



Law Society  
of Scotland

# Consultation Response

## Improving the Operational Effectiveness of the Control of Dogs (Scotland) Act 2020

15 January 2020



## Introduction

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Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Improving the Operational Effectiveness of the Control of Dogs (Scotland) Act 2010 (2010 Act) (the consultation). The committee has following comments to put forward for consideration.

## General Comments

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The consultation is referred to as "initial" focusing on "the operational effectiveness of the 2010 Act to aid enforcement agencies." A further review of wider dog control in 2020 is intended to consider how the Dangerous Dogs Act 1991 (1991 Act) operates and other associated dog control.

We support some policy changes that the Scottish Government are proposing regarding the animal legislation. What is needed is "a modern consolidated Act of the Scottish Parliament on dog control law" to address "the ineffectiveness of the 2010 Act." That requires a "comprehensive review of all dog control legislation" which we would consider is urgently required.<sup>1</sup>

Clarification of the law is required to assist the public as well as those involved in the justice system. Our members themselves are involved either as part of the prosecution service or in advising their clients where issues have arisen regarding control of their dogs. This need for clarification goes wider and includes vets, general practitioners and hospital authorities too who may be on the front line when seeing the medical results arising from dogs being out of control.

<sup>1</sup> <https://digitalpublications.parliament.scot/Committees/Report/PAPLS/2019/7/18/Post-legislative-Scrutiny--Control-of-Dogs--Scotland--Act-2010>

from the Public Audit and Post-legislative Scrutiny Committee's<sup>1</sup> recommendations at paragraph 27 of the Executive Summary

We would suggest that need for clarification and clear policy making is endorsed in respect of the number of recent Scottish Government consultations<sup>2</sup> regarding animals and wildlife in addition to the Animal and Wildlife (Penalties, Protections and Powers) (Scotland) Bill (the Bill)<sup>3</sup> which is making its passage through the Scottish Parliament.

Though these consultations and the Bill have a much wider scope than merely relating to dogs, various policy considerations coincide with those underpinning this consultation. There would be much benefit in co-ordination and join up, certainly to ensure that any resulting legislation and enforcement will be as effective as possible. Overlapping interests include

- The question of enforcement, as the current legislative measures are not considered to be either effective or consistently applied. (Question 9 refers)
- Any proposed increase in the use of Fixed Penalty Notices (FPN). (Question 8 refers)
- Any proposed increase in the powers afforded to local authority officers (potential obstruction offences. (Questions 1, 4 and 5 refer)
- Powers to seize dogs being extended. (Question 6 refers)

Our response to the Post-legislative scrutiny - Control of Dogs Act 2010 (2010 Act) consultation dated 4 October 2018 is also relevant.<sup>4</sup>

Consolidation of the legislation includes consideration of the 2010 Act whose aim was to ensure that dogs which were out of control were brought and kept under control.<sup>5</sup> The then existing legislation has been described as “piecemeal” focusing on dangerous dogs and particular breeds of dogs and not fully addressing the behaviour of irresponsible dog owners as a contributory factor leading to dogs behaving dangerously. The 2010 Act<sup>6</sup> aimed at:

- extending the provisions of the 1991 Act to make it an offence to allow a dog to be dangerously out of control anywhere in Scotland and
- repealing both the Dogs Act 1871 and the Dangerous Dogs Act 1989 in so far as they apply to Scotland to restate the provisions of these Acts into one piece of legislation (consolidation).

