



T: 0300 244 4000
E: scottish.ministers@gov.scot

Gillian Martin
Convener of the Environment, Climate
Change and Land Reform Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

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Dear Gillian

I am writing in response to the Environment, Climate Change and Land Reform Committee's Stage 1 Report on the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill. I would like to thank the Committee for its careful and detailed consideration of the Bill.

I am pleased that the Committee has agreed to the general principles of the Bill and that it has welcomed the steps taken by the Scottish Government to strengthen and improve the implementation of our important legislation to benefit all of Scotland's animals.

My comments below address the main recommendations in the Report.

Sentencing Guidelines

20. The Committee would welcome further discussion with the Scottish Government on sentencing guidelines for wildlife crime offences.

The independent Scottish Sentencing Council (SSC) has responsibility for the development of sentencing guidelines. In May 2019, the SSC announced that the creation of sentencing guidelines for wildlife and environmental crimes has been deferred, to enable them to focus on the production of multiple guidelines focusing on particular sexual offences. The SSC also noted that regardless of this, a delay may have been needed in any case due to our plans to increase penalties for wildlife crime, as guidelines cannot be prepared while the relevant penalties in law are in the process of being changed by the Scottish Parliament.

As a result, the production of wildlife and environmental crime sentencing guidelines is unlikely to be completed in the 2018-21 business period. Further details about the SSC's decision can be found on their website at;

<https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/environmental-and-wildlife-crime-sentencing-guideline/>

It is not appropriate for the Government or Parliament to be involved directly in sentencing guidelines but I will be happy to write to the SSC to draw to their attention to the discussions

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that have taken place in stage 1 of this Bill, to help inform considerations about their future work programme.

Fixed Penalty Notices (FPNs)

25. The Committee welcomes the proposed use of FPNs for animal welfare and animal health offences and agrees that FPNs should be used for minor and technical offences only. The Committee would welcome an update from the Scottish Government on the outcomes of the consultation on FPNs for animal health offences, which was ongoing at the time the Bill was introduced.

The Committee considers that there should be clear guidance on the use of FPNs and clear limits should be set. The Committee seeks assurance that FPNs will not be used when the severity of the crime is such that prosecution would be a more appropriate action. The Committee asks how the Scottish Government plans to ensure that this will be the case.

The Committee asks for clarity on how the Government proposes to introduce FPNs for wildlife offences following its recent consultation. To ensure FPNs are used effectively the Committee recommends that the Scottish Government develop and implement an awareness-raising and education campaign about wildlife crime and the impact that it can have. This should include information on the maximum penalties that can be applied to a person who commits a wildlife crime.

FPNs for Animal Health

The consultation on amending the Animal Health Act 1981 concluded on 23 December 2019 and provided valuable insight from those involved in enforcement as to the type of fixed penalty notice regime that would be appropriate for animal health offences. The full analysis of the consultation will be published shortly. I will of course alert the committee to this but I can advise the committee that I will seek to amend this bill at Stage 2 to introduce FPNs for animal welfare and animal health offences. I will of course be happy to provide more information about the nature and detail of these before Stage 2. One key aspect I want to reassure the committee on is that the animal health FPN power will, similar to the animal welfare FPN power, be subject to strict limits but will also allow for sufficient flexibility to take account of future changes to animal health legislation.

FPNs for wildlife offences

Following analysis of a focussed stakeholder consultation, the Scottish Government will now consider whether it is appropriate to lodge a Stage 2 amendment to introduce a power in the Bill for Scottish Ministers to make provision in future regulations for the use of FPN regimes for certain wildlife offences. Should we do this our intention is to include in the amendment a provision which will only allow the power to be exercised where the offence is punishable by imprisonment for a term not exceeding six months or by a fine not exceeding level 5 (£5,000) or both.

The Scottish Government intends to publish the full analysis of the consultation shortly and will provide a more detailed summary to the Committee in due course.

FPN Guidance

As the Committee notes, the Bill as currently drafted stipulates that FPNs can only be used in relation to offences which attract a maximum penalty on summary conviction of imprisonment for a term of 6 months or a fine of level 5 on the standard scale. This will

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prevent FPNs being used for offences involving unnecessary suffering or serious wildlife crime.

The purpose of FPNs is to provide a proportionate additional enforcement tool, to tackle minor and technical breaches of animal health & welfare regulations that would not usually merit an individual report to the Crown Office and Procurator Fiscal Service (COPFS). These generally 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 more widely.

The decision of how to deal with an individual case will remain with the relevant enforcement authority who, presented with the individual circumstances of the incident, will decide if a case merits being reported to the COPFS or should be dealt with using a FPN.

I agree that it would be useful to provide guidance for enforcement authorities to encourage consistency. The Lord Advocate will issue any necessary guidelines for police officers about the use of FPNs for wildlife crime. The Scottish Government is committed to ensuring the enforcement of animal health and welfare continues to work effectively and will review the impact of these new arrangements throughout their implementation through existing stakeholder working groups and collaborative approaches.

I will also give further consideration to what more we might do to raise awareness with the public of the new penalties regime after the legislation commences and more generally, of the impact of wildlife crime.

The Scottish Government is already a member of the Partnership for Action Against Wildlife crime (PAW) Scotland, representing a wide range of bodies concerned with the prevention and tackling of crimes against wildlife. It includes agencies like Scottish Natural Heritage, Police Scotland and prosecutors as well as organisations representing a wide range of conservation and land management interests.

