responsible dog ownership.

Health issues

9. Dog faeces contain, amongst other things, parasitic worm eggs (e.g. roundworm). If these worm eggs find their way onto human hands there is a risk of them being ingested and this can lead to tissue damage and, in some cases, severe and permanent sight loss. Amongst those who are most at risk are children, users of manually operated wheel chairs and those who participate in active sports such as football and rugby.

10. Once ingested, the worm eggs will hatch and release their larvae. The larvae can penetrate the gut lining and migrate to various parts of the body leading to toxocariasis. There are two possible forms of toxocariasis - visceral larva migrans (VLM) which affects the body’s organs, and ocular larva migrans (OLM) which affects the eyes.

11. Some of the more common symptoms of VLM include headaches, sore throat and aching arms and legs (due to the movement of the worms throughout the body). The more serious symptoms of VLM include pneumonia and asthma.

12. OLM occurs when the hatched larvae lodges in the eye. This can cause inflammation, and scarring of the retina is likely to occur during the healing process. In America 700 people a year who have been infected with toxocariasis experience permanent partial loss of vision.

13. The incubation period can be weeks or months depending on the infective dose and the sensitivity of the patient. Eye symptoms can occur as late as 4 to 10 years after the initial infection. The eggs themselves can remain infective for up to 2 years before being ingested. The Scottish Centre for Infection and Environmental Health records 1 or 2 incidents per year. A possible explanation for this seemingly low figure is that the majority of people infected do not go on to develop signs of illness and, for those who do, the infection is not always serious enough to be accurately diagnosed.

14. Other diseases that can be contracted by contact with dog faeces include salmonella, campylobacter, leptospira canicola and E-coli 0157.
Specific aims of the Bill

Offence
15. The Bill aims to change the law so that the offence of dog fouling occurs when a person in charge of a dog fails to clear up and appropriately dispose of the dog’s excrement. Under the existing law, the offence occurs when a person allows a dog under their control to deposit excrement in certain areas regardless of whether the person then clears up after the dog.

Person liable
16. The person to be held responsible is the person who is in charge of the dog at the time the offence occurs, regardless of whether or not this is the owner.

Exemptions and defences
17. The provisions in the Bill do not apply to a blind person in charge of a dog that is being used for the person’s guidance. Nor do they apply to a disabled person with a physical impairment affecting their mobility, manual dexterity, physical co-ordination or ability to lift, carry or move everyday objects, who is in charge of an dog that has been trained by a Scottish charity to assist that person. People in charge of working dogs such as police dogs, Customs and Excise dogs, rescue dogs and sheepdogs are also exempt, but only when the dogs are actually working.

18. The Bill provides that a person shall be found guilty of the offence unless they have a reasonable excuse for failing to clear away the excrement. An example of what is considered a reasonable excuse could be where it would be a danger to themselves or others to attempt to move excrement, or if the dog had suffered diarrhoea and the person had cleaned it up to the best of their ability.

19. It will not be a defence under the Bill for a person to claim that they were unaware of the defection or that they did not have a suitable means of disposing of the excrement. This is designed to encourage dog owners to take steps to ensure that they are in a position to clear up after their dogs.

Land
20. In an attempt to meet the concerns that existing legislation excludes certain areas of land the Bill will apply to any open public place. The Bill specifically includes common passages, courts, closes, gardens, back greens, yards and stairs. An exception to this will be agricultural land.

21. In relation to land the policy objective of the Bill is to ensure that as much land as possible is covered in the Bill. The Bill not only applies to public open places, it also applies to places that the public or a section of the public have access to, whether or not they are permitted to do so and whether or not they have paid for access. By referring to a “section” of the public it ensures that places to which some sections of the public have, or are permitted to have, access are included even if other members of the public do not generally use the area.
22. It will be a defence under the Bill to establish that the dog fouling took place with the consent of the owner of land or, in the case of land which is owned in common, with the consent of all of the owners. A person will not therefore be guilty of an offence if they allow a dog to foul on land which they own themselves without clearing up. In a situation where the land is owned by one person and is occupied or controlled by another person then both persons must consent to fouling taking place.

Penalties

23. The Bill retains the existing maximum penalty set out in the Civic Government (Scotland) Act 1982, namely level 2 on the standard scale – currently £500. The Bill also retains the existing method of prosecution which is through the district and sheriff courts.

Enforcement

24. The Bill creates a new enforcement regime that is intended to be more effective and less time-consuming than current methods both for dog fouling and most other fixed penalty offences.

25. Where an officer designated by the local authority or a police constable has reason to believe that a person has committed an offence under the Bill, the suspected offender may be given the option of paying a fixed sum of money (the fixed penalty) as an alternative to prosecution in and sentence by the criminal courts. This option is given to the suspected offender through the issue of a fixed penalty notice that explains the options available to the suspected offender.

