PARLIAMENTARY COUNSEL OFFICE
SHAPING THE LAW OF SCOTLAND

GUIDANCE ON INSTRUCTING COUNSEL:

COMMON LEGISLATIVE SOLUTIONS

Scottish Government
Riaghaltas na h-Alba
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Foreword
by Andy Beattie, Chief Parliamentary Counsel

Andy Beattie
Chief Parliamentary Counsel

As the legislative drafting office for the Scottish Government, Parliamentary Counsel Office strives to produce first-class legislation: clear, effective, accessible law which will serve the people of Scotland well.

Having drafted all of the Scottish Government's Bills since the advent of devolution, we are always looking to share our knowledge of legislation with others who take an interest in how it is made. That is why I was delighted, on behalf of the Scottish Government, to support the UK-wide initiative to develop this guidance.

Its genesis is in work undertaken by the National Archives to research patterns which occur in legislation: in other words, common legislative solutions to policy questions or problems which occur frequently.

So where legislation is being developed in those commonly recurring areas, we hope that this guidance will act as a useful tool to enable the best possible quality of Bill instructions to be provided to counsel – allowing us in turn both to deliver for our Ministers more efficiently and effectively and to help users of legislation by making it more consistent.

This guidance has been produced in collaboration between members of each of the four legislative drafting offices in the UK, who have consulted officials across all four administrations in refining it: solicitors, policy officials and drafters alike. It represents an excellent example of civil service collaboration, exemplifying principles of mutual respect and cooperation in the carrying out of one of our most essential public functions, the instruction and creation of good law.

We would welcome suggestions and feedback on this guidance from all those who take an interest in legislation as we work to continuously improve the quality of Scotland's law.

As with Drafting Matters!, our drafting manual published in 2016, we hope that publishing this guidance on instructing legislation will help to make the process more transparent and accessible – not just to those working within government, but to the wider public.

Andy Beattie
Chief Parliamentary Counsel

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Background

This guide is intended to help officials to develop policy and produce instructions for Bills, and to assist legislative drafters.

A group of legislative drafters from the four drafting offices in the UK is responsible for producing and maintaining the guidance:

- James George (Office of the Legislative Counsel, Cardiff)
- Justin Leslie (Office of the Parliamentary Counsel, London)
- Luke Norbury (Office of the Legislative Counsel, Belfast)
- Gavin Sellar (Parliamentary Counsel Office, Edinburgh).

The group would be delighted to receive any feedback on this guidance, whether on the overall approach adopted or on points of detail. Please send any feedback on this Scottish Government edition of the guidance to Gavin.Sellar@gov.scot.

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Introduction

1. This Chapter contains a brief overview of the process of making policy for legislation, and explains how the detailed guidance in the following Chapters fits in with that process.

Developing policy for legislation

2. A traditional model for developing policy for legislation is as follows:

    - identify what the issue or "problem" is,
    - think of possible solutions and the advantages and disadvantages of each solution,
    - analyse the possible solutions and their advantages and disadvantages, and select the most promising solution,
    - if a legislative solution is chosen, work up the proposed solution in sufficient detail so that draft legislation could be produced, and
    - test the worked-up solution against a range of factual scenarios to see whether the solution would have the desired effect in those scenarios.

3. In the course of doing this, policy makers will of course need to work out what the existing legislative landscape is, and how that affects, and is affected by, the proposed solution.

4. Some policy issues that arise are novel or unique, and as such may require creative thinking and entirely novel solutions. Similarly, sometimes what is wanted is a new solution to a commonly occurring problem.

5. But there are some commonly occurring policy issues that are dealt with by adopting a commonly occurring legislative solution. That is what this guidance is concerned with.

6. For these cases, it is possible to identify issues that may need to be addressed, when working up and instructing on the proposed solution. That is what we have done for a number of legislative solutions.

7. The aim of the detailed guidance is to stimulate thinking, increase awareness of possible options, improve the quality of instructions, and improve the efficiency of the policy-making and instructing processes, by articulating matters that may need to be addressed.

8. Please note, however:

    - The detailed guidance in the following Chapters sets out matters that *may* need to be considered. Some of these matters are likely to arise in all or most cases, but other matters may arise only sometimes or even rarely. So please

don’t assume that the instructions necessarily need to address all the issues identified in the detailed guidance.

- Depending on the policy, it may of course be the case that something not mentioned in the detailed guidance is wanted – whether in addition to the matters mentioned there or instead of some of those matters.

- Above all, it must be emphasised that although the detailed guidance aims to assist policy makers and instructors, it is not intended to constrain thinking and is not a substitute for working out what is really wanted from a policy perspective.

9. We hope that the detailed guidance will also help policy makers when they are dealing with any other topics upon which legislation is required, as the detailed guidance in the following Chapters is a guide to the level of meticulous analysis that needs to be undertaken whenever policy on legislation is developed and instructed on.

Format of following Chapters

10. Each Chapter deals with a particular legislative solution, and is in the following format:

Description of the solution

11. This high level description is intended to assist policy makers in selecting the correct solution for the policy issue they wish to address.

12. Where there is a section on related solutions, the aim is to draw the policy maker’s attention to alternative policy solutions.

Elements of the solution

13. This section consists of a series of questions that the instructor may or will need to address, in order to enable the drafter to produce a draft.

Examples of the solution

14. This section lists examples of the solution, so that policy makers, instructors and drafters can easily locate examples of the solution.

15. These examples show the policy and drafting choices that have been made in other contexts. Again, the aim is to show examples that reflect a range of policy choices that have been made, not to constrain thinking.

Additional solutions to be added in future

16. We hope to expand this guidance over time, to include detailed guidance on other legislative solutions, including:

    - offences
    - civil penalties
    - appeals
    - giving notices
    - publishing documents
    - guidance (including codes of conduct and codes of practice)
    - information sharing
    - reorganisation of public bodies (including merger and dissolution)
    - ombudsmen
    - subordinate legislation.

    Any suggestions as to other legislative solutions that might be covered would be welcome.

Establishing a statutory corporation

Contents of this Chapter

Description of the legislative solution

This legislative solution establishes a body or office to exercise statutory functions, where it has been decided that those functions should be exercised by a new public authority, rather than by Ministers[1], an existing public authority or a voluntary or private sector body.[2]

The reasons for establishing a new body or office as a statutory corporation, rather than in another form such as an unincorporated association, generally relate to the fact that a statutory corporation has its own legal personality distinct from that of the individual members or office-holder. It can therefore enter into legal relations and hold property, and continues to exist despite changes in the membership of the body or holder of the office. Executive and regulatory agencies are commonly statutory corporations with their own staff and budgets, whereas advisory bodies and tribunals are not usually statutory corporations.

In England, Wales or Northern Ireland, a statutory corporation may be a body corporate (i.e. a body with a number of members) or a corporation sole (i.e. an office held by a single individual). Scots law does not have the concept of a "corporation sole," but legislation may provide that an office constitutes a "distinct juristic person" from the individual holding it, which is intended to achieve a similar effect to creating a corporation sole.[3]

Instead of creating a body or office directly, an Act may delegate the power to establish it (for example, by giving Ministers the power to establish it through subordinate legislation).

Related legislative solutions

Designation: an alternative to establishing a new statutory corporation may be to designate an existing person or body to exercise particular functions.

Collaboration: it may be appropriate to require the newly created statutory corporation and other bodies to work together in exercising their functions.

[1] References to Ministers should be read as including Northern Ireland Departments.
[2] The Public Bodies Unit of the Scottish Government wishes to be consulted on all draft legislation in Scotland for new public bodies and public appointments, with a view to ensuring greater consistency in governance arrangements; the Unit has its own guidance on the establishment of new public bodies and keeps a comprehensive list of other legislation that may potentially apply (see the Annex to this Chapter for the most commonly applying). Cabinet Office Guidance on public bodies is also available at https://www.gov.uk/government/publications/public-bodies-information-and-guidance
[3] See for instance section 51A(2F) of the Health and Safety at Work Act 1974. The Office of the Advocate General should be consulted on this issue.

Elements of the legislative solution

1. Name and status of the statutory corporation

1.1. What will be the name of the body or office (including, where appropriate, the name in Welsh, Gaelic etc. as well as English)?

1.2. Should the body or office have Crown status, either generally or for particular purposes? The main effects of a body having Crown status are that it is not bound by legislation that does not bind the Crown, and that its staff are Crown servants. Most statutory corporations (and most other public bodies) are not Crown bodies.

2. Positions to which appointments are made

2.1. In the case of a body corporate:

2.1.1. How many members should there be? It is more usual to set a maximum and minimum number of members than to legislate for a specific number.

2.1.2. Should there be different types of member (such as executive and non-executive members, or professional and lay members)? Must there be members of every type?

2.1.3. Should all members be appointed to the body, or should any of them be members automatically by virtue of holding another office (such as the relevant Auditor General[4])?

2.1.4. Should there have to be a chair? And a deputy chair? Should they be appointed directly to those positions, or chosen from the members of the body?

2.2. In the case of an individual office:

2.2.1. Should there be one or more deputies to the office-holder? Should a deputy be a separate office-holder, or a member of staff designated for the purpose?

2.2.2. In which circumstances should the corporation's functions be exercised by a deputy (for example, if the office is vacant or the office-holder is unable to act)?

3. Appointment of members or office-holder

3.1. Who should appoint the office-holder and any deputy, or the chair and members of the body? Appointments might, for example, be made by Ministers, the legislature, the Queen, other members or staff of the statutory corporation, or by another body.

3.2. Should appointments have to be made on the recommendation or nomination of another body, or be approved by another body (such as Ministers or the legislature)?

3.3. Should any criteria have to be applied in making appointments, or should there be any qualifications for appointment (such as particular skills or experience)? Should any

[4] These are the (UK) Comptroller and Auditor General, the Comptroller and Auditor General for Northern Ireland, the Auditor General for Scotland and the Auditor General for Wales.

matters disqualify people for appointment (such as membership of the legislature or a local authority)?

3.4. Should the appointment process be subject to external oversight? (Where appointments are made by Ministers, this is likely to require an amendment to the relevant public appointments legislation: see the Annex.)

3.5. Should membership of the statutory corporation disqualify a person from membership of the House of Commons or devolved legislature? (This may require an amendment to the relevant disqualification legislation: see the Annex.)

3.6. For what period should a person be appointed? An Act may fix the term of office, or give the person making the appointment power to fix it, perhaps subject to a maximum.[5]

3.7. Should a person be eligible to be re-appointed at the end of the period of appointment? Should there be any restriction on the number of times a person may be re-appointed?

3.8. Who should set the terms of appointment (insofar as they are not set by the legislation)?

4. Termination of appointment

4.1. Should a person be able to resign from office, and if so how (e.g. notice to Ministers or the chair)?

4.2. Should it be possible to suspend or dismiss a person from office? Who should be able to suspend or dismiss a person, and on what grounds? The grounds should reflect the nature and functions of the body or office.

4.3. Should the Act set the grounds and procedure for dismissal, or give the person making the appointment the power to deal with them in the appointment letter?

4.4. Where an Act specifies grounds for dismissal, the general ground of unfitness, unwillingness or inability to act seems to be universal. Other more specific grounds that may be mentioned include:

- unauthorised absence from meetings of a body for a period (often 6 months);
- conviction for a criminal offence;
- insolvency or indebtedness.

4.5. If insolvency is to be a ground for dismissal, which types of insolvency proceedings or arrangements should give rise to the power to dismiss?

4.6. Should any events (such as election to the legislature) automatically terminate a person's appointment?

[5] In Scotland it should be noted that if the Public Appointments and Public Bodies etc. (Scotland) Act 2003 is applied to the new body, the maximum total length of appointment would be 8 years, as per the code of practice of the Commissioner for Ethical Standards in Public Life in Scotland.

5. Conflicts of interest

5.1. Is anything needed to prevent or regulate conflicts between the personal interests of members or office-holders and the performance of their functions?

5.2. Should it be sufficient to rely on the person who makes appointments to consider potential conflicts of interest in the appointment process?

5.3. Should a prejudicial conflict of interest be a ground for dismissal?

5.4. Alternatively, should members be required to declare conflicts of interest (e.g. at meetings of the body) and prohibited from taking part in decisions in which they have an interest? Or should the corporation just be required to make arrangements for dealing with conflicts of interest?

5.5. Should the body be required to keep and publish a register of members' interests? (This is the norm for Scottish devolved bodies but less common elsewhere.) If so, which interests must be registered? When does the duty to register them arise?

6. Effect of vacancy or other defect on validity of acts

6.1. Who should exercise the functions of an individual office-holder if the office (and any post of deputy) is vacant or if the office-holder (and any deputy) cannot act because of a conflict of interest? Should there be provision for Ministers to appoint another person to act?

6.2. If the position of chair of a body corporate is vacant, or if the body has fewer members than it is required to have, should the body still be able to act? Or should anything done by the body be invalid?

6.3. If the appointment of a member is procedurally defective, or was made in breach of any eligibility rules, should a decision in which the member participates be valid?

6.4. Should a decision be valid if it is made in breach of rules relating to conflicts of interest?

7. Payments to members

7.1. What sort of payments (if any) should the statutory corporation make to its members? Should they receive remuneration (such as a salary or fees) for performing their duties? Should they receive payments in respect of expenses they incur, or other allowances?

7.2. Should the statutory corporation have a power or a duty to pay remuneration or allowances? Should Ministers be able to require it to pay them? Should the amount of the payments be set by Ministers, or by the corporation with the approval of Ministers?

7.3. Should other payments be possible, such as compensation for loss of office? Is such compensation paid by Ministers, or by the statutory corporation with their approval? Must there be special circumstances to justify paying compensation?

