

Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill

[As Amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with rule 9.7 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. This supplementary memorandum should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The following delegated powers were inserted into the Bill at Stage 2:
 - the power in section 10A of the Bill for the Scottish Ministers to make regulations for the issuing of fixed penalty notices in relation to wildlife offences; and
 - the power in new section 32K(4) of the Animal Health and Welfare (Scotland) Act 2006 ("the 2006 Act"), to be inserted by section 11 of the Bill, for the Scottish Ministers to make regulations concerning disposal of

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the proceeds of sale of animals in exercise of the new powers over animals in new section 32A(1) of the 2006 Act,

4. Two delegated powers that were included in the Bill at introduction were amended at stage 2:
 - the power in section 4 of the Bill to make regulations for the issuing of fixed penalty notices in relation to animal health offences; and
 - the power in new section 32L(1)(a) of the 2006 Act, to be inserted by section 11 of the Bill, to make regulations about the content and service of notices in relation to the new powers over animals found in new section 32A(1) of the 2006 Act.
5. The new delegated powers and the amendments to the existing delegated powers in the Bill 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.

Rationale for subordinate legislation

6. In deciding whether provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered the need to:
 - strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;
 - anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Scottish Parliament;
 - make proper use of valuable parliamentary time;
 - allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill; and
 - take account of the likely frequency of amendment.
7. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

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- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to make subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated Powers

Section 4 – inserting new section 76A into the Animal Health Act 1981 (fixed penalty notices for certain offences relating to animal health)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Amended or new power: amended

Provision

8. Section 4 inserts a new section 76A into the Animal Health Act 1981.
9. New section 76A confers a power on the Scottish Ministers to make provision by regulations for, or in connection with, the issuing of fixed penalty notices (FPNs) in relation to certain offences relating to animal health. In this section, an FPN means a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.
10. The new section provides that the offences in relation to which FPNs may be issued must be specified in or by virtue of regulations. The section was amended to extend the list of offences which may be specified in or by virtue of the regulations to those contained in the following enactments—

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- the Bees Act 1980,
- orders made under the Bees Act 1980,
- Acts of the Scottish Parliament which the Scottish Ministers consider relate to bee health.

11. It continues to be the case that the power may only be used to make provision for FPNs in relation to any offence that may be specified in the regulations (including offences contained in the above enactments) if the maximum penalty on conviction does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale (or both).

12. The section was also amended to insert detail into new section 76A, which sets out the type of provision which the regulations may contain and specifies information that the fixed penalty notices issued under the regulations must contain. For example, as regards the type of provision which the regulations may contain, it is clear that the power may be used to create offences relating to obstruction of a person who is exercising functions in relation to FPNs, or a failure to provide information requested in relation to FPNs. But for any such offence, the maximum penalty that may be provided for is, on summary conviction, a fine not exceeding level 5 on the standard scale.

Reason for taking power

13. The ability of enforcement authorities to issue FPNs when certain animal health offences are committed will be an important additional enforcement tool. FPNs are considered to be an effective and efficient means of addressing minor and technical breaches of animal health legislation.

14. It is not possible at this point to envisage all the potential situations in which an FPN might be appropriate as legislation on animal health is constantly being reviewed, updated, and improved and the details of any FPN regime will necessarily be influenced by the type of offence involved. In each case where it is proposed that the powers be used to make provision for FPNs in relation to one or more specified offences, it is envisaged that the Scottish Ministers will consult on the proposals, and thereafter lay draft regulations before the Parliament for scrutiny and approval. The Parliament will therefore have the final say over whether to approve any such regulations.

15. Strict limits are placed on the power. The power may only be used to make provision for FPNs in relation to offences relating to animal health

(including bee health) which are created by virtue of powers in other enactments. The power cannot itself be used to create new animal health offences. In addition, the power may only be used in relation to such an offence if the maximum penalty does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale (or both).