PAW Scotland has a number of working groups which meet on a regular basis to take forward specific areas of work related to tackling wildlife crime, including a media group. As well as taking forward awareness-raising campaigns for wildlife crime, this group arranges wildlife crime exhibitions at the summer game fairs such as the Royal Highland Show, and production of information leaflets for Police Scotland Wildlife Crime Officers to hand out at training events, such as school talks and sharing good practice events. Clearly the ongoing work of this group has a key role to play in how we raise awareness of the new legislation.

Income Generated from Fines and FPNs

27. The Committee asks the Scottish Government to provide clarity over the treatment of income generated from fines and FPNs before consideration of the Bill at Stage 2.

Decisions about the allocation of any income received through any new FPN regime will be taken when the regulations are developed. The regulations will specify who should issue the FPNs and where the income from the FPNs should be destined for. It is anticipated that different FPN regimes will be established for different types of offences, and consequently the enforcement authority may vary depending on which offence has been committed.

If local authorities become responsible for issuing FPNs, it is anticipated that the authorities will be able to retain that money within their General Fund. In other cases, depending on the

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enforcement authority, the money received by FPNs may be destined for the Scottish Consolidated Fund.

Prior to March 2018, where income was destined for the Scottish Consolidated Fund, the Scotland Act 1998 (Designation of Receipts) Order 2009 required income from fixed penalties and fines (in most cases) to be designated as receipts payable to the Secretary of State, and therefore deducted from the Scottish Consolidated Fund.

Since March 2018, by virtue of the Scotland Act (Designation of Receipts) (Amendment) Order 2017, Scottish Ministers are no longer required to pay an amount equivalent to fixed penalties and fines to the Secretary of State. However, given that the Smith Commission agreed a principle of “no detriment” to either side, under the respective financial agreement the Scottish Government is surrendering an amount to HM Treasury every year as an equivalent to the fines income gained. Therefore, if FPN income were to become part of the Scottish Consolidated Fund, there would be no net benefit to the Scottish budget.

Empathy training

28. The Committee would welcome an update from the Scottish Government on its consideration of the use of other approaches that could be used alongside sentencing.

The Committee asks the Scottish Government if it considers that this is an issue that can be addressed through regulations that would be made if the Bill passes Stage 3 and becomes an Act.

Community Payback Orders rather than custodial sentences are routinely used by the courts for animal welfare and wildlife offences. It would already be open to a Sheriff or a Judge to send someone on an empathy training course under a programme requirement of a Community Payback Order, if such courses were available. This would be in terms of section 227A of the Criminal Procedure (Scotland) Act 1995 (“1995 Act”).

Section 227A provides that where a person is convicted of an offence punishable by imprisonment the court may, instead of imposing a sentence of imprisonment, impose a Community Payback Order (CPO). CPOs are run by local authorities. Before a Sheriff or Judge can sentence someone to a CPO they must first obtain a report from a criminal justice social worker. The report will give the Sheriff or Judge background information about the person such as any offences they have previously committed, their risk of offending again, their health and living situation etc. The criminal justice social worker is assigned by the local authority to supervise the different requirements of the CPO. There are nine different requirements that can be given as part of a CPO (as set out in s227A(2) of the 1995 Act). It is a matter for the Sheriff or Judge to decide which ones should be selected for each sentence. The nine possible requirements are:

- *An offender supervision requirement*
- *A compensation requirement*
- *An unpaid work or other activity requirement*
- *A programme requirement++*
- *A residence requirement*
- *A mental health treatment requirement*
- *A drug treatment requirement*
- *An alcohol treatment requirement*
- *A conduct requirement*

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++If a programme requirement were attached to the CPO, the person convicted of the offence could be ordered to attend a programme arranged by a social worker. These will deal with offending behaviour and can cover a range of issues. If there were retraining or empathy courses were developed then they would likely fall under this requirement of a CPO.

Should retraining or empathy courses be developed then it would be open to the criminal justice social worker to recommend, in their report, that the offender attends the programme as part of the CPO.

The Scottish Government has considered the availability of training that seeks to improve “empathy” or understanding of animals and their welfare needs in general. There are a number of initiatives around teaching children empathy, centred on kindness to both people and/or animals. We consider this is the most important area to focus on as a preventative measure for welfare issues.

In particular, the Scottish Government has supported the Roots of Empathy programme for selected Scottish schools <https://uk.rootsofempathy.org/scotland/>. Roots of Empathy is an evidence-based classroom programme that has shown significant effect in reducing levels of aggression among schoolchildren by raising social/emotional competence and increasing empathy. Scotland was the first country worldwide to deliver Roots of Empathy in every council area, following £1.2 million Scottish Government funding.

The Scottish SPCA also have significant activities in this area in Scotland, through visits to schools and in programmes that intervene with children and young people who are starting to display offending behaviour towards animals such as their Animal Guardians programme <https://www.scottishspca.org/our-work/our-work-with-young-people/animal-guardians> .

There is also a considerable amount of training available for adults on developing empathy with regards to e.g. emotional intelligence, communication, relationships, customer service, victim support and crowd control; all focussed on human-human interactions. There do not, however, seem to be courses to develop empathy in adults towards animals.

There have been a number of recent studies on the efficacy of rehabilitation/ / empathy training on sexual/violent offenders, with mixed results being reported. This may be because the factors/motivations behind the offending behaviour are complex and multifactorial, with each offender being a unique product of their childhood and adult situation. While it is possible that empathy training might benefit some offenders, it would be very difficult to come up with training that would effectively prevent/reduce re-offending in all offenders.