7.4. Should the corporation make pension arrangements for its members? Should it have a power or duty to do so? Should it be free to choose whether to operate its own pension scheme, make payments into another scheme, or provide pensions in some other way? Should its pension arrangements require Ministerial approval?

7.5. Should members be entitled to join the GB or NI civil service pension scheme? (This may require an amendment to the relevant legislation: see the Annex.)

8. General powers

8.1. A statutory corporation will have the power to do things that are incidental to the exercise of its functions. Examples may include holding land and other property, making contracts, participating in companies, co-operating with others, receiving assistance in performing the corporation's functions, and bringing legal proceedings.

8.2. Should any of the corporation's general powers be restricted? For example, should it be allowed to invest money only in certain ways, or require Ministerial approval to dispose of property or form a company? Should it be prevented from doing any things that might otherwise be regarded as incidental to its functions?

8.3. Should the corporation be able to provide assistance to others for purposes that go beyond its own aims and functions? Should it have the power to give assistance to other bodies for the performance of the functions of those other bodies?

8.4. Should the corporation have a duty to do anything that it might otherwise have an incidental power to do? For example, should it be required to consult other public authorities, share information with them, or co-operate with them?

8.5. If the corporation is expected to share information with others, is it necessary to remove or qualify any restrictions that might otherwise prevent it from doing so?

8.6. In Northern Ireland, legislation establishing a body corporate usually applies section 19 of the Interpretation Act (Northern Ireland) 1954, which contains a number of general provisions about the powers and procedures of statutory corporations.

9. Procedure

9.1. Should the corporation be free to make its own rules regulating its decision-making procedure, including the quorum for meetings? Should it be required to make rules or standing orders? Should the rules be approved, or even made, by Ministers?

9.2. Do any aspects of the corporation's procedures need to be specified or regulated by the legislation? For example, are special rules needed about quorum, to ensure that different categories of member are represented at meetings?

10. Committees

10.1. Is the corporation likely to establish committees? Should it be required to establish particular types of committee (e.g. regional committees, advisory committees)?

10.2. Should there be requirements relating to the membership of any of its committees?

10.3. Is a committee, or the corporation itself, likely to establish sub-committees? Should there be any membership restrictions for sub-committees?

10.4. Should people who are not members of the body be eligible for appointment to its committees? Should people who are not members of a committee be eligible for appointment to its sub-committees? If non-members are appointed:

10.4.1. Should there be a limit on how many non-members can be appointed?

10.4.2. Can a committee or sub-committee consist entirely of non-members?

10.4.3. On what terms should non-members be appointed? Can they be paid?

10.4.4. Are non-members entitled to vote at committee or sub-committee meetings?

11. Staff

11.1. Will the statutory corporation need staff? Will it employ its own staff? Will it be staffed by civil servants provided by the sponsoring department or administration? Will staff be seconded to the statutory corporation from other organisations?

11.2. Should the corporation be required to have a chief executive (or any other posts)? Should the chief executive be appointed by the corporation itself? Should the appointment have to be approved by Ministers? Should the first appointment be made by Ministers?

11.3. Should the corporation be free to determine the terms and conditions on which staff are employed (including their remuneration), or should the terms and conditions be approved or set by Ministers?

11.4. Should the corporation have a power to make pension arrangements for staff, or a duty to do so? Should it be free to decide whether to operate its own pension scheme, make payments into another scheme, or provide pensions in some other way? Should its pension arrangements require Ministerial approval?

11.5. Should staff be entitled to join the principal civil service pension scheme? (That follows automatically where people employed by the corporation are civil servants; otherwise it may be necessary to amend the relevant legislation: see the Annex.)

11.6. Should the statutory corporation be exempt from the obligation to have employer's liability insurance in respect of injury or disease suffered by its employees?

12. Delegation

12.1. Should the statutory corporation have the power (or be under a duty) to delegate the exercise of any of its functions? The corporation might, for example, have the power to delegate functions to:

- committees or sub-committees;
- individual members of the corporation;
- members of staff.

12.2. Where there is a power to delegate to a committee or sub-committee, should it only permit delegation to a committee or sub-committee that meets certain membership requirements (or other requirements)? Should a power to delegate to members of the corporation or its staff be limited to particular types of member?

12.3. Should any functions be excluded from a general power to delegate, so that they must be exercised by the corporation itself, for example because of their importance?

12.4. Should the statutory corporation retain the power to exercise a function it has delegated? Or can only the delegate exercise the delegated function?

12.5. Should a committee be able to sub-delegate functions that have been delegated to it, for example to a sub-committee or an individual member of the committee?

12.6. Should any other delegation between parts of the statutory corporation be possible?

13. Execution and authentication of documents

13.1. If the corporation has a seal for executing deeds (which is generally only needed for land transactions), should there be any requirement for the use of the seal to be accompanied by the signature of particular members or employees of the corporation? Should this be left to the corporation to decide for itself?

13.2. Should there be a presumption that a document has been properly signed and sealed, so that there is no need to prove its authenticity (in the few cases where that would be required by the law of England & Wales or Northern Ireland)?

13.3. In Scotland, provision about these issues is not required, as they are addressed by the Requirements of Writing (Scotland) Act 1995; in Northern Ireland, section 19(1)(c) of the Interpretation Act (Northern Ireland) Act 1954 may be sufficient.

14. Money

14.1. Should the statutory corporation receive payments (or “grants”) from Ministers? (This would not be appropriate for a Scottish body that is to form part of the Scottish Administration.) Should it be possible for the payments to be made subject to conditions (including conditions that could mean the money has to be repaid)?

14.2. Should the statutory corporation have the power to borrow money? Should it be able to borrow from any lender, or only from Ministers? Should there be any limit on how much it can borrow? Should borrowing require the approval of Ministers?

14.3. Might Ministers provide any other forms of financial assistance (such as guarantees or indemnities)?

14.4. Should the corporation be able to accept gifts, even if the property is likely to be held for the long term and money may need to be spent to maintain it?

14.5. Should the statutory corporation be able to charge fees for providing services or carrying out any of its functions? Should it be free to decide how much to charge, or should the fees require the approval of Ministers or be set by them?

14.6. Should the corporation be required to pay any sums that it receives to Ministers or into the relevant Consolidated Fund?

14.7. Should the corporation have the power to make grants, lend money or give other financial assistance? Should it be able to give assistance subject to conditions?

14.8. Should there be any restrictions on its powers to give financial assistance, such as requirements that assistance is only given for particular purposes or on particular terms, or a requirement to obtain the agreement of Ministers?

15. Plans, estimates and reports

15.1. Should the statutory corporation be required to produce an estimate of income and expenditure for each financial year (other than its first financial year)?

15.2. Should it be required to prepare a plan for each financial year, or for a longer period, setting out how it proposes to carry out its activities during the period? Occasionally both annual and longer-term plans are required, or annual plans are required to include financial estimates.

15.3. Should the statutory corporation be required to make annual reports on how it has exercised its functions during each financial year?

15.4. If any of these documents are required:

15.4.1. When must the statutory corporation prepare the document? Consider which period the first estimate, plan or report must cover, and when it must be prepared.

15.4.2. Are there any specific matters that an estimate, plan or report must deal with, or any criteria or standards that it must apply?

15.4.3. Should there be any requirement to consult in preparing the document?

15.4.4. Should the document be submitted to Ministers? Should there be a requirement to lay it before the relevant legislature (by the corporation or Ministers), or for it to be published?

15.5. In the case of an estimate or plan:

15.5.1. Should the document require the approval of Ministers? Should they be able to modify it?

15.5.2. Should the corporation be required to exercise its functions in accordance with its plan? Should Ministers be required to provide funding in accordance with a plan or estimate?

16. Accounts and audit

16.1. If there are accounting and audit requirements, they should appear in the legislation establishing the statutory corporation. (But for Scottish bodies, rely on sections 19, 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000 if they apply.)

16.2. The usual form of accounting provision requires the corporation to keep proper accounts and accounting records, and to prepare a statement of accounts for each financial year in accordance with directions given by Ministers (or HM Treasury).

16.3. Are special rules needed about the appointment, identity or responsibilities of the corporation's accounting officer? For example, is it necessary to require that the accounts are signed by the statutory office-holder, or to enable Ministers to appoint the accounting officer or specify the officer's responsibilities?

16.4. The standard features of audit provisions are:

16.4.1. The accounts must be submitted to the relevant Auditor General.

16.4.2. The Auditor General must examine, certify and report on the accounts.

16.4.3. The certified accounts and report must be laid before the relevant legislature.

16.5. Consider:

16.5.1. whether the accounts should be submitted to the relevant Auditor by the statutory corporation itself or by Ministers;

16.5.2. whether to specify a date by which the accounts must be submitted (31 August and 30 November are common) or give Ministers the power to do so;

16.5.3. whether the certified accounts and report should be laid before the relevant legislature by the Auditor or by Ministers;

16.5.4. whether to specify a period within which the certified accounts and report must be laid (4 months from submission of the accounts is common).

16.6. Occasionally statutory corporations are required to establish audit committees. If an audit committee is to be required, what functions and membership should it have?

16.7. Should the relevant Auditor General have the power to carry out examinations into the economy, efficiency and effectiveness with which the statutory corporation is using or has used its resources? If so:

16.7.1. Does the power need to exclude any questioning of the policies pursued by the corporation?

16.7.2. Should there be a duty to consult anyone before exercising the power?

16.7.3. Should the Auditor have a duty or only a power to make a report of the results of the examination?

16.7.4. Should reports be published, or made to Ministers or the relevant legislature?

16.8. Accounts usually relate to financial years running from 1 April to 31 March, but where a corporation is established on a date other than 1 April it will be necessary to determine what its first accounting period should be.

17. Control by Ministers or legislature

17.1. Should Ministers have a general power to give directions to the statutory corporation in relation to the exercise of its functions? Should there be exceptions?

17.2. Should the corporation be required to comply with requests from Ministers to give them information or advice?

17.3. Should the corporation be under a general duty to have regard to Ministerial guidance when exercising its functions?

17.4. Should there be any procedure for giving directions or issuing guidance (such as a requirement to consult the corporation)? Must they be published?

17.5. Alternatively, does the nature of the body or office mean that it must not be subject to the direction or control of Ministers?

17.6. In that case, should it be subject to any special form of oversight by the legislature instead?

18. Other legislation relating to duties and scrutiny of public bodies

18.1. Should freedom of information legislation apply to the corporation, so that there is a general right of access to information it holds?

18.2. Should the records of the statutory corporation be public records that must be managed and made available in accordance with public records legislation?

18.3. Should the corporation be subject to investigation by an Ombudsman where there is a complaint of maladministration?

18.4. Should the corporation be required to comply with public sector equality legislation?

18.5. Should the corporation be subject to review or investigation by other Commissioners concerned with children, older people, etc.?

(The Annex lists the legislation dealing with these issues.)

19. Reorganisation of existing public bodies

19.1. Is the new statutory corporation intended to replace one or more existing bodies, in whole or in part?

19.2. Should the new corporation take on any or all of the functions that are currently exercised by an existing body? Which functions should be transferred to it?

19.3. Should the new corporation be put into the position of the existing body, so that it can continue anything that the existing body was doing at the time of transfer? (Should that be the case where existing functions are not being transferred but the new corporation is being given functions similar to those of a predecessor body?)

19.4. Should the new corporation assume any or all of an existing body's property, rights and liabilities?

19.5. Should Ministers have the power to determine which property, rights and liabilities are transferred? The usual method for doing this is by making a transfer scheme. Consider whether there are particular issues that the scheme may or must include.

19.6. Should any transfer include property, rights or liabilities that could not otherwise be transferred (for example because their transfer requires someone's consent)? Should it include criminal liabilities, or rights and liabilities that have not yet arisen?

19.7. Will staff be transferred from an existing body to the new statutory corporation? Legal advice will be needed on whether TUPE will apply to the transfer of staff, so that contracts of employment are continued. If TUPE does not apply, it will be necessary to make equivalent provision for continuity of employment.

19.8. Should staff transferred from an existing body be entitled to continue as active members of their existing pension scheme?

19.9. Might the new corporation need a right of access to property or information held by an existing body, or vice versa? Might ownership of property need to be shared?

19.10. Should any property, rights or liabilities of an existing body be transferred to a person other than the new corporation, such as Ministers?

19.11. If an existing body is being wound up, consider what provision needs to be made about its final annual report and accounts. Who should be required to prepare them (for example, the successor body or Ministers)? What procedure should apply to their preparation and to the audit of the final accounts?

20. Power to dissolve the new statutory corporation

20.1. Should there be a power for Ministers to bring the corporation's existence to an end? This may be appropriate where:

20.1.1. the statutory corporation is intended to perform a fixed set of tasks or to have a limited lifespan;

20.1.2. circumstances can be envisaged in which the corporation would no longer need to exist, for example because it had achieved its aims;

20.1.3. a group of authorities is being established which may need to be reorganised in future.