16. The power may, however, be used in combination with other powers which may provide for such offences. For example, section 73 (general offences) of the Animal Health Act 1981 provides that a person is guilty of an offence if the person, without lawful authority or excuse, does anything in contravention of an order or regulations made under that Act. Among other things, the Act confers various powers on the Scottish Ministers to, by order, make provision to prevent infection and the spread of disease in connection with animal health. Any such order may therefore result in new offences being created under section 73. If these powers are used in parallel with the new power in section 76A, provision could be made for FPNs to be issued in relation to any such new offence.
17. Each offence in relation to which FPNs may be issued must be specified in or by virtue of the regulations. Examples of the types of offences that are likely to be specified in or by virtue of regulations made under the power as amended include non-compliance with measures to control notifiable diseases, such as European Foul Brood and American Foul Brood. Non-compliance with such measures, which include compulsory disease notification and movement controls, can put the health of the bee population as a whole at risk. It is therefore important to secure compliance with such measures. Provision to enable enforcing authorities to issue FPNs in relation to such offences, and to accept the payment of such fixed penalties as an alternative to prosecution, will provide an additional route to securing compliance.
18. Other situations where FPNs might be considered appropriate may not yet be legislated for. For example, orders and regulations are expected to be developed for a number of animal health policy areas. In these instances, the new power may be expected to be used in due course to specify additional situations in which FPNs may be issued having considered this as part of the policy development. In addition, provision for FPNs (including the levels of fixed penalty) will be reviewed from time to time to determine whether it remains effective and fit for purpose. Any FPN regime established using the new power is therefore likely to require updating and refinement in light of experience.

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19. The new power is therefore thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances (including the creation of new animal health offences in exercise of powers conferred by other legislation, and the likely frequency of amendment) without the need for primary legislation.

Choice of procedure

20. By virtue of new section 76A(5), regulations made using the new power will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

Section 10A – Fixed penalty notices for certain wildlife offences

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Amended or new power: new

Provision

21. New section 10A of the Animals and Wildlife (Penalties, Protections and Powers) Bill confers a power on the Scottish Ministers to make provision by regulations for, or in connection with, the issuing of fixed penalty notices (FPNs) in relation to certain offences relating to wildlife. In this section, an FPN means a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.
22. The new section 10A provides that the offences in relation to which FPNs may be issued must be specified in or by virtue of regulations. The offences which may be specified are offences under Part 1 of the Wildlife and Countryside Act 1981, the Protection of Badgers Act 1992, the Deer (Scotland) Act 1996, or under another enactment that Scottish Ministers consider relates to wildlife. But the power may only be used to make provision for FPNs in relation to any such offence if the maximum penalty on conviction does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale (or both).

23. The new section makes it clear that the regulations may include certain things. In particular, it makes it clear that the power may be used to create offences relating to obstruction of a person who is exercising functions in relation to FPNs, or a failure to provide information requested in relation to FPNs. But for any such offence, the maximum penalty that may be provided for is, on summary conviction, a fine not exceeding level 5 on the standard scale.

Reason for taking power

24. The ability of enforcement authorities to issue FPNs when certain wildlife offences are committed will be an important additional enforcement tool. FPNs are considered to be an effective and efficient means of addressing minor and technical breaches of wildlife legislation.
25. It is not possible at this point to envisage all the potential situations in which an FPN might be appropriate as legislation on wildlife is constantly being reviewed, updated, and improved and the details of any FPN regime will necessarily be influenced by the type of offence involved. In each case where it is proposed that the powers be used to make provision for FPNs in relation to one or more specified offences, it is envisaged that the Scottish Ministers will consult on the proposals, and thereafter lay draft regulations before the Scottish Parliament for scrutiny and approval. The Parliament will therefore have the final say over whether to approve any such regulations.
26. Strict limits are placed on the power. The power may only be used to make provision for FPNs in relation to offences relating to wildlife which are created by virtue of powers in other enactments. The power cannot itself be used to create new wildlife offences (except insofar as it may create offences relating to obstruction of person or a failure to provide information). In addition, the power may only be used in relation to an offence if the maximum penalty does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale (or both).
27. Where the power is to be used in relation to any such offences, each offence must be specified in or by virtue of the regulations. In addition, under new subsection 10A(6), the FPN must itself identify the offence to which it relates and specify the reasonable particulars of the circumstances alleged to constitute the offence. Under new subsection 10A(7), the FPN must also state the date on which it is issued, the amount of the fixed penalty, the person to whom payment may be made and their address, the period for payment, the method of payment, the effect of paying the fixed

penalty within the payment period and the consequences of not doing so, and the details of any procedure for challenging or appealing the FPN.

28. Examples of the types of offences that are likely to benefit from the use of FPNs include non-compliance with requirements for a licence, or non-compliance with record keeping. Whilst committing such offences might not impact directly on an individual wild animal's welfare, widespread non-compliance may put the welfare of the wider species population at risk. It is therefore important to secure compliance with such requirements. Provision to enable enforcing authorities to issue FPNs in relation to such offences, and to accept the payment of such fixed penalties as an alternative to prosecution, will provide an additional route to securing compliance.
29. Other situations where FPNs might be considered appropriate are not yet legislated for. For example, consideration is currently being given to the need to make amendments to regulations for a number of wildlife policy areas. In these instances, the new power may be expected to be used in due course to specify additional situations in which FPNs may be issued having considered this as part of the policy development. In addition, any FPN regime established using the new power may itself require updating and refinement in light of experience. The new powers will enable provision in the FPN regulations (including the levels of fixed penalty) to be reviewed from time to time to determine whether they remain effective and fit for purpose.
30. The new power is therefore thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances (including the creation of new wildlife offences in exercise of powers conferred by other legislation, and the likely frequency of amendment) without the need for primary legislation.

