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

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This Bill amends animal welfare, animal health and wildlife legislation, principally to increase maximum penalties for existing animal welfare and wildlife offences. This briefing describes what the Bill does and discusses implications of the changes for animal welfare and wildlife.



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# Relevant Bill documents

[The Animals and Wildlife \(Penalties, Protections and Powers\) \(Scotland\) Bill](#) was introduced in the Scottish Parliament on 30 September.

The Bill was accompanied by:

- [An Explanatory Note](#)
- [A Policy Memorandum](#)
- [A Financial Memorandum](#)
- [Statements on legislative competence](#) by the Presiding Officer and the Scottish Government

The lead committee for the Bill is the Environment, Climate Change and Land Reform (ECCLR) Committee. The ECCLR Committee [took evidence from Scottish Government officials on the Bill on the 29 October 2019](#) and issued an [open call for views](#) between 10 Oct 2019 and 12 Nov 2019.

# What the Bill does - summary

Animal welfare is a devolved matter. The Bill amends the [Animal Health and Welfare \(Scotland\) Act 2006](#) (“2006 Act”), several pieces of wildlife legislation, and the Animal Health Act 1981 for the purposes of further protecting health and welfare in connection with animals and wildlife in Scotland.

It seeks to achieve this by:

- Amending the [Animal Health and Welfare \(Scotland\) Act 2006](#) to increase maximum available penalties for causing **unnecessary suffering and animal fighting offences** from the current 12 months imprisonment and/or a £20 000 fine, triable by summary procedure only (i.e. without a jury) with a six months time bar; **to five years imprisonment and/or an unlimited fine**. Trial will be by summary procedure or by indictment (i.e. with a jury), with no time bar for bringing a prosecution either way.
- Amending maximum penalties for 58 **wildlife crime offences** involving harm to animals or habitats in six pieces of legislation. Currently maximum penalties between three months and two years imprisonment and various fines apply, most triable by summary procedure only. The Bill will increase the maximum penalty for 22 offences to **five years and/or an unlimited fine** when tried by indictment.
- Introduce powers for Scottish Ministers to **make regulations for the issuing of Fixed Penalty Notices** in respect of certain animal health and welfare offences.
- Increasing **protection for service animals** (e.g. police dogs and police horses) by making it easier to convict people of causing them unnecessary suffering. The Bill implements a Scottish “Finn’s Law” (background [in this section](#)) by amending the 2006 Act. Currently, in determining whether a person has committed the offence of unnecessary suffering under section 19(1) the court must have regard to whether the conduct concerned was for the purpose of protecting a person, property or another animal. The Bill will change this so that the court must disregard that purpose where that offence is committed against a service animal that deals with potentially violent people as part of their normal duties, such as a police dog.
- The Bill amends the 2006 Act to introduce a new procedure to allow enforcement agencies to **transfer (e.g. sell or rehome), treat or destroy animals taken into their possession for welfare reasons without the need to obtain a court order**. Currently enforcement agencies must obtain a court order to allow them to take those actions.

# What is not in the Bill

A number of animal welfare issues are being pursued by the Scottish Government outwith the Bill. On 2 October 2019, the Minister for Rural Affairs and Natural Environment, [Mairi Gougeon MSP wrote to the ECCLR Committee](#) to set out the Government's approach to the Bill and provide details of issues being pursued via other means:

“ To make the best use of valuable Parliamentary time, the Bill is tightly focused on important improvements to penalties and powers that will greatly assist front-line enforcement authorities and which require primary legislation to put them in place. The Bill will not create any new offences or responsibilities, or do things that can be more suitably taken forward by secondary legislation or by other means, such as guidance or industry initiatives. ”

The other animal welfare policy issues or areas of development referenced were:

- **Scottish Animal Welfare Commission**

The Scottish Government committed in its [2018/2019 Programme for Government](#) to establish a Scottish Animal Welfare Commission "to provide expert advice on the welfare of domesticated and wild animals in Scotland and ensure that we maintain high standards of animal welfare after Brexit". The Scottish Government is establishing an interim, non-legislative Commission with a view to having a fully functioning body in early 2020. It was [announced in September that Professor Cathy Dwyer will be the Chair](#). The Commission will provide an annual report on how the welfare needs of sentient animals (i.e. animals that are capable of being aware of their surroundings) are being considered in legislation and policy development in Scotland.

- **Licensing of animal breeding, pet sales and sanctuaries/rehoming activities**

The Scottish Government is developing a statutory instrument under section 27(1) of the Animal Health and Welfare Act 2006 that will introduce modern licensing arrangements for animal sanctuaries and rehoming activities, dog, cat and rabbit breeders, and pet sales. The Government has said that the legislation will require anyone operating an animal sanctuary or rehoming activities to be licensed by the local authority, strengthen licensing requirements for dog breeders and introduce new requirements for cat and rabbit breeders. The Government also intends to use the legislation to prevent the third party sale of young cats and dogs to implement what is known as "Lucy's Law" (a campaign named after a Cavalier King Charles Spaniel puppy called Lucy who died in 2016 after being poorly treated on a puppy farm).

- **Fox Hunting & Wildlife Welfare Issues**

A '[Report of the Review of the Protection of Wild Mammals \(Scotland\) Act 2002](#)'<sup>1</sup>, also known as the Bonomy review, was published in November 2016. Lord Bonomy made a number of recommendations including legislative changes. The Government plans to legislate to implement "the majority of Lord Bonomy's recommendations" and will seek to limit to two the number of dogs that can be used to find or flush wild mammals from cover (with the possibility of a new licensing scheme), and make provision to discourage 'trail hunting'.