20.2. A power to use subordinate legislation to dissolve a body established by primary legislation may be controversial.

Examples of the solution in Acts passed in 2012-2016

Acts of the UK Parliament

- Energy Act 2016 (Oil and Gas Authority)
- Enterprise Act 2016, Part 1 (Small Business Commissioner) and Part 4 (Institute for Apprenticeships)
- Small Business, Enterprise and Employment Act 2015, section 41 and Schedule 1 (Pubs Code Adjudicator)
- Care Act 2014, Part 5 (Health Education England, Health Research Authority)
- Defence Reform Act 2014, section 13 and Schedule 4 (Single Source Regulations Office)
- Groceries Code Adjudicator Act 2013
- Health and Social Care Act 2012 (NHS Commissioning Board, clinical commissioning groups, Monitor, National Institute for Health and Care Excellence)
- Protection of Freedoms Act 2012, Part 5 (Disclosure and Barring Service)

Acts of the National Assembly for Wales

- Tax Collection and Management (Wales) Act 2016, Part 2 (Welsh Revenue Authority)
- Regulation and Inspection of Social Care (Wales) Act 2016, Part 3 (Social Care Wales)
- Qualifications Wales Act 2015
- Well-being of Future Generations (Wales) Act 2015, Part 3 (Future Generations Commissioner for Wales)
- Education (Wales) Act 2014, Part 2 (Education Workforce Council)
- Local Government (Democracy) (Wales) Act 2013, Part 2 (Local Democracy and Boundary Commission for Wales)
- Public Audit (Wales) Act 2013 (Auditor General for Wales, Wales Audit Office)

Acts of the Scottish Parliament

- Land Reform (Scotland) Act 2016, Part 2 (Scottish Land Commission)
- Scottish Fiscal Commission Act 2016
- Community Justice (Scotland) Act 2016 (Community Justice Scotland)
- Food (Scotland) Act 2015, Part 1 (Food Standards Scotland)

- Historic Environment Scotland Act 2014
- Revenue Scotland and Tax Powers Act 2014, Part 2 (Revenue Scotland)
- Police and Fire Reform (Scotland) Act 2012 (Scottish Police Authority, Scottish Fire and Rescue Service)

Acts of the Northern Ireland Assembly

- Justice Act (Northern Ireland) 2016, Part 2 (Prison Ombudsman for Northern Ireland)
- Legal Complaints and Regulation Act (Northern Ireland) 2016, Part 1 (Legal Services Oversight Commissioner for Northern Ireland)
- Public Services Ombudsman Act (Northern Ireland) 2016 (Northern Ireland Public Services Ombudsman)
- Education Act (Northern Ireland) 2014 (Education Authority)

Annex: other legislation about public bodies

The legislation mentioned below lists the public bodies or categories of body to which it applies, and may therefore need to be amended to apply to a new statutory corporation. Check the legislation in question to see how it describes the types of body it applies to.

Oversight of appointments

- Oversight by Commissioner for Public Appointments of appointments by Ministers of the Crown or the Welsh Ministers: Public Appointments Order in Council 2015
- Oversight by Commissioner for Public Appointments for Northern Ireland of appointments by NI Departments: Commissioner for Public Appointments (Northern Ireland) Order 1995
- Oversight by Commissioner for Ethical Standards in Public Life in Scotland of appointments by the Scottish Ministers: Public Appointments and Public Bodies etc. (Scotland) Act 2003

(If appointments to a body are to be monitored by the UK or NI Commissioner, the body should be listed in the next Order in Council replacing or amending the current Order.)

Disqualification from membership of legislature

- House of Commons: House of Commons Disqualification Act 1975
- Northern Ireland Assembly: Northern Ireland Assembly Disqualification Act 1975
- National Assembly for Wales: Order in Council under section 16 of Government of Wales Act 2006
- Scottish Parliament: Order in Council under section 15 of Scotland Act 1998

(If the members or employees of a statutory corporation are to be disqualified from the NAfW or SP, this should be done by an Order in Council under the relevant section.)

Civil service pensions

- GB: Superannuation Act 1972 and Public Service Pensions Act 2013
- NI: Superannuation (Northern Ireland) Order 1972 and Public Service Pensions Act (Northern Ireland) 2014

Freedom of information

- UK, England, Wales and NI public authorities: Freedom of Information Act 2000
- Scottish public authorities: Freedom of Information (Scotland) Act 2002

Public records

- Records of UK Government departments and sponsored bodies: Public Records Act 1958

- Welsh public records: Government of Wales Act 2006, sections 146-8 (but until an order is made under section 147, the Public Records Act 1958 applies)
- Records of Scottish public bodies: Public Records (Scotland) Act 2011
- NI records: Public Records Act (Northern Ireland) 1923

Ombudsmen

- UK Government departments and other bodies exercising non-devolved functions: Parliamentary Commissioner Act 1967
- Wales: Public Services Ombudsman (Wales) Act 2005
- Scotland: Scottish Public Services Ombudsman Act 2002
- NI: Public Services Ombudsman Act (Northern Ireland) 2016

Public sector equality legislation

- GB: Equality Act 2010, Part 11 (general public sector equality duty and specific duties imposed by a Minister of the Crown, the Welsh Ministers or the Scottish Ministers)
- NI: Northern Ireland Act 1998, sections 75 and 76 (general public sector equality duty and prohibition on religious discrimination)

Reviews and investigations by other Commissioners

Wales:

- Review by Children's Commissioner for Wales of the effect of a body's exercise of its functions on children: Care Standards Act 2000, Part 5
- Review by Older People's Commissioner for Wales of the effect of a body's exercise of its functions on older people: Commissioner for Older People (Wales) Act 2006
- Potential for body to be required to comply with Welsh language standards enforced by the Welsh Language Commissioner: Welsh Language (Wales) Measure 2011
- Duty of public bodies to carry out sustainable development, subject to examination by the Auditor General for Wales and review by the Future Generations Commissioner for Wales: Well-being of Future Generations (Wales) Act 2015

Scotland:

- Requirement for body to produce code of conduct for members, and power for the Commissioner for Ethical Standards in Public Life in Scotland to investigate alleged breaches of the code: Ethical Standards in Public Life etc. (Scotland) Act 2000

Northern Ireland:

- Review by Northern Ireland Commissioner for Children and Young People of arrangements made by authorities and investigation of complaints that they have infringed the rights or adversely affected the interests of a child or young person: Commissioner for Children and Young People (Northern Ireland) Order 2003

- Review by Commissioner for Older People in Northern Ireland of arrangements made by authorities and investigation of complaints that they have adversely affected the interests of an older person: Commissioner for Older People Act (Northern Ireland) 2011

Strategies

Description of legislative solution

This legislative solution deals with provisions to give effect to a policy desire for a person to be required to formulate a strategy in relation to a particular objective.

A relevant objective might be the achievement of a particular goal or task, or the tackling of a particular problem or challenge.

Why have a strategy?

Whether to address a problem by way of a legislating for a strategy is, ultimately, a policy question. There might be many reasons for proceeding in this way. To give direction or focus to activity in a particular area? To get various agencies to pull together? To drive activity in relation to a new social value or goal? To make transparent the way in which a person is working? To deliver a degree of "soft" accountability, in the sense of there being a document which gives rise to political accountability even if there are no legal sanctions for non-delivery?

Considering these questions is central both to determining whether a strategy is the right policy choice and if so, what the content of the provision needs to be.

Strategy provisions are popular, but do give rise to an ongoing administrative burden. This burden may be difficult to lift even if, many years later, the issues with which the strategy is concerned are very much diminished in importance.

Elements of the legislative solution

1. Duty to formulate a strategy

Basic idea: requirement for a person to formulate a strategy in relation to an objective.

1.1 Need to describe the objective: i.e. what is it that is to achieved, or helped to be achieved, by the strategy? May be quite specific (e.g. meeting a target) or more general (e.g. achieving a certain goal or furthering a certain longer term aim).

1.2 Need to describe the goal of the strategy in relation to the objective, e.g.—

- achieving it;
- helping to achieve it.

1.3 Need to say who is to formulate the strategy. If more than one person, need to say how, legally, they are to work in relation to the formulation of the strategy.

1.4 Need to say whose action is to be regulated by the strategy.

1.5 Need to describe the content of the strategy, e.g.—

- how the objective will be achieved or furthered;
- what action is intended in pursuance of achieving the objective;
- how progress is to be measured.

1.6 Need to describe whose action it is which is to be the subject of the strategy: the person formulating the strategy or someone else? Both?

1.7 Over what period is the strategy to be for?

- Fixed period, e.g. 3 or 5 years?
- Indeterminate?

The answer here may depend on the nature of the strategy.

2. Format of the strategy

2.1 How is the strategy to be embodied?

- Simple requirement to have a strategy?
- Or a requirement to embody the strategy in a document?

2.2 If the strategy is to be set out in a document, should the document be made public in any way (e.g. published, sent to particular persons, laid before the legislature)?

3. Formulation of the strategy

How is the strategy to be formulated?

3.1 Requirement to consult particular people? If so, is consultation general or on a draft of the strategy?

3.2 Requirement to have regard to particular issues, needs or information?

3.3 If not prepared by Ministers, requirement to involve them? Sometimes strategy must be submitted in draft for Ministerial approval. If so, should Ministers be able to amend? What is to happen if Ministers reject?

3.4 Requirement to obtain agreement of persons subject to the strategy before including material about them?

4. Legal consequences of the strategy

4.1 Is there to be any legal consequence in relation to the strategy?

Not always essential. The existence of the strategy gives rise to a degree of political accountability.

4.2 Sometimes legal consequences are imposed in relation to the achievement of the objective of the strategy, e.g.—

- requirement to, or to endeavour to, achieve it;
- reporting on progress in achieving it.

In such cases, it is probably unnecessary to create legal consequences in relation to the strategy as well.

4.3 Alternatively, may (but as noted above do not need to) create legal consequences in relation to the strategy, e.g.—

- May go so far as a requirement on some person to “follow” or “act in accordance with” the strategy.
- Alternative options include a requirement on some person to “have regard to” the strategy.

4.4 Choices here depend on the nature of the objective, e.g.—

- If a specific objective such as the meeting of a target, may be more appropriate to create legal consequences in relation to the objective. For example, the objective might be to eradicate carbon emissions. It is the failure to do so that matters here, not the failure to follow the strategy.
- If the objective is more uncertain such as “promotion” of some social issue, may be more appropriate to create legal consequences in relation to the strategy. For example, there might be an obligation to have a strategy promoting low carbon living. It is the following of the strategy (or having regard to it) which is important.

4.5 Obligations may be placed on the person whose strategy it is, or on other persons.

4.6 Ministers may be given powers to direct persons to take steps to implement the strategy.

5. Changing the strategy

5.1 What scope should there be for changing the strategy?

- None?
- Free to revise at will?
- Requirement to review or act on particular information to revise?
- Requirement to review may be ongoing (i.e. “to keep under review”) or to be done at or before the expiry of set intervals.

5.2 What should the procedure be for changing the strategy?

- Usually corresponds with the requirements for preparing the strategy in the first place.
- Sometimes relaxed where the proposed changes will not materially alter the strategy.

5.3 If the strategy is changed, should there be any requirements to make the change public?

- Usually corresponds with the requirements for making the strategy public in the first place.
- Sometimes those requirements are relaxed where the proposed changes will not materially alter the strategy.

Related issues

A strategy as described above is about action in pursuance of a particular objective. It can in a narrow sense be distinguished from an obligation to identify the objective itself. Often that objective is stated in the legislation. However, it is perfectly possible for obligations to be put on a person both to identify objectives and to articulate the action to be taken in pursuance of their achievement. Whether in such a case it is right to describe the resulting document as a “strategy” is a moot point, but there are certainly examples of such obligations comprising both elements being called strategies. Drafters can advise on the best language to use in individual cases.

A strategy can also be distinguished from the placing on a person of obligations to set out how they will carry out particular functions without any link to the achievement of particular objectives. Such obligations are, perhaps, further away from a strategy itself and might be more properly be encapsulated in a “plan”. Again, however, the best language to use is a matter where drafters can advise.

However these related forms of obligation are characterised and described, many of the elements described above will apply in relation to them.

Examples

Petroleum Act 1998 section 9A to 9C

Bank of England Act 1998 section 9A

Greater London Authority Act 1999 section 41 to 44 (and the various specific strategies in the Act)

Child Poverty Act 2010 sections 9 to 13 (now repealed, but still a relevant example)

Flood and Water Management Act 2010 sections 7 to 12

Autism Act (Northern Ireland) 2011 sections 2 and 3

Health and Social Care Act 2012 section 193

Procurement Reform (Scotland) Act 2014 sections 15 to 17

Housing (Wales) Act 2014 sections 50 and 52

Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 sections 3 to 8, 12 and 13

Infrastructure Act 2015 section 3 and Schedule 2

Immigration Act 2016 sections 2 and 5

Carers (Scotland) Act 2016 Part 5

Collaboration

Description of the legislative solution

This solution is designed to impose specific duties on two or more parties to work with each other if certain criteria are satisfied.

This may involve a party delegating functions to another body, a party exercising functions on behalf of another body, a party assisting another body with its functions, a body co-ordinating functions for another body or two parties jointly exercising functions. Other activities are possible.

The purpose of such collaborative arrangements may be to increase efficiency, although different purposes may be specified.

This solution forms part of a category of legislative solutions that relate to cooperation and joint working. See below for a description of some of these other solutions.

Related legislative solutions

This solution forms part of a category of legislative solutions that relate to bodies working together. These include:

- *The general cooperation solution*, which is where bodies are put under a general duty to cooperate with each other.

- *The joint working solution*, which is usually somewhere between the general cooperation solution and the collaboration solution in terms of how intense the duty is.

- *The asymmetric duty solution*, which is where a body is simply required to provide another body with help or resources. This is done using simple duties but can achieve the same effect of a collaboration (such as efficiencies etc).

Elements of the solution

1. Define collaboration arrangements

- What kind of collaboration arrangements are envisaged?
    - For example, the parties might only be required to assist in the exercise of the other parties' functions. This is relatively light touch.
    - However, many collaborations involve either:
        - the parties discharging functions jointly, or
        - one party discharging functions on behalf of another party.
    - In addition, the focus of the collaboration may be on 'back office' functions or on operational functions (a collaboration would usually stop short of a full merger).
- Each form of collaboration has different implications, which need to be considered. For instance, if one party should be able to discharge the functions of another party, the following points need to be considered:
    - Who should be responsible for the exercise of the functions?
    - Are powers of delegation required to effect the collaboration?
    - Should the party that is exercising the functions be able to charge a fee for providing the service?
    - Should the arrangement be symmetrical (each party being able to exercise the other's functions) or asymmetrical (one party being able to exercise the functions of another, but not the other way round)?

