



Law Society  
of Scotland

## Stage 3 Briefing

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

16 June 2020



## Introduction

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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 3 debate on the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill (the Bill) which is scheduled to take place on Wednesday 17 June 2020.

Our briefing focuses primarily on highlighting the need for publicity, guidance and information in raising awareness of the provisions of the Bill. We also discuss the changes to conservation and protection of marine life and the imposition of vicarious liability.

### **Need for Publicity, Guidance and Information regarding the Increase in Sentencing and the issue of Fixed Penalty Notices**

We welcome the Bill's introduction where it recognises<sup>1</sup> that there is a need to deal with concerns expressed following "a decade of experience of enforcing the [Animal Health and Welfare (Scotland) Act 2006.]" These concerns addressed in the Bill focused on the need for an increase in penalties which were no longer commensurate in recognising the seriousness of certain offending behaviour relating to animal health and welfare and wildlife. The Bill also seeks to increase the range of Fixed Penalty Notices (FPNs) to be issued in respect of a range of animal and wildlife crimes and offences.

The Bill does not create any new offences.<sup>2</sup>

While the Bill widens the scope of options for enforcement, increasing sentencing powers will not on their own ensure that the Bill's measures are effective in combatting the commission of such offences.

<sup>1</sup> <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/animals-and-wildlife-penalties-protections-and-powers-bill/introduced/policy-memorandum-animals-and-wildlife-penalties-protections-and-powers-scotland-bill.pdf> at Paragraph 9

<sup>2</sup> [https://www.parliament.scot/S5\\_Bills/Animals%20and%20Wildlife%20Bill/SPBill56S052019.pdf](https://www.parliament.scot/S5_Bills/Animals%20and%20Wildlife%20Bill/SPBill56S052019.pdf)

We stress that “sentencing for wildlife offences [is] quite different from other criminal offences with regard to the assessment of culpability harm and public policy aspects.”<sup>3</sup> The Bill therefore should consider

- raising public awareness of the range and nature of the offences and
- the preventative effect of the increase in sentencing.

The following factors seem pertinent to us:

### **Sentencing Guidelines**

There is an urgent need to produce sentencing guidelines which we appreciate lies within the remit of the Scottish Sentencing Council<sup>4</sup> and are disappointed to note that these sentencing guidelines are “unlikely to be completed in the 2018-21 business period.”<sup>5</sup> That would in our view have presented the best opportunity to emphasis the changes which the Bill is bringing forward which guidelines while they will be produced in the long term, does not deal with the present issue following commencement.

Raising awareness of the provisions in the Bill are vital to raise public awareness of the new penalties regime in helping support the public (for the benefit of the community and economy) in understanding what constitutes offences and the level of penalties that may be imposed.

### **FPNs**

At Stage 2 of the Bill, the Scottish Government increased the range of Fixed Penalty Notices (FPN) to include other animal health and wildlife offences.<sup>67</sup> Though FPNs offer much needed flexibility for low level offending, there are concerns over the lack of details of their proposed use within the Bill to address the scale of the issues.

What that indicates is given the wide range of FPN powers within the Bill, there is a need to publish guidance where responsibility for such guidance lies with the Lord Advocate (COPFS), Police Scotland and the relevant bodies such as the Partnership for Action Against Wildlife crime (PAW) Scotland (where their working groups have a key role to play) in how awareness of the new legislation can be undertaken.<sup>8</sup>

FPNs provide a proportionate additional criminal enforcement tool tackling minor and technical breaches of the relevant legislation. These relate to offences which do not involve harm to individual animals but where it is in the public interest that there should be good general compliance with legal requirements that protect animal health and welfare and wildlife. Just when FPNs will be issued is relevant, for instance, as COPFS

<sup>3</sup> Paragraph 19 Stage 1 Report <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>

<sup>4</sup> <https://www.scottishsentencingcouncil.org.uk/>

<sup>5</sup> [https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.03.09\\_AB\\_IN\\_Min\\_on\\_Stage\\_1\\_report\\_response.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.03.09_AB_IN_Min_on_Stage_1_report_response.pdf)

<sup>6</sup> [https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.05.14\\_AWB\\_IN\\_MIN\\_Stage\\_2.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.05.14_AWB_IN_MIN_Stage_2.pdf)

<sup>7</sup> This was anticipated, having been signalled earlier with consultations taking place co-terminus with the initial passage of the Bill.

<sup>8</sup> [https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.03.09\\_AB\\_IN\\_Min\\_on\\_Stage\\_1\\_report\\_response.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.03.09_AB_IN_Min_on_Stage_1_report_response.pdf)

have alternatives to prosecution that they can pursue including the issue of warning letters. FPNs are not be appropriate when “the severity of the crime is such that prosecution would be a more appropriate action.” Furthermore, should FPNs be issued to companies, corporate entities or charities who are involved with animals?

Providing fuller information regarding FPN such as within the COPFS Prosecution Code<sup>9</sup> seems to be appropriate at this stage so that the whole package of reforms including sentencing and extended powers may be viewed.

A taskforce is to be set up to consider any extension of the powers of the Scottish SPCA.<sup>10</sup> That multi-agency approach is welcomed, but for the provisions of the Bill to be effective, this relies on effective evidence seizure to allow for successful criminal enforcement. That needs an understanding of the background of the criminal justice landscape, from prosecution to sentencing including COPFS where greater understanding of how evidence is gathered and what is admissible in court may provide some necessary understanding for the public and those reporting the commission of such offences.