<sup>2</sup> Wildlife Crime Penalties <https://www.lawscot.org.uk/media/363313/2019-08-15-crim-wildlife-crime-penalties-002.pdf>

Amendments to the Animal Health and Welfare (Scotland) Act 2006 <https://www.lawscot.org.uk/media/362508/26-04-2019-crim-amendments-to-the-animal-health-welfare-scotland-act-2006.pdf>

Amendments to the Animal Health Act 1981

Fixed Penalty Notices- Wildlife

<sup>3</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/112958.aspx>

<sup>4</sup> <https://www.lawscot.org.uk/media/361158/crim-call-for-evidence-control-of-dogs-scotland-act-2010-4-october-2018.pdf>

<sup>5</sup> The Bill's Policy Memorandum [http://www.parliament.scot/S3\\_Bills/Control%20of%20Dogs%20\(Scotland\)%20Bill/b29s3-introd-pm.pdf](http://www.parliament.scot/S3_Bills/Control%20of%20Dogs%20(Scotland)%20Bill/b29s3-introd-pm.pdf)

<sup>6</sup> Paragraphs 8-13 of the Bill's Policy Memorandum [http://www.parliament.scot/S3\\_Bills/Control%20of%20Dogs%20\(Scotland\)%20Bill/b29s3-introd-pm.pdf](http://www.parliament.scot/S3_Bills/Control%20of%20Dogs%20(Scotland)%20Bill/b29s3-introd-pm.pdf)

Exactly what aspects the further consultation on the 1991 Act is intended to cover remains unclear. There seems to be an inevitable overlap and scope to create potential confusion complicating any effective reform as any review of dog legislation would involve amendments to both the 1991 Act and the 2010 Act.

Consolidation has advantages. It provides a one stop place for all concerned to consult regarding dog control. It ensures that there is a clear decision made about the routes/methods for enforcement in seeking up to divide what may include civil and criminal enforcement.

Examination of any overlapping policy interests can be examined such as considering:

Any increase of local authority officers' powers that may have implications requiring necessary training and education to be undertaken for the appropriate organisations.

The relationship with criminal prosecution increasing the use of FPNs since FPNs should extend to general animal health and welfare and wildlife matters. Increasing the scope or opportunity to issue FPNs would have significant training implications for local authorities

The need for primary legislation. The timescales may not be in favour but we note the intention outlined in the Bill and the consultation on the Amendments to the Animal Health Act 1981 (closed on 23 December 2019) to bring in changes at Stage Two of the Bill to take account of that consultation. We refer to our observation:

*"The Bill includes the introduction of secondary regulations powers to allow for the issue of Fixed Penalty Notices (FPNs) for both animal welfare and animal health matters. The principle of introducing these regulatory powers is, in effect, similar in respect of both aspects but, as was recognised in paragraph 108 of the Bill's Policy Memorandum, this consultation had not been concluded and was running at the same time. It is anticipated that amendments to the Bill will now be needed following the conclusion and analysis of this consultation responses. We would suggest that this approach and practice is somewhat "slightly unusual.""*<sup>7</sup>

An indication as to the intentions regarding the outcome of the consultation would be appreciated.

We would respond to the various questions as follows:

## **Question 1: Do you think an obstruction offence should be added into the 2010 Act?**

The concept of incorporating an obstruction offence for enforcement purposes is familiar to us. It is seen in legislation such as the Misuse of Drugs Act 1971.<sup>8</sup> However evidence should have been provided to show how the absence of these powers has proved to be an obstacle to authorised officers. Before criminal law

<sup>7</sup> Environment, Climate Change and Land Reform Committee 29 October 2019  
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328>

<sup>8</sup> Section 23(4)

is involved or new offences created, a need should be demonstrated. Any conduct amounting to the commission of any offence must be clearly identified.

Any failure to give their name or walking away does not necessarily amount to obstruction. “Obstruction” means “something that obstructs, blocks, or closes up with an obstacle or obstacles; obstacle or hindrance.”<sup>9</sup>

What is more appropriate would be to consider what is required. We suggest that is for information to be provided such as a name or to engage. That is more allied to section 172 of the Road Traffic Act 1988 though failure to provide information in these circumstances amounts to the commission of a criminal offence.<sup>10</sup> There are of course similar provisions under the Criminal Justice (Scotland) Act 2016 for a suspect to provide certain information but note that is following the suspected commission of an offence.<sup>11</sup>

If it is intended that certain information is provided given a set of circumstances, it would need to be articulated clearly that there was an obligation to provide certain information (and the exact nature of that information), failing which an offence would be committed. Recall too the right to remain silent when accused of a criminal offence. If obstruction was involved, that would need to be involve physical action.

