



Law Society
of Scotland

Consultation Response

Fixed Penalty Notice Consultation: Wildlife

17 January 2020



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Fixed Penalty Notice (FPN): Wildlife (the consultation). The committee has the following comments to put forward for consideration.

General Comments

The consultation is the fifth in a relatively short timescale in relation to what may be generically referred to as animals and related policy. It is also taking place at the same time as the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill is passing through the Scottish Parliament. The policy intentions of the Bill are set out in paragraph 4 of the Bill's Policy Memorandum¹ that state:

“to increase the maximum available penalties for the most serious animal welfare and wildlife offences to a prison sentence of five years or an unlimited fine, or both, and making related procedural changes.”

Paragraph 4 of the consultation acknowledges this, and we would repeat our earlier observations that this consultation is taking place at the same time as the Bill is progressing when the whole picture on law reform and animals and wildlife policy is unclear. There seems to be an opportunity to set out clearly what the Scottish Government policy is but is being somewhat obscured by multiple consultations on various matters at the same time.

The purpose of considering the introduction of an FPN scheme for wildlife crime is stated as “providing an additional level of enforcement that would not require referral to the procurator fiscal nor the involvement of the Scottish courts.”²

¹ https://www.parliament.scot/S5_Bills/Animals%20and%20Wildlife%20Bill/SPBill56PMS052019.pdf

² Paragraph 1 of the consultation

That is predicated on a misunderstanding of an FPN scheme. An FPN scheme allows for such notices to be given as an alternative to prosecution in relation to less serious offences. Where the accused does not accept the FPN, the Procurator Fiscal would be able to bring the case to court as a normal prosecution.

Question 1: Do you agree that the introduction of proportionate fixed penalty notices help with the enforcement of wildlife crime?

Arguably, the introduction of an FPN scheme would not make any difference to enforcement as any offence committed prior to the introduction of any such scheme would still amount to an offence.

We do not understand from the consultation that there is any suggestion there are to be new wildlife offences introduced in respect of which FPNs could be issued.

The advantage of FPNs were set out by us in our response to the consultation on Amendments to the Animal Health Act 1981 where we highlighted in that consultation the benefits that would arise with any proposed introduction of the FPN regime. We repeat them here for the purposes of this consultation:

FPNs can certainly be used for purposes of enforcement. However, they can be treated as a civil or criminal penalty. We assume that their proposed introduction relates to an alternative to prosecution as a criminal remedy.

The consultation lacks clarity in relation to examples of the offences where and when FPNs might be issued. FPNs should only be available to be used in respect of minor or lower level offences.

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

It may also be useful to consider the effect of the number of FPNs that will remain unpaid.

The issue of FPN would not preclude prosecution by COPFS³ by way of issuing warning letters, imposing any alternatives to prosecutions including fiscal fines or indeed prosecution in the courts where they felt that this was an appropriate use of their discretion.⁴

Exactly what reduction is anticipated in offences being dealt with by the courts has not been stated. That would have indicated the current scale of the problem.

If FPNs are to be issued, training would need to be provided for inspectors before such new powers come into force.

³ <https://www.copfs.gov.uk/about-us/what-we-do/10-about-us/297-alternative-to-prosecution>

How would it intended to make such changes as we assume that they will require to involve the use of secondary making power regulations which should be subject to affirmative parliamentary procedure? That would seem appropriate.

Question 2: Do you agree that FPNs would provide a useful and effective alternative to prosecution for wildlife offences which carry a maximum penalty of 6 months Imprisonment?

This question requires an evidence basis to demonstrate that the introduction of FPNs would provide an effective alternative to prosecution. Much depends on their proposed use and in relation to which offences they would apply which has not been specified.

Question 3 Please provide examples of any other wildlife offences you feel may be suitable for fixed penalty notices

We are not able to answer that question. We would again suggest that it would have been useful for the purposes of the consultation to have referred to the recently published Wildlife crime in Scotland: 2018 Annual Report.⁵ By reference to the Report, it could have outlined to which offences FPNs might apply and how it might benefit enforcement.

Question 4 Please provide examples of existing wildlife offences you feel may be unsuitable for fixed penalty notices

We refer to our answer to Question 1. The observations made there are all relevant to consideration as to the level at which any FPN regime would be set.

Question 5: if you do not think that FPNs would be a suitable or effective means of enforcement for any wildlife offences please provide your reasons here

We refer to our answer to question 1.

Question 6: Are there any FPN schemes in Scotland you feel are partly effective and

⁵ <https://www.gov.scot/publications/wildlife-crime-scotland-2018-annual-report/>

provide a good example of an enforcement regime?

FPN schemes operate regarding a wide range of offences; the most common of which is driving. The police issue FPNs to enforce a raft of offences from speeding to driving with no insurance. There are advantages to the prosecution system as it reduces the time in court as relatively few will opt into court process to go to trial.

The stress should be on FPNs being available for minor or low-level offending but for any FPN to be issued, there should be adherence to the basic principles of criminal law as to requiring sufficiency of evidence and being in the public interest to prosecute.

Question 7: Do you have any other comments on the use of Fixed Penalty Notices for wildlife offences?

We have no further comment to make.



For further information, please contact:

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