Other aspects are relevant too in relation to addressing offending which include:

- Proceeds of Crime Act 2002 with the potential for monetary clawback from criminality in relation to 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.”<sup>11</sup>
- Presumption against Short Periods of Imprisonment (Scotland) Order 2019<sup>7</sup> 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.
- Including a Programme Requirement within the Community Payback Orders to allow for a “relevant programme requirement” where it provides a person mentioned in subsection (1) with an opportunity, for the purpose of addressing offending behaviour— (i) to be referred to restorative justice service, or (ii) to attend a rehabilitation programme to develop empathy skills in connection with the care and welfare of animals. These seem to be important to provide these opportunities especially where the Bill objective’s is more effective sentencing.
- Though victim personal statements, community impact statements and species impact statements have not been included in the Bill as specific requirements of sentencing, encouragement for these would seem to be invaluable in showing the wide-ranging impact of this type of offending and would provide victims and communities direct inclusion in the criminal justice process and address concerns about the seriousness of the issues.

<sup>9</sup> <https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance?showall=1&start=0>

<sup>10</sup> [https://www.parliament.scot/S5\\_Environment/Meeting%20Papers/ECCLR\\_2020.06.08\\_AWB\\_IN\\_MIN\\_Stage\\_3\\_extension\\_of\\_powers\\_to\\_SSPCA.pdf](https://www.parliament.scot/S5_Environment/Meeting%20Papers/ECCLR_2020.06.08_AWB_IN_MIN_Stage_3_extension_of_powers_to_SSPCA.pdf)

<sup>11</sup> [https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.05.14\\_AWB\\_IN\\_MIN\\_Stage\\_2.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.05.14_AWB_IN_MIN_Stage_2.pdf)

## Conservation and protection of marine life

At Stage 3 of the Bill,<sup>12</sup> the Scottish Government brought forward amendments to bring in changes to the Marine (Scotland) Act 2010 (2010 Act) relating to seals. The Bill's provisions are understood to be required to allow for the continued exporting of commercial fish and fish products to the US that requires to be to the same standards as US commercial fisheries, where the taking of marine mammals is prohibited under the US Marine Mammal Protection Act (MMPA). The Minister's letter of 18 May 2020 indicated for compliance that:

“While the UK and other exporting nations have sought to fully comply with the MMPA, there has been a lack of clarity from the US on the interpretation of these rules and what specific action needs to be taken by nations in order to comply.”

We appreciate that the legislative timescales were short as this change requires to be in place by March 2021 for equivalency with the MMPA, otherwise Scotland would not be able to export farmed Atlantic salmon to the US from 1 January 2022. Significantly, absent is any indication of what the comparative UK Government approach is or indeed the status of the negotiations which would have been helpful.

Notwithstanding the Bill seeks to amend the 2010 Act in respect of:

- removal of specific grounds for which Scottish Ministers can grant licences to kill, injure or take seals and
- increasing the penalties associated with the offence of killing, injuring or taking a live seal (intentionally or recklessly).<sup>13</sup>

We understand that licences with the relevant conditions that would need revoked may currently be operational until 31 January 2021. Presumably commencement of these provisions should not present an issue, but this should be confirmed.

Related proposed amendments to the Bill to be considered at Stage 3 include reference to investigation into whether the existing provision in relation to animals and wildlife is sufficient to manage the use of acoustic deterrent devices on land constituting a fish farm. This includes the possible regulation of acoustic deterrent devices which help to deter marine animals without causing harm.

## Vicarious Liability

This topic is a focus of various amendments scheduled for Stage 3 of the Bill. We consider if any additional

<sup>12</sup> Amendment 29 to be inserted after section 10A <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/animals-and-wildlife-penalties-protections-and-powers-bill/stage-3/marshalled-list-of-amendments-at-stage-3-animals-and-wildlife-penalties-protections-and-powers.pdf>

<sup>13</sup> [https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.05.18\\_AWB\\_IN\\_MIN\\_Stage\\_3\\_seal\\_licensing.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.05.18_AWB_IN_MIN_Stage_3_seal_licensing.pdf)

criminality should be added that this is best addressed by those with specific knowledge and understanding of the relevant “animal” and “wildlife offences” offences.

However, as a reminder, vicarious liability tends not to form part of criminal law as a person is normally only liable for their actions and not the actions of others. Exceptions apply as vicarious liability,<sup>14</sup> a type of strict liability, is used in limited circumstances. If vicarious liability is to apply here, where an employee commits an offence in the course of their employment, the employer could be held criminally liable for the actions of their employee, unless a due diligence defence applies (such as in licensing and the sale of under-age alcohol.) That would create new offences which was understood not to form part of this Bill.

What is important is again seems to be awareness raising and discussion among those affected who would wish to introduce such an offence. If there are examples of circumstances and cases where COPFS are unable to prosecute, that would show where there was any gap and that the law requires to be extended.<sup>15</sup> To criminalize vicarious responsibility would effectively extend the law.

<sup>14</sup> Where a person (A) commits an offence to which this subsection applies on any land to which subsection (3) applies while acting as the employee or agent of the owner or manager (B) of that land, then B is also guilty of the offence and liable to be proceeded against and punished accordingly.

<sup>15</sup> [https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.03.09\\_AB\\_IN\\_Min\\_on\\_Stage\\_1\\_report\\_response.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.03.09_AB_IN_Min_on_Stage_1_report_response.pdf)



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