## **Question 2: Do you think a national dog control notice database should be established?**

Section 8(3) of the 2010 Act sets out the information which is to be included in the Dog Control Notices.

The 2010 Act passed before the requirements of GDPR under the Data Protection Act 2018 came into force. If it is intended that a national dog control notice database is to be established, then it would require to comply with GDPR requirements.

## **Question 3: Do you consider that dog control notices can be capable of being enforced across Scotland under the 2010 Act?**

Section 4 (3) of the 2010 Act refers to co-operation. That does not equate to enforcement.

<sup>9</sup> <https://www.dictionary.com/browse/obstruction>

<sup>10</sup> Duty to give information as to identity of driver etc in certain circumstances

<sup>11</sup> Section 34(4)

**Question 4: Do you think that the 2010 Act should be amended to make clearer that dog control notices can be enforced outwith the local authority area they were imposed in?**

We refer to our answer to question 3.

**Question 5: (local authorities only)- Does your local authority seek to enforce dog control notices issued in a different local authority area?**

This question is not relevant to the Criminal Law Committee.

**Question 6: Do you think that the 2010 Act should be amended so that it contains clear authority for a dog to be seized by the local authority pending the court's consideration of a destruction order in relation to the dog?**

What seems to be proposed is that the local authority should have powers to seize the dog pending an application for its destruction.

Section 9 of the 2010 Act operates where an authorised officer considers that, in relation to a dog which is out of control and dangerous, serving a dog control notice (or a further dog control notice) would be inappropriate so that the local authority can apply by summary application to a court to appoint a person to undertake the destruction and require the dog to be delivered for that purpose.

The purpose of the 2010 Act is set out at paragraphs 42 and 43 of the Policy Memorandum that states the DCN regime was designed to be “essentially a local authority implemented administrative scheme.” The scheme will cover a wide range of individuals and is aimed at improving and educating irresponsible owners to responsibly control their dogs.”<sup>12</sup>

What is proposed here would radically alter what is outlined to be an administrative scheme. It there is such a need, we echo the concerns of the Scottish Parliament's post-legislative scrutiny about the “lack of data ... prevented the Committee from accurately determining the effectiveness of the [2010 Act]”<sup>13</sup>.

No evidence has been produced to demonstrate how the absence of any powers impedes effective enforcement. Any changes as outlined would involve primary legislation and overlaps with reform of the 1991 Act (the powers of seizure mentioned in the consultation are limited to certain types of dogs as set out in sections 1 and 2 of the 1991 Act.)

<sup>12</sup> [http://www.parliament.scot/S3\\_Bills/Control%20of%20Dogs%20\(Scotland\)%20Bill/b29s3-introd-pm.pdf](http://www.parliament.scot/S3_Bills/Control%20of%20Dogs%20(Scotland)%20Bill/b29s3-introd-pm.pdf)

<sup>13</sup> Executive Summary point 2

The case of *Scottish Borders Council v Johnstone*<sup>14</sup> illustrates problems with section 9 of the 2010 Act. The sheriff failed to consider a DCN as an alternative to destruction. If local authority officers could seize dogs, the expenses for wrongful seizure could be considerable (and the possible civil actions for wrongful seizure that may also be competent) if such powers were not exercised appropriately.

### **Question 7: Do you think that the 2010 Act should be amended to make clearer what powers exist for local authorities to share information about dog control notices?**

We refer to section 4(4) of the 2010 Act where:

The Scottish Ministers may, in relation to information held by a local authority by virtue of subsection (1)(c), by order—

(a) permit the authority to share, for the purposes of this Act, that information with other local authorities, Scottish Ministers and the police, and

(b) permit or require any person to be given access to that information (or to some part of that information) for research purposes.