2. Is legislation needed?

- Depending on the kind of collaboration that is intended, there is the question of whether legislation is needed to achieve this. Legal advice will be needed to answer this question.

3. Identify parties

- Who is to be the subject of the collaboration arrangements? For instance, two or more categories of public bodies could be involved. This is a basic requirement.

- Should it be possible for additional, non-specified parties to be involved in the arrangements? For instance, it might be desirable to allow a contractor to be party to the arrangements if the contractor might actually perform the functions involved. This allows for more flexibility.

4. Identify functions

- What functions should be subject to the collaboration agreement?

    - Will it be *all* or *some* of the functions of the parties involved?

        - If it is only some of the functions, is the dividing line between those functions and the body's other functions sufficiently clear?

- Is there a need to distinguish between "operational" and "back-office" functions? In some cases, the objective is to allow back-office functions to be merged without impacting operational functions. A particular example is collaboration between the emergency services.

5. Define purpose

- Should the purpose of entering into the collaboration arrangements be defined? For instance, the collaboration could be for the purposes of:

    - Making the exercise of the parties' functions more efficient,

    - Making the exercise of the parties' functions more effective, or

    - Promoting the uptake of a particular service or product provided by the parties.

- If a purpose is defined, this can be used as a relevant consideration for the parties. For instance, if a party is considering whether to enter into collaboration arrangements the body might be required to take into account whether the arrangements would be in the interests of efficiency or effectiveness.

6. Process of entering into collaboration arrangements

- Should the parties be required to consider on an ongoing basis whether they should enter into collaboration arrangements with each other? This may be useful if there is a concern that the parties would not otherwise consider entering into such arrangements.

- Should there be a procedure for how arrangements might be arrived at? Here is an example of a possible procedure:

    - Party A could consider that it is in the interests of its effectiveness to collaborate with Party B.

    - Party A notifies Party B of this.

    - Party B considers whether it would be in the interests of its own effectiveness to collaborate with Party A.

    - If Party B concludes that it would be, Party A and Party B must enter into collaboration arrangements.

- What is to be the mechanism for parties to agree on:

    - the functions that will be subject of the arrangements, and

    - how they are to be exercised (whether jointly or by one party on behalf of another)?

- Should there be a requirement to consult, and if so who should be consulted and how should they be consulted? Depending on the bodies involved, it may be desirable to have consultation requirements so that stakeholders' views are taken into account.

- Should it be possible for collaboration to be imposed on parties by way of a direction from Ministers (or a Northern Ireland department)? This may be needed if it is considered that the parties might not otherwise work together.

7. Restrictions

- Should there be any exceptions to the requirement to collaborate? For instance, it may be that one of the parties has a particularly sensitive function that should not be subject to the arrangements.

- Do special considerations need to be taken into account when considering whether to collaborate? Again, a party may have a sensitive functions that should be given particular regard before collaborating.

- Are special consultation requirements required for any of the parties? For instance, some bodies are overseen by others and it might be appropriate for that party to consult the overseer before entering into arrangements (for instance, some police forces are overseen by police and crime commissioners or by policing boards).

8. Effect of collaboration arrangements

- Consider whether the functions that are the subject of the collaboration agreement are to be exercised on the basis of the parties' current powers, or whether new

powers are required. For instance, it may be that some of the parties do not have sufficient powers to delegate functions.

  - It may be that the policy is to ensure that the parties simply have sufficient powers to give effect to the collaboration. If so, it may be that a general power is needed to allow the parties to do anything "necessary or expedient" in relation to the collaboration. However, if the policy is not to give any significant new powers to the parties, such a power may need to be qualified by reference to any other legal restrictions imposed on the parties.

- If Party A is exercising the functions of Party B under the collaboration arrangements, should Party B still be able to exercise those functions? Or should Party B be unable to exercise those functions?

- Should a duty to take all reasonable steps to give effect to the collaboration be imposed on the parties? It may be thought that the parties need to be further encouraged to collaborate once the arrangements are in place.

9. Additional matters to consider

The following issues will need to be considered:

- Payments: Should the parties be allowed to make payments to each other in pursuance of the collaboration agreement? This is particularly relevant in cases where a body is exercising the functions of another body.

- Formal requirements: Is the collaboration to be contained in a document? Should it be published? Should Ministers (or a Northern Ireland department) be informed?

- Sanction: Should there be an explicit sanction for any failure to comply with any of duties relevant to entering into collaboration arrangements? An alternative is to rely on judicial review if the only parties to the agreement are public bodies.

- Ending collaboration: How, and in what circumstances, is (or may) the collaboration to be brought to an end? An example might be a time limit, although another option would be to allow the parties to withdraw from the arrangements if it no longer served its purpose (such as efficiency).

- Variation: Consider how, and in what circumstances, the parties can vary their collaboration arrangements.

- Information sharing: Consider whether any information sharing powers are required, and if so whether anything needs to be said about the use of shared information.
  NB: legal advice may be required as regards information sharing and data protection.

- Guidance: Should there be a power or duty to provide guidance about collaboration arrangements for the parties?

- Devolution: If the collaboration will involve bodies across jurisdictions, are there any special considerations? For instance, are technical provisions required to make this work? Legal advice will be needed on this point.

- Dispute resolution: Is a mechanism needed to address situations where a collaboration breaks down or is threatening to break down?

- Scrutiny / accountability: Is there a need to have a mechanism that allows for scrutiny of the collaboration? For instance, a reporting requirement on the parties might assist with this.

Examples of the legislative solution

Police Act 1996 sections 22A to 23I (collaboration agreements)

Learning and Skills Act 2000 section 33K (delivery of local curriculum entitlements: joint working)

Education Act 2002 section 26 (collaboration between schools)

Civil Contingencies Act 2004 sections 15 and 15A (cross-border collaboration)

Education (Wales) Measure 2011 section 3 (duty of education body to collaborate)

Schools Standards and Organisation (Wales) Act 2013 sections 5, 12 and 13

Public Bodies (Joint Working) (Scotland) Act 2014

Social Services and Well-being (Wales) Act 2014 sections 12 and 160 and Part 9

Environment (Wales) Act 2016 sections 14, 15 and 46

Regulation and Inspection of Social Care (Wales) Act 2016 Part 9

Policing and Crime Act 2017 Part 1, Chapter 1 (collaboration of emergency services)

Designation of bodies

Description of legislative solution

This legislative solution allows a body to be identified to perform certain, often specialist, functions. For example, a higher education regulator might want the assessment of the standards of higher education providers to be conducted by a specialist assessment body.

In many cases, the body must be either representative of a sector or otherwise suitable to be designated to perform the functions. The terms of the designation need to be considered.

The solution provides some flexibility, can ensure that functions are performed independently and by experts, and can also restrict the kind of bodies that may be designated.

NB: In some statutes, the language of “recognition” is used instead of “designation”.

Related legislative solutions

The statutory corporation solution could be used to establish a body or person, which could become designated under this solution.

Elements of the solution

1. Identify functions to be designated

- What are the functions that the designated body will be required to perform?
    - Are they functions that the body already exercises?
    - Or are they functions that the body will need to exercise in addition to its current functions?
        - If so, will further powers be required?
- In some cases, the designated functions will be existing Ministerial functions[6] and the policy is that an external body would be better placed to perform those functions.
- In other cases, the policy will be that new functions should be performed by a body – if so, the new functions will need to be identified.

2. Identify type of body

- Should the designated body be a public body or a private body (perhaps performing public functions)? If it is a private body, there may be implications in terms of how to enforce any duties (such as through the use of injunctions).
- Should the body be a body corporate? This may not be necessary and depending on the designated functions, they could be performed by an individual or an unincorporated association.
- Should the body be based in the UK? It may create inflexibility to specify this.

3. Process of establishing a designation

- The process of establishing which body should be designated, and which functions it should perform, is important. However, the legislation may be more or less detailed depending on the policy and the circumstances.
- A less elaborate way of designating a body is to simply leave it to the discretion of a Minister or whichever relevant authority has the power to designate. Secondary legislation could also be used. However, who does the designation should be identified.
- A more elaborate way of designating a body could be as follows. This assumes that an authority (such as a regulator) has the power to designate.

[6] In NI, references to Ministers are to be read as references to an NI department.

- Before recommending a designation, the authority conducts a consultation with relevant stakeholders.

- Having consulted, the authority decides whether to recommend the body to perform the functions.

- The authority notifies the body (and Ministers if desired) of its decision.

- The body is then designated (subject to the agreement of Ministers if desired). A parliamentary procedure might be used, such as notifying Parliament or using secondary legislation.

- In each of the powers described in these steps, the powers could be duties.

4. Suitability of the designated body

- It is usual for a body to be designated only if it is suitable. Whether that is defined or implied is a policy question.

- If suitability is defined, the following points could be considered:

  - Should there be a requirement for the body to be representative of the sector? If so, what is wanted in this regard?

  - Should there be a requirement that the body is capable of performing the designated functions properly? If so, what is wanted in this regard?

  - To the extent that the above issues are matters of opinion, who is to judge whether the criteria are met?

  - Has the body agreed or applied to perform the designated functions?

5. Effect of designation

- Where there is a designation in place, the following things should be considered:

  - If the designated body is performing functions of another body, should that other body be able to continue to exercise those functions?

  - Are there any additional duties, such as reporting or information sharing duties, that should apply to the designated body?

  - Are there any functions that the designated body should be prevented from performing whilst the designation is in place? This could address conflict of interest points.

  - Also, if there is no designated body, who is to exercise the functions?

6. Oversight and withdrawal

- Linked to the effect of the designation, oversight of the designated body needs to be addressed. The following should be considered:
    - Should the designated body provide information to the authority which made the designation or anyone else?
    - Should the designated body provide an annual report?
        - If so, what associated requirements are there? For example, the timing of the report and how it should be published.
    - Should the authority be required to conduct reviews of the designated body every few years?
        - If so, what associated requirements are there? For example, the timing of the review and how it should be published.
    - Should the authority be required to inform anyone if it has concerns about the performance of the designated body?
    - Should the authority be able to give directions to the designated body?
- This leads to a consideration of the circumstances when the designation should be withdrawn. These circumstances might include:
    - Where the designated body is under-performing,
    - Where the designated body and the authority agree, or
    - When a specified time limit for the designation has run out.

7. <u>Financial matters</u>

- Should it be possible to pay the designated body for performing the designated functions?
- Should the designated body be able to charge fees for its services?

Examples of the legislative solution

Insolvency (Northern Ireland) Order 1989 Articles 350 and 350A (as substituted/inserted by Insolvency (Amendment) Act (Northern Ireland) 2016 section 14)

Communications Act 2003 ss. 368B and 368D (appropriate regulatory authority)

Higher Education Act 2004 ss. 13–18 (operator of student complaints scheme)

Financial Services Act 2012 section 43 (designated consumer bodies to make super-complaints). See section 234C of the Financial Services and Markets Act 2000, inserted by section 43 of the 2012 Act.

Financial Services (Banking Reform) Act 2013 section 68 (designated representative body to make complaints)

Regulatory Reform (Scotland) Act 2014 Part 2

Housing (Wales) Act 2015 section 3 (licensing authority – choice of designating a single authority for Wales, or different authorities for different areas in Wales)

Small Business, Enterprise and Employment Act 2015 sections 144 to 146 (regulator of insolvency practitioners)

Environment (Wales) Act 2016 section 44 (advisory body)

Higher Education and Research Act 2017, ss 27 and 66 (body designated to exercise assessment functions)

Licensing

Description of legislative solution

This legislative solution involves making the doing of an otherwise lawful activity unlawful, unless done in pursuance of (and in accordance with) a licence. It is, therefore, a tool used to regulate and monitor a particular activity – or in other words to decide how it should be done.

The power to grant licences may be conferred on a part of government or on another body or person.

Licensing regimes range from the very simple (eg a dog licence or a TV licence – perhaps better regarded as a way of raising money rather than regulating the activity?) to the complex (eg the licensing of the supply of electricity).

Related legislative solutions

Notification regime

A close relation of this legislative solution is a notification regime, ie a regime that requires a person to notify a regulator of the person's intention to do a particular kind of activity, with the regulator having certain powers in relation to the doing of the activity. An example of this is to be found in Part 2 of the Communications Act 2003 (which regulates certain providers of electronic communications services etc).

Registration regime

Another close relation is a registration regime, ie a regime that provides that a person may do an activity only if the person's name appears on a register kept by an authority.

In substantive terms, in comparison to a licence there are usually fewer (or no) grounds for refusing an application to register, and little or no discretion about doing so. But complex registration regimes may provide for qualifications for registration, for conditions to be imposed and for registrants to be removed from the register if certain conditions are met (eg registration of doctors by the General Medical Council). In such cases, the difference between "licence" and "registration" may be minimal.

Elements of the legislative solution

1. Activity to be regulated

1.1 What is the activity that is to be subject to the licensing regime?

NB: there is an important link here to the issue of enforcement, considered below - doing the activity without a licence is almost invariably criminalised, so the activity must be defined with sufficient clarity to form the basis of an offence.

1.2 Should there be any exceptions, ie any persons who may do the activity without a licence or any other cases in which the activity may be done without a licence?

For example, if the activity is something that may be done by a public authority as part of, or incidentally to, its functions, should the public authority require a licence? Does anything need to be said about this in order to achieve the right result?