Those animal welfare offences most likely to involve a significant lack of empathy and that result in custodial sentences are those involving deliberate abuse. Given that there are so few custodial sentences, it does not seem proportionate or cost effective to develop and deliver bespoke training for them.

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Sharing of information

32. The Committee considers that information-sharing on convictions (disqualification orders, fixed penalty notices issued, fines and custodial sentences) for animal welfare offences and the potential for a database shared by relevant authorities and agencies, including social services, may help track patterns of offending, including animal welfare and other forms of offending such as domestic abuse and criminal activity.

The Committee welcomes the commitment of the Minister to consider what further opportunities there may be for intelligence sharing. The Committee encourages the Scottish Government to set out proposals to establish a registration system or a means of effectively sharing information between authorities. This would highlight if the same people were receiving a fixed penalty notice for the same offence on a regular basis, warranting further action or investigation, and enable authorities to know where disqualification orders are in place.

The Scottish Government agrees that efficient information sharing between enforcement authorities is important. The importance of an intelligence led approach has been highlighted throughout the development of this Bill, and work continues to ensure the network of professional and technical staff communicate and collaborate effectively in order to prevent and detect criminal activity across Scotland.

Although there is not a single animal welfare database for the various Scottish enforcement agencies, in practice there are two main databases which are currently used to record and share information on convictions and other intelligence on animal welfare and other offending behaviour. These existing databases and procedures enable data to be collated and shared appropriately for the purposes of detecting and preventing criminal activity, in line with the new GDPR regulations.

Convictions and court orders, including Disqualification Orders, are recorded by Police Scotland. Police records are not generally available to other agencies or individuals, but information can be passed to other agencies when appropriate. Police Scotland have formal Information Sharing Agreements (ISA's) with Food Standards Scotland (FSS) and the Scottish SPCA, and are currently discussing a joint working protocol with Scottish SPCA.

There is also a national database (MEMEX) used by local authority trading standards enforcement staff and other UK enforcement agencies which contains a wide range of information relating to animal health and welfare offences and other intelligence, such as suspicions of wrongdoing and previous interventions including warning letters. The future use of this system is currently being considered by local authorities and other enforcement agencies and it is possible that they will move to a new single database (IDB) to be used by local authorities in England, Wales and Scotland in the near future. This database will allow technical staff of all the key organisations to input data, including the result of court cases and disqualification orders. This could be used in future to record fixed penalty or other notices issued by the enforcement authorities using the database. Information is also shared through well-established local authority regular regional working groups which feed into the Scottish Animal Health and Welfare Panel and Strategy groups. The "home authority principle" is also well established; whereby if a trader in an area has come to the attention of local authorities in other areas, information is fed back to the "Home Authority" enabling them to have an overview of that trader's trading behaviour.

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The Scottish Government is committed to supporting the development of best practice in relation to information and intelligence sharing, and identifying processes which augment existing initiatives, such as the Memorandum of Understanding between Scottish SPCA, APHA, and local authorities to share information. The Scottish Government also holds regular meetings with these enforcement bodies through the Scottish Livestock Welfare Group to facilitate and improve information sharing.

We will continue to monitor this issue closely through our regular meetings with the enforcement bodies and will carefully consider how we can support any possible improvements to information sharing and databases.

Harming a service animal

38. The Committee is content with the removal of the defence of self-defence in relation to attacks on service animals. The Committee notes the calls to extend the provisions to include other working animals but received no firm evidence to support the position that existing legislation is insufficient to protect working animals. Attacks against other types of assistance animal may be prosecuted under existing offences in the 2006 Act, such as causing unnecessary suffering. The Committee notes that maximum penalties for this offence are increased by this Bill, regardless of the type of animal involved, which increases protection across the board.

The Committee asks the Scottish Government if it is aware of instances of working animals, including assistance animals, being attacked and the attacker successfully using an argument of self-defence, or another defence, under the relevant subsection of section 19 as a defence. The Committee invites the Scottish Government to consider whether there may be merit in examining the issue in relation to assistance animals at a future date.

The Scottish Government is not aware of any instances of other working animals being attacked and the attacker successfully using an argument of self-defence or another defence under section 19.

It seems unlikely that this issue would arise in relation to attacks on assistance animals as, unlike police service animals, they are not routinely used in situations where an attacker could reasonably claim to have been defending themselves.

The proposed change will provide service animals with equivalent protection under the Act to other animals, by removing a possible defence directly related to the particular way they are used.

Categorisation of wildlife crimes

39. The Committee wishes to see a consistency of approach for categorising and prosecuting different types of wildlife offence. The Committee understands there are different tiers of penalties and is unclear as to the logic for these differences. The effect of the destruction of a habitat could be as fatal as directly harming or killing an animal. For example, the destruction of setts could lead to the destruction of a colony and the deaths of the animals.

The Committee recommends that the Scottish Government reconsiders its approach to ensure enhanced protections are extended to resting places and breeding sites

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therefore sentencing can reflect where crimes in effect have equivalent outcomes i.e. in terms of harm to the animal.

I agree with the committee that it is important to achieve a consistency of approach and that is what we are seeking to do, so that the penalties which are available and which apply to different types of offences are coherent, proportionate and appropriate and fit the particular circumstances of each individual case. Accordingly, I do not consider that there is a need to increase the penalties for offences of this kind any higher than those already proposed in this Bill.

