Local Government Committee

28th Meeting, 2002

Tuesday 12 November 2002

The Committee will meet at 2.00 pm in the Chamber, Assembly Hall, the Mound, Edinburgh

1. **Items in private:** The Committee will consider whether to take items 4, 5 and 6 in private.

2. **Local Government in Scotland Bill:** The Committee will consider the Bill at Stage 2 (day 2).

3. **Dog Fouling (Scotland) Bill:** The Committee will take evidence on the general principles of the Bill at Stage 1 from—

   Peter Peacock, MSP, Deputy Minister for Finance and Public Services;
   Ann Callaghan, Local Government Constitution and Governance Division, Scottish Executive;
   Alex Gibson, Local Government Constitution and Governance Division, Scottish Executive;
   Patrick Down, Local Government Constitution and Governance Division, Scottish Executive;
   Gillian Russell, Office of the Solicitor, Scottish Executive;
   Gordon Temple, Justice Department, Scottish Executive;
   Councillor Anne Hall, Member, Environment, Sustainability and Community Safety Executive Group, COSLA;
   Robert Graydon, Environmental Protection Manager, Renfrewshire Council;
   Kathy Cameron, Policy Officer, COSLA;
   Keith Harding, MSP;
   David Cullum, Non-Executive Bills Unit, Scottish Parliament;
   Ruaraidh Macniven, Non-Executive Bills Unit, Scottish Parliament.

4. **Prostitution Tolerance Zones (Scotland) Bill:** The Committee will consider its approach to the Bill at Stage 1.

5. **Renewing Local Democracy - Phase 2 Inquiry:** The Committee will consider an interim report from the Committee adviser.
6. **Mental Health (Scotland) Bill**: The Committee will consider a draft Stage 1 report.

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The following papers are attached for this meeting:

**Agenda item 2**

Local Government in Scotland Bill: Briefing paper from the Adviser [PRIVATE]  
LG/02/28/1

**Agenda item 3**

Memorandum from the Scottish Executive  
LG/02/28/2  
Submission from COSLA  
LG/02/28/3  
Submission from Keith Harding, MSP  
LG/02/28/4

**Agenda item 4**

Prostitution Tolerance Zones (Scotland) Bill: Paper from the Clerk [PRIVATE]  
LG/02/28/5

**Agenda item 5**

Renewing Local Democracy – Phase 2 Inquiry: Interim report from the Committee adviser [PRIVATE]  
LG/02/28/6

**Agenda item 6**

Mental Health (Scotland) Bill: Draft Stage 1 report [PRIVATE]  
LG/02/28/7
Introduction

1. This Memorandum has been prepared by the Scottish Executive to assist consideration by the Local Government Committee (as lead committee) of the Dog Fouling (Scotland) Bill 2002 (referred to throughout as “the Bill”) which was introduced in the Scottish Parliament by Keith Harding MSP on Tuesday 11 June 2002.

2. The memorandum provides some background to, and sets out the Executive’s view on, the Bill. It confirms that the Executive supports the Bill, in principle, but that a number of amendments will be required before it would be considered entirely acceptable.

Scottish Executive
September 2002
Background

3. Members of the public regularly complain to their councillors, MSPs and the Scottish Executive about dog fouling. The current dog fouling provisions are contained at Section 48 of the Civic Government (Scotland) Act 1982. These make it an offence for anyone in charge of a dog to allow it to deposit its excrement on footpaths, pavements, grass verges, pedestrian precincts, children’s play areas and certain local authority areas which are used for sporting and recreational purposes. Any person committing such an offence is liable, on summary conviction, to a fine not exceeding £500.