2. The licensing authority

2.1 What body or other person is to grant licences?

2.2 Is there a single body for the regime or a number of local bodies eg councils (or a mixture of the two)?

2.3 If local bodies are to issue licences: are the licences in respect of each body's area only, or do they have effect generally? If the latter, what are the implications as regards enforcement? Can local bodies act together and issue a joint licence?

3. Applications for licences

3.1 Who may apply for a licence (anyone, or only certain kinds of person)?

3.2 Should a licence authorise only the legal person to whom the licence is granted, or should it also authorise the activities of others? If the latter, does anything need to be said about this in order to achieve the right result?

For example, should a licence granted to a company authorise employees and/or agents of the company? Or if the licence relates to activity on land, should a licence granted to the owner of the land authorise the activity on the land, regardless of who does it?

3.3 Should it be possible to grant a licence jointly to two or more people (where this makes sense in terms of the activity to be regulated)?

For example, if the licence relates to activity on land or in a building, what is to happen where the land or building is jointly owned?

3.4 Are there to be any restrictions on the circumstances in which applications may be made?

4. Grant or refusal of application for licence

4.1 Should there be a discretion to grant a licence, or a duty to grant one (except in certain cases)?

- If a discretion, do any conditions need to be met in order for a licence to be granted? Are they matters of fact or opinion?
- If a duty, what are the cases where there is no duty to grant? Are they cases where there is a duty to refuse the application, or is there still a discretion to grant a licence?

4.2 What kinds of activity should a licence actually authorise, and to what extent should the activity be authorised?

For example, should a licence authorise:

- the whole range of the regulated activity,
- a certain sub-set of that activity (eg driving only certain types of vehicle, or entering into only certain kinds of credit agreement), or
- a particular example of the activity (eg a licence for a particular vehicle or for particular premises to be used as a house in multiple occupation)?

4.3 What should the duration of a licence be?

4.4 May conditions be imposed on the doing of the activity?

If so:

- What kinds of conditions?
- Should all the permitted conditions be set out in the legislation (so that the person granting the licence can or must choose between them), or should there be a wider discretion to impose conditions of their own devising (if so provide some examples of conditions - take particular care if a condition might confer a discretion on a person, eg by referring to things approved or specified by a person)?
- Should there be "standard" conditions which must be included in the licence, or are automatically included unless the authority decides otherwise?

4.5 What is the procedure for applications?

In particular:

- Should the applicant be entitled to prior notice of an intended refusal? Or to a hearing where it is proposed to refuse the application?
- Should the licensing authority be permitted or required to consult others about granting a licence?

See section 12 below for points to consider if third parties may have an interest.

5. Amendment of licences

5.1 Should amendments of licences be possible? If so, consider the following.

5.2 Should the licensee (ie the licence holder) be able to make an application for amendment?

5.3 Should the licensing authority be able to amend the licence on its own initiative?

5.4 Should someone other than the licensee or the licensing authority be capable of applying for it to be amended?

5.5 In relation to any application to amend:

- Should there be any restrictions on making applications?
- Should any conditions need to be met in order for the licence to be amended?
- Should the power to amend be unlimited or may the licence be amended only in certain ways and/or in certain circumstances?
- What is the procedure for considering applications for amendment of licences (see the questions above as regards the procedure for applications for licences)?

5.6 Similar questions arise as regards the making of amendments by the licensing authority of its own initiative. Additional questions (as regards procedure) in such a case are:

- Should there be a requirement to give the licensee notice of a proposed amendment?
- Should there be a requirement to give the licensee an opportunity to make representations about the proposed amendment?

6. Transfer of licences

6.1 Should it be possible for a licence to be transferred from one person to another?

If so:

- Should it be possible for an application be made for the transfer of the licence?
- Should there be any restrictions on making such applications?
- Should any conditions be met in order for the licence to be transferred?
- See the questions above about the procedure for considering applications for licences.

6.2 Does anything need to be said about situations where a person's property transfers by operation of law, eg the insolvency or death/dissolution of the licensee?

7. Suspension/revocation/surrender of licences

7.1 Should the licensing authority be able to suspend the licence?

If so:

- Should it be able to do so only on certain grounds (if so what are they)?
- Should there be any restrictions on the period for which a licence may be suspended (if so, can the period be extended and if so how)?
- What is the procedure for suspending the licence? In particular, does notice of a proposed suspension need to be given and does the licensee need to be given the opportunity to make representations about the suspension or proposed suspension?
- Should a suspension be capable of being lifted (otherwise than at the end of any fixed period of suspension), and if so how?
- What should the effect of suspension be (eg should the licence be treated as not existing for all purposes, or if fees are payable from time to time should they still be payable)?

7.2 Should the licensing authority be able to revoke the licence?

If so:

- Should it be able to do so only on certain grounds (if so what are they)?
- What is the procedure for revoking the licence? In particular, should there be a requirement to give notice of a proposed revocation and should the licensee be given the opportunity to make representations about the proposed revocation?

- Is any transitional provision needed in the event of a revocation (eg regarding activity which already underway when the licence is revoked and cannot easily be stopped)?

7.3 As regards suspension or revocation, should partial suspension or revocation be possible?

If partial revocation is to be possible, consider the potential for overlap between that and the amendment of a licence by the licensing authority of its own initiative.

7.4 Should the licensee be able to surrender the licence? If so:

- Are there to be any restrictions on this?
- What is the procedure for surrendering a licence?
- If there is a licence fee, is the licensee entitled to a pro rata refund?

8. Renewal of licences

8.1 If a licence is valid for a particular period, can it be renewed?

8.2 If so, in what respects (if any) should the process of renewal differ from the process of applying for a licence?

8.3 Does anything need to be said about the continuation of the licence while the renewal application is being processed (or is the idea that any renewal should occur before the end of the period for which the licence is valid)?

9. Fees

9.1 Are fees payable? If so, the following issues arise.

9.2 Are they payable in respect of applications and/or appeals?

9.3 Are they payable in respect of licences? If so, is there a one-off charge or is a fee payable in respect of each period (eg year), so long as the licence is in force?

9.4 How are the fees to be set?

- If in primary legislation, should there be a power to amend?
- If in subordinate legislation, what procedure?
- If less formally: should there be constraints on the power? Should there be a duty to (a) consult before setting the fee (b) publish the licensing authority's fee-setting policy (c) publish the amount of the fee?

9.5 Should it be possible to set different fees for different cases (if so, provide examples)?

9.6 What are the consequences of not paying a fee (eg If an annual fee is payable, should the licence be suspended or revoked? If so, should this occur automatically, or be a ground for suspension/revocation?)

9.7 Are there any restrictions (whether in EU law - for example under the services directive - or otherwise) as regards the amount of the fee, and if so does anything need to be said about this?

10. Appeals

10.1 Is there to be a right of appeal against any decision?

10.2 To which decisions is the right to apply?

10.3 Who may appeal?

10.4 To whom is the appeal to be made?

10.5 Should there be restrictions on appeals (eg time period, grounds etc)?

10.6 What powers should the appellate body (or person) have when hearing the appeal (may it only confirm or set aside the original decision, or should it be able to substitute its own decision)?

10.7 Does anything need to be said about the effect of the decision appealed against while the appeal is being considered (eg is the decision suspended)?

This needs to be considered especially in the case of a decision to revoke a licence if the consequence of revocation is that a business cannot continue in operation.

10.8 Consider what more (if anything) is needed to cater for procedural aspects of appeals (see also sections 11 and 12 below). For example, where the appeal is to an existing appellate body, do that body's powers need to be amended to cater for the new rights of appeal?

11. Applications and appeals: contents, form etc

11.1 What provision is wanted as to the contents and form of applications and appeals, and the way (or manner) in which they must be made?

11.2 Should applicants be required to provide copies of documents?

11.3 What provision is to be in primary legislation, what in subordinate legislation, and what requirements are to be imposed more informally (eg by the giving of a general direction)?

11.4 Should the licensing body be able to require an applicant to provide further information/documents? If so, should failure to comply entitle the licensing body not to proceed with the application and/or to refuse it?

11.5 Should the licensing authority be required to process applications within a time-limit? If so how is that requirement to be enforced?

12. Applications and appeals: interests of third parties

12.1 Do third parties have an interest in whether the licence is granted and/or any licence conditions?

Compare, for example, a TV licence with a licence to incinerate waste on a commercial basis.

12.2 If third parties may have an interest, consider:

- whether, and how, particular interested parties or the public at large should be informed when applications and/or appeals are made (eg should there be a duty to publish notice of the application/appeal);
- whether interested parties should be given the opportunity to make representations in relation to any application or appeal;
- whether any interested party should be able to appeal against the grant of a licence (or in respect of the conditions of a licence).

See also the questions above about the licensing authority consulting others.

13. Enforcement

13.1 How is the prohibition on undertaking the activity without a licence to be enforced?

13.2 Are any powers of entry, search or inspection required?

13.3 Are any powers of arrest or detention required?

13.4 Should there be a (criminal) offence? If so, should it be an offence simply to undertake the activity without a licence, or would acting in that way be a ground for issuing an enforcement notice or compliance notice (breach of which would be an offence)?

13.5 As regards any offence:

- set out the elements of the offence;
- state the mode of trial (summary only, indictment only, or either way);
- state the maximum penalty;
- indicate whether there is a desire for fixed penalty notices (if so, see the legislative solution for fixed penalty notices).

13.6 An alternative is a civil penalty regime – which would require similar analysis.

13.7 If the authority is to have power to impose conditions as part of the licence, how should those conditions be enforced? (Offence? Ground for revoking the licence?)

14. Publicity

14.1 Is anything wanted to enable the public to know whether a person has a licence (eg a requirement to display the licence at a place of business or to state the licence number in business documentation)?

14.2 Is there to be a register of licences, and if so what is it to contain and who may have access to it?

15. Objectives/guidance

15.1 Is there a desire to set out objectives that guide the whole system? If so, should they be set out in primary or subordinate legislation, or issued more informally?

15.2 Should someone have a power or duty to issue guidance as regards the operation of the licensing system? If so, should there be a duty to consult before issuing guidance? Is a duty to publish guidance required?

Examples of the legislative solution

Consumer Credit Act 1974 Part 3 (now replaced by regulations under the Financial Services and Markets Act 2000)

Road Traffic (Northern Ireland) Order 1981 Part 2 (driving licences)

Electricity Act 1989

Licensing Act 2003 (alcohol etc)

Gangmasters (Licensing) Act 2004

Gambling Act 2005

Licensing (Scotland) Act 2005 (alcohol)

Marine and Coastal Access Act 2009 Part 4 (marine licensing)

Scrap Metal Dealers Act 2013

Mobile Homes (Wales) Act 2013 Part 2

Licensing of Pavement Cafés Act (Northern Ireland) 2014

Housing (Wales) Act 2014 Part 1 (private sector housing: system of registration and licensing)

Air Weapons and Licensing (Scotland) Act 2015 Part 1 (certificates for air weapons) and Part 3 (taxis etc, metal dealers etc)

Houses in Multiple Occupation Act (Northern Ireland) 2016 Parts 2 and 3

Public Health (Wales) Act 2017 Part 4 (licensing of persons who carry out acupuncture, body piercing etc) (link to Bill)

Powers of entry

Description of the legislative solution

This solution confers, and regulates, the power to enter premises and to inspect or search them, possibly seizing and removing items found there. Such powers are usually – but not always – exercised for the purpose of finding out whether a criminal offence has been committed.

The power to enter premises may be conferred on constables or on other public officials (such as employees of a Department, a local authority or a statutory body).

The Home Office Code of Practice on Powers of Entry issued under sections 47 to 53 of the Protection of Freedoms Act 2012 gives further information and guidance regarding "non-devolved" powers of entry (see section 47 of the Act for detail about what "non-devolved" means here). 'Relevant persons' as defined in those sections must have regard to the guidance.

Elements of the solution

1. Are new powers of entry needed?

Two initial issues are:

1.1 What is the purpose of any proposed new power (for example, to investigate an offence or to facilitate the exercise of some other function)?

1.2 Is a new power necessary? It may be that existing powers are sufficient to meet the policy intention.

The following powers of entry are of general application:

- In England and Wales, and probably in Northern Ireland, a power at common law for constables to enter premises to deal with or prevent a breach of the peace. In Scotland the police have some powers of entry at common law when (a) they are in close pursuit of someone who they believe has committed, or is about to commit, a serious crime; (b) they detect a disturbance; or (c) they hear cries for help or of distress.
- In England and Wales and Northern Ireland, a power for constables *with a warrant* to enter premises in connection with the investigation of indictable offences: see section 8 of the Police and Criminal Evidence Act 1984 ("the PACE Act") and Article 10 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("the PACE Order").
- In England and Wales and Northern Ireland, a power for constables *without a warrant* to enter premises for a number of specified purposes, mostly to do with arresting persons for certain offences or recapturing persons unlawfully at large (see section 17 of the PACE Act and Article 19 of the PACE Order).
- In England and Wales and Northern Ireland, a power for constables *without a warrant* to enter any premises occupied or controlled by a person who is under arrest for an indictable offence, if the constable has reasonable grounds for suspecting that there is evidence there that relates to that offence or another indictable offence (see section 18 of the PACE Act and Article 20 of the PACE Order).
- In England and Wales and Northern Ireland, where a person has been arrested for an indictable offence, a power for constables *without a warrant* to enter any premises in which the person was when, or immediately before, being arrested, for the purpose of searching for evidence relating to the offence (see section 32 of the PACE Act and Article 34 of the PACE Order).

In each case it will need to be decided, in the light of the existing common law and statutory powers (whether or not listed above), whether new provision is necessary. Where a common law power already exists, that power could be replaced by a statutory power if it were considered desirable to do so (for example, in the interests of clarity or of updating the law), even though it is not strictly necessary.