There are over 200 wildlife offences across many pieces of legislation. The approach to the increase of penalties for this area of crime was to offer a proportionate maximum level for crimes that involved direct unnecessary suffering, akin to the offences under section 19 and 23 of the Animal Health and Welfare (Scotland) Act 2006. Those offences that we identified as having the most severe welfare impact, such as the killing or harming of a wild animal, have been increased to a maximum of five years imprisonment or an unlimited fine or both under solemn conviction, as recommended by Professor Poustie in his review of wildlife penalties.

We then considered a range of offences that may indirectly cause harm to a wild animal, such as the disturbance or damage to habitats. For these offences we have proposed the maximum penalty be raised to 12 months imprisonment or a £40,000 fine or both under summary conviction. Should a person commit an offence in respect of more than one animal, egg, and/or nest, there is currently provision within the Wildlife and Countryside Act 1981 for the court to consider each animal, egg or nest separately when sentencing. It would therefore be possible for a fine to be imposed up to the new maximum of £40,000 in respect of each animal, egg and/or nest.

Detection and prosecution of wildlife crimes

40. The Committee supports the increased penalties. The Committee considers that penalties form part of the solution to addressing wildlife crime. The Committee asks the Scottish Government if it is content that there is a sufficiently collaborative approach and sufficient resources allocated to the detection of wildlife crime and if it has any plans for the deployment of further resources or collaboration with other agencies in the light of this Bill. The Committee also asks the Scottish Government if it has any plans in relation to publicity or education around the outcome of cases to help deter potential offenders.

The Committee would welcome sight of the full evaluation of the pilot for the use of Special Constables in the Cairngorms area. The Committee understands that this will be available early in 2020 and asks the Scottish Government for a firmer indication of when it will be available to the Committee.

The Scottish Government has recently increased the resources available for Police Scotland to investigate wildlife crimes. Police Scotland now have a central investigative support unit, wildlife crime liaison officers in each Division and over 100 officers with additional training. Police Scotland recently held a wildlife crime training course for Officers involved in the investigation of wildlife crime. It has been developed to offer specialist knowledge and support, and is available for all wildlife crime officers currently in post.

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The Cabinet Secretary for the Environment, Climate Change and Land Reform, Roseanna Cunningham launched the inaugural course in January to 18 students from divisions across Scotland. A second course is planned for later in the year, it is hoped that it will become part of the Detective Training prospectus and will be used to train officers in various roles in wildlife crime. The syllabus covered;

- Suspect and witness investigation techniques,
- Information sharing and partnership working,
- Forensic recovery and examinations lead by Scottish Police Authority and SASA
- Inputs from RSPB in relation to satellite tag investigations
- Inputs from SNH in relation to licensing and SASA in relation to traps and snares
- Inputs from NWCU, Scottish Government, COPFS and a defence solicitor

The Crown Office and Procurator Fiscal Service has a dedicated Wildlife and Environmental Crime unit to prosecute wildlife crime cases.

I too am keen to see further collaboration and that is why I am pleased that Police Scotland and the Scottish SPCA are meeting in March this year to discuss a joint working protocol.

The Partnership for Action Against Wildlife Crime Scotland (PAWS) also provides a forum for stakeholders, including Police Scotland, Scottish Natural Heritage and various conservation and land management groups such as the RSPB and Scottish Land and Estates to share information and discuss strategies for addressing wildlife crime.

Through PAWS, the Scottish Government will provide a wildlife crime exhibit at the Royal Highland Show and Scone Game Fair. This year, information on the changes to wildlife crime penalties will be supplied and members of the Bill team will be available to advise the public on its passage into law.

The Scottish Government has no specific plans for publicity or education about the outcome of wildlife crime prosecutions. There is often extensive media coverage of wildlife crime cases in court and many enforcement bodies and other organisations issue press releases and publicise the outcomes of such cases on their websites. For example, in August 2019, the COPFS published information concerning a gamekeeper convicted of various wildlife offences -

<https://www.copfs.gov.uk/media-site/media-releases/1852-gamekeeper-sentenced-for-killing-multiple-protected-species>

A summary of findings of the pilot project for the use of Special Constables and the future plans for policing within the Park area will be made available to the Committee shortly. Police Scotland will continue to make full use of the Wildlife Crime trained Special Constables, who will be deployed alongside their respective full-time Wildlife Crime Officers across the three Divisions within the Park. Within Highlands Division, which encompasses a large portion of the Park, information sharing and a partner agency approach will be improved through regular liaison between representatives of the Park and the Wildlife Crime Officers.

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Scottish Society for Prevention of Cruelty to Animals (Scottish SPCA) - powers

43. The Committee recommends that the Scottish Government explores in detail the options to enhance detection and prosecution by expanding the powers of the SSPCA, alongside the evaluation of the Special Constables pilot, as an approach to better resourcing wildlife crime enforcement. The Committee would welcome an indication of the timeframe for this consideration and how it fits with the passage of this Bill.

We understand why some, including the committee, would be keen to see the powers of the SSPCA expanded into wildlife crime enforcement. We also know that the SSPCA is keen to enhance its powers.

However, this is not a straightforward matter. Expanding the powers of the SSPCA has not been fully explored in terms of the consequences and implications, not least the potential impact on existing enforcement bodies. We must fully consider the concerns around accountability of the Scottish SPCA and the implications of such changes, touched on by Mike Radford in his evidence to the committee: *“My view is that the SSPCA should be given more powers and that it should be treated as a public body, so that it would be subject to judicial review in the same way as other public bodies are.”*

To consider this as part of the bill would mean pausing it to investigate the issues fully and to gather more evidence before coming back to Parliament. This could potentially delay the bill to the extent that there might not be sufficient time to complete its passage in this current parliamentary session.