Section 17 of the 2010 Act states that any powers to make an order are excisable by statutory instrument.

The question is whether Scottish Ministers have authority to permit the sharing of information under secondary regulation making powers.

The sharing information seems to go further as indicated by the Committee<sup>15</sup> where there needs to be improvements regarding baseline data<sup>16</sup> including:

“General Practit[i]oners, hospitals, local authorities and Police Scotland required to record and collect consistent data on reported incidences of out of control dogs and attacks by dogs on both humans and animals. This data should be collected regularly at a local level and published on a local authority area basis by the Scottish Government, to ensure that the data on the incidences of out of control dogs and dog attacks can be specifically linked to the number of Dog Control Notices (DCNs) that have been issued and the resources available to each local authority.”

### **Question 8: Do you think the 2010 Act should be amended to empower local**

<sup>14</sup> 2015 S.L.T. (Sh Ct) 2

<sup>15</sup> <https://digitalpublications.parliament.scot/Committees/Report/PAPLS/2019/7/18/Post-legislative-Scrutiny--Control-of-Dogs--Scotland--Act-2010>

<sup>16</sup> We refer to the recently concluded Scottish Government consultation on Official Statistics which may be worth considering ensuring the relevant data is captured there in any revisions that are being brought forward. We attach a copy of our response. <https://www.lawscot.org.uk/media/367990/2019-11-25-crim-a-consultation-on-how-official-statistics-present-information-on-recorded-crimes-and-related-topics.pdf>

## authorities to be able to issue a fixed penalty notice in relation of breaches of a dog control notice?

Section 5(1) of the 2010 Act refers to breach of a DCN being a criminal offence. On conviction, the court can impose in addition to a fine a disqualification order and /or a destruction order. Were a Fixed Penalty Notice regime (FPN) to be introduced, these additional penalties could not be imposed. Since these seem to be essential aspects of the sanctions being applied, is any FPN regime appropriate?

There is of course a purpose in allowing for FPNs to be issued. From the context of the consultation, since breaches are criminal offences, the FPNs would be issued and pursued through the criminal enforcement regime. Parking FPNs are a civil and not a criminal penalty.

A criminal offence can be prosecuted when sufficient admissible evidence of a crime arises, and it is in the public interest to prosecute. The suggestion that any FPN should be introduced because breaches can “involve a considerable amount of work” misses the point entirely.

There may be circumstances where a local authority may wish to introduce an FPN regime as outlined in the consultation on the Animal Health Act 1981.<sup>17</sup> Enforcement of that Act’s measures should be undertaken using a variety of methods which include “providing verbal advice without resorting to statutory measures or using statutory provisions to issue warning letters or notices and finally, pursuing prosecution through the courts.”

That purpose may be distinguished from DCNs. The issue of DCNs do not seem to equate to an “offer [of] advice, guidance and support to achieve compliance.”<sup>18</sup> DCNs require compliance and where there is not compliance, the follow up is by means of criminal procedure.

There are evidential complexities and serious consequences where breaches arise in what serious cases that require reporting to the Crown Office and Procurator Fiscal Service (COPFS) for consideration over potential prosecution. Remember too that COPFS has non-court options available including the issue of warning letters and fiscal fines but that is about reducing the costs of prosecution rather than the burden of proof.

In principle, introducing any FPN regime would be for minor or lower level offences. Is that the message to be sent to the public regarding breaches of DCNs?

The flexibility of FPNs in dealing with low level offending and adding to the suite of potential enforcement measures is an important feature. FPNs can provide a proportionate means of dealing with minor types of offending. However, much depends on exactly why and the purpose for them being used.

