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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Welfare of Dogs (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 26 September and 31 Octoberⁱ 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Welfare of Dogs \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ Oliver Mundell MSP submitted apologies for this meeting.

Overview of the Bill

3. This Members' Bill was introduced by Christine Grahame MSP (the "Member in Charge") on 20 June 2023. The lead committee is the Rural Affairs and Islands Committee.
4. The stated focus of this Bill is 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 or a puppy; and to regulate the sale or transfer of puppies from unlicensed litters.
5. It aims to do this by:
 - requiring the Scottish Ministers to make a new code of practice that should be followed by any person who is considering acquiring a dog to keep as a pet, and by any person who is considering selling or giving away a dog to someone else, and
 - enabling the Scottish Ministers to make regulations which would prohibit the sale of puppies from unlicensed litters not subject to registration, and make provisions about such a register.
6. There already exists a Code of Practice for the Welfare of Dogs which was introduced under the Animal Health and Welfare Act 2006 Act ("the 2006 Act") in 2010 ("the 2010 Code"). The aim of the 2010 Code is to help people to look after their dog properly and deals primarily with the dog's environment, health, exercise and food.
7. The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 ("the 2021 Regulations") also already regulate the sale or transfer of puppies from licensed litters. Under the 2021 Regulations, any person in Scotland breeding three or more litters of puppies in any 12-month period must be licensed.
8. This Bill seeks to regulate the sale or transfer of puppies by persons from two litters or less in any 12-month period.
9. The Bill comprises 14 sections arranged in three parts; and where these sections are not outlined under the 'Review of relevant powers' section, they are outlined in **Annex A**.

Delegated powers

10. The Bill contains four delegated powers. One in Part 1 of the Bill, requiring Scottish Ministers to make, and revise, a code of practice, which is not subject to any parliamentary procedure. The other three are contained in Part 2. All powers are discussed fully in the next section, 'Review of relevant powers'.
11. The Member in Charge has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.
12. At its meeting on 26 September, the Committee indicated that it was content with three of the delegated powers:
 - Section 8 – Power to require registration;
 - Section 9 – Regulations – Supplementary; and
 - Section 10(1) and (3) – Compliance.
13. However, the Committee agreed to write to the Member in Charge to raise questions on the following delegated power:
 - Sections 1 and 5 – Making and revising of code of practice.
14. The Committee’s questions and the response received from the Member in Charge are set out at **Annex B**. The Committee's consideration of this, and the other delegated powers contained in the Bill, are set out in the next section of the report.

Review of relevant powers

Sections 1 and 5 – Making and revising of code of practice

Power conferred on: The Scottish Ministers

Power exercisable by: code of practice

Parliamentary procedure: none

Provision

15. 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.
16. 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
17. Section 2 sets out a list of questions that the prospective acquirer of a dog of any age should ask themselves. Section 2 also provides that the code should include a requirement that the prospective acquirer and the prospective supplier (unless this

is not practicable) meet in person before reaching any agreement to sell or transfer the dog from one to the other.

18. Section 3 sets out what the code of practice is to include in respect of the sale or transfer of a young dog less than 12 months by the first owner of the litter.
19. Section 4 sets out that the code will prescribe 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. The certificate is intended to signify that the acquirer fulfilled the requirements under sections 2 and 3 as described above. 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 certificate must include any other matter the Scottish Ministers consider appropriate.
20. Section 5 provides that the Scottish Ministers may revise the code of practice, although not in such a way that means it does not include provision giving effect to sections 2 to 4 as described above. Scottish Ministers must consult such persons they consider appropriate before making such a revised code of practice. The Scottish Ministers must re-publish the code of practice as revised unless none of the revisions materially alters the effect of the code.
21. Section 6 provides that failure to comply with the code of practice does not in itself render a person liable to proceedings of any sort. However, in proceedings for a relevant offence either under this Bill or the Animal Health and Welfare Act 2006 Act (“the 2006 Act”), failure to comply with a relevant provision of the code of practice may be relied on by a court to establish liability and conversely compliance with the code can be relied on to negate liability.
22. The Member in Charge explains in the DPM that the reasons for taking the power are to strengthen a culture of responsible dog acquisition and ownership in Scotland and achieve behavioural change, without placing formal legal obligations on the parties involved.
23. The Member in Charge also explains in the DPM that the reason for not making the code subject to any Parliamentary procedure is that the substantive elements of the code will be set out in the Bill itself. Furthermore, the Member in Charge states that the power allowing the Scottish Ministers to add further matters to the code is narrowed by the requirement that it is tied to the purpose of setting out good practice to follow when acquiring or supplying a dog. She explains that it was felt that it would not be a good use of valuable parliamentary time to also require Parliament to approve the code at a later point.