4. The Executive acknowledges that the above provisions have not been entirely successful in tackling the problem of dog fouling, particularly in relation to a lack of enforcement by the Police given other conflicting priorities. In reviewing the current legislative provisions the Executive concluded that three major changes are required. Firstly, that the emphasis of the offence should be changed from allowing a dog to foul to one of failing to clear up after it. As well as being more practical, this would bring it into line with the provisions of the Environmental Protection Act 1990 which places a duty on local authorities to keep land under their control clear of litter and dog refuse, including dog refuse. Secondly, in order to improve enforcement local authorities as well as the Police should have an enforcement role. Given that only police officers have the power of arrest, enforcement should be by way of fixed penalty notices. Finally, to further assist enforcement the need for corroborative evidence should be removed. These three principles are all provided for in Mr Harding’s Bill.

Keith Harding’s Bill

5. The Bill repeals the existing dog fouling provisions contained at Section 48 of the 1982 Act and puts in place a new legislative regime. Essentially, the Bill (1) introduces a criminal offence of allowing a dog to foul and failing to clear up after it; (2) applies the offence to all land other than agricultural land – unless prior consent by the owner is given to allow dogs to foul on the land; (3) allows fixed penalties (£40, increasing to £60 if unpaid after 28 days) to be issued by both the police and designated local authority officers; (4) provides for a court hearing if the fixed penalty is contested, subject to the Procurator Fiscal agreeing to proceed; (5) dispenses with the requirement for corroboration; (6) enables local authorities to collect unpaid fixed penalties administratively by permitting civil diligence without the normal authority of a court warrant; (7) allows local authorities to retain the monies collected from fixed penalties issued; and (8) gives various Order making powers which will allow Ministers to vary timespan for payment, amount of fixed penalties etc.

Consultation

6. Keith Harding issued a consultation document on his Bill proposal in March 2001. The document outlined his proposals to change the legislative provisions relating to dog fouling and invited comments on them. Among the organisations consulted were animal and dog welfare organisations, agencies concerned with
public health, legal bodies, organisations whose work is connected to land which is open to the public (e.g. Historic Scotland, the National Playing Fields Association Scotland), police forces, local authorities, and a number of other organisations including, the Society of Local Authority Chief Executives (SOLACE), the Association of Scottish Community Councils and Guide Dogs for the Blind.

7. The Report of that consultation exercise states that 38 Consultees responded. All but one of the respondents (Dog Aid Scotland) was, to varying degrees, in favour of some change in the law along the lines of that proposed by Keith Harding. However, many had concerns regarding the details of the proposals and in particular the ability of local authority officers to enforce the provisions.

8. Scottish Ministers indicated at the time that Keith Harding submitted his outline Bill proposal, that they supported the general principles. As such, Scottish Executive officials have been assisting the Non-Executive Bills Unit in formulating the policy albeit that the final Bill does not entirely reflect the Scottish Executive’s policy objectives. Additionally, the Scottish Executive established a small, informal Focus Group, comprising of a number of local authority officers with responsibility for dog fouling, to assist with our consideration of NEBU’s emerging proposals.

Discussion

9. There is little doubt that the change in the emphasis of the offence, the involvement of local authority officers, the introduction of fixed civil penalty notices and the removal of the need for corroboration will be an improvement on the existing provisions. However it is acknowledged that while well placed to do so, there is a question mark over the ability of local authority officers to effectively enforce the provisions. Keith Harding’s consultation resulted in a mixed response from local authorities regarding their direct involvement in issuing the fixed penalties. Our own Focus Group also had some concerns in this regard based on their experiences in enforcing fixed civil penalty litter notices, when the alleged offender refuses to co-operate. The Focus Group, while not unhappy about being given a power to enforce the proposed new offence provisions, stressed the need to ensure that local authority officers are given sufficient powers to do so effectively. They welcomed the continued involvement of the police in enforcing the provisions, albeit with the recognition that in practice police involvement would, in general, likely be restricted to intervention when offenders failed to co-operate with local authority officers e.g. failure to provide name and address etc. The Bill attempts to make enforcement easier in a number of ways, including the removal of the requirement for corroborative evidence which in the past has, due to the lack of witnesses or their unwillingness to testify, caused problems; and decriminalisation of the penalty by permitting enforcement by civil diligence on the authority of local authority officers in place of a court warrant.

