



Law Society
of Scotland

Stage 1 Briefing

Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill

10 March 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 has the following comments to put forward for consideration at the Stage 1 debate on the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill (the Bill) which is scheduled to take place on Thursday 12 March 2020.

The Bill focuses on:

- increasing penalties for the most serious animal welfare and wildlife offences,
- providing for fixed penalties in relation to animal welfare offences
- increasing the protection for service animals from being caused unnecessary suffering,
- Providing for Fixed Penalty Notices (FPN) in relation to animal health offences,
- Providing powers to inspectors and constables, where animals have been taken into possession to alleviate their suffering.¹

Our comments focus on:

- Increasing penalties
- Fixed Penalty Notices (FPNs)

¹ https://www.parliament.scot/S5_Bills/Animals%20and%20Wildlife%20Bill/SPBill56S052019.pdf

For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 01314768206
gillianmawdsley@lawscot.org.uk

Increasing penalties

It is important to remember that the Bill does not create any new offences.

It concerns an increase in the range of sentencing options in relation to a number of animal welfare and wildlife offences that currently exist. We understand and support these increases in sentencing powers as these will allow for a widening of the range of prosecutorial options to permit certain offences to be tried on indictment where the circumstances of the cases merit this. Where offences are serious, they should be tried on indictment in sheriff and jury proceedings and can attract sentencing of up to five years.

However, increased powers in sentencing on their own will not ensure that the Bill's measures are effective in combatting the commission of animal welfare and wildlife offences. We would stress that "sentencing for wildlife offences can be quite different from other criminal offences with regard to the assessment of culpability, harm and public policy aspects."²

Though reference was made earlier to animal cruelty cases attracting media attention because the offences were so shocking and that current sentencing powers were not enough, no actual evidence of any cases were provided in the supporting documents to the Bill. This is disappointing as that would have highlighted how there needs to be a sliding scale of seriousness to allow for all offences to be prosecuted in the correct forum and for the opportunity for a commensurate sentence to be imposed (our emphasis).

Evidence by way of examples such as decided/reported cases would have allowed an examination of their facts to be made to understand where the issues lie. For instance, are the problems arising from:

- the public lack of awareness of the offences or their seriousness
- the prosecution failing to prosecute or the appropriateness of the forum in which the case was prosecuted
- the sentence that was imposed.

The greatest emphasis for change would in our view lie around the issue and effect of sentencing.

- **The sentence that was imposed**

² <https://sp-bpr-en-prod-cdnep.azureedge.net/published/ECCLR/2020/2/10/Stage-1-report-on-the-Animals-and-Wildlife--Penalties--Protections-and-Powers--Scotland--Bill/ECCLRS0520R1.pdf>

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Consideration should be had to the following factors:

Sentencing guidelines: We would suggest that there is a need for sentencing guidelines to be issued by the Scottish Sentencing Council (SSC) to help inform, guide and ensure consistency of sentencing. This echoes the recommendation in the Stage 1 Report.³

We outlined this in our response to the Bill's Call for Evidence⁴ where it was recognised that there would be a public benefit for Scottish communities and economies to issue guidance to inform the public as indeed the SSC's⁵ responsibilities by law include:

- promoting consistency in sentencing
- assisting the development of sentencing policy
- promoting greater awareness and understanding of sentencing.

Issuing of guidelines would do much to inform. This seems crucial though we understand that the SSC had undertaken some research, the publication of these guidelines has been delayed. We would welcome their publication as soon as practical.

Other measures: We would stress the role of the Proceeds of Crime Act 2002. There is potential for claw-back for money that has been made in relation to criminality and animal welfare and wildlife offences. There is *“growing evidence that there are connections between the wildlife trade and serious organised crime and it is generally accepted that some wildlife trade, particularly at the international level involved crime groups and trafficking networks.”*⁶

There is a need in looking at considering public awareness issues of the impact of the Presumption against Short Periods of Imprisonment (Scotland) Order 2019⁷ where there is a statutory presumption against a sentence of imprisonment for a term of twelve months or less unless the court considers that there is no other method of dealing with the person was appropriate.

³ <https://sp-bpr-en-prod-cdn.azureedge.net/published/ECCLR/2020/2/10/Stage-1-report-on-the-Animals-and-Wildlife--Penalties--Protections-and-Powers--Scotland--Bill/ECCLRS0520R1.pdf>

⁴ <https://www.lawscot.org.uk/media/368082/2019-11-13-call-for-evidence-animals-and-wildlife-bill.pdf>

⁵ <https://www.scottishsentencingcouncil.org.uk/about-us/aims-and-accountability/>

⁶ <https://www.wwf.org.uk/sites/default/files/2017-01/WWF-UK%20Report%20-Sentencing%20wildlife%20trade%20offences%20in%20England%20and%20Wales.pdf>

⁷ <http://www.legislation.gov.uk/sdsi/2019/9780111042281/contents>

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That means realistically in most cases that it is unlikely that the commission of an offence will attract a custodial sentence.