Committee consideration

24. The Committee asked the Member in Charge:
 - to provide more information regarding the decision to take a different approach to parliamentary scrutiny in respect of the code of practice than the one taken in the Animal Health and Welfare Act 2006, whereby section 37(6) of that Act sets out that an animal welfare code requires to be laid before, and approved by resolution of, the Scottish Parliament; and
 - specifically, what “other matters” she envisages the Scottish Ministers could add in time, and why she does not feel it necessary that such an inclusion

should be subject to no parliamentary scrutiny.

25. In her response, the Member in Charge agrees with the requirement for parliamentary scrutiny of codes of practice made under the 2006 Act because of the legal obligations placed on persons responsible for animals in this Act; and because of the evidential link between compliance with a code and the possible commission of an offence. It is noted that although the code of practice suggested in the Bill does not create a standalone legal obligation to comply with the code, section 6 does provide that a failure to comply with a relevant provision of the code of practice may be relied on by a court to establish liability and conversely compliance with the code can be relied on to negate liability for a relevant offence either under this Bill or the 2006 Act. Therefore, there is a similar evidential link between compliance with the code to be made under the Bill and the possible commission of an offence as was envisaged by the 2006 Act; and given this link, it may therefore be appropriate that a similar scrutiny procedure of the code is followed.
26. Further, although as the Member in Charge states the code has a defined scope, it is possible for Scottish Ministers to revise the code following consultation; and the member also points to additions that have already been suggested by stakeholders. Therefore, although a number of key elements to the code are outlined on the face of the Bill, it will be possible for stakeholders to make suggestions and for Scottish Ministers to add to these elements and revise the code. Therefore, it may be appropriate that these additions are subject to parliamentary scrutiny as the key elements have been.
27. It is noted that during evidence sessions at the lead committee, there is some support for the current Welfare of Dogs: Code of Practice, made under the 2006 Act, to be combined with this code, in which case that combined code would have to come back to parliament for approval under the 2006 Act. There have also been a number of suggestions to amend the prescribed elements of the code and to add in further details, which again would support that the final code be subject to appropriate parliamentary scrutiny.
28. It is also noted that the Member in Charge states in her response that she is amenable to a level of parliamentary scrutiny and that her decision was finely balanced on considering, and being considerate of, a proportionate use of parliamentary time.

29. **The Committee considers that the code of practice should be subject to a parliamentary procedure and that that could be either the negative or affirmative procedure. It therefore asks the lead committee to consider this issue further, noting that there are arguments to be made in favour of the appropriateness of both procedures.**

The arguments the Committee sees in favour of the affirmative being because of:

(a) the evidential link of a failure to follow the code of practice to the possible commission of an offence; and

(b) the power for Ministers to revise the code after consultation. This would

align the code with codes of practice made under the 2006 Act.

Those which it sees in favour of the negative being that:

(a) there is a defined scope for the code of practice; and

(b) there are already a number of key elements outlined on the face of the Bill.

Section 8 – Power to require registration

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

30. Section 8 enables the 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.
31. It provides a non-exhaustive list of what may be included in such regulations. This includes provisions for or in connection with the establishment and operation of a register, about steps to register and for the updating or deleting of information, regarding public or other access to the register, and allowing Scottish Ministers to apply a fee or other charges in relation to the register.
32. The Member in Charge has stated that the register would be a means of regulating the activity of those breeding puppies, making it more difficult for those breeding puppies irresponsibly without care for animal welfare. She states that a register would complement the code of practice, with a lack of licence or register details possibly pointing towards irresponsible breeding; that people wishing to acquire a puppy can search the register for litter information; and that 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 to fulfil wider enforcement needs.

Committee consideration

33. The Member in Charge explains in the DPM that she 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.
34. The Member in Charge also explains in the DPM that the reasons for making this power subject to the affirmative procedure are that:
 - while there is substantial detail set out on the face of Bill, and the scope to

make regulations is narrowed, it is considered appropriate for the affirmative procedure to apply in respect of the detailed elements of any regulations made and that these are subject to highest level of scrutiny; and

- it is appropriate that regulations which potentially make provision for information to be shared with the public are subject to the affirmative procedure.

35. The Committee finds the power acceptable. It considers that there is sufficient detail in section 8 and in the DPM as to how this power is likely to be exercised, that this power is limited but allows for an element of flexibility, can be updated more easily than by primary legislation and is tempered by the obligation to consult. It also agrees that the affirmative procedure is appropriate given the registration requirements and the potential sharing of information contained in the register with the public and third parties.

36. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 9 – Regulations – Supplementary

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

37. Sections 8 and 10 of the Bill contain delegated powers, which are set out in detail above and below. With regards to these powers, section 9(1) of the Bill provides that the powers to make regulations conferred also include the power to make incidental, supplementary, consequential, transitional, transitory or saving provision and different provision for different purposes.
38. Section 9(2) requires that the Scottish Ministers must consult such persons as they consider appropriate prior to making regulations under this Bill.
39. The Member in Charge explains in the DPM that the reasons for taking the power are that, 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, to make necessary changes to related legislation or to deal with technical, operational or implementation matters clearly within the scope and policy intention of the Bill.
40. The Member in Charge also explains in the DPM that the reasons for making this power subject to the affirmative procedure are that 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 and given the broader nature of the powers included in the Bill, it was considered appropriate that the higher level of scrutiny applies.

Committee consideration

41. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it.
42. This is a standard ancillary power and before making regulations, it is noted that the Scottish Ministers are required to consult with such persons they consider appropriate and that they are subject to the affirmative procedure.
43. **The Committee find the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 10(1) and (3) – Compliance

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

44. This provision provides Ministers with the power to make regulations to secure compliance with regulations made under section 8.
45. Section 10(2) provides a non-exhaustive list of provisions that could be included in such regulations including (a) imposing prohibitions or requirements on the first owner of a litter of puppies, (b) enforcement measures, (c) creation of an offence; (d) post-conviction orders and (e) powers of entry, search, inspection and seizure.
46. Section 10(3) enables the Scottish Ministers, by regulations, to make it an offence to breach a prohibition or requirement set out in regulations on the first owner of a litter of puppies; and to make it an offence to obstruct a person tasked with enforcement in exercise of a power conferred to enter, search, inspect and seize.
47. Section 10(4) limits the creation of an offence to that punishable by summary conviction only with a maximum penalty of imprisonment for a term not exceeding 12 months or a fine not exceeding £40,000 or both.

Committee consideration

48. The Member in Charge explains in the DPM that the reasons for taking the power are that:
 - as 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 appropriate that they 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;
 - there are limits placed on the power, making clear that the power can only be

used for or in connection with the power to make provision for a puppy register;
and

- section 10(2)(c) creates a catch-all provision – that a breach of a provision of the regulations is an offence – in case it is needed in future for 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.

49. The Member in Charge also explains in the DPM that the reasons for making this power subject to the affirmative procedure is 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) or the creation of criminal offences.
50. The Committee finds the power acceptable. It considers that there is sufficient detail in section 10 and in the DPM as to how this power is likely to be exercised. It also agrees that the affirmative procedure is appropriate, given the potential impact of the powers on individuals and the creation of criminal offences.

- 51. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Annex A - Outline of sections of the Bill not referred to in 'Review of relevant powers'

52. Section 7 provides that the Scottish Ministers must take reasonable steps to ensure public awareness and understanding of the code of practice.
53. Section 11 provides that the Scottish Ministers must take reasonable steps to ensure public awareness and understanding of circumstances in which the activity of supplying a dog aged less than 12 months require a licence or registration under the 2006 Act, or registration under regulations made by virtue of this Bill.
54. Section 12 makes interpretative provision.
55. Section 13 provides for commencement.
56. Section 14 provides the short title for the Act.

Annex B - correspondence with the Member in Charge

Letter to Christine Grahame MSP, 28 September 2023

The Delegated Powers and Law Reform Committee considered the delegated powers in the above Bill at its meeting on 26 September and seeks an explanation on the following provision:

Sections 1 and 5 – Making and revising of code of practice

Power conferred on: The Scottish Ministers

Power exercisable by: Code of practice

Parliamentary procedure: none

As you are aware, Section 1(1) of the Bill provides that Scottish Ministers 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.

Section 5 provides that the Scottish Ministers may revise the code of practice, although not in such a way that means it does not include provision giving effect to sections 2 to 4. Scottish Ministers must consult such persons they consider appropriate before making such a revised code of practice.

The Scottish Ministers must re-publish the code of practice as revised unless none of the revisions materially alters the effect of the code.

The Delegated Powers Memorandum (“the DPM”) states that the reason for taking the power is to strengthen a culture of responsible dog acquisition and ownership in Scotland and achieve behavioural change, without placing formal legal obligations on the parties involved. It also explains the code is not subject to any Parliamentary procedure because the substantive elements of the code will be set out in the Bill itself.

Furthermore, the DPM states that the power allowing the Scottish Ministers to add further matters to the code is narrowed by the requirement that it is tied to the purpose of setting out good practice to follow when acquiring or supplying a dog. It therefore suggests it would not be a good use of valuable parliamentary time to also require Parliament to approve the code at a later point.

The Committee asks the Member:

1. to provide more information regarding the decision to take a different approach to parliamentary scrutiny in respect of the code of practice than the one taken in the Animal Health and Welfare Act 2006, whereby section 37(6) of that Act sets out that an animal welfare code requires to be laid before, and approved by resolution of, the Scottish Parliament; and
2. specifically, what “other matters” she envisages the Scottish Ministers could add in time, and why she does not feel it necessary that such an inclusion should be subject

to no parliamentary scrutiny.