10. Fixed civil penalties, enforced solely by local authority officers, are optional provisions in England and Wales by virtue of the Dog (Fouling of Land) Act 1996. The Executive is advised by the Department of Environment, Food and Rural Affairs (DEFRA) that generally the legislation is working well, with only a few enforcement difficulties being encountered by local authority officers.
11. Fixed civil penalties, based on the procedure outlined in the Bill, are intended to reduce the burdens on the Procurator Fiscal Service and the criminal Courts. While provision has been made in the Bill for a person to request a court hearing in the event of dispute about the fixed civil penalty, in the event of non-payment and without any request for a court hearing, the local authority would proceed straight to the recovery of the monies without application to the courts but see paragraph 15 below.

12. Overall, fixed civil penalties are intended to offer a speedy resolution to what is in essence anti-social behaviour. If uncontested, they would be enforced as a civil liability by recourse to the civil diligence system with the local authority officer's notice giving authority to proceed in place of a court warrant for all lawful diligence. The penalty has been set at 20% of level 1 on the standard scale, currently £40, increasing by a further 10% of level 1 to £60 if remaining unpaid 28 days from the day after it was issued. It is considered that these have been set at the appropriate levels and could act as a deterrent to offenders and encourage them to change their behaviour and comply with the law; although decriminalisation of the means of enforcing unpaid penalties may reduce the extent of the anticipated deterrent effect. Provision has also been made for local authorities to retain such civil penalty (fine) income as a means of encouraging them to enforce the new provisions, although it should be stressed that the long term aim is, of course, to educate dog owners to clean up after their dogs so that the problem of dog fouling is largely eliminated.

Amendments

13. The Executive is of the view that there are several sections of the Bill that require to be amended. Many of these are minor technical or drafting amendments, but a few more significant amendments are required before the Bill would be considered acceptable to the Executive. These are detailed below.

14. It is clear that if local authority officers are to be largely responsible for enforcing the new provisions they need to have sufficient powers to do so effectively. Accepting that this does not appear to be a major problem in England and Wales, provision in the Bill would nonetheless be desirable to facilitate local authority officers who encounter difficulties in obtaining the personal details of alleged offenders. While it is anticipated that the continued involvement of the police will assist local authority officers in this regard the Executive is nonetheless of the view that there would be merit in amending the Bill to include an offence of obstructing a local authority officers in carrying out their duties. This offence would be triggered if an offender refused to give details to a local authority officer to enable the penalty to be issued or failed to co-operate in some other way. The limitation of such an offence would be that as local authority officers would not have a power of arrest, police assistance would be required before the alleged offender could be prosecuted, unless identity of the offender could be corroborated by another witness. While the Executive considers that in practice this provision is likely to be rarely used, its very existence will encourage offenders to co-operate given that non-compliance would result in police and criminal court involvement in addition to the fixed civil penalty.
15. Section 11 of the Bill provides for unpaid fixed civil penalties to be recovered as a civil liability "in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom". In practice, this means that local authorities do not need to take civil court action, in order to obtain decree carrying a warrant for all lawful diligence, before seeking to enforce any unpaid fixed penalty using the civil diligence system. The administrative notice would act in place of a court decree and warrant. However, local authorities could face difficulties in recovering the money due as fixed civil penalties without having access to information enabling civil diligence to be done (e.g. bank details or place of work). This is an issue which applies generally to use of the civil enforcement system and was considered in the Executive's recent consultation paper "Enforcement of Civil Obligations in Scotland". Other options, if civil procedures are to be used, would involve use of existing civil procedures within the civil justice system for establishment and recovery of monetary liabilities. That is, a small claim or extension of local authority powers to use summary warrant procedure for this purpose. The Executive considers that any civil enforcement mechanism adopted in the Bill should conform to the principles which the Executive has applied to its current proposals for reform of the civil enforcement system. Alternatively, there is an argument for the matter to continue being dealt with as a criminal offence. The Executive is currently considering which of the above procedures is the most appropriate and, if appropriate, will table an Executive amendment.