Note also that sections 15 and 16 of the PACE Act and Articles 17 and 18 of the PACE Order provide various procedural safeguards for the operation of entry-and-search powers by constables under warrants (whether under that Act or Order or under other legislation). Where a new power is conferred on constables, some of the questions considered below will be answered by those sections/Articles. (Note that "constable", in England and Wales and

Northern Ireland, is not confined to police constables; for Northern Ireland, see section 43A of the Interpretation Act (NI) 1954.)

2. If a new power of entry is needed, how will it be exercisable: only with a warrant, or without one?

Some powers of entry are exercisable only if a warrant is obtained. Others are exercisable without this requirement. If a new power is to be conferred, should it be exercisable only by warrant?

- It is almost unheard of for a power to enter private dwellings to be exercisable without a warrant.
- The following factors may tilt the policy balance in favour of requiring a warrant:
    - Powers of seizure may be exercised on entry.
    - The purpose of the entry is to allow a search to be carried out to ascertain whether an offence has been committed.
    - Force may be used to effect entry.
    - The powers are exercisable by persons other than constables or other law enforcement officers.
- Sometimes a power is split into two, so that it is exercisable in some circumstances only with a warrant and in other circumstances without. See the splits between sections 239 and 240 of the Housing Act 2004 and between sections 62A and 62D of the Animal Health Act 1981 (on the one hand) and sections 62B and 62E of that Act (on the other).

Whether the power is to be exercisable with or without a warrant, what conditions (substantive and procedural) will need to be fulfilled before exercising the power?

- If a warrant is to be required, the following matters will need to be resolved:—
    - the grounds for the issue of the warrant (that is, the grounds for entry);
    - who issues the warrant;
    - who may apply for the warrant;
    - who may execute the warrant (that is, who may exercise the power);
    - the form and contents of the application;
    - the contents of the warrant.

  It will be necessary to specify most or all of these in the statute.
- Where it is decided that the power of entry is to be exercisable without a warrant, the relevant statute will need to specify:—
    - the grounds for the exercise of the power of entry;
    - who may exercise the power.

  In order to provide appropriate safeguards in the absence of a judicial warrant, powers exercisable without warrant are usually also subject to one or more other conditions prior to their exercise, such as:
    - authorisation by a senior official (a safeguard falling short of judicial approval);
    - the giving of notice to the owner or occupier of the premises.

All of these matters are dealt with below under separate headings.

3. Questions arising on warrant powers

3.1 What are the grounds for the issue of the warrant to be?

- The choice of grounds for the issue of a warrant will depend on the policy.
- It is often the case that two different types of ground are set out, and that both need to be satisfied.
- The first type of ground relates to why entry is required at all. It might be that there are reasonable grounds for suspecting that there has been a breach of a requirement and that there is material evidence on the premises, or that an offence is being committed on the premises. Or entry might be required in order to inspect or investigate some activity or state of affairs on the premises even if no wrongdoing is suspected.
- The second type of ground relates to why a warrant (with the element of coercion which accompanies it) is justified. Commonly these are: that entry has been requested and has been refused, or is likely to be refused if it is requested; that the owner or occupier cannot be found; that requesting entry would defeat the purpose of the entry (such as by giving the occupier the opportunity to destroy evidence).
- The usual test is that the person issuing the warrant must be "satisfied" that the grounds exist. Often there is an explicit test of reasonableness. It might be that the issuer must be satisfied that entry is "reasonably required" for one or more of the listed purposes. Or it might be that there are reasonable grounds for believing that a state of affairs exists.

3.2 Who is to issue the warrant?

- In the vast majority of cases, the warrant is to be issued by (and the application is to be made to): in England and Wales, a justice of the peace; in Scotland, a sheriff, summary sheriff[7] or justice of the peace; in Northern Ireland, a lay magistrate.
- In some exceptional cases, the power to issue a warrant is vested in a more senior judge.

3.3 Who may apply for the warrant and to whom is it issued?

- Should the statute specify who is to make an application for a warrant? The person who exercises the power of entry may or may not be the same as the person who makes the application for the warrant. Some statutes make clear that the applicant and the executor may be different individuals, as when a warrant applied for by one official of a statutory body may be executed by any other official of it.
- Some statutes specify the person to whom the warrant is issued, but not the person who is to execute it. In the absence of any indication to the contrary, the implication in such cases is probably that the warrant must be executed by the person to whom it is issued (and no-one else). But it is better to leave no doubt. See further below under *"...who will be able to exercise the power?*".

[7] Many statutes conferred this function on a stipendiary magistrate. This office has now been replaced by that of summary sheriff: see sections 5 and 128 and Schedule 5 of the Courts Reform (Scotland) Act 2014.

3.4 What are the form and content of the application for a warrant?

- Should the legislation spell out in any more detail what the application must contain? In particular, will the application be required to be supported by particular material or by evidence of a particular kind?
- It is the usual - but not universal - practice to specify some formal requirements as to how the application is to be supported:
    - For England and Wales, this is usually by "information in writing", by "information [given] on oath", or by "sworn information in writing".
    - For Scotland, all the above expressions are used, as well as "evidence on oath".
    - For Northern Ireland, it is by "complaint on oath", by "complaint in writing" or by "a complaint in writing [and] substantiated on oath".

3.5 What information should the warrant contain?

- Should the legislation spell out what is to be contained in the warrant (such as the name of the applicant, the date of issue, the premises to be searched and the articles sought)?

3.6 How long should the warrant to be valid for? Will it authorise entry on more than one occasion?

- Should there be a period within which entry must be effected (ie, how long is the warrant to be valid for)? Many provisions require that a warrant must be executed within one month. Some provide for it to remain valid for three months. Occasionally, statutes provide that a warrant is to remain in force until it is executed.
- Does the warrant permit entry on more than one occasion? The law on this point is not entirely clear, but from a drafting point of view, it seems that the only safe course is to assume that the result of silence will be that only one entry is permitted. If the policy is that more than one entry is to be possible under a single warrant, clear words to that effect will be needed.

4. <u>Questions arising on powers exercisable without warrant</u>

4.1 What are the grounds for exercising the power to be?

- Even where a power is exercisable without warrant, setting out some grounds for its exercise is an essential element. These will often be similar to those discussed above (under the equivalent heading for warrant-based powers), except of course they will not be expressed as matters of which the issuer of the warrant must be satisfied. Instead, they will be expressed either as objective criteria or as matters of which the person exercising the power must be satisfied.

4.2 Should authorisation by a senior official be necessary?

- Should the person seeking to exercise the power be required to obtain prior authorisation of a senior official in his or her organisation? This requirement is sometimes added as a safeguard against the improper use of the power.

4.3 Should notice to the owner or occupier be necessary?

- Should the legislation require advance notice of the exercise of the power to be given to the owner and/or to the occupier of the premises? This is an important safeguard, but in some cases the giving of notice may defeat the purpose of the exercise of the power. Notice is more likely to be required where the power is exercisable in relation to a private dwelling.
- Where notice is required, the legislation ought to indicate how much notice must be given. The appropriate length of the notice period will differ according to the circumstances. Should it be specified, or is "reasonable" notice sufficient?

5. Further questions arising in either case

5.1 Who should be able to exercise the power?

- A statute will need to state:
    - for a power exercisable by warrant, who is authorised to execute the warrant;
    - for a power exercisable without warrant, who may exercise a power of entry.
- Should the power be conferred on an artificial person (such as a body corporate)? If so, it must be remembered that the power of entry must ultimately be exercised by an individual. The most prudent course may be to require that the warrant be issued to an "officer" or "member [of staff]" of the body, or even that the warrant is to be issued to an individual named in it. If it is to be issued to an officer (or member of staff), can it be any officer (or member of staff) or must they be specified or authorised to perform this function on behalf of the body? If so, who should be able to authorise this? Should the legislation provide that the exercise of the power can be delegated to someone else (eg, if the warrant is issued in the name of the body, or to an officer but does not name him/her, can it be executed by another officer)?
- Where an entry-and-search warrant is issued to a constable, the default position is that the warrant may be executed by any constable (not just the constable to whom it is issued): see section 16(1) of the PACE Act and Article 18(1) of the PACE Order. Where a new power exercisable by warrant is to be conferred on a constable in England and Wales or Northern Ireland, should this default position be changed?

5.2 Should the person authorised to exercise the power be able to take other persons?

- Should it be possible for other persons to accompany the person exercising the power of entry? In the absence of express provision, it is unlikely that a power to take accompanying persons would be implied unless their presence is a necessary part of exercising the power or is otherwise clearly envisaged by the power.

- If accompanying persons are to be permitted, what is their role to be? How much detail should be spelled out about this? In particular, should accompanying persons be required to be persons of a particular type (eg, constables or particular types of inspector), or can they be anyone the person exercising the power thinks appropriate? Where the power is to be exercisable by warrant, should it be the case that the person exercising the power can bring other people with them only if authorised to do so by the warrant (and should the warrant have to name the person, or type of person, who can accompany them)?

5.3 What property (premises) should the power extend to?

- If the power is to be exercisable in relation to "premises", does anything need to be said about the meaning of that word in the particular context? Particular attention may need to be given to whether to include vehicles or vessels.
- In particular, are there to be any special rules in relation to private dwellings (or other particular kinds of premises relevant to the context)? Should the power cover Crown property?
- In the case of a warrant, should it be for specified premises or should it (exceptionally) be for "all premises" (see section 8(1A) of the PACE Act and Article 10(1A) of the PACE Order)?
- Should there be any geographical limitations on the power of entry (eg, is a power conferred on a local authority only to be exercisable in relation to premises in the area of the authority)?

5.4 At what time of day should the power be exercisable?

- Should the power be exercisable at any time? Or only at a reasonable hour? Or at a reasonable hour *unless* it appears that the purpose of the entry may be frustrated if it is exercised at a reasonable hour?

5.5 Should there be a duty to produce the warrant or other evidence of the authority for exercising the power?

- In the case of a power exercisable by warrant, should there be a duty to produce the warrant or a copy of it and/or other documentation to the occupier of the premises? If so, is that duty to arise only when production is requested (or, to the contrary, even in the absence of a request)?
- In the case of power exercisable without a warrant, should there be a requirement to show documentation (such as written authority to exercise the power, or identification)? If so, should this duty arise only when production is requested?

5.6 Should it be permitted to use force in the exercise of the power?

- Should anything be said about the use of force (bearing in mind that the law is unclear about whether force is permitted in the absence of words to that effect)?
- In the case of warrants, should the use of force be authorised only if this is mentioned in the warrant? Or should the use of force be authorised (by words in the statute) on the basis of a warrant which is silent about it?

5.7 Should there be an express power to permit the taking of equipment onto the premises?

- What equipment might be necessary or desirable for the purpose for which the entry is required?
- Does anything need to be said to permit the bringing of that equipment onto the premises? (This is only likely to be necessary if the power of entry may entail the use of substantial equipment which would significantly interfere with the occupier's rights over and above what would ordinarily be involved in such an entry.)

5.8 Should there be any associated powers, such as the power to require the occupier to produce documents or other items, or to require an explanation of matters, or to permit the seizure of property?

Is express provision needed about any of the following:

- A power to inspect / examine / measure / sample any "items" or "things"
- A power to inspect and take copies of or extracts from "documents" (or "records", if that adds anything)
- A power to "seize" (and "remove"? and "retain"?) items or things
- A power to require others to provide an explanation of documents (or anything else)
- A power to require others to provide assistance
- How any of the above powers operate in relation to computers and IT equipment (including the possible need for a power to require the information to be rendered into visible and legible form, and made capable of being taken away).

5.9 If there is a power to search for or to seize material, should any particular material be excluded from the exercise of that power?

- For example, should the power exclude material which is (in England and Wales or Northern Ireland) subject to legal professional privilege or (in Scotland) material in respect of which a claim to confidentiality of communications could be maintained?

5.10 If it should be possible to seize property, what is to happen to it?

- A power to seize items is almost invariably accompanied by some provision about what is to happen to them afterwards.
- Property seized by the police is governed, in England and Wales and Northern Ireland, by section 22 of the PACE Act and Article 24 of the PACE Order and by the Police (Property) Act 1897 and, in Scotland, by the common law (see also section 3I of the Victims and Witnesses (Scotland) Act 2014).
- Where property is seized by persons other than the police, express provision is usually made reproducing at least some of the effect of section 22 of the PACE Act and Article 24 of the PACE Order.
- One possibility is provision that "anything that has been seized or taken away under [this power] may be retained for so long as is necessary in all the circumstances".
- Other provisions expressly refer to use as evidence at a trial for a relevant offence and/or forensic examination or for investigation in connection with a relevant offence.

- This is frequently combined with a qualification where the item itself is not needed, for example “no item may be retained for [those purposes] if a photograph or a copy would be sufficient for [them]”.
- Alternatively, there may be a qualified duty to return items.
- Occasionally, there is a power to destroy things that have been seized, although care must be taken here to ensure compatibility with Convention rights.

5.11 Should there be an obligation to re-secure the premises against trespassers?

- Should the legislation include provision requiring unoccupied premises to be left “as effectively secured against trespassers [or unauthorised entry] as when the person exercising the power found them” (or other words to similar effect)?
- The inclusion of this obligation may be taken as an indication that force may be used in the exercise of the power (since if no force is required to enter a property, it is not secure against trespassers). If the policy is that force may not be used to exercise a particular power, then this provision should be included with caution (if at all).
- Almost invariably, the obligation is imposed only when the premises are empty at the time of entry. (This suggests that its purpose is to prevent further entry by unauthorised persons rather than to compensate the property owner for damage to the property.)

