

Consultation Title	<b>Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill</b>
Date	<b>12/11/19</b>
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Scottish Land & Estates (SLE) is a member organisation that uniquely represents the interests of both land managers and land-based businesses in rural Scotland. SLE condemns all wildlife crime unreservedly and is a key partner in the Partnership for Action Against Wildlife Crime in Scotland (PAW Scotland). Our members play their part in helping to prevent wildlife crime and assisting those that enforce wildlife law. They are committed to helping with the detection and prosecution of those responsible. We have regular dialogue with Police Scotland and other stakeholders and contributed to the Scottish Government's Wildlife Crime Penalties Review Group 2013 -15 chaired by Professor Poustie.

We recognise that in dealing with wildlife crime, preventative work, education and awareness are important factors, as well as a just and proportionate legal system backed by sanctions and with consistent and clear enforcement. We broadly agree with the need to update the schedule for maximum penalties for some wildlife offences which are clearly outdated but have concerns regarding extending time limits for prosecution.

**Are the proposed maximum penalties for animal welfare offences set at the right level to act as a deterrent?**

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SLE has no reason to believe the proposed maximum penalties are not set at the right level, although the proof will be once enacted and enforced. We do recognise that key penalties have not been updated for years and are therefore as stated happy to support an increase, not least bearing in mind inflation over the period. However, we do have concerns though about an "unlimited fine" which by its very nature means no limit. It is of course appropriate to review and uptake penalties, but having an unlimited fine is arguably no greater deterrent than a numerical fixed cap which is more tangible. We also have concerns about an "unlimited" fine being subject to external pressures. While we recognise that under the Criminal Procedure (Scotland) Act 1995 a court in imposing a fine is to take into account the means of the offender, we do feel that a specified cap may act as a better deterrent than an unlimited fine.

On the basis that the maximum penalties will only ever be imposed in the most serious cases and that the courts must take into account the circumstances of the offender including whether he or she is a first offender, is of otherwise good character and his or her income when considering any penalty we agree with this increase to five years maximum. The degree of criminal intention, negligence, recklessness, repetition of offending and so on all have an impact on how serious the offence should be considered. We believe that judicial discretion in sentencing is important - all cases turn on their own facts and circumstances and the courts must be allowed flexibility to deal with each case appropriately within a range of possible outcomes. Without access to court transcripts it is, unwise to compare penalties imposed in different cases as they will have been influenced by the individual circumstances of each case, including variables such as an early guilty plea, mitigation etc.

It is important that penalty and enforcement measures are robust and support one another. Regardless of the punitive value of a sentence, the deterrent effect will be limited if an offender concludes that the chances of being caught and receiving punishment are minimal due to resourcing or other issues. We believe it is right that there should be a wide range of appropriate penalties available which offer necessary flexibility to the courts or to be lenient where it is needed but also offer the opportunity to impose significant fines and/or imprisonment to those offenders at the more serious end of the scale. Clear guidelines are also essential.

The reality is that there will be a host of facts and circumstances which will make each offence different from another. It is necessary that there is enough flexibility within parameters for each offence so that each case can be treated individually, taking all of the circumstances into account. This flexibility is required for the system to be fair in terms of adequately punishing the offender but doing so in a just and cost-effective way for society as a whole.

**Are the proposed maximum penalties for wildlife offences set at the right level to act as a deterrent?**

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We would reiterate our points made to the question above on animal welfare offences in relation to unlimited fines.

SLE does agree with the maximum available penalty for damage of nests or shelters being increased to a prison sentence of one year or a fine of up to £40,000, or both.

It should be noted that while the occurrence of any deliberate wildlife offences is the cause of extreme frustration and disappointment for those closely involved in the land management sector, crime is still at a relatively low level when the whole sector is looked at objectively. The fact that this is the case even when maximum penalties are rarely imposed may suggest that the penalties available are generally (along with other factors) successful as deterrents, but more needs to be done to educate and influence.

The threat of penalties alone will not prevent offenders, but we appreciate that increasing awareness of sentences and knowledge of offences and their impacts also assists in deterring illegal activity. There is certainly an awareness in the land management sector that the courts take wildlife crime offences increasingly seriously and are more prepared than ever to impose heavy sentences where that is appropriate given the nature and scale of the offence.