16. The Bill provides for the fixed civil penalty to be increased from £40 to £60 if it remains unpaid 28 days from the day after it was issued and no hearing has been requested. However, it does not make any provision for a hearing should a person wish to contest the appropriateness of the increased fixed penalty coming into effect e.g. in the event that the person has submitted a request for a hearing or has already paid the fixed civil penalty. While it may be that in such circumstances there may be some form of redress through the courts, the Executive considers there is some doubt as to whether that remedy would be sufficiently practical and effective to ensure compliance with article 6 of the European Convention on Human Rights. Consequently, in order to ensure compliance, the Executive intend to table an amendment which will allow a person, in certain circumstances, on whom the increased penalty has been imposed a similar right to request a hearing. For the avoidance of any doubt, the Executive also propose to table an amendment to provide for authorised officers/constables to waive the increase in the fixed civil penalty if they consider it is appropriate to do so e.g. firm evidence that the fine has already been paid.

17. In conclusion, the Executive confirms that it supports the Bill in principle subject to the above and other minor and technical amendments being accepted. Support for the Bill, albeit with amendments as necessary, emphasises the Executive’s commitment to tackling the problem of dog fouling which will in turn have a positive impact on improving the quality of life of the people of Scotland.
FINANCIAL IMPLICATIONS

18 The costs of implementing the Bill are outlined in the Financial Memorandum to the Bill. The main costs will fall on local authorities in terms of training staff (no requirement to recruit additional staff), costs of enforcement by civil diligence and administration, including IT systems. However there is provision in the Bill for local authorities to retain all the monies resulting from fixed civil penalties which should, based on the figures contained in the Financial Memorandum, exceed the costs of local authorities implementing the Bill. There may also be some savings for local authorities in terms of cleaning up refuse if the Bill reduces the number of instances when people in charge of a dog fail to clear up after it has fouled. There will be some cost to the criminal justice system depending on the actual number of appeals and fiscal fines (estimated at 8 per annum). The burden would be greater on the criminal justice system in the event that unpaid fixed civil penalties are not decriminalised (paragraph 15 above refers).

19. The provisions of the Bill will impose additional, albeit small, direct costs on the Scottish Executive in relation to the court service.

20. It is not anticipated that there will any additional costs on other bodies, individuals or businesses.

INTERESTED PARTIES

21. Police forces and local authorities, as the agencies responsible for enforcing the provisions of this Bill, should be consulted. Organisations responsible for the management of large areas of land to which the public have access (e.g. Historic Scotland) may also have comments to make on the provisions of this Bill as well as dog organisations.
COSLA Response to Scottish Parliament Private Members Bill on Dog Fouling
Executive Summary

1. Introduction

1.1 The Dog Fouling (Scotland) Bill was introduced in the Parliament in June 2002 by Mr Keith Harding, MSP, as a private members bill. The Local Government Committee has been designated lead committee and will be beginning its Stage 1 consideration of the Bill in October 2002.

1.2 COSLA has invited comment from member councils on the Bill, knowing it to be an issue of concern. The concerns expressed by councils regarding a range of issues identified in the Bill, suggest that a substantial re-drafting or perhaps an abandonment of the bill, in favour of an amendment to the Civic Government (Scotland) Act 1982, might be more practical, the main points of concern being:

- The lack of empowerment for local authority officers to require possible offenders to supply identification and the safety of those officers in seeking information;
- The system of hearings and how these will operate, should a Fixed Penalty Notice be challenged;
- The cost to councils of implementing the proposed legislation; and
- Enhanced public expectations as a result of this proposed Bill, which may be unable to be fulfilled.

2. General Comments

2.1 Councils noted that the offence has changed from permitting the dog to foul, to failure to clear up after the dog has defecated. This appears to be a sensible change as it now focuses on the act of removal of the faeces and makes the person more aware of a lack of action by him/herself causes the offence rather than the action of the dog. COSLA would welcome clarity in the legislation on the issue of stray dogs, the ownership of which can be identified.