5.12 Should there be a sanction for obstructing exercise of the power of entry (or associated powers)?

- What sanction, if any, should the occupier of premises face for obstructing the exercise of a power of entry or failing to comply with requirements associated with such a power? This will need to be considered alongside the question of whether force may be used in the exercise of the power (because if force is not permitted, the sanction for obstruction may be the only means of ensuring that the power is effective).
- Where the power of entry is conferred on a constable, no special provision is needed: it is an offence in all UK jurisdictions to wilfully obstruct a constable in the execution of his or her duty, or a person assisting a constable in the execution of his or her duty.
- Some powers conferred on persons other than constables contain provisions making it an offence to obstruct that person in the exercise of the power.
- A number of statutory provisions confer on someone entering premises the power to require persons on the premises to assist them in various ways. In such cases, it will be necessary to consider whether any general sanction for “obstructing” the exercise of a power should apply to a refusal to provide the assistance requested and, if not, whether there should be a separate sanction for failing to provide the requested assistance.

5.13 Should anything be said about the effect of failure by the person exercising a power to comply with any requirements concerning its exercise?

- Entry to premises which is not authorised by a warrant or a statutory provision (or by the consent of the owner/occupier) will be unlawful and actionable in trespass.
- But what if, where an entry is apparently authorised by a warrant or statute, there is a breach of one or more of the statutory requirements - for example, if the procedure

for applying for a warrant is not followed correctly, or evidence of authorisation is not produced to the occupier? Should this render the whole exercise of the power unlawful?

- It cannot be predicted with confidence how the courts will approach legislation which is silent on the point, so it may be that making express provision as to the consequences of the breach of any requirements would lead to greater certainty. But care needs to be taken with the width of any express provision which validates something that would otherwise be irregular.

5.14 Does anything else need to be said?

For example, about:

- The making and keeping of records relating to the entry.
- The return of the warrant to the court that issued it. Some provisions require the warrant to be returned to the issuing court when it is has expired or has been exercised, although the purpose of this type of provision is not entirely clear.
- Compensation where land or property is damaged in the course of exercising the power (perhaps unless the damage results from actions of the owner or occupier).

Examples of the legislative solution

Animal Health Act 1981 sections 60 to 62F

Police and Criminal Evidence Act 1984 Part 2 (see in particular sections 8 and 15 to 18)

Police and Criminal Evidence (Northern Ireland) Order 1989 Part 3 (see in particular Articles 10 and 17 to 20)

Housing Act 2004 sections 239 and 240

Animal Health and Welfare (Scotland) Act 2006 Schedule 1

Marine and Coastal Access Act 2009 Part 8 Chapter 2 (see in particular sections 246 to 252 and Schedule 17)

Marine (Scotland) Act 2010 Part 7

Housing (Scotland) Act 2014 sections 53 to 56

Revenue Scotland and Tax Powers Act 2014 Part 7

Regulation and Inspection of Social Care (Wales) Act 2016 Part 1 Chapter 3

Houses in Multiple Occupation Act (Northern Ireland) 2016 sections 78 to 80

Tax Collection and Management (Wales) Act 2016 Part 4 Chapters 4 and 5

Public Health (Wales) Act 2017 Part 3 to 5 (link to Bill)

Fixed penalty notices

Description of the legislative solution

This solution authorises the giving of a fixed penalty notice ("FPN"), which is a notice giving the recipient the opportunity of discharging any liability to conviction for an offence by paying a fixed sum of money within a particular period.

The power to issue fixed penalty notices tends to be conferred in respect of lower level offending. The issuing of a notice is an alternative to prosecuting the offender.

A classic example is the giving of a fixed penalty notice for a minor traffic offence.

The power may be conferred when the offence in question is created, or at a later time.

NB: Notices which impose a civil liability on the recipient, not alleged to have committed an offence, are sometimes called fixed penalty notices – these are not the same thing (see below).

Related legislative solutions

Civil penalties

Another policy option is to create a scheme for civil penalties. The appropriateness of this solution depends on the kind of conduct that is being regulated and its seriousness.

A civil penalty regime enables a regulator to impose financial penalties on certain persons, in certain circumstances. Civil penalties must be paid (subject to any rights of appeal etc). There is usually no question of there being any criminal liability.

For examples of powers to impose civil penalties, see the Broadcasting Act 1990, s. 18 (simple penalty provision), Traffic Management Act 2004 Part 6 (civil enforcement of traffic contraventions), and the Immigration Act 2014, Part 3 Chapter 1 (residential tenancies: power conferred on Secretary of State).

On occasion notices imposing civil penalties have been called fixed penalty notices - see for example s.40 Pensions Act 2008, ss.15 and 16 of the Mobile Homes (Wales) Act 2013 and ss. 46A-46D Environmental Protection Act 1990.

Scotland – fiscal fines

In Scotland, the power of a procurator fiscal to issue a fine may suffice (ie may mean that a power to give a fixed penalty notice is not needed) - an advantage is that a system for the collection of the penalty money is in place. Whether issuing a fixed penalty notice or a fiscal fine, the usual standards for prosecution would apply.

Elements of the solution

1. In respect of what offences should FPNs be capable of being given?

2. What test should be applied for the giving of an FPN?

A commonly used formulation is that the giver of the notice has "reason to believe" that a person has committed an offence.

Alternatives include "reasonable grounds for believing" that the person has committed an offence, and it appearing that there are "grounds for instituting...proceedings for an offence".

3. Who may give an FPN?

This will usually be those responsible for enforcing the legislation. So, for ordinary criminal offences it might be a "constable", while for regulatory offences it might be an authorised officer of the body – department, local authority etc – responsible for enforcing the regulatory scheme.

If referring to an "authorised officer", what is to be the method of authorisation?

4. What provision is to be made about the form and contents of FPNs?

The form and contents of FPNs could be set out in primary legislation, there could be a power to make subordinate legislation about these matters, or a mixture of both.

As regards contents, the provisions commonly provide that the notice must state the offence and give particulars of the circumstances alleged to constitute the offence, and must contain most or all of the following information:

- the amount of the penalty,
- the period for payment of the penalty,
- the consequences of not paying the penalty,
- the person to whom and the address at which payment must be made,
- the method of payment.

5. How should the amount of the fixed penalty be determined?

5.1 How should the amount of the penalty be determined?

- Is an amount to be specified?
- Or is there to be a formula for calculating the amount of the fixed penalty?
- Or is legislation to set the maximum amount (and the minimum amount?), leaving the giver of the notice a discretion as to the amount of the penalty?
- If there is to be discretion as to the amount of the penalty, should there be a power to issue guidance as to the exercise of the discretion, with the giver of the notice being required to have regard to the guidance?

5.2 If an amount (whether the amount of the penalty, or the maximum or minimum amount) is to be specified, should it be specified in primary legislation (if so should there be a power to substitute a new amount) or, alternatively, should it be specified in subordinate legislation?

6. Duration of the period for paying the penalty ("the notice period")

6.1 Should there be a fixed notice period, or is there to be a minimum period (with the FPN to specify the actual period)?

6.2 Should the duration (or minimum duration) of the notice period be set out in primary or subordinate legislation?

7. Discount for early payment

7.1 Should there be a discount for early payment of the fixed penalty?

7.2 If so, the questions above about the amount of the payment and duration of the period arise here too, ie how is the reduced amount, and the period for which the reduced amount is payable, to be determined?

8. What should be the effect of giving an FPN?

8.1 The usual effect of giving an FPN is that a person may not be prosecuted for the offence in the period for making the payment, and may not be prosecuted at all if payment is made within that period (subject to the notice being withdrawn, as to which see below). Is this what is wanted, or is something different wanted?

8.2 In some cases, an FPN has the further effect of imposing a penalty on the recipient if the person fails to pay the fixed penalty within the period for payment and also fails to indicate that the person wishes to be tried for the offence (eg Road Traffic Offenders Act 1988 s.55) - see section 11, below.

8.3 Some examples of the solution provide that the recipient of the FPN may be prosecuted within the period for payment. They also provide that in such cases the notice is treated as withdrawn. Is this wanted and, if so, what happens if the person has already paid the fixed penalty? Is there any need for this provision (as a similar result could be achieved by withdrawing the FPN and then prosecuting)?

9. What provision should be made about payment of the fixed penalty?

9.1 To whom should any payment of a fixed penalty be made?

9.2 Should anything be said about the way in which payments should be made (eg requiring or permitting payments to be made in particular ways)?

9.3 Should anything be said about when payments made in a particular way are to be treated as paid? (For example, it is common to provide that payments made by post are treated as paid when they would be delivered in the normal course of post.)

10. Withdrawal of fixed penalty notices

10.1 Should it be possible to withdraw an FPN? This might be wanted for cases where the recipient of the FPN should be prosecuted, as well as for cases where the recipient has not committed the offence.

10.2 If it should be possible to withdraw an FPN, are there any limits on the withdrawal of a notice and what are the consequences of a notice being withdrawn? (For example: May the recipient of the FPN be prosecuted, or does the bar on prosecution continue despite the withdrawal? Does any payment that has been made need to be repaid? NB a provision as to

repayment may do double duty, as it indicates that an FPN may be withdrawn despite payment of the fixed penalty.)

10.3 If, unusually, it is to be possible to prosecute the recipient of an FPN in the notice period (without having withdrawn the FPN, and without the recipient having given a notice of the kind mentioned immediately below), it would make sense to provide that the FPN is treated as withdrawn by the commencement of a prosecution.

11. Notice of intention not to pay the fixed penalty, representations, appeals etc

11.1 Should provision be made about the giving of a notice, by the recipient of the FPN, indicating that he or she does not intend to pay the fixed penalty (or asks to be tried for the offence to which the FPN relates)?

11.2 What is the effect of such a notice? Is it simply that proceedings in respect of the offence may be brought even if the notice period has not ended? If so, is there any purpose in providing for the giving of such notices (given that it is possible to withdraw the FPN or wait until the end of the notice period in any event)?

11.3 Is there any consequence of not giving such a notice? As mentioned at paragraph 8.2 above, in some cases failure to give such a notice will result in a penalty being imposed. If this is what is wanted, indicate what penalty is to be imposed and how it is to be enforced.

11.4 Some examples provide for the possibility of representations to be made in respect of the FPN or, occasionally, for appeals against the giving of the FPN. If any of this might be wanted, consider carefully what the purpose of the additional machinery is. It is always open to a recipient of an FPN to state that he or she is not guilty, and to invite the matter to be tested by prosecuting in the normal way. Another thing to bear in mind is any time limits for summary prosecutions – representations and appeals will take time.

12 Evidential matters

The usual practice is to provide for a signed certificate stating that payment has, or has not, been received to be evidence (or in Scotland sufficient evidence) of the facts stated. If this is wanted, state who must sign the certificate.

13 Duty to give name and address?

13.1 Should a person be required to give his or her name and address, for the purposes of being given an FPN?

13.2 If so, should failure to provide the information be an offence (and, if so, what are the ingredients of the offence, the maximum penalty and the mode of trial)?

14 Guidance on giving of FPNs

14.1 Should there be a power or duty to give guidance as regards the giving of FPNs?

14.2 If so, should anything be said about the giving of the guidance (eg persons who must be consulted first)? Should there be a duty to publish the guidance?

14.3 Alternatives include a requirement to publish an enforcement policy. Such a policy would set out the circumstances in which a fixed penalty notice is likely to be given, and those in which prosecution is likely to be the preferred response to the offending.

15 Report on FPNs that have been given?

Should there be a duty to produce a report, at intervals, giving details of FPNs that have been given? If this is wanted, provide details of who must make the report, whether the report must be published or given to another person, and the periods in respect of which a report must be made.

16 Use of fixed penalty receipts

16.1 What is wanted as regards the use of fixed penalty receipts?

16.2 Can the person to whom payments in respect of FPNs are made keep the monies, or must that person pay the monies to Ministers (or an NI department) or into the relevant Consolidated Fund?

16.3 If the monies may be retained, can they be used as the person considers appropriate, or only for particular purposes or functions?

16.4 If there are to be restrictions on the use of the monies, what else is wanted in connection with this (eg do accounts need to be kept, and published or provided to another person, to ensure that the restrictions are complied with)?

17 Notices and payments sent electronically

Should the FPN scheme provide for notices and/or payments to be sent electronically? (this issue may arise in a number of places above)

Examples of the legislative solution

Road Traffic Offenders Act 1988, Part 3 (these provisions also provide for the endorsement of driving licences, so they are quite complicated compared with other provisions)

Social Security Administration Act 1992, s. 115A (FPNs by Secretary of State etc – recovery of overpayments)

Anti-social Behaviour Act 2003, ss. 43-47 (local authority FPNs)

Wireless Telegraphy Act 2006, Schedule 4 (FPNs by OFCOM or procurator fiscal)

Aquaculture and Fisheries (Scotland) Act 2007, Part 4 (FPNs by persons appointed by Scottish Ministers)

Climate Change (Scotland) Act 2009, s. 88A and Schedule 1A (enforcement authority FPNs; representations about FPNs)

Planning Act (Northern Ireland) 2011, ss 153-155 (council FPNs)

Local Government Byelaws (Wales) Act 2012 (council FPNs)

Food Hygiene Rating (Wales) Act 2013, ss. 21 and 22 and the Schedule (council FPNs)

Food (Scotland) Act 2015, Part 3 (enforcement authority FPNs)

Fisheries Bill 2015/16 (Northern Ireland), clauses 14 and 15 (power to make provision about FPNs to be given by department; quite wide powers, including power to enable a person to make a payment and then be prosecuted – to cater for, say, the owner of a ship wishing to contest liability after a FPN had been paid)

Food Hygiene Rating Act (Northern Ireland) 2016, s.11 and the Schedule (FPNs by council)

Smoking Prohibition (Children in Motor Vehicles) (Scotland) Act 2016, Schedule (FPN, provision for hearing to make representations about whether FPN should be withdrawn, provision for enforcement of unpaid FPN). *NB this started out as a Member's Bill*

Regulation and Inspection of Social Care (Wales) Act 2016 section 52

Public Health (Wales) Act 2017 sections 27 and 29 and Schedule 1 (link to Bill)

Preventative Orders

Description of legislative solution

This solution protects the public from harm through civil orders or notices, targeted against individuals, that prevent or prohibit certain identified kinds of activity from occurring or recurring. Such activity may otherwise be perfectly lawful in itself. A civil preventative order may have the advantage of providing more flexibility than criminal prosecution.

