

## **DOG FOULING (SCOTLAND) ACT 2003**

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### **EXPLANATORY NOTES**

#### **COMMENTARY ON SECTIONS**

##### *Section 1: Offence*

6. Subsection (1) provides that, subject to the exceptions in subsection (1)(a) and (b), if a person who is in charge of a dog that defecates on a place to which the Act applies fails to immediately remove the dog's faeces that person will be guilty of an offence.
7. There are two exceptions to this. The first, in subsection (1)(a), applies if the person has a reasonable excuse for failing to remove the faeces. An example could be if the dog had diarrhoea – in such a situation, the person may have tried their best to remove the faeces but failed to do so fully. Another example of a reasonable excuse could be if the act of removing the faeces would create a risk of causing injury to the person in charge of the dog or to others.
8. The second exception is in subsection (1)(b), which applies if each person who owns, occupies or otherwise has control over the land has given permission that persons in charge of dogs that defecate on that land do not need to remove the excrement. Where there is more than one owner, occupier or other person or authority having control of the place, all must consent to dog fouling before there is an exemption to the offence. A specific example of this would be in a situation where there was a tenant and a landlord; both would need to give their consent. Permission can be given generally or specifically. Thus, permission could be restricted to specific areas or times. Permission could also be given on an individual basis or in relation to all persons in charge of dogs that defecate on the land. By virtue of the definition of "owner" in section 15 a creditor in a heritable security who is not in possession of the security objects is not regarded as an owner.
9. Subsection (2) provides that any person found guilty of the offence will be liable on summary conviction to a fine not exceeding level 2 on the standard scale. Summary conviction occurs when criminal proceedings in respect of the offence are brought before the district or sheriff court (without a jury sitting) and the person has been found, or pleads guilty. The current level 2 fine is £500.
10. Subsection (3)(a) creates a presumption that a person who is ordinarily in possession of a dog is regarded as being in charge of that dog at any time. This means that individuals will not be able to evade prosecution by claiming that they were not in charge of a dog because it was not on a lead at the time. It also means that where there is a doubt or dispute as to who was in charge at the particular time the person normally in possession of the dog will be regarded as having been in charge unless that person can prove another person was in charge.
11. Subsection (3)(b) makes it clear that disposal of the faeces in a rubbish bin or a bin provided specially for the disposal of dog faeces is considered sufficient removal. The effect of subsection 3(c) is that the dog faeces must not be subsequently thrown, deposited or dropped onto any other place to which the Act applies.

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(asp 12) which received Royal Assent on 22 April 2003*

12. Subsection (3)(d) provides that being unaware of the defecation or not having suitable means of removing the faeces are not considered to be reasonable excuses under section 1(a).
13. Subsection (4) provides that corroboration (evidence from two sources) is not required to convict someone of this offence. In practice this means that authorised officers and police constables will be able to operate alone rather than in pairs.

***Section 2: Places to which Act applies***

14. Subsection (1) applies the Act to any public open place. Public open place is defined in subsection (3) and includes areas to which the public or a section of the public have access whether or not they are expressly or impliedly permitted to do so. The reference to a “section” of the public makes it clear that places which may be used by a special class of members of the public, rather than generally by the public are included as are places where access may be subject to certain conditions, e.g. the purchase of a ticket. The provision also makes clear that what matters is whether members of the public or a section of the public have access as a matter of fact, not whether they have permission to have access. For the purposes of the Act, any covered place which is open to the air on at least one side is ‘open to the air’ (subsection (4)).
15. Public open place is also defined as including communal areas such as back gardens, common passages, closes, courts, stairs, back greens, gardens, yards or any other similar area whether or not such places are open to the air.
16. Subsection (2) provides that the Act does not apply to agricultural land which is defined in subsection (3) by reference to the definition of agricultural land in section 86(1) of the Agriculture (Scotland) Act 1948. That is “land used for agriculture which is so used for the purposes of a trade or business”, “agriculture” being defined in section 86(3) of the 1948 Act. Under section 86(1) of the 1948 Act, the Scottish Ministers may designate land as “agricultural” for certain purposes even although it is not being used for agriculture. That land is not covered by the exemption until it is actually in use for agricultural purposes.

***Section 3: Exceptions to offence***

17. The existing law in the 1982 Act does not apply to blind people in charge of guide dogs and stockpersons in charge of working dogs. This section of the Act retains these exceptions and in addition specifies that certain types of persons in charge of certain types of dog are also not subject to the Act.
18. Subsection (1)(a) provides that a blind person in charge of a dog that is being used for that person’s guidance will not be subject to the Act. In line with the existing law and unlike the position in relation to the offence of dog fouling in England and Wales, it is not necessary for the blind person to be registered blind.
19. Subsection (1)(b) sets out an exception for persons in charge of working dogs being used for the tending or driving of sheep or cattle. Subsection (1)(c) provides exceptions for members of the armed forces, Customs and Excise or the police force for any area. Subsection 1(d) provides an exception for persons in charge of rescue dogs. These exceptions apply only when the dog is working.
20. Subsection (1)(e) provides an exception for a disabled person in charge of a dog that has been trained to assist that person but only if the disabled person has a physical impairment that affects their mobility, manual dexterity, physical co-ordination or ability to lift, carry or otherwise move everyday objects. The effect of this is that disabled persons with dogs to assist them will be subject to the Act unless the disability affects their ability to clear up after their dog. The term “disabled person” has the same meaning as given in section 1 of the [Disability Discrimination Act 1995 \(c.50\)](#), according to which “a person has a disability ... if he has a physical or mental

impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.”