2.2 COSLA notes that the Bill proposes to apply the provisions to any public open place and, in principle, this extension to the legislation on wider areas of land is welcomed. Current legislation defines areas where it is an offence to foul and in some councils’ experience is that this causes confusion in the minds of dog owners and public alike. The proposal to extend offences to "any public open place" is one that is sensible and clarifies the position for everybody.

2.3 There is a suggestion that an alternative to the proposed Bill would be to use existing powers under the Environmental Protection Act 1990. There are substantial arguments
that the EPA cannot be used to deal with the problem, and that at present the only provision is the CG (S)A 1982. As an alternative to this Bill, the Scottish Parliament might consider simply extending the EPA to cover dog dirt, by enacting an inclusive definition of litter (e.g. “Litter includes anything deposited by an animal”) so that dog fouling offences might be proceeded against under the existing EPA Fixed Penalty Notice procedure. An advantage of this approach would be that there would be a single code of procedure, rather than two separate codes.

2.4 There is concern, however, that the passing of new legislation will lead to enhanced public expectations that are unable to be fulfilled. Reinforcement of section 48 of the CG (S)A 1982, rather than the introduction of new legislation might be a more practical solution in addressing this matter.

3. **Empowerment**

3.1 Whilst a Police Officer in the exercise of his/her duty, has the power to require an individual to identify him or herself, and failure to do so is a separate offence, no such power is available to “an authorised officer” of a local authority. There nothing in the Bill to address this issue. Some councils have advised that enquiries for assistance from the police to deal with dog fouling offenders are often met with the response that police resources are not available to deal with such matters. There are, however, some good examples of joint working arrangements with the police, for example in Renfrewshire, where a Protocol on Joint Litter and Dog Fouling has been adopted by the Police and the Environmental Services department of the local authority.

4. **Fixed Penalty Notices and Hearings**

4.1 With regard to the Bill’s suggestion of using Fixed Penalty Notices and the use of hearings, where a person wishes to avoid paying an FPN, COSLA suggests the option to follow the system of FPNs already used for minor motoring offences; if the offender denies guilt, he/she simply fails to pay the fine within the appointed period and in due course is prosecuted as if there had never been a FPN. There should be the requirement to pay the whole fine within the specified time or, if payment by instalments is allowed, a failure to pay further instalments on the due date leads to the additional ‘surcharge’ and the balance being recoverable via the usual Means Enquiry procedure, with the alternatives of imprisonment and Supervised Attendance Order.

4.2 Whilst it is believed that there are likely to be few reports to the Procurator Fiscal, there may be instances where this is desirable. For example, where the situation occurs that a person has deliberately allowed their dog or the dog they have charge of, to foul in an enclosed children's play area, thus endangering public health, and where an offender has been obstructive in giving their personal details, then it may be more appropriate to process this through the Procurator Fiscal. COSLA would also welcome clarity on whether Procurator Fiscals put in the necessary resources for the proper implementation of the Bill when it is enacted.

4.3 Regarding the age of the offender, councils have expressed a view concerning the treatment of those under the age of 16, COSLA is concerned to see appropriate amendment in the proposed legislation that safeguards the enactment of a FPN, to the extent that ' the officer or constable has reasonable cause to believe that the person is
of or over sixteen years'. COSLA also seeks clarification regarding the treatment under this legislation, of children under the age of eight, if in charge of a dog.

5. **Cost**

5.1 It is noted that the income from Fixed Penalties will be returned to councils and this is welcomed. It is unlikely though, even allowing for the revenue which will be generated by a fixed penalty scheme, supervision, particularly in rural areas will be sufficient to eradicate the problem. The administration for a Fixed Penalty System for dog fouling does not exist at present, the cost of which is likely to exceed the amount described in the Financial Memorandum. There is concern too that costs will exceed revenue and that this legislation may put additional strain on local resources. Even supposing that a FPN might be recovered as if it was a civil debt, rather than a criminal penalty, the local authority would have to bear the cost in the first instance. If the debtor is untraced or has no assets, the costs may be irrecoverable, but by the time that the local authority realises this, those costs have been incurred.