If being introduced, it may also be useful to consider the effect of the number of FPNs that will remain unpaid. Exactly what reduction is anticipated in the number of lesser offences being dealt with by the

<sup>17</sup> <https://consult.gov.scot/animal-welfare/animal-health-act-1981/>

<sup>18</sup> <https://consult.gov.scot/animal-welfare/animal-health-act-1981/>

courts has not been stated. FPNs may provide an opportunity to seek other methods of enforcement. What would have been useful in support of these new powers would have been evidence as to the number of offences currently prosecuted under the 2010 Act where FPN's might be issued in the future. That would indicate the scale of the problem.

If FPNs are to be issued by local authorities, training would need to be provided for inspectors before any new powers are introduced. That overlaps with ongoing policy considerations in the Bill and related consultations.

### **Question 9: How best could awareness be raised in local authority areas as to their powers under the 2010 Act?**

We refer to our General Comments above. The application of the legislation concerning dogs being out of control and/or dangerous is very complex and challenging for all concerned including the public. That includes the 1991 Act and 2010 Act, and the range of other measures set out in full in the Protocol referred to in Question 12 below.

A policy overview of the current law and consolidation of the legislation has many advantages including the opportunity to address awareness.<sup>19</sup> Awareness includes education and training and goes much further than merely involving local authorities.

A public awareness campaign should form part of the reforms which we suggest is “long overdue and should be undertaken as a matter of urgency.” There seems little to be gained from such a campaign at present considering expressed views that the current legislation is not effective.

We would note that there are groups and communities which would seem to be a priority whenever any such campaign is undertaken. These include children as part of their school education as they are one groups who may be most at risk from dogs being out of control.

We stress that awareness would in our view fits best into the wider animal concerns highlighted in the other consultations and the Bill. Consideration could be given too as to how this raising awareness fits into GIRFEC<sup>20</sup>.

### **Question 10: Do you think the statutory guidance in relation to information sharing should be updated? If so, please provide how you think it should be updated?**

<sup>19</sup> Sexual Offences (Scotland) Act 2009 represented my needed consolidation of sexual offences

<sup>20</sup> <https://www.gov.scot/policies/girfec/>

We are not sure what is meant by “kept under review” as that appears not to have resulted in any changes being made to the statutory guidance. What would be useful would be to ascertain from the consultation if there are specific areas that have been identified for change- as the Guidance<sup>21</sup> can be updated without primary legislation. Additionally, is there a mechanism or a working group whose responsibility is to revise and issue the Guidance? Though the consultation refers to experience, how is that collected and obtained to ensure that the Guidance is fully up to date and fit for purpose?

There is no information as to the parties to whom the Guidance is being directed and relevant. That would seem important as it identifies the scope and purpose in issuing Guidance. That might be a useful aspect to consider when updating the Guidance. How can the Guidance be updated meantime since it refers to other legislation including the 1906 Act and 1991 Act? It seems not to be possible to change without awaiting the outcome of the further consultation.

The Guidance should be revised to take account of case law decisions. This area of law is complex with several published case law decisions that may be relevant. Under Appendix A, we outline some cases for illustrative purposes. The Guidance also does refer to the Protocol in Question 12.

Regarding notification of conditions within DCNs, where a court issues bail orders subject to specific conditions, the police are specifically tasked with letting the complainer know about the conditions. That seems sensible approach and seeks to avoid escalation or recurrence of the original incident.

We also refer to our answer to Question 7 regarding Scottish Ministers’ powers and sharing of information.

### **Question 11: Do you think that the statutory guidance in relation to information sharing should be added to statutory guidance? If so, please provide suggested wording?**

We refer to our answer to Question 10.

### **Question 12: Do you think the protocol should be updated?**

We could not find the Protocol except through the Scottish parliamentary link.<sup>22</sup> That prompts a question as to the purpose of the Protocol (and if the term Protocol is correct since it seem to have no statutory status

<sup>21</sup> <https://www2.gov.scot/Resource/Doc/254430/0114020.pdf>

<sup>22</sup> [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Control\\_of\\_Dogs\\_-\\_joint\\_protocol\\_document\\_as\\_of\\_6\\_May\\_2016\\_Web.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Control_of_Dogs_-_joint_protocol_document_as_of_6_May_2016_Web.pdf)

and is not a Scottish Government document” though Scottish Government: has a responsibility <sup>23</sup>), to whom it is being addressed and assigned responsibility for updating.