- **Public safety and dog control**

Following the [Public Audit and Post-Legislative Scrutiny Committee report on the Control of Dogs \(Scotland\) Act 2010](#) published in July 2019, the Scottish Government has said it will publish a wider review of dog control legislation in 2020, with a view to exploring practical steps "to encourage responsible dog ownership and help improve public safety".

- **Members Bills**

There are three Member's proposals for Bills on animal welfare topics:

- Christine Grahame MSP's [Proposed Responsible Breeding and Ownership of Dogs \(Scotland\) Bill](#).
- Emma Harper MSP's [Proposed Protection of Livestock \(Scotland\) Bill](#).
- Alison Johnstone MSP's [Proposed Protection and Conservation of Wild Mammals \(Scotland\) Bill](#).

# Background and Scottish Government consultations

The Scottish Government said [in its 2018-2019 Programme for Government](#) that it would "take steps to allow animals taken into the protection of the Scottish SPCA or local authorities to be rehomed much more quickly and efficiently than at present and introduce increased sentences for the worst types of animal cruelty, including attacks on police dogs, an initiative known as 'Finn's Law'." In its [2019-2020 Programme for Government](#), it went on to commit to introduce a Bill to achieve the above, and to increase the maximum penalties for the most serious animal welfare offences to five years imprisonment and/or an unlimited fine and also make changes to the maximum penalties for various wildlife offences.

- **Consultation on amendments to the Animal Health and Welfare (Scotland) Act 2006**

The Scottish Government consulted on the proposed changes to penalties for animal welfare offences, the proposed 'Scottish Finn's law', and the introduction of Fixed Penalty Notices for animal welfare offences in the consultation [Amendments to the Animal Health and Welfare \(Scotland\) Act 2006](#), which ran from 1 February to 26 April 2019.

A total of 4,595 responses were received (69 from groups or organisations, and 20 from local authorities). An [analysis of consultation responses](#) was published in July 2019<sup>2</sup>.

The analysis concluded that overall the responses were positive about;

- Strengthening the maximum penalties for the most serious animal welfare offences.
- Removing the upper limit on fines for unnecessary suffering or animal fighting offences.
- Strengthened legislation in regard to attacks on service animals.
- Eliminating the statutory time limit for prosecuting unnecessary suffering or animal fighting offences.
- The introduction of Fixed Penalty Notices (FPNs).
- Speeding up the process of making permanent arrangement for at risk animals taken into possession and that 3 weeks is a reasonable appeal period.

Key themes of responses included the view that the current maximum penalties available are too low, that increasing maximum penalties would give sheriffs more sentencing options and that ultimately the increase in maximum penalties would act as a deterrent.

- **Consultation on wildlife crime penalties**

The Scottish Government [consulted on wildlife crime penalties](#) between 19 July and 16 August 2019. The consultation sought to respond to the 2015 findings of [an independent review by the Wildlife Crime Penalties Review Group](#) (the Poustie review) which found that current penalties may not be serving as a sufficient deterrent or reflect the serious nature

of some of the crimes being committed. It also responded to one of the recommendations of the 2016 '[Report of the Review of the Protection of Wild Mammals \(Scotland\) Act 2002](#)' (the Bonomy review), that the time limit for summary convictions made under that act be extended to enable Police Scotland to have sufficient time to investigate.

- **Consultation on Fixed Penalty Notices for less serious animal health offences**

The Scottish Government [published a consultation on 03 Oct 2019](#), closing 23 Dec 2019, to establish if there is stakeholder support for proposals "to allow for more effective and proportionate enforcement of the Animal Health Act 1981 by introducing fixed penalty notices for less serious animal health offences".



# Increasing maximum penalties for animal welfare offences

The Bill amends the Animal Health and Welfare (Scotland) Act 2006 to increase maximum available penalties for unnecessary suffering (section 19) and animal fighting (section 23) offences to five years imprisonment and/or an unlimited fine. Trial will be by summary procedure or by indictment at the discretion of the Procurator Fiscal, with no time bar for bringing a prosecution either way.

All offences under the 2006 Act are currently prosecuted using summary procedure only i.e. there is no jury, and it is the court (via a Sheriff or Justice of the Peace) who determines innocence or guilt as well as sentencing. For more information on the Scottish criminal justice system (e.g. the differences between summary and solemn procedure, see the SPICe briefing [The Scottish Criminal Justice System: The Criminal Courts](#)).

Enforcement of the Act can be undertaken using a variety of methods including non-statutory verbal advice, warning letters, statutory care notices and prosecution. The maximum penalties currently available for the most severe animal cruelty offences are currently a prison sentence of one year or a £20,000 fine, or both.

From 2008-2018, [there have been 773 convictions for animal cruelty or animal fighting offences](#), with 41 custodial sentences and 147 community sentences, and the remaining convictions resulted in fines. More detail on sentencing trends can be found in [Table 1 of the Financial Memorandum](#).

Because all offences under the 2006 Act are currently prosecuted using summary procedure only, there is an automatic time limit for bringing a prosecution under section 19 (unnecessary suffering) of 6 months from the date of the offence. This time limit applies to all offences that are only triable by way of summary procedure, unless otherwise specified in statute. Specific rules enabling longer time limits for prosecuting offences under 23 (animal fights) already exist in section 44 of the 2006 Act.

