

This document relates to the Animals and Wildlife (Penalties, Protections and Powers) Bill as amended at Stage 2 (SP Bill 56A)

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

[As Amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill, introduced in the Scottish Parliament on 30 September 2019.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 56–FM);
 - a Policy Memorandum (SP Bill 56–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 56–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a section or a part of a section does not seem to require any explanation or comment, none is given.

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The Bill

5. The Bill amends the Animal Health and Welfare (Scotland) Act 2006 (“2006 Act”), several pieces of wildlife legislation, and the Animal Health Act 1981 to further protect health and welfare in connection with animals and wildlife in Scotland.

- Section 1 increases the maximum available penalties for the most serious animal welfare offences to a prison sentence of five years or an unlimited fine, or both, and makes related procedural changes.
- Section 2 gives the Scottish Ministers power to make regulations for the issuing of fixed penalty notices in relation to less serious animal welfare offences.
- Section 3 increases the protection for service animals by making it easier to convict people of causing them unnecessary suffering (also known as “Finn’s Law”).
- Section 4 gives the Scottish Ministers power to make regulations for the issuing of fixed penalty notices in relation to less serious animal health offences.
- Sections 5 to 10 increase the maximum available penalties for the most serious wildlife offences to a prison sentence of five years or an unlimited fine, or both, making related procedural changes, and increase the maximum available penalties for other wildlife offences, including the disturbance of animals or damage of nests or shelters, to a prison sentence of one year or a fine up to £40,000, or both.
- Section 10A gives the Scottish Ministers power to make regulations for the issuing of fixed penalty notices in relation to less serious wildlife offences.
- Sections 11 to 13 give authorised persons (including certain inspectors and constables) new powers (as regards animals taken into possession to alleviate suffering) to transfer, sell, treat or, in limited circumstances, humanely destroy those animals.
- Sections 14 and 15 make provision regarding, respectively, commencement and the short title.

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Commentary on sections

Chapter 1 – Animal welfare, animal health and wildlife: offences and penalties

Animal welfare offences: penalties

Section 1 – Prevention of harm to animals: penalties for offences

6. This section amends section 46 (penalties for offences) of the 2006 Act, and repeals section 44 (proceedings for animal fighting offences) of the same Act in consequence of this amendment.

7. Section 46 currently provides that a person who commits an offence under section 19 (unnecessary suffering) or 23 (animal fighting) is liable, on summary conviction only, to imprisonment for a term not exceeding 12 months or to a fine not exceeding £20,000 or to both. The amendment made to section 46 means that, for these offences, any such person may alternatively be liable, on conviction on indictment, to imprisonment for a term not exceeding five years or a fine (or both).

8. The time limits for bringing proceedings for an offence under section 19 are currently governed by section 136 (time limit for certain offences) of the Criminal Procedure (Scotland) Act 1995. As a result of the amendment to section 46 those time limits will no longer apply. The time limits for bringing proceedings for an offence under section 23 are currently governed by section 44 (proceedings for animal fighting offences) of the 2006 Act. Section 44 is repealed so that no such time limits apply.

Section 2 – Fixed penalty notices for certain animal welfare offences

9. This section inserts a new section 46A (fixed penalty notices for certain offences) into the 2006 Act.

10. The new section confers a power on the Scottish Ministers to make provision by regulations for, or in connection with, the issuing of fixed penalty notices (FPNs) in relation to certain offences (subsection (1)). For the purposes of this new section, a FPN is a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.

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11. The offences in relation to which FPNs may be issued must be specified in or by virtue of the regulations (subsection (2)). The offences which may be specified are offences under Part 2 of the 2006 Act, under regulations made under section 26, 27 or 28 of that Part, or under another enactment that the Scottish Ministers consider relates to animal welfare. The offences that may be specified include offences under any such future regulations or enactments which are made or passed after section 2 of the Bill comes into force (subsection (3)(a)). But the power may only be used to make provision for FPNs in relation to any such offence if the maximum penalty on conviction does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale, or both (subsection (3)(b)).