We support that impact statements⁸ should be introduced. That would allow those affected to outline clearly the effect on the animals and them of the offending. Reference can be made to England and Wales regarding the use of Impact Statement where they recognise that:

“Wildlife, Rural and Heritage crime can have a significant impact on victims and wider communities. The wider impacts of poaching can include vandalism of property, loss of income, theft, intimidation and road traffic issues including the driving of unlicensed vehicles. Wildlife offences can also have significant detrimental impacts on particular species.

Victim personal statements, community impact statements and species impact statements can be invaluable in showing the wide-ranging impact of this type of offending and gives victims and communities a voice in the criminal justice process.”⁹

These would allow for inclusion and also heighten awareness of the seriousness of the issues.

- **the prosecution failing to prosecute or the appropriateness of the forum in which the case was prosecuted**

Though the Bill’s Stage 1 Report called for transparency¹⁰ of decision making from the Crown Office and Procurator Fiscal Service (COPFS), no evidence has been provided to show that there is any lack or prosecutions taking place where there is sufficient admissible evidence that a crime has been committed and that it is in the public interest to prosecute.

The COPFS Prosecution Code¹¹ may be helpful if that regard.

Arguably, greater understanding of how evidence is gathered and is admissible in court may provide some necessary understanding for the public and those reporting the commission of such offences.

⁸ Paragraph 44 of the Stage 1 Report

⁹ <https://www.cps.gov.uk/legal-guidance/wildlife-offences>

¹⁰ Paragraph 49 of the Stage 1 Report

¹¹ https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

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That comes back to the need for public awareness of the nature and effect of these offences which in our submission is crucial to the success of the Bill.

- **Public awareness of the offences or their seriousness**

Paragraphs 25 and 40 in the Stage 1 Report,¹² the Committee asked about “*plans in relation to publicity or education around the outcome of cases to help deter potential offenders.*”

These plans seem vital as the Bill as offenders need to know both that the commission of activities are criminal and what the likely sanctions may be. Ignorance of the law is no excuse but there is a public interest in ensuring the promotion of the aims of the Bill. We would be interested how that is planned to take place in tandem with the provisions of the Bill coming into force.

There is much merit in adopting other approaches to be used alongside sentencing to develop empathy offenders to prevent future offending and add protection for animals. We would support the introduction of any type of awareness raising course for wildlife crime offenders to attend, including courses on empathy, where appropriate. This could be achieved through Community Payback Orders or as a condition of any deferred sentence. Such courses need to be made available and publicised. They offer a valuable opportunity to re-educate.

Fixed Penalty Notices

The Bill intends to allow regulations to be made to allow for the issue for FPNs.

Though we support the flexibility of introducing FPNs for low level offending, it is important not to tax people but make them face the consequences of their criminality. It may be worth considering too how many FPNs may remain unpaid. 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 and how FPNs would address this.

Our concern is about the operation of the FPNs is the lack of detail provided. Coterminous with the passage of the Bill have been consultations looking at the issue of FPNs as paragraph 108 of the Bill’s Policy Memorandum recognised. This approach is “slightly unusual.” We would have expected consultations to be concluded before the introduction of the Bill to provide as comprehensive view of the

¹² <https://sp-bpr-en-prod-cdneq.azureedge.net/published/ECCLR/2020/2/10/Stage-1-report-on-the-Animals-and-Wildlife--Penalties--Protections-and-Powers--Scotland--Bill/ECCLRS0520R1.pdf>

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landscape around the Bill's intended enforcement provisions.¹³ This Bill provides an opportunity to set out clearly what the Scottish Government policy on animal welfare and wildlife but is at risk of being somewhat obscured by multiple consultations on various matters at the same time.

FPNs allow for flexibility to use non-custodial options. There must be clear guidance issued as to when FPNs will be available which should be for minor and technical offences only. We would suggest that some reassurance should be addressed during the Bill's passage to include.

1. Confirmation as to who can issue FPNs. Confirmation that they are intended as a criminal penalty. It looks like this power will be provided to police officers and inspectors. That requires training. This power extends too to COPFS who have a number of measures related to alternatives to prosecution that they can pursue. That would presumably be when the FPN had failed or indeed where the circumstances of an offence reported to them in their discretion, they as the prosecuting authority considered that the issue of an FPN was appropriate. That would not rule the use of other sanctions such as warning letters.
2. FPNs are not appropriate when "*the severity of the crime is such that prosecution would be a more appropriate action.*" That reflects the need for training and the issue made in relation to sentencing guidelines above. There needs to be awareness-raising and an education campaign about animal welfare and wildlife crime and the impact that it can and does have. This should include information on the maximum penalties that can be applied to a person who commits an animal welfare or wildlife crime.
3. Is it intended that FPNs can be issued to companies, corporate entities or charities who are involved with animals?

Providing fuller information regarding FPN seems to be appropriate at this stage so that the whole package of reforms including sentencing and extended powers may be viewed. Fuller information would make this clearer.

¹³ <https://www.lawscot.org.uk/media/368222/2020-01-17-crim-fixed-penalty-notice-consultation-wildlife.pdf>

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