A [24 October 2019 letter from the Scottish Government to the ECCLR Committee](#), in response to a question about the **reasons and evidence base for the increase in penalties**, said:

“ A number of animal cruelty cases in recent years have attracted media attention due to the shocking nature of the crime and the maximum sentence available to the court was considered by many, including in some cases the court itself hearing relevant cases, to be insufficient when viewed against the harm caused by the offender and the culpability of the offender.”

It also said that the maximum penalty of 5 years in prison will be "in line with the current penalty available in Northern Ireland, Ireland, New Zealand, Canada, parts of Australia, many American states and the proposed increased sentence in England and Wales".

The [analysis of the responses to the Scottish Government's consultation](#) on the proposed changes said that 99.4% respondents agreed that penalties should be strengthened. Key themes included; the view that the current maximum penalties available are too low; that increasing the maximum penalties would give sheriffs more sentencing options and that ultimately the increase in maximum penalties would act as a deterrent.

# Rehoming (and other interventions) without a court order, of animals taken into possession

The powers in the Animal Health and Welfare (Scotland) Act 2006 (section 32) allow enforcement authorities, usually the Scottish Society for the Protection of Cruelty to Animals (SSPCA) or local authorities, to take animals (commercial and domestic) into possession if they are suffering or are likely to suffer. Where an owner does not agree to voluntarily transfer ownership, a court order under section 34 of the 2006 Act (a disposal order) is required to allow the animal to be sold, rehomed or destroyed.

The Bill proposes a new procedure that will remove the need for that court order, with a view to speeding up the process of rehoming to benefit animal welfare by freeing up the resources of welfare charities, reducing costs and maximising chances of rehoming. The new powers inserted into the 2006 Act will become the default means by which "authorised persons" (namely inspectors appointed under the 2006 Act, constables and other persons specifically authorised by the Scottish Ministers to use the new power, which may include bodies such as local authorities and particular animal welfare organisations) may make permanent arrangements for animals. The power can only be exercised following service of a notice on a person established to be the owner of the animal. The owner of the animal and any person having sufficient concern for the animal will have three weeks from the service of that notice to appeal the decision taken in relation to the animal or, alternatively, seek an order for its release (new section 32D).

The [Policy Memorandum](#) states that the court procedures currently available to enforcement authorities by which arrangements may be made for animals that have been taken into possession to protect their welfare are extremely variable in duration, and can therefore delay action being taken which would benefit the welfare of such animals.

The SSPCA [said in response to this proposed change to rehoming procedures](#):

“ This will put an end to the animals caught up in court proceedings spending months waiting to be rehomed. Since 2016, the Society’s spend on caring for animals involved in court proceedings exceeds £1.5m. In one puppy farming case, the Scottish SPCA spent £440,000 caring for the dogs involved whilst they waited on court proceedings to conclude.”

In [evidence to the ECCLR Committee on 29 October 2019](#), Scottish Government officials said:

“ We are doing this to improve animal welfare and avoid suffering by animals that have been taken into possession by allowing proper arrangements to be made reasonably swiftly. We are thinking primarily of commercial situations involving dog breeders or farm livestock, which are probably the most problematic situations, or potentially the animal hoarder scenario, in which somebody has acquired a large number of animals that need to be dealt with properly.”

The [analysis of responses to the Scottish Government's consultation on this proposal](#) found that 91.6% agreed that there is a need to speed up the process of making permanent arrangements for animals taken into possession under section 32 of the 2006

Act. Local Authorities responded unanimously in support of the proposal. Key themes from individual responses included; speeding up the process would prevent unnecessary suffering as the welfare of animals is affected by prolonged periods in temporary accommodation, and welfare centres are stretched with the volume of animals currently housed.

# Compensation provisions

Under current procedures (under the 2006 Act), animals taken into possession by authorities may be sold and the proceeds are returned to the owner, although the enforcement authority can deduct reasonable expenses from the value. This requires a court process. The Bill introduces new compensation procedures (section 32A), whereby the owner can be compensated where animals are taken into possession and subsequently rehomed, transferred or destroyed without a court order, but compensation can be deferred if there is a related on-going criminal case. A court will be able to order that compensation is not paid to the owner, where that person is convicted of an animal welfare offence.

The [Policy Memorandum for the Bill](#) sets out that views on compensation were sought as part of the consultation on amendments to the 2006 Act, and included that if the owner was guilty of animal abuse they should lose rights to any compensation, and that if compensation was given it should allow for reasonable costs to be awarded to rehoming agents. The Government states that these views have been taken on board and the proposed amendments are thought to "strike the correct balance between protecting a person's property rights, protecting animal welfare, and allowing the courts to decide whether compensation should be forfeited according to the facts and circumstances of each case". The Government has also stated that there are a wide range of circumstances in which an animal might be found to be suffering (or likely to suffer if its circumstances do not change) and taken into possession under section 32 of the 2006 Act, including situations where the owner might not be at fault or have committed a crime e.g. due to illness.

A [letter from Mairi Gougeon MSP - Minister for Rural Affairs and the Natural Environment to the ECCLR Committee on 24 October 2019](#) described that the legal basis of the requirement for compensation to be paid where animals are taken into possession by authorities, is Article 1 of Protocol 1 to the European Convention on Human Rights, under which every natural or legal person is entitled to the peaceful enjoyment of the person's possessions, and no one is to be deprived of these except in the public interest and subject to the conditions provided for by law. For these purposes, an animal can be treated as a possession.