21. Subsection (2) provides an order-making power for the Scottish Ministers to add, remove or amend the exceptions to the Act. The order cannot be made until the Parliament has approved a draft of the order by resolution (this procedure is commonly known as the affirmative procedure – see section 15(3)(b)). Adopting the affirmative procedure in this case will require the Parliament to agree to any change to the exceptions to the offence.

#### ***Section 4: Authorisation by local authority of persons to issue fixed penalty notices***

22. This section requires each local authority to authorise in writing at least one person to issue fixed penalty notices. In practice, the local authority will be able to authorise as many other persons as it considers necessary to carry out its functions in accordance with the Act. The section does not restrict the local authority to authorising employees; it could for example authorise contractors to issue fixed penalty notices on its behalf.

#### ***Section 5: Issue of fixed penalty notices***

23. **Section 5** allows persons suspected of having committed an offence under the Act to be issued with a fixed penalty notice as an alternative to criminal prosecution.
24. Subsection (1) allows an authorised officer of the local authority or a police constable to issue fixed penalty notices to a person where the authorised officer or police constable has reasonable grounds for suspecting of that the person has committed an offence under the Act.
25. Subsection (2) sets out that an authorised officer may require the person suspected of committing the offence to provide his or her name and address. Subsection (3) requires that when asking for these details, the authorised officer must tell the person that he or she has reasonable grounds for suspecting an offence has been committed and that a failure to provide the required information may be an offence.
26. Subsection (4) provides that any person who fails to provide their name and address without a reasonable excuse is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale (currently £500).
27. Subsection (5) requires the fixed penalty notice to be issued as soon as is reasonably practical. If the fixed penalty notice is not issued at the time of the offence then there is a maximum time limit of seven days after the commission of the offence in which the notice can be issued.
28. Subsection (7) provides that a fixed penalty notice can be issued to a person by handing it or delivering it to that person. This is the primary method of issuing fixed penalty notices however subsection (8) provides that if the authorised officer or constable has been unsuccessful in issuing the fixed penalty notice under subsection (7) they may then issue it by leaving it at the person’s last known address or by sending it to them by post at that address.
29. Subsection (9) places a requirement on an authorised officer or constable who has issued a fixed penalty notice in accordance with subsection (7) to then send a copy of the notice by post to the person at the persons last known address. This must be done as soon as reasonably practicable and no later than seven days after the notice has been issued. This is to provide additional protection to innocent parties whose details may have been falsely given when the notice is issued personally.
30. Subsection (10) provides that when a notice is sent by post it is deemed to take effect at the time of posting.

### ***Section 6: Form of fixed penalty notices***

31. [Section 6\(1\)](#) lists the information that a fixed penalty notice must contain. No style of notice is prescribed by the Act.
32. While the Act does not prescribe a style of notice, subsection (2) confers power on the Scottish Ministers to prescribe the form of fixed penalty notices thereby ensuring that the same form of notice is used throughout Scotland. Subsection (3) provides that an order made under subsection (2) can amend, remove or add to the list of information that is required to be included in a fixed penalty notice. Any order prescribing the form of fixed penalty notices cannot be made unless the Parliament has approved a draft of the order by resolution (affirmative resolution procedure – see section 15(3)(b)).

### ***Section 7: Restrictions on proceedings***

33. This section prevents criminal proceedings being brought for the offence of dog fouling against the person named in the fixed penalty notice unless that person requests a hearing before the expiry of the “period for paying.” The section also provides that criminal proceedings may be brought where a fixed penalty notice has been withdrawn under section 12. The period of paying is defined in section 16 as being the period of 28 days beginning with the day after the day on which the fixed penalty notice was issued. The number of days in the period for paying may be amended by an order made by the Scottish Ministers which is subject to negative resolution procedure (see section 16(1) and (2)).

### ***Section 8: Request for a hearing***

34. This section provides that a person who has been issued with a fixed penalty notice may request a hearing in respect of the offence. Any such request must be in writing and must be posted in sufficient time to arrive with the local authority within the 28-day period mentioned above. When sent by post, service is effected at the time when the notice would arrive in the normal course of post. Accordingly, if a notice arrives with the local authority outwith the period for paying it may be valid depending on when it was posted.
35. Subsection (4) provides that when a hearing is requested within the required timescale the fixed penalty is no longer payable. A person authorised for the purpose of notification must provide the procurator fiscal with details of the request for a hearing unless the fixed penalty notice has been withdrawn under section 13. The procurator fiscal will treat the request in a similar manner to a complaint from the police and decide whether to initiate district court or sheriff court proceedings. In the event of a conviction following such proceedings the offender would be liable a fine of up to £500 (see section 1(2)).