26. A person who is issued with a fixed penalty notice must either pay the fixed penalty or request a hearing. If they fail either to pay the penalty or to request a hearing then an increased fixed penalty will become enforceable against them as if it were an extract registered decree arbitral bearing a warrant for execution by the Sheriff Court. This means that the local authority will be able to enforce the increased fixed penalty using existing civil enforcement methods. Enforcement of the increased fixed penalty will not involve the procurator fiscal or the courts. The 50% increase in the fine is comparable with the system for parking penalties in London (section 66 of and paragraph 1(2)(d) of Schedule 6 to the Road Traffic Act 1991).

27. If the offence is disputed a hearing can be requested and the procurator fiscal will be able to raise criminal proceedings. If convicted, the offender will face a fine of up to £500 (level 2 on the standard scale) and will have a criminal conviction recorded against them.

28. It was not considered appropriate to give local authority officers powers that are normally available only to the police. The Bill therefore does not give any power to the local authority officer to detain the person in order to obtain their details. Under the Bill, police officers will also be able to issue fixed penalty notices.

29. In relation to the local authority officers, under the Bill only those persons who have been authorised in writing by the local authority may issue fixed penalty notices. The Bill requires each local authority to nominate at least one person to issue fixed penalty notices. The authorised officers could be employees or private contractors.
30. The Bill also contains powers for the local authority and the police to withdraw notices, which may have been issued in error. If that happens any sums paid by way of the fixed penalty must be repaid.

31. It will remain possible under the Bill for criminal proceedings to be raised without the option of a fixed penalty having been afforded. However, it is anticipated that this will occur rarely and that police and local authorities will prefer instead to make use of the fixed penalty system.

32. The Bill provides for the local authority to retain all money received from fixed penalty fines.

**Single witness and corroboration**

33. The Bill provides that for this offence it will be lawful to convict on the evidence of one witness (for example, an authorised officer).

**Other countries**

34. In Ireland, dog fouling is provided for in the Litter Pollution Act 1997. The Act applies to certain public areas that are specified on the face of the Act. Fixed penalty notices can be issued by either litter wardens or a member of the Garda Siochana. The current level of the fine is set at £50. If the fixed penalty notice is not paid then a person guilty of an offence under the Act is liable, on summary conviction, to a fine not exceeding £1,500.

35. In Singapore, dog fouling is an offence under the Parks and Trees Act, and people found guilty of committing an offence under this Act are liable for a fine not exceeding $5,000 (approximately £1,890). In the United States, the Brooklyn Village Board, City of Madison also has fouling provisions, the fine of $86.50 (approximately £59) is set by General Ordinance. Other US jurisdictions that have comparable provisions include New Jersey, Colorado, Connecticut and Florida.

36. In Australia, provisions regulating dog fouling are controlled under state legislation. South Australia and New South Wales have in place legislation that enables fines to be issued to persons in charge of a dog who fail to remove the dog’s faeces from a public place.

37. In England and Wales, the Dogs (Fouling of Land) Act 1996 provides the enforcement for dog fouling. In April 2002 the amount of the penalty was increased from £25 to £50. See paragraph 54 for further information on the 1996 Act.

**IMPLEMENTATION**

38. The Bill will come into force six months after Royal Assent. This period is to allow local authorities, the Procurator Fiscal Service and the courts to put into place the required administrative systems (and staff resources).
CONSULTATION

39. Keith Harding issued a consultation paper to seek the views of interested parties. The responses to this consultation helped to develop the policy in advance of preparing a draft Bill. The main areas that were consulted on included identifying the main faults of current legislation, how to define public land, defining the person liable, the level of penalty, enforcement, defences, financial implications and any other obligations that should be placed on local authorities. More detailed information on these areas appears earlier in the memorandum.

40. Copies of the consultation paper were sent to 71 different organisations, including all Scottish local authorities, the police, the Scottish Court Service and organisations with animal interests such as the Kennel Club and the National Canine Defence League. 43 responses were returned, 20 of them from local authorities. The comments and suggestions made in the responses to the consultation have been taken into account in developing the policy underlying the Bill.

41. From the responses to the consultation the main faults identified with the current legislation are that in practice it is difficult to enforce and it fails to cover many problem areas of land. These issues are specifically addressed earlier in this memorandum (see paragraphs 20-22).

42. There were varying views from respondents with regard to exemptions to the Bill. Some felt that there was no need for exemptions and that decisions could be made based on the circumstances of each case; in contrast, others believed that exemptions should be clearly listed in the Bill. The member believes that if no exemptions are listed in the Bill, it could lead to problems for the authorised officers who have to enforce the Bill, and to inconsistency between different local authority areas. To reflect this a list of exemptions has been provided for in the Bill and, should circumstances change in the future, then the Scottish Ministers are given the power to amend or add to the list of exemptions.