Compensation will in principle fall due to be paid as a result of sale or destruction of the animal using the new powers conferred by new section 32A. As compensation in such circumstances is measured with reference to the market value of the animal less "relevant expenses", no compensation will be paid if the animal has no market value or where the "relevant expenses" exceed the market value of the animal. Compensation will in principle also fall due to be paid where the powers under section 32A are solely used to give treatment to an animal. Compensation in that scenario is measured by the difference in the market value of the animal when it was taken into possession under section 32 of the 2006 Act, and the time immediately after the treatment was given to the animal "less relevant expenses". Accordingly, no compensation will be due if the animal had no market value when it was taken into possession, or if the value of the animal has not decreased following treatment, or if the "relevant expenses" exceed any reduction in the value of the animal.

But where the owner is convicted of certain offences under the 2006 Act, and that conviction results from proceedings which arise from the circumstances which led to the

animal being taken into possession under section 32, new section 32K confers a power on the convicting court to order forfeiture of the compensation (in whole or in part). As relevant criminal proceedings may not have concluded by the date the compensation would ordinarily become payable, new section 32J(3) confers a power to defer payment of the compensation pending the outcome of such proceedings.

# A 'Scottish Finn's Law' - increasing protection of service animals

The Bill implements a 'Scottish Finn's Law' by amending the 2006 Act. Currently, in determining whether a person has committed the offence of unnecessary suffering under the 2006 Act, the court must have regard to whether the conduct concerned was for the purpose of protecting a person, property or another animal.

Section 3 of the Bill ('Harming a service animal') will change this so that the court must disregard that purpose where that offence is committed against a service animal that deals with potentially violent people as part of their normal duties, such as a police dog. The current wording of the 2006 Act has been described as a loophole in the law by campaigners arguing for Finn's Law, as it allows a person to argue in court that an attack on a service animal such as a police dog was motivated by self-defence (or the desire to protect another person or property) and so was not an offence. The Bill will change this, so that the court must disregard that purpose where that offence is committed against a service animal that deals with potentially violent people as part of their normal duties, such as a police dog - provided it was being used in a way that was reasonable in all the circumstances in the course of the handler's duties.

The Scottish Government considers it inappropriate for this legal defence to be available as service animals such as police dogs and horses are, by the nature of their job, required to interact with people to prevent or stop criminal activity or escape, and those people may in some cases violently resist those actions.

## What are service animals for the purposes of the Bill?

Service animals covered by this provision (section 3 of the Bill) include any animal that was under the control of a relevant officer at the time of the conduct in question, and it was being used by that officer at that time, in the course of the officer's duties, in a way that was reasonable in all the circumstances, and that officer is not the person accused of committing the offence.

A "relevant officer" means a constable, special constable within the meaning of section 9 of the Police and Fire Reform (Scotland) Act 2012, or a person (other than a constable or a special constable) who has the powers of a constable or is otherwise employed or engaged to carry out, or assist in the carrying out of, police functions, or a prisoner custody officer within the meaning of section 114 of the Criminal Justice and Public Order Act 1994. The Bill includes provisions to add to the relevant officers covered in future Regulations.

Regarding the type of animal the provisions could apply to, the Scottish Government [said in its 24 October letter to the ECCLR Committee](#):

“ As well as police dogs this will include police horses and potentially prison service dogs although there are currently none in service in Scotland. ”

The background to Finn's law is a campaign originating from the stabbing of a police dog, Finn, in England in 2016 during an attempted arrest, leading to calls for tougher

sentencing for attacks on service animals. In the criminal prosecution following, the accused was convicted of the offence under English law of causing criminal damage to property under the Criminal Damage Act 1971 rather than under animal welfare legislation. The accused was sentenced to eight months detention for causing criminal damage to the police dog as property.

Similar changes to those proposed in the Bill have already been made to section 4(1) of the Animal Welfare Act 2006 which applies in England and Wales, via the Animal Welfare (Service Animals) Act 2019. The provisions relating to harming a service animal in the Bill do not have precisely the same wording as the English law but the Scottish Government has stated that the purpose of increasing the protection for service animals is the same.

It should be noted that provisions in the Bill increasing the maximum available penalty for causing unnecessary suffering to five years imprisonment will apply to all offences, whether the victim was a service animal or any other animal protected under the 2006 Act.

# Introduction of Fixed Penalty Notices

The Bill will amend the Animal Health and Welfare (Scotland) Act 2006 to give Scottish Ministers a power to make regulations allowing Fixed Penalty Notices (FPNs) to be used in relation to certain **animal welfare offences**, and amend the Animal Health Act 1981 to give Scottish Ministers a power to make regulations allowing FPNs to be used in relation to certain **animal health offences**.

The Scottish Government considers that the ability to issue FPNs as an alternative to prosecution in court may be a more proportionate, flexible and efficient means of penalising minor and technical animal welfare and animal health offences, and reduce the likelihood of re-offending. Currently, the type of technical offences anticipated to attract fixed penalties in future are dealt with by local authorities by either warning letters, advice or the issuing of care notices. Some cases may be reported to the Crown Office & Procurator Fiscal Service (COPFS) for potential prosecution.