Nonetheless, there is clearly more work that can and should be considered. I am committed to giving this matter more consideration and will provide the committee with a timetable for this future work ahead of Stage 3.

Impact statements

44. The Committee recommends that impact statements should be used as a matter of standard practice. The Committee is concerned that in case of wildlife prosecutions the victim has no voice and the impacts of the harmful actions can be extensive. The Committee asks the Scottish Government why it considers putting impact statements on a legislative footing, as recommended by Professor Poustie, is unnecessary. The Committee would welcome any available evidence to support this position. The Committee also asks the Scottish Government to consider how a monitoring process could be enhanced and used to determine whether impact statements are being used to best effect in the process of prosecution and sentencing. The Committee also asks the Scottish Government whether putting impact statements on a legislative basis would be a better way forward and if it considers it is not, the Committee would appreciate more clarity on the that position.

In relation to victim impact statements, recent discussions with COPFS and Police Scotland indicate that the current system is working well and that impact statements are presented to the court as part of the evidence at trial or the narration of the facts of a case.

The amount and nature of the impact information will vary from case to case. It is within the discretion of a Sheriff to take impact information into account as part of the whole body of

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evidence in a case and reflect that in any sentence. Often, a Sheriff will comment on the severity and impact of the offending when passing sentence.

Pesticides

45. The Committee would welcome an update from the Scottish Government before Stage 2 commences on the appropriate level of penalties for the possession of illegal pesticides. The Committee would also welcome the Scottish Government's view of potential plans for a further pesticides amnesty.

Section 15A of the Wildlife and Countryside Act provides that any person who is in possession of any pesticide containing one or more prescribed active ingredient shall be guilty of an offence. The penalty for the offence under section 15A is imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale, or both. The Possession of Pesticides (Scotland) Order 2005 sets out in the schedule ingredients which are prescribed by the Scottish Ministers for the purpose of section 15A of the 1981 Act. There are 8 ingredients listed in the schedule, 4 of which are pesticides and 4 of which are biocides.

The Scottish Government last held an anonymous disposal scheme in 2015, prior to this, there had also been a UK wide amnesty, which was overseen by the UK Government Department for the Environment, Food and Rural Affairs (DEFRA).

It was made clear at the time that it would be a short life scheme and that anyone still in possession of any of the banned pesticides would have no excuses for not having disposed of them safely and free-of-charge at that time. It is also clear though, that some individuals continue to deliberately deploy illegal pesticides, some having been banned for over 20 years.

Given this, we think it is unlikely that a further scheme would be effective as those who wished to dispose of their stock have had ample opportunity to do so. We also sought the views of SASA, RPID, Police Scotland and COPFS on the need for and potential effectiveness of another disposal scheme and it was felt that there would be little merit in undertaking another disposal scheme.

Vicarious liability

49. The Committee appreciates that identifying who is potentially vicariously liable can be difficult. However the Committee would welcome the concept of vicarious liability being extended to further wildlife offences and would welcome the Scottish Government's view on this.

The Committee recommends that the Scottish Government works with the Crown Office to provide more clarity and guidance about vicarious liability – what is essential to make successful prosecution, what is desirable, how the court applies procedures and evidence and opportunities for increased transparency around Crown Office decision making (whilst recognising those decisions will always be made on a case-by-case basis by the Crown Office).

The Committee would also welcome a view from the Scottish Government, before the start of Stage 2, as to whether the principles of the Victims' Right to Review (VRR) scheme, could apply to organisations working in the public interest in relation to wildlife crime (given the 'victims' of alleged wildlife crimes are not able to act in their

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own interest). The Committee considers that this could enable non-government organisations (NGOs) acting in the public interest (i.e. on behalf of nature) to seek more information regarding decisions not to prosecute serious alleged wildlife offences and not only in situations where alleged crimes took place on their own land.

After careful consideration and discussions with stakeholders, my officials and I have not been able to identify any further offences to which we think it would be useful or appropriate to extend the offence of vicarious liability too.

I would therefore welcome the Committee's suggestions on which particular offences would warrant this and I will happily look at this further.

However, as part of the wider work we will be undertaking to publicise the changes being made as part of this Bill, I will ensure that the availability of vicarious liability offences under the Wildlife and Countryside Act 1981 are included in the publicity.

The VRR scheme applies to businesses, companies and other organisations which are victims of a crime. Therefore, if a nature conservation or welfare organisation are a victim of a crime then they have a right under the VRR to request a review of decisions by the Crown Office (although it is unlikely that such bodies would ever be the victim of a wildlife crime).

However, even where a person or organisation is not a victim, it remains open to them to make enquiry with COPFS about particular cases. It is for COPFS to decide what information can appropriately be made available taking into account the nature of any particular case, the information requested and who is making the request. Legitimate and relevant considerations include issues of confidentiality, appropriate handling of sensitive personal data, the privacy and reputation of witnesses and the presumption of innocence of the accused persons.

Video evidence/surveillance

51. The Committee recognises that the Bill does not impact the powers of other agencies or groups in relation to surveillance. However, it agrees that there is a place for cameras to be deployed by other agencies as long as they are not being used in contravention of privacy rights, under article 8 of the European Convention on Human Rights. The Committee recommends that the Scottish Government works with the Crown Office to discuss whether more detailed reasons can be made publicly available regarding admissibility of video evidence in alleged instances of wildlife crime.