5.2 COSLA supports the proposal that unpaid Penalties become a civil debt to the Council and particularly support the option to retain criminal prosecution.

5.3 COSLA suspects that the £6,630 identified in the Financial Memorandum distributed among 32 local authorities will not be sufficient to implement the Bill in each authority area. The Bill takes no account of staff costs for training, fieldwork or administration. Printing costs alone would more than swallow up the £207 allocated per authority. Investigation time for these offences will cost more in terms of an officer's time plus associated clerical support and transport costs, which run at approximately £20-£25 per hour. Furthermore, the costs to urban Local Authorities will be disproportionate because of the large numbers of common areas located there, which will to prove difficult and time consuming to deal with. It is not possible for local authorities to take on the additional responsibilities without substantial additional human and financial resources. The burden on councils concerning this proposed legislation needs to be recognised by additional appropriate resources being given to the local government sector. A detailed, accurate cost analysis should therefore be undertaken, before any new responsibilities are placed upon local authorities, which would be keen to progress work in this area, if it is properly funded.

6. **Public Expectation**

6.1 Several councils have suggested that the sanction suggested in the draft legislation will not have a significant impact on the anti-social behaviour arising from lack of responsible removal of dog faeces. Rather, it is suggested that the way forward is one of education and assistance. There have been good results in at least one council, in terms of reducing fouling by issuing standard "occupier" letters to housing estate residents (outlining their responsibilities and highlighting the health risks of improper behaviour), providing dog litter bins on popular walk routes, and promoting responsible dog ownership through leaflet and "goody bag" campaigns in conjunction with the local police.

6.2 COSLA suggest that an amendment to the Bill be made to address other broader issues relating to dog ownership, such as the need to introduce a registration/licensing
scheme for dogs, it having been highlighted that revenue for such a scheme could be used by the local authority to improve dog warden services and to promote related education and public relations initiatives.

COSLA
25 September 2002
SUBMISSION FROM KEITH HARDING

OFFENCE

- CAN BE ISSUED BY AUTHORISED OFFICER OR POLICE CONSTABLE
  - PAID
  - NOT PAID
    - NO CONVICTION
    - AUTOMATICALLY ENFORCED AS CIVIL COURT DECREE. NO NEED FOR ANY COURT PROCEEDINGS OR REGISTRATION
      - MECHANISM FOR WITHDRAWAL IF NOTICE SHOULD NOT HAVE BEEN ISSUED EG FALSE NAME GIVEN
      - PROPOSED AMENDMENT TO CREATE MECHANISM FOR APPEAL TO COURT IF DISPUTE THAT PENALTY HAS BEEN PAID OR HEARING REQUESTED

- FIXED PENALTY NOTICE – 20% OF LEVEL 1 FINE (£40)
  - SECTION 5
    - PAID
    - NO CONVICTION
  - SECTION 11
    - FIXED PENALTY INCREASED BY 10% OF LEVEL 1 FINE (£20)

- MUST BE ISSUED IN PERSON OR WITHIN 72 HOURS BY POST. THE LATTER ALLOWS SOME TIME TO IDENTIFY THE SUSPECTED OFFENDER IF NAME REFUSED
  - SECTION 5(2)
    - REQUEST HEARING
      - SECTION 8
        - TO COURT VIA PROCURATOR FISCAL
          - SECTION 8(4)
            - TRIAL
              - NO CONVICTION
              - CONVICTION AND FINE
              - ACQUITTAL

- OPTION TO PROSECUTE AS A CRIMINAL OFFENCE RETAINED
  - SECTION 1

Agenda item 3
Local Government Committee
12 November 2002