Inspectors appointed under the 2006 Act by a local authority or the Scottish Ministers (such as employees of local authorities, the Animal & Plant Health Agency (APHA) and the Scottish Society for the Prevention of Cruelty to Animals (SSPCA) may issue statutory care notices under section 25 of the 2006 Act. A statutory care notice can be issued when a person is failing to secure the welfare of an animal for which they are responsible and it appears to the inspector that the failure constitutes an offence under section 24 of the 2006 Act. Care notices allow inspectors to require that people follow specific advice set out by them to ensure the needs of an animal are met. It is an offence not to comply with a statutory care notice without reasonable excuse.

The [Scottish Government considers that](#) statutory care notices generally work well, but in the rare cases where a care notice is not complied with, those responsible may be prosecuted for the offence of failing to comply with a statutory notice in addition to the original welfare breach. The Government considers that this may not always, depending on the circumstances, be appropriate for enforcement by way of prosecution, and the ability to issue an FPN may be an appropriate alternative in certain circumstances.

The Scottish Government [consulted on the use of FPNs for minor animal welfare offences](#) from 1 February to 26 April 2019. A majority (61.4%) of respondents agreed with the introduction of FPNs, and local authorities were unanimously in agreement.

Government officials said [in evidence to the ECCLR Committee on 29 October 2019](#) regarding the rationale for introducing the powers and type of offences they could be applied to:



“ It will be a requirement that FPN regimes apply only to offences that have a maximum penalty of up to six months’ imprisonment and a fine at level 5 on the standard scale, which is currently £5,000. They will certainly not apply to offences for which there are higher penalties. In practical terms, we see the need for FPN regimes in relation to, for example, offences that do not necessarily involve harm to individual animals, in the context of our attempts to improve overall compliance with legislation to benefit animal health and welfare more widely. For example, we are planning to introduce legislation to require licensing of animal sanctuaries and rehoming centres and to modernise licensing for dog breeding and pet sales, and there might be paperwork offences, such as not applying for a licence or not holding one, which would not necessarily involve an animal being harmed.”

Regarding the fact that the Bill has been introduced in advance of the conclusion of [a Scottish Government consultation on the use of FPNs for animal health offences \(which opened 03 October 2019\)](#), officials said:

“ There have been initial discussions with local authorities, primarily about the principle of fixed-penalty notices for animal health offences, and there is a clear desire to introduce FPN regimes for animal health offences, and a need to have the ability to do so. That is why there is provision for animal health FPNs in the bill. The purpose of the consultation is really to go into a bit more detail about what sort of FPN regimes would be appropriate for animal health. As local authorities will be involved in administering such regimes, a lot of the arguments and considerations in that regard are probably similar to the ones about FPN regimes for animal welfare. That is why we thought that it was justifiable to include in the bill a general provision, which could be refined after the results of the consultation are known.”

Officials also said on the 29 October that regulations making use of the powers will be affirmative, as is the case for all regulations that are made under the 2006 act, and will be subject to consultation before they are laid.

# Increasing penalties for wildlife crime

## Background

Wildlife crime is defined by the [Partnership for Action against Wildlife Crime in Scotland](#) (PAW Scotland) as "any unlawful act or omission, which affects any wild creature, plant or habitat, in Scotland". This can range from targeted persecution of rare species and habitats for financial gain, to unnecessary cruelty against common species for sport. A list of offence categories considered to constitute wildlife crime can be found in the [Appendix of the most recent annual Scottish Government Report on Wildlife Crime](#)<sup>3</sup>. As well as the potential for offences to involve animal cruelty, wildlife crime offences can threaten the conservation status of species, depending on the circumstances.

In 2016-17 there were 231 offences relating to wildlife recorded by the police. Fish poaching (68 offences) were the most commonly recorded type of offence, and offences relating to birds (50 offences) were the second most commonly recorded<sup>4</sup>.

Detecting and obtaining sufficient evidence to prosecute wildlife crime presents challenges, for example where crimes take place in remote, rural areas. [PAW Scotland state](#) regarding bird of prey persecution for example:

“ Wildlife crime, especially that against birds, remains a significant threat to the conservation of a number of species in Scotland... This problem is increasingly well documented in the scientific literature and deliberate human killing has been demonstrated to be one of the main threats to species such as golden eagles, hen harriers and the reintroduced red kites... It is likely that those bird or mammal victims that are found each year are a small proportion of the actual deaths. Those engaged in this activity have a good opportunity to conceal evidence and the chance of finding evidence that hasn't been removed is slim.”

The Bill Policy Memorandum states:

“ Crimes in recent years include those involving deliberate and sadistic behaviour such as badger baiting and hare coursing. There have been a number of instances of the deliberate targeting of birds of prey, resulting in death or serious injury. Some of these crimes have involved the use of banned pesticides which not only pose a serious health risk to wildlife but to any animals or people who come into contact with it. Wildlife crimes can also have a serious impact on the conservation status of species resulting for example in the loss of local bird of prey populations and the extinction of freshwater pearl mussel populations from certain rivers.”

## Current available penalties

The current maximum available penalties for wildlife offences are set at different levels depending on the offence and relevant legislation. The maximum penalties for many of the principal offences, for example those set out in the Wildlife and Countryside Act 1981 (e.g. intentionally or recklessly killing or injuring a wild bird), are a £5,000 fine and/or up to 6 months imprisonment on summary conviction with no option of conviction on indictment, although there have been penalty increases for newer offences.