COPFS wrote to the Convener of the Committee in 2017, explaining in detail the law surrounding admissibility of evidence;

https://www.parliament.scot/S5_Environment/General%20Documents/20170530_COPFS_to_GD_response_letter.pdf

As highlighted in that letter, “... *the principles governing the admissibility of evidence are not specific to video evidence or CCTV evidence...often used in criminal trials in Scotland.*”

In addition to considerations related to the admissibility of evidence being compatible with the European Convention on Human Rights, “*any question about the admissibility of such evidence in any particular case will depend on the particular facts and circumstances of that*

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case. Questions about the admissibility of video evidence often relate... to the manner, or the circumstances, in which the evidence was obtained.

In making decisions in individual cases, prosecutors must apply the law (including the law on the admissibility of evidence), to the particular circumstances of the case. There is no particular policy or guidance to be applied in assessing questions of admissibility of evidence: it is a matter of law, not policy, and a matter to be resolved by applying the law to the particular factual circumstances of individual cases.”

Again, this applies to the admissibility of all types of evidence and is not specific to video evidence or CCTV evidence.

Decision notices and appeals

55. The Committee asks the Scottish Government to clarify if both the owner and the ‘keeper’ of the animal could and should be served a decision notice.

Exercise of the new powers will involve interference with the property rights arising from ownership of animals. Various procedural safeguards have been provided for in the new powers over animals, which should ensure that any interference with property rights which results from exercise of the powers is justified.

The safeguards include the requirement to serve a “decision notice” on the owner of the animal and the conferral of a right of appeal (against the decision set out in the decision notice) on the owner of the animal.

An appeal may also be made by any person considered by the court to have “sufficient concern for the animal”. Accordingly, while there is no requirement to serve a decision notice on any person other than the owner of the animal, persons who have a concern for that animal may nonetheless bring an appeal. Such persons may also be heard in the course of appeals as a third party even if they do not initiate the appeal.

A keeper of the animal may accordingly make representations in the course of an appeal if considered by the court to have sufficient concern for the animal. Whilst the Scottish Government considers that such participation in the appeal process should be permitted, it does not propose that there should be any legal duty on the part of the person exercising the new powers to serve the decision notice on any keepers of the animal (if different to the owner of the animal).

The procedures relating to decision notices have been designed to be as streamlined as possible. A requirement to serve a copy of the decision notice on keepers would add a further layer of complexity to the procedure and could represent an insuperable obstacle if it were not possible in a particular situation to identify, trace or effect service on the keeper of the animal. The requirement to serve the decision notice on the owner of the animal (together with the other procedural safeguards and the owner’s entitlement to compensation) are considered sufficient, together with other features of the new powers, to justify interference with Convention rights.

The person exercising the new powers would be able, at their discretion, to notify any keeper, who is not also the owner of the animal of the decision taken in relation to the animal. The Scottish Government will give consideration to whether future guidance to local authorities regarding exercise of the new powers will include advice as to the circumstances

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in which notification to keepers would be appropriate. Appeals will be subject to a form of procedure that allows the sheriff considerable discretion as to how the appeal is managed. The court may accordingly order during the course of an appeal that notice be given to other interested parties (such as a keeper) if considered appropriate in the circumstances.

The Committee has also expressed concern about circumstances in which it is difficult to identify the owner of the animal. Whilst failure to serve a decision notice on the owner of the animal would preclude resort to the new powers, this would not prevent the authorities from making suitable arrangements for the animal to secure an animal's welfare. The existing procedure provided for in section 34 (disposal orders) of the 2006 Act remains available where it is not possible to proceed by way of service of a decision notice under the new procedure.

The explanation above refers to the procedure in new section 32C to be inserted into the 2006 Act. The Bill as drafted allows for the notice provisions to be amended by regulations at a later date, thereby allowing the Scottish Government flexibility to adapt the procedures based on the practical experiences of stakeholders' use of the new notice provisions. The requirements for service of the decision notice (and other notices) will be subject to any future variation by way of regulations made under affirmative procedure. Such regulations could provide for variation of the of the rules as to the persons on whom a decision notice is to be served and also the means by which such a decision notice may be served.

Vulnerable People

56. The Committee recommends that the Scottish Government engages with enforcement agencies and provide guidance as to how, and by whom, people suffering from health issues, which might prevent their effectively engaging with the decision notice and appeals procedure within a three week period, are to be identified and supported in practice.

Enforcement agencies are accustomed to dealing with people suffering from health or other personal problems as these are often a significant contributory factor in cases where animals are not being properly cared for. In such cases animals are generally only taken into possession after previous advice and warnings have failed, and the enforcement authorities will be well aware of the owner's personal situation.

Awareness of these issues in the agricultural sector has led to the establishment of the industry-led "Farmwell Scotland," an initiative established by organisations from across Scotland's agricultural sector to promote wellbeing in those working in the farming industry, and to protect farm animal welfare.

Farmwell Scotland encourages those with concerns, where possible, to talk to the person they're worried about and where possible encourage them to call the Royal Scottish Agricultural Benevolent Institution (RSABI) Helpline to get support, before it becomes a crisis. RSABI is a Scottish Charity providing varied support to individuals and families across the agricultural sector. They are a good first contact for farmers who are struggling emotionally, practically or financially and need support. They may also be able to direct people to other bodies giving help or advice if that is more appropriate.