The power to issue the order may be conferred on central or local government, on the courts, or on another legal person.

The classic example of this legislative solution is an anti-social behaviour order ("ASBO").

Related legislative solutions

In the consideration of how to approach the problem that the proposed legislation is aimed at, this solution might be viewed as almost the mirror image of licensing: the latter involves prohibiting everyone from undertaking an activity, then licensing to permit it in individual cases (licences being applied for voluntarily); whereas preventative orders stop individuals undertaking an activity which might generally be lawful (orders being imposed on a person involuntarily). From a technical perspective, it can be seen that the typical procedures surrounding preventative orders involves many of the same considerations as for licensing: e.g. application, variation, renewal, discharge, appeal, and enforcement through the creation of an offence of non-compliance.

There is also a clear link with criminal offences in general. Civil preventative orders such as ASBOs, trafficking and exploitation prevention orders and dog control notices may be seen as an alternative for policy-makers to the creation of a criminal offence for the same kind of harmful activity. So although usually they are civil orders, they may appear to have a criminal "feel" to them, in restricting or prohibiting certain kinds of behaviour. They are also often used in criminal courts after conviction for relevant offences (for example sexual offences).

The crucial difference is one of timing: preventative orders represent an attempt to act before the harmful activity actually occurs, rather than punish it after the fact, by restricting an individual from doing something that may enable them to cause harm of a particular kind. This may be a key factor when considering which legislative solution is chosen for the particular policy problem.

Elements of the pattern

1. Activity to be regulated

1.1 What is the harmful activity that is to be the subject of the preventative order?

1.2 What triggers should there be for an application for the order?

For example, conviction and sentencing for a relevant offence (and / or acquittal on the grounds of mental disorder or other relevant court finding) or a freestanding application after certain factual criteria are met, or both.

2. Procedure for applications for preventative order

2.1 Who may apply for a preventative order? Who hears the application?

This will ultimately depend on the gravity of the harm which the order seeks to prevent.

2.2 What is the process to be for applying for an order?

For example, should any pre-application consultation needed?

2.3 Should the applicant be entitled to a hearing? Should the person who is to be subject to the order be entitled to a hearing?

If so, what rules of evidence should apply? For example, who should bear the burden of proof, and to what standard of proof – civil or criminal?

2.4 Should there be a requirement to give notice of the application to the person who is to be subject to the order and / or to any other interested persons – and if so, to whom?

2.5 Should there be an opportunity for the person who is to be subject to the order and / or any other interested persons to make representations on the order?

Natural justice would usually require some form of due process for the person(s) affected by the order – a strong justification would be needed for a lack of provision on this or else ECHR issues are likely to arise.

2.6 Consider also any impact on existing court rules – and whether new rules are needed – as a result of the procedures proposed for the order.

3. Grant or refusal of application for preventative order

3.1 Is there to be a discretion to grant the order, or a duty to grant one?

3.2 If a discretion, what criteria must the decision-maker use to assess the application? Are these criteria matters of fact or opinion? Should the criteria apply to each requirement or prohibition in the order, or to the order as a whole?

3.3 If a duty, are there exceptions where the duty to grant the order does not arise? Are these cases where there is a straightforward duty to refuse the application, or should there be a residual discretion to grant the order?

4. Content and form of preventative order

4.1 What form is the order to take and what should the order contain on its face?

4.2 Is the principal requirement preventing or prohibiting the harmful activity unconditionally or is the activity to be allowed subject to meeting specified conditions?

4.3 If the activity is to be allowed subject to conditions, what conditions may be imposed? Should all the permitted conditions be set out in the legislation, or should there be a wider discretion to impose conditions? Should there be default conditions which must be included?

4.4 May the order specify particular positive steps the person subject to the order must take to prevent the harmful activity (e.g. muzzling a dangerous dog, reporting at a police station)? Or particular examples of activity (e.g. playing music excessively loudly, foreign travel) that the person is prohibited from undertaking?

4.5 What ancillary requirements should (or may) the order contain?

One common example would be a duty on the person subject to the order to notify the relevant authority of changes in name or address.

4.6 What should be the permitted duration of an order? Are the minimum and / or maximum periods prescribed? Can they be extended?

Orders of indefinite length may raise ECHR issues, particularly if regulating behaviour that would otherwise be lawful.

A situation can arise, on the sentencing of an offender in separate criminal proceedings, where a preventative order already exists, having been imposed by the civil courts – and the criminal court would examine whether the existing order should be varied. Therefore consider whether there should be extension of the order on conviction for another offence (see also paragraph 7.8 below).

4.7 What other particular details (if known) must be included in the order?

For example: the date of service and effect; the name and address of the person subject to the order; the reasons for service of the order; and information for the person subject to the order on further procedures e.g. on appeal, variation, discharge and on non-compliance with the order constituting an offence (if applicable).

4.8 What provision on content and form is to be in primary legislation, and what details can be left to subordinate legislation? If subordinate legislation is chosen, what parliamentary procedure is deemed appropriate?

5. Variation, renewal and discharge of preventative order

5.1 Should it be possible for a preventative order to be varied, renewed or discharged?

5.2 If so, should the original applicant (e.g. if a public authority) be able to vary, renew or discharge the order of its own motion? Or should it have to make an application to do so?

5.3 If the original applicant can vary etc of its own motion, what is the procedure for doing so? Should notice be given to the person subject to the order and any other interested persons? Are they to have an opportunity to make representations?

Again, ECHR issues are likely to arise without adequate provision of due process here.

5.4 Who would hear an application to vary, renew or discharge?

In Scotland the strong preference of the Courts Service, for resourcing reasons, is that such applications should go back to the court of first instance.

5.4 Who else should be able to apply to vary, renew or discharge – e.g. the person subject to the order? Should there be any restrictions on doing so – for example a time limit, or only specific grounds being available?

5.5 What criteria need to be met in order for the order to be varied, renewed or discharged?

5.5 How does the procedure for applying for variation, renewal or discharge differ (if at all) from the procedure for the main application?

5.6 What should be the status of the original order while the variation / renewal / discharge application is being processed – should it be suspended or should it continue in force?

6. Appeals

6.1 Who should have the right of appeal against decisions concerning the preventative order?

Appeal rights may be particularly important if, for instance, there is no opportunity to make oral representations on the initial application. The question of what is adequate due process may be measured cumulatively.

6.2 To which particular decisions should the right apply?

For example, only the grant or refusal of the order; or also to variation, renewal or discharge.

6.3 To whom should the appeal be made?

This will depend on which is the court of first instance but also, again, on the gravity of the harm which the order seeks to prevent.

6.4 Are there to be restrictions on the making of appeals – for example a time limit, or only specific grounds of appeal being available?

6.5 What powers should the appellate body have when hearing the appeal? Can it only confirm or set aside the original decision? Or can it vary that decision?

6.6 What should be the status of the original decision while the appeal is being considered – should it be suspended or should it continue in force?

6.7 Is there to be a chance for a further appeal, or is the appellate body's decision final?

6.8 Where the appeal is to an existing body, do that body's powers need amending?

6.9 What provision is wanted as to the content and form of appeals, and the way (or manner) in which they must be made? What particular provision is to be in primary legislation and what provision in subordinate legislation? If subordinate legislation is chosen, what parliamentary procedure is appropriate? What might be left to court rules?

6.10 Should there be explicit double jeopardy provision?

That is, where an application is made and dismissed, or the grant of an order successfully appealed, a rule that there can be no repeat application made for another order against the same person unless there is a change of circumstances. An absence of double jeopardy restrictions may raise ECHR issues (see control orders under the Prevention of Terrorism Act 2005 as an example).

7. Enforcement

7.1 How should the preventative order be enforced? Are there to be general duties on government or other persons e.g. to monitor compliance with orders?

7.2 Is it necessary for the preventative order to be enforceable throughout the UK? For instance, in Scotland, the need for subordinate legislation under section 104 of the Scotland Act 1998 will need to be considered at the same time as the primary legislation is instructed.

7.2 Is there to be a discrete offence of breach of the order? If so –

7.3 Is there to be a mental element to the offence – i.e. intent, recklessness, knowledge? Or is it to be a "strict liability" offence with no mental element?

7.4 What is to be the method of trial – summary only, indictment only, or either way?

7.5 What is the maximum penalty to be for the offence?

7.6 Are any post-conviction orders to be available? For example, disqualification from ownership of dangerous dogs (see also paragraph 10.2 below on last-resort alternative options).

7.7 What is the status of the original order after prosecution / conviction for breach?

7.8 As an alternative or additional approach to creating a discrete offence of breach of the order, are there to be specific consequences for the person subject to the order if separate offences are committed while the order is in force – e.g. the existence of the order serving to aggravate the sentence for those separate offences?

7.9 Are the police or other persons to be given particular powers of entry, search, arrest or detention in order to be able to enforce compliance with the order?

8. Interim orders

8.1 Should it be possible to make an application for an interim preventative order?

8.2 If so, who may apply for an interim order? To whom is the application to be made?

8.3 When should the application for the interim order be capable of being made? Only at the same time as the main application is made, or separately?

8.4 What are the criteria to be used by the decision-maker to assess the interim application?

8.5 How are these criteria to be different to the assessment of the main application? For example, is a broader or a narrower discretion to be given to the decision-maker?

8.6 What is the procedure for applying for an interim order? How does it differ (if at all) from the procedure for the main application? Should there be a requirement to give notice to those affected and an opportunity for them to make representations? See paragraph 2.5 above on this.

8.7 When should the interim order come into effect and for what duration? For example, for a fixed period or until determination of the main application?

9. Register of orders

9.1 Is there to be a register or database containing the preventative orders in force?

9.2 If so, who is to maintain and manage it?

9.3 What information should it contain?

9.4 Who should be able to access it? Should fees be payable for access?

9.5 Should the information contained in it be capable of being shared with other bodies and persons?

If so, the interaction with the Data Protection Act 1998 – and related ECHR issues – would need careful consideration.

10. Miscellaneous issues

10.1 Are there to be any mechanisms for monitoring the implementation of the preventative orders? This may be a particular issue where the orders are perceived as being highly restrictive (e.g. control orders). Such mechanisms might include, for example–

- the preparation and laying before Parliament of a report on the orders;
- the appointment of a person to review the operation of the legislation; or
- a “sunset clause” making the legislation expire after a fixed period of time.

10.2 Should there be a last-resort or alternative option available if it appears that a preventative order is, or would be, ineffective or inappropriate? For example, an application for a dog’s destruction where a dog control notice has failed or is likely to fail.

10.3 Can one kind of order lead on to another kind? For instance, the Antisocial Behaviour etc. (Scotland) Act 2004 allows a sheriff, if imposing an ASBO on a child, to make a linked parenting order against the child’s parent, and to refer the case to a children’s hearing.

10.4 Also of note in the 2004 Act is the requirement for the sheriff to explain the ASBO's terms in ordinary language when making it: something that might be considered in particular for orders that can be made against children.

Examples of the legislative solution

Protection from Harassment Act 1997 and Protection from Harassment (Northern Ireland) Order 1997 – introduced restraining orders and non-harassment orders.

Crime and Disorder Act 1998, Part 1 – introduced ASBOs.

Sexual Offences Act 2003, ss.104-113; and ss.123-129 – introduced sexual offences prevention orders (SOPOs); and risk of sexual harm orders (RSHOs).

Antisocial Behaviour etc. (Scotland) Act 2004, Part 2 – introduced new kind of ASBOs for Scotland.

Anti-social Behaviour (Northern Ireland) Order 2004

Prevention of Terrorism Act 2005 – introduced control orders.

Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005, ss.2-8 – introduced RSHOs for Scotland.

Serious Crime Act 2007, Part 1 – introduced serious crime prevention orders.

Terrorism Prevention and Investigation Measures Act 2011 – replaced control orders with terrorism prevention and investigation measures (TPIMs).

Anti-social Behaviour, Crime and Policing Act 2014, Parts 1, 2 and 4 – replaced ASBOs in England and Wales with injunctions (Part 1); also introduced criminal behaviour orders (Part 2), community protection notices (Chapter 1 of Part 4) and public space protection Orders (Chapter 2 of Part 4).

Control of Dogs (Scotland) Act 2010 – introduced dog control notices.

Human Trafficking and Exploitation (Scotland) Act 2015, Part 4 – introduced trafficking and exploitation prevention and risk orders.

Modern Slavery Act 2015, Part 2 – introduced slavery and trafficking prevention and risk orders.

Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Part 2 – replaced SOPOs and RSHOs in Scotland with sexual harm prevention orders (Chapter 3) and sexual risk orders (Chapter 4).

Note regarding instructing for Scotland

Consider speaking to officials in the Scottish Government's Justice Directorate, the Lord President's Private Office and the Scottish Courts Service when instructing this legislative solution. Practical difficulties have arisen in the Scottish courts over particular aspects of some of the UK statutes listed above due to the conferral of a civil jurisdiction on the High Court of Justiciary, and there is an institutional preference for bespoke provision in the manner of e.g. the Antisocial Behaviour etc. (Scotland) Act 2004.

Ultimately the guidance here should not be viewed in isolation. Previous examples of this solution may not be suitable or helpful for the policy needs of the new legislation which is being instructed.

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