In addition to custodial sentences and fines, forfeiture penalties are also available in relation to most wildlife offences (e.g. requiring forfeiture of equipment used to carry out offences). Community Payback Orders may also be imposed, potentially requiring offenders to undertake up to 6 weeks unpaid work. Proceeds of crime legislation can be used to target unlawful gains from offences. Disqualification provisions relating to firearms and keeping animals are available in some cases. Other existing mechanisms to incentivise compliance include linking wildlife offences with loss of wider rights or benefits such as penalising land managers by making reductions to subsidy payments.

### **The Scottish Government consultation and Poustie review**

The Scottish Government [consulted on proposals to increase penalties for different types of wildlife crime between 19 July and 16 August 2019](#). An [analysis of consultation responses was published in September](#). Nearly all (97%) of respondents agreed that penalties for wildlife crime should be strengthened.

The consultation sought to respond to the findings of [an independent review by the Wildlife Crime Penalties Review Group](#) (the Poustie review <sup>5</sup>) which found that current penalties may not be serving as a sufficient deterrent or reflect the serious nature of some of the crimes being committed. The Wildlife Crime Penalties Review Group was formed as part of a package of measures aimed at tackling wildlife crime [announced by the Minister for Environment and Climate Change, Paul Wheelhouse in 2013](#). The [group's remit](#) was to examine and report on how wildlife crime in Scotland is dealt with by the courts, with particular reference to the penalties available, whether these are a sufficient deterrent, and commensurate with the potential damage to ecosystems.

The [Wildlife Crime Penalties Review Group Report](#) was published on 19 November 2015 <sup>5</sup>. It compared available penalties and penalties imposed in wildlife law with other areas of environmental law such as pollution control. In contrast to the maximum penalties on summary conviction for many of the principal wildlife offences, which were said to have remained unchanged for over 30 years in some cases, the review found that maximum penalties for pollution offences have increased 20 fold from £2,000 to £40,000, and terms of imprisonment have been increased from up to 3 months to up to a year. In addition, conviction on indictment is available for all the principal pollution offences with maximum penalties of an unlimited fine and/or up to 5 years imprisonment being available. The Group concluded that there was a case for increasing the maximum penalties for wildlife offences.

### **Proposed increases to penalties in the Bill**

Sections 5 to 10 of the Bill increase the maximum penalties available to the courts for serious wildlife offences under the following legislation:

- Wildlife and Countryside Act 1981, section 1, 5 to 11, 13 and 14
- Protection of Badgers Act 1992, sections 1 to 3 and 13,
- Conservation (Natural Habitats &c) Regulations 1994, regulations 39 and 41,
- Deer (Scotland) Act 1996, sections 17, 21 and 22,
- Wild Mammals (Protection) Act 1996, section 1, and
- Protection of Wild Mammals (Scotland) Act 2002, section 1. 40.

The Bill will allow some offences, such as those that involve injuring or the unlicensed killing or taking of wild animals, to be tried under solemn procedure and the maximum penalties which may be imposed for committing such offences **are increased to imprisonment for up to five years or an unlimited fine, or both**. The maximum penalties available for other wildlife offences which are subject to summary conviction only, including the disturbance of animals or damage of nests or shelters, are increased to imprisonment for a period of up to one year or a fine up to £40,000, or both.

Full details of each wildlife offence and the proposed amendments can be found in [Annex A to the Policy Memorandum](#).

Regarding the rationale for which specific offences are subject to which increased penalties, the Scottish Government [said in its 24 October 2019 letter to the ECCLR Committee](#):

“ The focus of this Bill is to protect animals from harm. In determining which offences should incur higher penalties the Scottish Government reviewed over 200 offences across six statutes dealing with wildlife crime. The offences that were deemed to be most serious were those that involved the illegal killing or injuring of wild animals and crimes which involved deliberate cruelty and suffering. We also took into consideration that these crimes may have wider conservation impacts too, for example if they involve the killing or injuring of an endangered or protected species.”

## Implications for investigation - time limits and treating some wildlife crime as 'serious crime'

The Bill may have implications for how wildlife crimes are investigated, via increasing statutory time limits for prosecutions, and via the potential for some wildlife offences to be treated as 'serious crime' by virtue of increased maximum sentences.

The ECCLR Committee asked Scottish Government officials how the Bill will impact on the ability of authorities to investigate and gather evidence of serious wildlife crime. [Officials said in evidence on 29 October 2019](#) in relation to **timeframes for investigations**:

“ One of the things that the bill is doing is increasing the time limit for prosecutions to be brought. We have spoken to the police, the Crown and stakeholders, and they have all said that there have been cases that they have not been able to pursue because of the time limit, for the reasons that you alluded to. In addition, quite a lot of complex forensic testing sometimes needs to be undertaken.”

The practice of undertaking **covert surveillance** to detect and gather evidence of wildlife crime, and the admissibility of covert video evidence has been the subject of debate in Scotland. For example, there is currently a [live Scottish Parliament petition \(PE01705: Wildlife crime - penalties and investigation\)](#) which argues that the Wildlife and Countryside Act 1981 should be amended to include a presumption that for any offence against wildlife under Part 1 of the Act (e.g. the illegal killing of birds of prey), photographic, audio recording or video evidence should be admissible evidence in court. The petition also calls for maximum penalties for wildlife crimes to be increased to enable them to be treated as 'serious crimes' for the purposes of enabling the gathering and use of evidence. There have also been instances where NGOs such as conservation bodies have undertaken covert video surveillance of purported illegal activity and this has been deemed inadmissible by the COPFS <sup>6</sup>.