Response from Christine Grahame MSP, 11 October 2023

Thank you for your letter of 28 September, regarding the Delegated Powers and Law Reform Committee's consideration of the delegated powers in Welfare of Dogs (Scotland) Bill at Stage 1. My response to the Committee's questions is detailed below:

Sections 1 and 5 – Making and revising of code of practice

Power conferred on: The Scottish Ministers

Power exercisable by: Code of practice

Parliamentary procedure: none

The Committee asked:

- 1. to provide more information regarding the decision to take a different approach to parliamentary scrutiny in respect of the code of practice than the one taken in the Animal Health and Welfare Act 2006, whereby section 37(6) of that Act sets out that an animal welfare code requires to be laid before, and approved by resolution of, the Scottish Parliament; and**
- 2. specifically, what “other matters” she envisages the Scottish Ministers could add in time, and why she does not feel it necessary that such an inclusion should be subject to no parliamentary scrutiny.**

Section 37(6) of the Animal Health and Welfare (Scotland) Act 2006 (“the 2006 Act”) gives Scottish Ministers the power, after appropriate consultation, and subject to the approval of Parliament, to issue and revise codes which provide practical guidance in relation to the provisions of the animal welfare part of the Act or regulations made under that part.

The provisions of the animal welfare part of the 2006 Act are wide in scope. They apply to a variety of animals and set out the duties owed towards these animals by the man in the street and by the person responsible for them throughout their lifetime. They include a number of offences if those duties are breached, such as causing unnecessary suffering to an animal (section 19) or the welfare offence in section 24 of the 2006 Act. As per section 24, where someone is responsible for an animal, they are required to take such steps as are reasonable in all the circumstances to ensure its needs **are met to the extent required by good practice** (subsection (1)). The Codes' purpose is then to set out important good practice guidance for anyone who is responsible for an animal in fulfilling their legal duty to take reasonable steps to ensure its welfare **throughout the animal's lifetime**. The courts can refer to the relevant Code when making a judgement as to whether an offence has been committed under the welfare provisions of the Act or regulations made under section 26 or 27. Given the wide scope and the importance placed on Codes made under section 37(6) of the 2006 Act for ensuring that anyone responsible for a protected animal knows how to fulfil their legal duties under the Act, it seems entirely appropriate that they require to be laid before and approved by resolution of the Parliament. This especially, as there are no other means of Codes made under the 2006 Act receiving parliamentary scrutiny (as opposed to the Code to be made under this Bill, as set out below).

The Code under Part 1 of my Bill is much more limited in scope and purpose. As detailed

in section 1(1) of the Bill, it is to **set out good practice for anyone considering acquiring or supplying a dog or puppy as a pet**. In scope, its focus is therefore on the **pre- transaction stage**. The Code is intended mainly as a tool for educating the public so that people wishing to acquire a dog or puppy know what questions to ask the supplier and what red flags to look out for. These questions to ask are set out in section 2 of the Bill and require the prospective acquirer of a puppy or dog to ask themselves whether their lifestyle, routines, family and living situation is suited to having and keeping a dog. It requires them to do some research and to then certify that the research was done, and necessary considerations had been had. The provisions that are aimed at raising the public's awareness towards red flags are set out in section 2(3) and 3. The certificate is detailed in section 4. It is also intended as a potential additional element for the courts to consider when making a judgment as to whether an offence has been committed under the welfare provisions of the 2006 Act or regulations made under section 26 or 27 (or part 2 of this Act).

Therefore, I consider that the key elements of the Code are set out in Bill provisions and are therefore already subject to extensive Parliamentary scrutiny. As explained in the delegated powers memorandum, I consider that this core content will stand the test of time (and therefore provision is made that these key provisions cannot be revised out of the Code, section 5(2)).

In response to your question about the type of additions to the Code that I envisage, these could be further elements to what Scottish Ministers consider the acquirer should be aware of prior to transferring ownership of the puppy or dog, and what knowledge should be exchanged between the parties. They may use the Code to signpost existing advice, support or other resources. There are numerous suggestions within the written evidence from key stakeholders received by the lead committee, an example being adding a question about whether the prospective owner would have time to train and socialise the dog they are considering buying. These are the key stakeholders that I would assume the Scottish Government would consult on the terms of the Code as required by my Bill.

Finally, in relation to the lack of an affirmative procedure for the Code, I hope the detail provided in this letter has set out the basis of my thinking in relation to whether parliamentary scrutiny was necessary and a proportionate use of Parliament's time. That said, should your committee or the lead committee consider that, based on the evidence and associated deliberations, further parliamentary scrutiny is required, I would certainly be amenable to that approach. My decision to prescribe no parliamentary procedure was a finely balanced one.

I hope the Committee finds this helpful.