Choice of procedure

31. By virtue of section 10A(9) of the Animals and Wildlife (Penalties, Protections and Powers)(Scotland) Bill, regulations under new section 10A will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

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Section 11 – inserting new subsections 32K(4) and (5) into the 2006 Act (forfeiture of compensation)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Amended or new power: new

Provision

32. Section 11 inserts new section 32K into Part 2 of the 2006 Act.

33. Section 32K(1) makes provision for the circumstance in which a person is convicted of a “relevant offence” (certain offences under the 2006 Act listed in section 32G(8)) and that conviction arises out of “relevant criminal proceedings”. “Relevant criminal proceedings” is defined in section 32G(8) as proceedings in respect of a relevant offence which arise from the circumstances which led to the protected animal being taken into possession under section 32 of the 2006 Act.

34. In the above circumstance, subsection 32K(1) provides that the convicting court may order that the person forfeits (in whole or part) any right to compensation which would otherwise be due under Part 2 of the 2006 Act in respect of a protected animal to which the offence relates. Subsection 32K(3) provides that an order under subsection (1) may include such other provision that the court considers appropriate, including for disposal of any proceeds of sale which would otherwise be applied under section 32HA(2)(b) to meet the authorised person’s liability to pay the compensation amount to the “relevant owner” (as defined in section 32G(8)).

35. Subsection 32K(4) confers a delegated power on the Scottish Ministers to make provision by regulations for or in connection with the disposal of any proceeds of sale under subsection (3).

36. Subsection 32K(5) provides that regulations under subsection (4) may modify any enactment (including the 2006 Act).

Reason for taking power

37. Section 11 inserts new sections 32A to 32L into the 2006 Act. Section 32A(1) confers powers on “authorised persons” (as defined in section 32A(9)) in relation to animals that have been taken into possession for welfare reasons under section 32 of the 2006 Act. Following exercise of any of the powers conferred by section 32A(1), compensation may become due to the “relevant owner” under section 32J (payment of the compensation amount). A convicting court may exercise the power in section 32K(1) to order forfeiture of compensation and may, as provided for in subsection (3), in doing so may make such other provision for disposal of any proceeds of sale which would otherwise be applied to meet the authorised person’s liability to pay the compensation amount. This gives the court considerable discretion as to the disposal of the proceeds of sale.
38. The new power in section 32K(4) will allow the Scottish Ministers to make more detailed provision as to the way in which the proceeds of sale may be disposed of by means of order forfeiture under section 32K(1). For example, the Scottish Ministers may wish to prescribe bodies to which the proceeds of sale may be paid by order of the court in the event of forfeiture of the compensation amount. The power in section 32K(4) in this area is necessary to allow different provision to be made over time in relation to disposal of the proceeds of sale. For example, any provision as to the bodies to which the proceeds of sale may be paid could be influenced by the identities of the persons appointed as authorised persons under section 32A(9) or other changing circumstances.
39. The new power is therefore thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation.

Choice of Procedure

40. By virtue of section 51(3) of the 2006 Act, regulations made using the new power will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

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Section 11 – inserting new section 32L (modification of powers over animals) into the 2006 Act

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Amended or new power: amended

Provision

41. Section 11 also inserts new section 32L into Part 2 of the 2006 Act. Section 32L(1)(a) confers a power on the Scottish Ministers to make provision by regulations about the content and service of decision notices and compensation notices. Section 32L(1)(a)(iii) provides that this power includes the ability to make provision in relation to the method by which service of a notice may be effected. Section 32L(1)(a)(iii) has been amended to clarify that this includes the ability to make provision as to how service may be effected other than in accordance with section 32C(2) or 32G(2).

Reason for taking power

42. The amended version of section 32L(1)(a)(iii) will ensure that the Scottish Ministers will be able to make changes to the service provisions that allow for service by means that are wholly alternative to those currently provided for in sections 32C(2) and 32G(2), in light of experience from operating the new sections after they have come into force.
43. The new power is thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation.

Choice of Procedure

44. By virtue of section 51(3) of the 2006 Act, regulations made using section 32L will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

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