Each [Police Scotland division has a Wildlife Crime Liaison Officer](#). Section 19(2) of the [Wildlife and Countryside Act 1981](#) gives a specific power to constables to enter premises other than a dwelling if the constable has reasonable cause to suspect that any person is committing or has committed an offence under Part I of the Act. The police have statutory powers under the [Regulation of Investigatory Powers \(Scotland\) Act 2000](#) ('RIPSA') and the [Police Act 1997](#) under which they may, when certain conditions are met, be authorised to undertake covert surveillance. Scottish Ministers, or the senior authorising officer or designated deputy may only authorise intrusive surveillance if they believe it meets certain conditions including, for example, to prevent or detect serious crime.

The tests for a serious crime are set out in section 31(7) of RIPSA and section 93 of the Police Act 1997: “(a) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of twenty-one and has no previous convictions **could reasonably be expected to be sentenced to imprisonment for a term of three years or more**; (b) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose.” (emphasis added)

It is therefore relevant to consider the impact of the Bill on these restrictions (in addition to those imposed by common law) and thus on the ability of the police to detect wildlife crime, such as alleged persecution of birds of prey, using covert camera surveillance - given the Bill increases maximum sentences for some offences to five years in prison. In relation to **use of covert video surveillance**, officials said in evidence on 29 October 2019:

“ The police have certain criteria under which they can authorise surveillance. Increasing the maximum penalties that are available for some of the crimes might make them fall under some of the categories in those criteria, but there would still be case-by-case decisions for the police to make about whether, based on all the criteria, it would be appropriate to authorise surveillance. There will be no impact on the use of video evidence from third parties. It will still be for the Crown to determine whether that can be used, under the current rules and regulations.”

## Implementation of Poustie review recommendations

The Bill increases maximum penalties for serious wildlife crime to imprisonment for up to five years and/or an unlimited fine, in line with recommendations of the Poustie review ([see more in the previous section](#)). Increasing the maximum penalties for these crimes to five years implements the first of ten recommendations made by Professor Poustie and the Wildlife Crime Penalties Review Group in its review of wildlife penalties “that conviction on indictment is more commonly made available across the range of wildlife offences with a maximum term of imprisonment of up to five years”.

The recommendations of the Poustie review were broadly accepted by the Government at the time of publication (a [response to the group's recommendations](#), from former Minister for Environment, Climate Change and Land Reform, Dr Aileen McLeod, was issued on 24 February 2016). In its [letter to the ECCLR Committee on 24 October 2019](#), the Scottish Government sets out its current position and actions taken on the other recommendations of the Poustie review (numbered headings in bold represent the review's recommendations):

"In his review of wildlife crime penalties, Professor Poustie made ten recommendations. This Bill will implement the first recommendation, that maximum penalties available on summary conviction for the more serious offences are raised to at least a £40,000 fine and up to 12 months imprisonment and that conviction on indictment is more commonly made available across the range of wildlife offences with a maximum term of imprisonment of up to five years, by increasing the maximum available penalties for a range of serious wildlife crimes.

Professor Poustie's other recommendations and the actions taken on them are listed below:

**2. That the use of conservation/ecological impact statements and animal welfare impact statements is put on a more systematic basis than at present. This might initially be done on an administrative basis with the prosecution seeking these as a matter of course and where appropriate, from either SNH in the former case, or a vet in the latter case.**

**3. That this requirement is put on a legislative footing along the lines of the requirement for courts to consider victim statements before sentencing in other areas of criminal law where such statements are made available to the court and also providing the court with a power to order the preparation of such a statement from a relevant regulatory agency before it passes sentence.**

Recent discussions with COPFS and Police Scotland indicate the current system is working and that impact statements are requested and used where it is deemed appropriate to do so.

We do not therefore believe that it is necessary to legislate further in this area. We will, however, keep the situation under review.

**4. That forfeiture provisions are extended and these and other alternative penalties are made consistent across the range of wildlife legislation as appropriate.**

The Bill provides for fixed penalty notices (FPNs) for certain animal welfare offences, and we intend shortly to consult on extending FPNs to some wildlife crime offences.

**5. That where a firearm or shotgun is involved in the commission of a wildlife crime, the court should have the power to cancel the relevant certificate as is already the case in the Deer (Scotland) Act 1996.**

**6. That consideration should be given to amending firearms legislation which is reserved to the UK Parliament to allow the Chief Constable to withdraw a shotgun certificate where such a weapon has been involved in the commission of a wildlife crime not just on grounds of public safety but also on the grounds of a threat to the safety of wildlife.**

Firearms legislation is currently reserved to UK Government. It is considered that the best opportunity to progress this recommendation would be as part of any wider work to revise firearms legislation in the UK.

**7. That the Crown Office and Procurator Fiscal Service should continue to consider the use of Proceeds of Crime legislation to the maximum extent possible in appropriate wildlife cases.**

COPFS have advised that they already consider the use of Proceeds of Crime legislation in wildlife cases where that is appropriate and will continue that approach. Therefore, we are content that no further action on this recommendation is required at present.

**8. That wildlife crime offenders should be required to attend retraining courses, including courses on empathy where appropriate, either through Community Payback Orders or suspended sentences. This would require establishing that such courses are available and raising awareness of such courses amongst the judiciary.**

Community Payback Orders (CPOs) are the main form of non-custodial sentence in Scotland and can have a number of flexible conditions included within them. CPOs are run by local authorities. Before a Sheriff or judge can sentence someone to a CPO they must first get a report from a criminal justice social worker.