It is called “Control of Dogs – Protocol Detailing the Responsibilities of Different Bodies in Dealing with irresponsible Dog Ownership<sup>24</sup> and aimed at:

“aid[ing] local authorities and Police Scotland with the decision-making process when considering how best to deal with complaints relating to irresponsible dog ownership within our communities. It has been developed by local authorities, Police Scotland, the National Dog Warden Association (Scotland), Society of Chief Officers of Environmental Health in Scotland and the Crown Office and Procurator Fiscal Service<sup>25, 26</sup>.”

Though it refers to case law, referring to Appendix A, there may be other pertinent cases that are relevant. In quoting case law, there is a need to ensure that it is kept under regular review.

We are concerned to note that the hyperlink refers to COPFS Guidance dated 2006. That may well suggest that much of the Protocol is out of date.

We would conclude that the inter-relationship between the Protocol and the Guidance should be considered. This ties into the Committee’s recommendation that:

“tak[ing] steps to ensure that the Joint Protocol is understood and publicised by local authorities and the police to ensure that the appropriate staff within these bodies are aware of their respective responsibilities<sup>27</sup>.”

Furthermore, the Protocol does include a very useful list of the relevant legislation which stresses the need to consolidate the legislation and how the Protocol cannot be changed until all the consultations are completed.

<sup>23</sup> Is it not more a memorandum of understanding?

<sup>24</sup> [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Control\\_of\\_Dogs\\_-\\_joint\\_protocol\\_document\\_as\\_of\\_6\\_May\\_2016\\_Web.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Control_of_Dogs_-_joint_protocol_document_as_of_6_May_2016_Web.pdf)

<sup>25</sup> Not located on the COPFS website

<sup>26</sup> [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Control\\_of\\_Dogs\\_-\\_joint\\_protocol\\_document\\_as\\_of\\_6\\_May\\_2016\\_Web.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Control_of_Dogs_-_joint_protocol_document_as_of_6_May_2016_Web.pdf)

<sup>27</sup> [https://www.parliament.scot/S5\\_Public\\_Audit/General%20Documents/Control\\_of\\_Dogs\\_-\\_joint\\_protocol\\_document\\_as\\_of\\_6\\_May\\_2016\\_Web.pdf](https://www.parliament.scot/S5_Public_Audit/General%20Documents/Control_of_Dogs_-_joint_protocol_document_as_of_6_May_2016_Web.pdf)



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## Appendix 1 Case Law

This is intended to be illustrative and not definitive to give a scale of number of cases arising requiring account to be factored into the Protocol and /or Guidance referred to in the consultation

Case Name	Citation	Legislation affected
Moray Council v Debidin	[2012] WLUK 531	Section 4 of the Antisocial Behaviour (Scotland) Act 2004
Church v Miller	[2012] HCJAC 109	Section 10(3) of the Dangerous Dogs Act 1991
Cairns v Watson	[2012] HCJAC 129	Section 3(1) of the Dangerous Dogs Act 1991
Reid v Murphy	[2015] HCJAC 60	Section 3(1) of the Dangerous Dogs Act 1991
Luckhurst v Procurator Fiscal, Forfar	[2016] SAC (Crim) 29	Section 4(1)(a) of the Dangerous Dogs Act
McLaughlin v Harvie	[2014] HCJAC 98	Section 3(1) of the Dangerous Dogs Act 1991
Hunter v Procurator Fiscal Kilmarnock	[2019] HCJAC 19	Section 4(1)(a) of the Dangerous Dogs Act 1991



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