The Scottish Government recently provided RSABI with £200,000 to help deliver early intervention advice and support more people get the emotional, practical and financial support they need.

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Local authorities have a legal duty to refer those considered to be suffering from mental health issues to local Social Services. This could be done for all manner of reasons, and is a professional judgement.

Police Scotland utilises the Vulnerable Person Database Concern Form when they come into contact with persons where there are concerns regarding their mental health. If it is felt that there were issues with an individual which required the support of another agency or there were concerns as to their wellbeing then this form would be completed and submitted through a geographical hub, were decisions are then made regarding sharing of this information. Should this be an immediate concern then officers utilise local Community Triage services (if available) and if required consider utilising powers under the Mental Health (Care and Treatment) (Scotland) Act 2003 regarding removal to a place of safety.

However, we understand the committee's concern that everything possible that could be done is being done to ensure people are supported to engage with the process and I will consider if specific guidance might be needed relating to decision notices once the legislation has been implemented.

Compensation

66. The Committee recognises that compensation is a complicated process and that once the draft provisions in the Bill sit within the existing legislation, they should be more readily understood. However, the Committee would welcome an explanation from the Scottish Government as to the rationale for and how it arrived at the drafting structure of the compensation provisions in the Bill

As the Committee has noted, animals may be taken into possession, using the existing powers in section 32 of the 2006 Act, to protect their welfare in a wide variety of situations. These situations range from cases where owners become incapable of caring for their animals through no fault of their own to cases involving deliberate abuse or neglect which then results in subsequent criminal proceedings.

It is important to note that when animals are taken into possession, the animals remain the property of the owner up to the point that the animals are sold, rehomed or destroyed. Currently, after a court order permitting sale is obtained using the existing procedure in section 34 of the 2006 Act, owners are likely in standard cases to receive the proceeds of sale minus expenses reasonably incurred by the enforcement authority.

The new provisions were drafted to provide a robust process that prioritises the welfare of the animals and which can be used promptly without requiring a court order, thereby minimising the scope for delay due to appeals or other court procedures. This is designed to be a completely separate matter from allocating blame to the owner or any subsequent legal proceedings. The new arrangements continue to recognise and protect the legitimate property rights of owners who may not have committed any offence, but new provisions also allow compensation to be deferred where there is a prosecution, and allow a court to determine that compensation should not be paid at all after a subsequent conviction if that is appropriate.

Although the value of the animals might have increased after being taken into possession, the animals remain the property of the owner during this period. With regard to the right to the peaceful enjoyment of possessions under Article 1 Protocol 1 of the European

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Convention of Human Rights, it is appropriate for any increase in value in the animal that accrues whilst it remains in the possession of the authorities to be reflected in the method of calculating compensation. Accordingly, the value of the animal is assessed at the time immediately before the owner is deprived of ownership where this is greater than its value when it was originally taken into possession.

In more unusual situations, the value of an animal may fall while it is in the possession of the enforcement authority. In these cases it is considered appropriate for compensation to be calculated with reference to the value of the animals at the time they are taken into possession. This should remove the basis for any grievance by owners who consider a fall in value of the animal to be the fault of the enforcement authority, so may therefore minimise the number of appeals by owners against the original decision taken in relation to the animal.

The compensation provisions have therefore been drafted so that the starting point when calculating the compensation amount is either the market value at the time it was seized under section 32 or the market value at the time immediately before the decision regarding the animal is implemented (whichever is the greater). The compensation is then calculated by deducting relevant expenses, namely any expenses reasonably incurred in relation to the animal after it was seized under section 32 and any reasonable costs of implementing the decision taken in relation to the animal. It is anticipated that, in many cases, deduction of the relevant expenses will mean there will be little or no compensation paid to the previous owner of the animal.

The new procedures confer a power on the authorities to defer payment of the compensation pending the outcome of criminal proceedings if certain conditions are met. After the conclusion of subsequent criminal proceedings for certain animal welfare offences, the convicting court may order forfeiture of the compensation if the conviction arises from the circumstances in which the animal was first seized under section 32 of the 2006 Act.

The powers of deferral and forfeiture may therefore be used to deprive the owner of compensation where the commission of a criminal offence would give rise to an entitlement to compensation. It is worth noting that deferral of compensation, in itself, has no effect on the amount of compensation regardless of how long criminal proceedings last because the amount of compensation is assessed at the time of seizure or immediately prior to the decision being implemented.

The procedures as drafted, including the provisions relating to compensation, have been designed for use in various scenarios. The new suite of inter-related procedures in the Bill, are considered to be justified, notwithstanding that they engage Convention rights, because they strike an appropriate balance between the rights of the individual and the public interest of protecting animal welfare.

Scottish Animal Welfare Commission (SAWC)

61. The Committee would welcome further information from the Scottish Government and from the newly-established Scottish Animal Welfare Commission on its planned programme of work.

You will be aware that the full membership of the Scottish Animal Welfare Commission was announced on Friday 28 February - <https://www.gov.scot/news/scottish-animal-welfare-commission-appointed/>

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It is intended that the Scottish Animal Welfare Commission will hold a first meeting on 18 March. Further information about its planned programme of work will be provided as this is developed.

Firearms legislation

63. The Committee welcomes the commitment of the Scottish Government to explore this and asks for an update on how this is being progressed.