We would also add that the commission of wildlife offences invariably attracts media and political attention, some of which can be skewed in its reporting. Those involved in the process, from all perspectives, have at times expressed suspicion of the authorities and the criminal justice system. Justice must not only be done but be seen to be done. Sentencing of a particular offence may be a highly technical matter and it would therefore be helpful in some cases to provide an explanation of the reasoning behind a particular sentence – particularly where it may appear unduly lenient or unduly harsh. A court will not be able to satisfy all concerns because those are often dependent on the particular viewpoint of the observer, but it should be transparent in how it reaches decisions so that accusations of bias or undue influence can be ruled out.

We also note that if the offender is a business entity, then the impact on the business should be a factor in reaching a proportionate sentence. The impact will vary according to the nature of the offences as well as the size and resources of the business. Where there are repeated and very serious offences then it may be right for the impact to be significant even if the business is small and not well resourced. Equally if there are minor or technical offences then

it may be disproportionate to impose a large financial penalty if job losses may result or the viability of the overall business may be jeopardised.

**Can you give specific examples where existing maximum penalties have been insufficient?**

SLE has no examples of situations where existing penalties have been insufficient, and we would reiterate the point above regarding the relatively low levels of wildlife crime to date. However, we are fully supportive of the Wildlife Crimes Penalties Review Group findings that penalties for wildlife crime offences should be updated. As stated, we do have concerns about unlimited fines.

**Do the proposals on wildlife penalties fully address the recommendations of the Poustie review on penalties?**

The proposals do not fully address all ten recommendations. It needs to be borne in mind that some of the recommendations relate to reserved matters (such as fire arms legislation) and would not form part of an Act of the Scottish Parliament. Some other points, while important, would not be for primary legislation and we appreciate that given time constraints of the Parliamentary session a fuller consolidation of the law, while desirable, is not practically possible.

There are a couple of areas where we feel there should be particular attention. An area of the Poustie review which we believe to be important is its call to develop, “*a more systematic approach to the use of impact statements*”. The impact assessment of any wildlife offence is important to ensure proportionality. We feel it is important the court has full information presented by the prosecution of the wider impact of the offence on the species or eco-system affected. Impact statements ought to be used more systematically. Any wildlife crime ought to be wholly condemned. The killing of a common predator with no further impact on the species is obviously different from the sizeable impact in some other wildlife crimes.

The proposals do not go so far as to legislate in this area, but it would be useful to understand the extent to which impact statements are requested and used and this is something which would benefit from ongoing monitoring. If the prosecution were to seek impact statements as a matter of course this would presumably be a straightforward administrative task. However, consideration could be given to including such a requirement within the Act itself. There would arguably be precedence in terms of the requirement for courts to consider victim statements prior to sentencing in other aspects of criminal law. These points made by the Poustie review have not on the face of it been taken up.

Another area covered by Poustie was the conclusion, “*that there would be merit in developing sentencing guidelines to enhance consistency and transparency of wildlife crime sentencing following the establishment of the Scottish Sentencing Council.*” We consider sentencing environmental and wildlife offences can be quite different from most criminal offences, particularly with regard to the assessment of culpability and harm. For example, there may be a public policy aspect to some cases, where the harm or the risk of harm is to the public at large rather than to an identifiable victim. In addition, the offender may be a company rather than an individual.

The threat of penalties alone will not prevent offenders, but we appreciate that increasing awareness of sentences and knowledge of offences and their impacts also assists in deterring illegal activity. There is certainly an awareness in the land management sector that the courts take wildlife crime offences increasingly seriously and are more prepared than ever to impose heavy sentences where that is appropriate given the nature and scale of the offence.

We appreciate that sentencing guidelines are for the Scottish Sentencing Council, but it would be helpful if the Council was to take forward the issuing of guidelines in this area.

Finally, we are interested in the Poustie review proposal of retraining or empathy courses. It does not seem that this has been taken forward and non-custodial sentences through for example Community Payback Orders could include such retraining or empathy courses as part of the Order. We recognise the need to have suitably qualified people to deliver the courses and sufficient numbers of people on a course.

**Are the proposals for treatment of service animals necessary and appropriate?**

SLE is not in a position to comment on this.

**Will the proposals have implications for how evidence is gathered and treated?**

It is understood that the increase in penalties proposed for certain types of offence under the Bill will mean that there will be opportunities for police sanctioned surveillance, providing that it is deemed that that would be appropriate and all the prerequisites for carrying out that surveillance are undertaken.

On the issue of evidence that has been gathered from third parties, the Bill does not make any changes to the processes or procedures under which crime is investigated or prosecuted. Presently, the rules governing the admissibility of evidence are not for instance specific to wildlife crime. The Crown has to make decisions on a case-by-case basis about whether a piece of evidence is admissible. There will be various reasons which are considered in that regard, including legal reasons.