43. Most of the respondents agreed that there was merit in introducing a fixed penalty scheme as it could potentially help resolve the problem of dog fouling. Some concerns were raised about offenders refusing to give their details to a local authority officer. The Bill attempts to resolve this by also providing police constables with the power to issue fixed penalties. It will also be possible for the fixed penalty notice to be posted to the suspected offender. This could be useful if the local authority officer is able to identify the alleged offender despite the refusal of that person to provide their details. In addition the Bill retains the original offence of dog fouling for which a person will be liable on summary conviction to a fine not exceeding level 2 on the standard scale (currently £500). This method could be used if a person persistently offends and or refuses to give their details to a local authority officer.

44. The amount of the fixed penalty suggested by respondents ranged from between £25 to £100. Those who did not indicate a figure agreed that it should be set at a level that would be high enough to act as a deterrent but would also be low enough to ensure people could afford to pay. The Bill sets the amount of fixed penalty at £40, as the member felt that such a sum would meet this requirement. It is broadly in line with, although slightly less than, the penalty of £50 that is provided for in Ireland and in England and Wales.
There were varied suggestions as to what types of training the authorised local authority officer should undergo before undertaking this role. Suggestions included customer care, basic legislation knowledge and note/statement taking. In agreement with the view of most respondents, it will be left to the local authority to determine what this training will be. Existing health and safety legislation (Health and Safety at Work etc Act 1974) places a requirement on employers to provide information, instruction, training and supervision to ensure the health and safety of their employees at work. This would include the handling of potentially confrontational situations, which most respondents highlighted as being necessary.

**ALTERNATIVE APPROACHES**

There were three alternative approaches that were considered by the member.

**1: The Civic Government (Scotland) Act 1982**

The first approach that was considered was to rely on and amend existing legislation. The existing legislation relating to dog fouling in Scotland is provided for by section 48 of the Civic Government (Scotland) Act 1982 (the 1982 Act). There are three main problems with that Act which were identified by respondents to the member’s consultation paper:

- its scope;
- enforcement;
- the absolute nature of the offence.

**Scope**

The land to which section 48 applies fails to cover some categories of public land where dog fouling is a problem, such as communal areas and gardens.

Section 48(1)(e) provides that local authority land used for recreational or sporting purposes is covered by the Act. However, section 48(2) provides that areas specified in section 48(1)(e) are not covered unless the local authority has erected the appropriate notices. In practice this has proved difficult to apply to areas that are accessible from several access points.

**Enforcement**

In 1998 only 109 people were reported to the procurator fiscal for the offence of dog fouling and of that number only 37 were actually prosecuted.

Under the 1982 Act dog fouling is a criminal offence, and only the police are able to take action to enforce the statutory powers provided for by section 48. Corroboration of the offence is required and so two people need to witness the offence before action can be taken. In addition to police time involved in apprehending offenders, time is also expended in the preparation of a report to the procurator fiscal and other administrative work. It is difficult for the police to make dog fouling a priority offence and allocate resources to it as opposed to dealing with other more serious crimes.
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52. Under the current law the procurator fiscal requires to be involved in all proceedings. This places an additional burden on the workload of the Procurator Fiscal Service when there are competing priorities. It would appear that the current system of enforcement is both time-consuming and overly bureaucratic.

**Absolute nature**

53. The provisions contained in section 48 of the 1982 Act make it an offence to allow a dog to foul in certain areas there is no defence even if the excrement is immediately cleaned up. This is an undesirable position and consultees support the change which is proposed. Under the Bill, the offence consists of failing to clear up after your dog.

**2: The Dogs (Fouling of Land) Act 1996**

54. The second approach considered by the Member was to follow the legislation currently in place in England and Wales. In England and Wales, dog fouling is regulated by the Dogs (Fouling of Land) Act 1996. This addresses some of the areas that are considered to be problematic in the 1982 Act. However, it was felt that further improvements could still be made.

55. The main problem is one of inconsistency. The 1996 Act does not require the local authority to implement the legislation. It is left to each individual authority to “opt in” if they wish to do so. Section 2(1) of the Act provides that local authorities “may” designate land for the purposes of the Act. Central records are not kept but it is known that not all local authorities have implemented this Act by designating areas.

56. Section 2 of the 1996 Act allows local authorities to designate, by way of order, land in their area to which the Act applies. The local authorities must publicise the making and the effect of these orders. This is time-consuming and as every local authority does not implement the Act it can leave the public in doubt as to the areas to which the Act applies.