As firearms legislation falls within the Justice portfolio I have written to the Cabinet Secretary for Justice asking if Professor Poustie's recommendations could be progressed with the UK Government. I will keep the Committee informed of any significant developments in this area.

General licence suspensions

65. The Committee would welcome a response on this question, and more broadly asks the Scottish Government for an update on its position on the effectiveness of the suspension of general licences as an enforcement tool in relation to wildlife crime.

Section 16 of the Wildlife and Countryside Act 1981 ("the 1981 Act") sets out the circumstances in which the appropriate authority may grant a licence to carry out certain actions which would otherwise be a criminal offences under Part 1 of the 1981 Act (e.g. killing wild birds).

Section 16 also provides that a licence may be modified or revoked at any time by the appropriate authority. Section 16A allows the Scottish Ministers to delegate their functions in relation to licences under section 16 to Scottish Natural Heritage ("SNH").

SNH has published a Framework ("the Framework") for Implementing Restrictions on General Licences which has been approved by the Scottish Government. Restrictions will be imposed where on the balance of probability (the civil standard of proof), wildlife crime has taken place.

SNH's Framework sets out that decisions to impose a restriction on a general licence will only be based on evidence received from the Police of an offence under the 1981 Act having been committed in relation to wild birds or where the terms of General Licences were not complied with. SNH has agreed to an Information Sharing Protocol (ISP) with Police Scotland that allow the Police to pass on such evidence to SNH.

The Framework sets out that where a decision is made to impose a restriction, the owners and occupiers of the land will be entitled to appeal the decision within 14 days of the date of the decision.

An appeal shall have the effect of suspending the restriction from the date the appeal is received by the Director of Policy and Advice until the date of the decision on the appeal, subject to the following exceptions:-

- i) an appeal against the geographical extent of the restriction will only have the effect of suspending the restriction insofar as it applies to the geographical area to which the appellant contends the restriction ought not to apply;
- ii) an appeal against the period of the restriction shall not suspend the restriction unless any shorter period contended for by the appellant expires prior to the date of the decision on the appeal;
- iii) there has been an actual breach in the conditions of the general licence.

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The framework has been subject to judicial scrutiny. On 4 November 2015, SNH issued a decision to restrict the use of general licences 01, 02 and 03 on the Raeshaw Estate and neighbouring land, managed by the same party, for a period of three years. The Estate appealed the restriction imposed by SNH following the procedure set out in the Framework. The effect of the appeal suspended the restriction until the date of the decision on the appeal. SNH refused the appeal on 1 February 2016 and as such the restriction on the general licence was upheld.

Following SNH refusing the appeal the estate then petitioned for Judicial Review, challenging the decision made by SNH and examining whether the procedures followed were lawful. The judicial review was heard in January 2017 and court's judgement published on 28 March 2017. In summary, the court decided that SNH had acted fairly and with due regard to the stated rationale for imposing a General Licence restriction as laid out in SNH's framework for implementing restrictions and so the restrictions were upheld.

More recently, on 26 November 2019, SNH issued a decision to restrict the use of General Licences 01, 02 and 03 on Leadhills Estate in South Lanarkshire for a period of 3 years. Leadhills Estate appealed the restriction imposed by SNH in accordance with the Framework on 10 December 2019. The effect of the appeal suspended the restriction until the date of the decision on the appeal. SNH rejected the appeal on 31 January 2020 and as such the restriction on the general licence is now in place until the 26th November 2022.

The ability to impose restrictions on the use of general licenses is just one of a number of approaches that can be taken to tackle wildlife crime. As restrictions can be imposed 'on the balance of probabilities' that wildlife crime is occurring, the Scottish Government considers that it can be an effective enforcement tool and demonstrates that action can be taken even when no criminal charge has been brought.

Links to the Grouse Moor Management Review Group report

67. The Committee welcomes the publication of the Werritty report. In advance of Stage 2, the Committee would welcome the Scottish Government response to the report and asks the Scottish Government to set out: to what extent this Bill reflects the recommendations of the report; what recommendations not included in this Bill could be within scope and; what recommendations not included within the Bill could be within scope.

Careful consideration is currently being given to the findings and recommendations of the independent Grouse Moor Management Review Group and I will publish the Scottish Government's response in due course. The report recommends that 'maximum penalties available on summary conviction, at least 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 5 year'. Both of these recommendations are being taken forward as part of this Bill.

Issues of scope in relation to any bill are a matter for the Parliamentary authorities. However, I would point to my comments in relation to paragraph 43 of the Stage 1 report. The report makes a number of recommendations and it is right that we take the time and space to fully evaluate them all and the various options available to take them forward.

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I do not see that is something we could do given the timescales of this Bill. Given the potential ramifications of some of the recommendations, it would not be appropriate to try to rush them through and I would not want to delay introducing the important provisions that we are already proposing within this Bill.

Wildlife Crime in Scotland: 2018 Annual Report

63. The Committee would welcome further discussion with the Scottish Government on the findings of this report

I would be happy to discuss this further with the Committee.

Conclusion

I hope that my response addresses the issues raised in the committee's Stage 1 Report and are helpful in your further consideration of the Bill. I look forward to exploring these issues during the Stage 1 debate on 12 March 2020 and to continue working with the committee. I am confident that we will be able to work together and with other stakeholders to reach a satisfactory resolution to any concerns expressed in your report.

Finally, I want to thank all the committee members for their careful and thoughtful deliberations on the bill and its measures to date and look forward to working with you on the next stages in the parliamentary process.



MAIRI GOUGEON

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