While the Bill includes the ability to increase sentences and make unlimited fines it does not necessarily increase the possibility of video evidence being used in a case. It is case that the police have certain criteria under which they can authorise surveillance and raising the maximum penalties that are available for some 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. We do not perceive any 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. However, as stated, the police will have more scope to consider using video evidence, because the limits involve whether something is a serious crime.

We are extremely concerned by the proposed increase in time limit in which to bring proceedings. We are unaware that the current time limit for prosecution has resulted in an inability of the police to prosecute offences under the legislation. The proposed change would mean that an allegation dating back three years can be brought so long as it is brought within six months from the date on which sufficient evidence came to the knowledge of the prosecutor.

If there is evidence of illegal activity, then it requires to be given to the police and we are not clear why such a period of time would elapse between the commission of an offence and the evidence being presented to the police. Also, why in the instance where it has been handed over and the police and prosecuting authorities have found this 'evidence' insufficient to support a prosecution, would this evidential problem of a lack of evidence be improved by extending the time limit. Indeed, could such a change be justified given the impact this could have on any defendant's right to a fair trial. We are concerned that the longer the lapse of time between the events in question and the prosecution, the harder it will be to ensure a fair trial to which defendants are entitled under Article 6(2) of ECHR. There is also the stress and

emotional impact for an accused and their family which would be heightened by lengthening this period.

If there are internal issues such as resourcing or communication in terms of those prosecuting a case then these should be resolved without recourse to extending the prosecution time limit. It is worth noting that in the response by the Minister to ECCLR Committee of 24<sup>th</sup> October 2019 that, “*Police Scotland have specialist wildlife crime officers in every division and over 100 officers trained in wildlife crime to ensure that wildlife crime scenes are processed swiftly and forensic evidence collected where possible. They are also planning further training in 2020. COPFS have a dedicated Wildlife and Environment Crime unit to prosecute wildlife crime cases.*” On this basis we would imagine that resourcing is less of an issue.

We disagree with the proposal to allow prosecution using solemn procedure. It is inappropriate that there would be no statutory time limit for bringing prosecutions for the most serious offences.

Presently, if the defendant pleads not guilty, the sheriff’s role is to assess the evidence put forward by the prosecution and defence and to decide whether there is sufficient evidence to prove beyond reasonable doubt that the defendant is guilty of the charge(s). If the sheriff finds the defendant guilty, or if the defendant has entered a guilty plea, the sheriff is responsible for determining the sentence after consideration of the fiscal’s narration and the defence agent’s mitigation plea. We do not believe there is a need to change this to trial by jury.

**Are the proposals to allow enforcement agencies to intervene without a need for a court order necessary and appropriate?**

SLE is not in a position to comment on this. This question is best directed to those that would have the knowledge about the use of the relevant resources. We would assume that the enforcement authorities and charities themselves can produce the management data to support such a change.

**What impact will the proposals have on: local authorities; animal welfare agencies, sanctuaries and rehoming centres; commercial businesses, individuals and; the welfare of different types of animal?**

SLE is not in a position to comment on this. This question is best directed to those that would have the knowledge about the welfare of the animals and the councils and businesses and charities directly involved. We assume that the type of care required along with disease control restrictions and livestock identification will on occasions present challenges for rehoming.

**Are the proposals to pay compensation to an owner necessary and appropriate?**

We appreciate that there are obligations in terms of ECHR and a balance to be struck between an individual and wider interests. We welcome the right of appeal provisions and the power of forfeiture seems sensible. Overall, we believe the proposals strike the correct balance and meet the need to ensure compatibility with ECHR.

**Will Fixed Penalty Notices act as a deterrent and how should they be used to maximise their positive impact on animal welfare?**

SLE has limited experience of Fixed Penalty Notices, but we assume that there is potential for such notices to permit a rapid proportionate response to less serious offending and at the same time reduce the burden on our court system. On that basis we believe that such notices

may be beneficial. However, it would be useful to see evidence, such as a reduction in recidivism after their service and we believe there should be consultation on the regulations introducing such a regime in the area of animal welfare and wildlife. It would need to be clear when such notices would apply with precise lists as to the types of non-compliance for which the Notice would be applicable and how the regime would be enforced. We would also be interested to know where any funds received by such an enforcement mechanism would be allocated and the capacity of local authorities to resource a Notice regime.

**Do you have any further issues or views about the Bill, and the adequacy of other legislation to deal with wildlife crime, that have not been covered in previous questions?**

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SLE has no further comment to make.