57. Another issue surrounding this Act is the enforcement of unpaid fixed penalties. The 1996 Act gives the alleged offender a period of 14 days to pay the fixed penalty or request a hearing. This Bill provides a 28-day period for payment or requesting a hearing, which is more realistic. As outlined in paragraph 26, the penalty is automatically increased and enforced as a decree arbitral, which removes the need for any criminal proceedings to take place.

58. While the member is in agreement with the general principles of the 1996 Act, it was felt that it did not go far enough to have an impact on the problem of dog fouling. The member felt that his Bill should cover a much wider range of land and that local authorities should be required to enforce the provisions instead being able to decide whether or not to implement the legislation. The member also felt that the fixed penalty scheme should be provided for in a way that placed the minimum requirements on the Procurator Fiscal Service. However in a similar way to the 1996 Act, the member wished to retain the option of a criminal offence in order to allow the police to take action against serial offenders.
3: The Environmental Protection Act 1990

59. In responses to the consultation it was suggested that dog fouling could be enforced under the provisions for litter found in the Environmental Protection Act 1990. Part IV of the 1990 Act makes it an offence to drop litter and gives local authorities the power to introduce a fixed penalty fine scheme if they wish to do so.

60. The main problem with this approach is that there may be a doubt as to whether the term “litter” actually includes dog faeces. In addition, the offence of “littering” is only committed when a person drops litter and would not cover dog faeces unless these are removed and subsequently dropped. Thus the penalties that can be imposed for littering can only be applied to dog fouling in exceptional cases.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

61. The 1982 Act exempts blind people who are in charge of a dog that is being used solely for their guidance. In addition to retaining this exemption in his Bill, the member in his consultation sought views on also providing an exemption for people with disabilities. In response to the views of those who responded to the consultation, the Bill contains a further provision to exempt people with a physical impairment that affects their mobility, manual dexterity, physical co-ordination or ability to lift, carry or otherwise move everyday objects, who are in charge of an assistance dog. The Bill therefore extends the provisions that exist in current legislation and provides exemptions for a wider category of people with disabilities to be exempt.

Human rights

62. One of the objects of this Bill is to provide an enforcement mechanism in respect of the offence of dog fouling which reduces the involvement of the courts. In particular, the Bill makes provision for an increased fixed penalty to become enforceable by civil diligence in the event that the recipient of a fixed penalty notice fails to pay the fixed penalty or request a hearing. As a consequence, issues arise in relation to Article 6 of the European Convention of Human Rights.

63. Article 6 of ECHR provides that individuals are entitled to access to a court in the determination of their civil rights and obligations of any criminal charge against them. Importantly, under this Bill an individual who receives a fixed penalty notice will be entitled to seek a hearing. In the event that a hearing is sought, proceedings may be brought by the procurator fiscal in respect of the offence to which the fixed penalty notice related. There are further safeguards in that authorised officers or police constables who are satisfied that fixed penalty notice ought not to have been issued can withdraw the notice.

64. The right to a hearing is only effective in the event that a person is given adequate notice of that right. The Bill provides, however, for the fixed penalty notice to be handed to the recipient, delivered to them or sent by post and for that person to have 28 days within which to request a hearing. Each of these methods of service is thought to constitute adequate notice.
65. The Bill also provides that the evidence of one witness will be sufficient in criminal proceedings for the offence of dog fouling. However, provided that the proceedings as a whole are fair, ECHR does not require corroboration.

66. There could also be arguments that, in so far as the offence applies to certain private property, the Bill constitutes an interference with a person’s peaceful enjoyment of property in terms of Article 1 of Protocol 1 of ECHR and an interference in a person’s private life under Article 8 of ECHR. The member considers that any interference is justifiable in the public interest in view of the health dangers of dog faeces. The member also considers that the measures are proportionate in that a person remains free to commit the offence on their own property provided all other owners/occupiers consent to the dog faeces not being cleared up.

**Local government**

67. The provisions in the Bill will result in local authorities having to designate officers with power to issue fixed penalty notices for the offence of dog fouling. The offence is currently only enforceable by the police.

68. The power to issue fixed penalty notices for the offence of dog fouling will provide the local authority with the means to effectively address a problem on which they receive a large number of complaints from the public. It is anticipated that one of the overall effects of the Bill will be a reduction in the incidence of dog fouling, leading to a reduction in the number of complaints the local authorities receive.

69. The accompanying Financial Memorandum assesses the financial impact of the Bill on local authorities in detail. This will have resource implications for the local authority. In general it is not expected there will be significant costs on local authorities. The Bill provides that they retain all money received from the payment of fixed penalties.

70. The Bill will have no adverse effect on island communities or sustainable development.
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