Currently, we are not aware of any organisation delivering the type of empathy training recommended by Professor Poustie. However, should retaining or empathy courses be developed then it would potentially be open to the criminal justice social worker to recommend that the offer attends the programme as part of the CPO.

**9. That wildlife legislation should be consolidated.**

This Bill will take a step toward this by harmonising the maximum available penalties and time limit for investigation of wildlife offences. We recognise that further consolidation would be desirable however, it is highly unlikely that there will be sufficient time available to undertake this during the current Parliamentary session.

**10. That with the establishment of the Scottish Sentencing Council in October 2015, sentencing guidelines are developed for wildlife offences in order to enhance the consistency and transparency of sentencing.**

The Scottish Sentencing Council is planning to take forward the production of a guideline in the area of environmental and wildlife crime in its next business plan. The legislative changes proposed by this Bill will, if passed, change the maximum penalties and so any work in this area by the Sentencing Council will be informed by changes in legislation."

# Financial implications

Regarding the financial implications of the Bill, the [Financial Memorandum states](#) that "given the Bill is amending existing legislation, is not creating any new offences, and for the most part is introducing and developing enforcement tools similar to those introduced at minimal cost under other legislation; it is expected that these introductory costs will be minimal."

A summary of the potential additional costs of the provisions of the Bill is set out in Table 9 of the Financial Memorandum. **An upper estimate is provided of £114,000 per annum**, based on an estimate of up to £50,000 additional costs for increasing maximum animal welfare penalties (i.e. costs of additional custodial sentences), and up to £50,000 additional costs for increasing wildlife crime penalties. An additional up to £14,000 estimated costs are based on increased costs to the Scottish Courts & Tribunals Service (SCTS), Crown Office & Procurator Fiscal Service (COPFS) and Scottish Legal Aid Board (SLAB).

Regarding implications of increasing maximum available levels of fines in the Bill, the Scottish Government said [in a letter to the ECCLR Committee on 24 October 2019](#):

“ The income generated from fines imposed in the criminal courts are, following the introduction of relevant provisions following the Smith Commission report, retained as part of Scotland’s consolidated fund. However, the funding received to Scotland’s block grant from the UK Government is adjusted to reflect the retention of fine income on the basis of ‘no detriment’ to either the UK Government or Scottish Government. In essence, this means there is no fine income available, as any fine income retained in Scotland as a result of the changes recommended by the Commission is offset by a reduction in Scotland’s block grant.”

A key area where the Bill is thought likely to (and is intended to) have financial implications for other bodies other than the Scottish Government is via the new powers to make permanent arrangements for animals seized to protect their welfare without a court order. This is expected to result in significant savings for local authorities and the SSPCA (as well as potentially for other organisations such as rehoming centres) by reducing the amount of time animals need to be cared for in temporary accommodation such as kennels, as well as reducing legal costs. The SSPCA has said that:

“ These reforms will prove to be transformational to the Scottish SPCA. All animals receive an incredible amount of love, attention and care from our dedicated staff, but spending hundreds of days in a rescue centre is not beneficial to the welfare of an animal and it is no substitute for a loving home and family. It will also alleviate the financial pressure of caring for animals for months or even years whilst criminal proceedings conclude and reduce the strain on our rescue and rehoming centres by freeing up space more quickly. On average, it costs the Scottish SPCA £15 per dog per day in our care, so holding dogs that cannot be rehomed after a very short period puts a massive strain on our resources and means kennel spaces are unavailable for dogs which could perhaps be rehomed more quickly. <sup>7</sup> ”



# Bibliography

- 1 The Right Hon Lord Bony, . (2016). Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002. Retrieved from <https://www.gov.scot/publications/report-review-protection-wild-mammals-scotland-act-2002/>
- 2 Scottish Government. (2019). Animal Health and Welfare (Scotland) Act 2006 Analysis of Consultation Responses. Retrieved from <https://consult.gov.scot/animal-welfare/animal-health-welfare-act-amendment-2019/results/animal-health-welfare-scotland-act-2006-analysis-consultation-responses.pdf>
- 3 Scottish Government. (2018). Wildlife Crime in Scotland 2017 Annual Report. Retrieved from <https://www.gov.scot/publications/wildlife-crime-scotland-annual-report-2017/>
- 4 Scottish Government, . (2017). Wildlife Crime in Scotland 2017 Annual Report. Retrieved from <https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2018/12/wildlife-crime-scotland-annual-report-2017/documents/wildlife-crime-scotland-2017-annual-report/wildlife-crime-scotland-2017-annual-report/govscot%3Adocument/00545062.pdf>
- 5 Scottish Government. (2015). Wildlife Crime Penalties Review Group: report. Retrieved from <https://www.gov.scot/publications/wildlife-crime-penalties-review-group-report/>
- 6 Duff, P. (2017). The law of evidence, video footage, and wildlife conservation: did COPFS make the correct decisions?. Retrieved from <https://www.abdn.ac.uk/law/blog/the-law-of-evidence-video-footage-and-wildlife-conservation-did-copfs-make-the-correct-decisions/>
- 7 SSPCA. (2019). Scottish SPCA backs game-changing overhaul of animal welfare law. Retrieved from <https://www.scottishspca.org/newsroom/latest-news/scottish-spca-backs-game-changing-overhaul-of-animal-welfare-law/>

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