### ***Section 9: Amount and payment of fixed penalty***

36. Subsection (1) provides that the fixed penalty will be payable to the local authority in whose area the offence was committed. Subsection (2) sets the amount of the fixed penalty at an amount that is equal to 20% of level 1 on the standard scale. Level 1 is currently £200, making the penalty to be paid £40. Specifying the level of the fixed penalty by reference to a percentage of level 1 on the standards scale ensures that the fixed penalty will increase in line with changes in the standard scale without the need for any amendment to the Act. The percentage can be changed by the Scottish Ministers under subsection (2) by an order subject to affirmative resolution procedure (see section 15(3)(b)).
37. Subsection (3) provides that a fixed penalty received by the local authority is treated as if it were a fine imposed by a district court. Section 23 of the [District Courts \(Scotland\) Act 1975 \(c.20\)](#) provides that fines imposed in the district court accrue to the local authority.

This provision therefore means that the local authority retains all money received in respect of payment of fixed penalties.

### ***Section 10: Increase in fixed penalty***

38. **Section 10** provides that where a fixed penalty has not been paid on time and no request for a hearing has been received, the amount of the fixed penalty will be automatically increased by 10% of level 1 on the standard scale. Currently this means an additional £20, making the amount of penalty payable £60. This section also gives the Scottish Ministers power by order to change the percentage increase. This order-making power is subject to affirmative resolution procedure (see section 15(3)(b)).

### ***Section 11: Recovery of unpaid fixed penalties***

39. **Section 11** deals with the recovery of unpaid fixed penalties. After the expiry of 28 days the local authority is able to enforce the unpaid penalty as increased under section 10 as if it were an extract registered decree arbitral. In practice this means that the unpaid penalty can be recovered in the same way as a sum of money due under a civil court decree. There is no need for any application to the sheriff court for any orders.

### ***Section 12: Judicial determination of enforcement of fixed penalty***

40. **Section 12** provides a mechanism under which disputes as to whether or not a fixed penalty has been paid or a hearing sought within the period for paying can be resolved by the courts. Subsection (1) enables a person who is in dispute with the local authority to apply to the sheriff by summary application for a declaration that the fixed penalty cannot be enforced under section 11 either because the fixed penalty has been paid or a request for a hearing has been made within the period for paying.
41. Subsection (2) provides that the sheriff may declare that the person has or has not paid the penalty or requested a hearing within the period for paying and that the fixed penalty is or is not enforceable under section 11.

### ***Section 13: Withdrawal of fixed penalty notice***

42. Under this section an authorised officer or a police constable can withdraw a fixed penalty notice if he or she determines that the offence has not been committed or that the notice should not have been issued to the person who is named in the notice. A local authority officer can only withdraw notices issued by the local authority and the police only have the power to withdraw notices issued by police constables. A fixed penalty notice might be withdrawn, for example, where it was issued to a person and it was then later discovered that the person had consent from the owner and occupier of the land (section 1(b)). Another situation where a fixed penalty notice may be withdrawn is if it transpires that there has been a mistake as to the identity of the alleged offender and the fixed penalty notice should not have been issued to the person who is named in the notice.

### ***Section 14: Effect of Act on byelaws***

43. Under this section any existing byelaws in respect of an offence of dog fouling will cease to have effect when the Act comes into force. This includes byelaws made by local authorities and any made under private legislation. In addition, any byelaws that are made after the Act comes into force shall not have effect in so far as they apply to places to which the Act applies

### ***Section 15: Orders***

44. Subsection (1) provides for the powers given to the Scottish Ministers to make orders under the Act to be exercisable by statutory instrument.

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45. Subsection (3)(a) provides that any statutory instruments made in respect of the period for paying (section 15(2)) are subject to negative resolution.
46. Subsection (3)(b) provides that any statutory instruments made in respect of section 3(2) (power to amend exemptions to offence), section 6(2) (the form of fixed penalty notices) section 9(2) (the amount of the penalty) and section 10 (the amount of increase in the penalty) are subject to affirmative resolution.

***Section 16: Interpretation***

47. Subsection (2) provides the Scottish Ministers with an order-making power to alter the 28-day period for paying. The order-making power is subject to negative resolution procedure (see section 15(3)(a)).

***Section 17: Consequential repeal of section 48 of the Civic Government (Scotland) Act 1982***

48. This section repeals section 48 of the Civic Government (Scotland) Act 1982 which sets out the current offence of dog fouling.

***Section 18: Short title and commencement***

49. Subsection (2) provides that the Act will come into force six months after the date of Royal Assent. This period is to allow for local authorities and the police to put into place the required administrative systems (and staff resources).