12. The new section makes it clear that the regulations may include provision for certain things (subsection (4)). In particular, it makes it clear that the power may be used to create offences relating to obstruction of a person who is exercising functions in relation to FPNs, or a failure to provide information requested in relation to FPNs. But for any such offence, the maximum penalty that may be provided for is, on summary conviction, a fine not exceeding level five on the standard scale (subsections (4)(t) and (5)).

13. Although the power cannot be used to create new animal welfare offences (except insofar as it may create offences relating to obstruction of a person or a failure to provide information), it may be used in combination with other powers such as section 26 (provision for securing welfare) of the 2006 Act. For example, regulations under section 26 could create a new offence and, if used in combination with the new power, the same regulations could provide for FPNs in relation to that new offence.

14. Where the new power is used to make regulations for the issuing of FPNs in relation to an offence, any FPN to be issued in pursuance of those regulations must identify the offence to which it relates and specify the reasonable particulars of the circumstances alleged to constitute the offence (subsection (6)). Any such FPN must also state: the date on which it is issued, the amount of the fixed penalty, the person to whom payment may be made, the payment period, the method of payment, the effect of paying the fixed penalty within the payment period and the consequences of not doing so, and details of any procedure for challenging or appealing the fixed penalty notice (subsection (7)).

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15. By virtue of section 51(3) of the 2006 Act, regulations under new section 46A are subject to the affirmative procedure. Accordingly, any such regulations cannot be made unless a draft of the instrument containing them is laid before, and approved by resolution of, the Scottish Parliament.

Protecting police dogs etc. from unnecessary suffering

Section 3 – Harming a service animal

16. This section inserts new subsections (4A), (4B) and (4C) into section 19 (unnecessary suffering) of the 2006 Act.

17. Section 19(1) makes it an offence to cause a protected animal unnecessary suffering where that person knew, or ought reasonably to have known, that the act would have caused the suffering or be likely to do so. “Protected animal” is defined by section 17 of the 2006 Act.

18. A court is required to have regard to the purposes in section 19(4), including the purpose in section 19(4)(c)(ii) of protecting a person, property or another animal, when reaching a decision about whether a person has committed the offence of causing unnecessary suffering under section 19(1).

19. New subsection (4A) of section 19 of the 2006 requires a court to disregard the purpose in section 19(4)(c)(ii) when reaching a decision about whether a person has committed the offence of unnecessary suffering under section 19(1), where: (i) the animal concerned was under the control of a “relevant officer” at the time of the conduct; (ii) the animal concerned was being used by the “relevant officer” at that time, in the course of that officer’s duties, in a way that was reasonable in all the circumstances; and (iii) that “relevant officer” is not the person accused of committing the offence under section 19(1).

20. In this context, “relevant officer” means a constable or a special constable (or any other person 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, such as persons who are employed by the police to use dogs for drug detection purposes), or a prison custody officer (new subsection (4B)). This ensures that animals used by these relevant officers in the course of their duties are further protected from harm.

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21. The Scottish Ministers may, by regulations, add any category of person in the public service of the Crown to the list of persons who are “relevant officers”, or vary or remove any category of person for the time being included in that list (new subsection (4C)). By virtue of section 51(3) of the 2006 Act, regulations under this new subsection are subject to the affirmative procedure. Accordingly, any such regulations cannot be made unless a draft of the instrument containing them is laid before, and approved by resolution of, the Scottish Parliament.

Animal health offences: penalties

Section 4 – Fixed penalty notices for offences relating to animal health

22. This section inserts a new section 76A (fixed penalty notices) into the Animal Health Act 1981 (“1981 Act”).

23. The new section confers a power on the Scottish Ministers to make provision by regulations for, or in connection with, the issuing of fixed penalty notices (“FPNs”) in relation to certain offences (subsection (1)). For the purposes of this new section, a FPN is a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence (subsection (4)).

24. The offences in relation to which FPNs may be issued must be specified in or by virtue of the regulations (subsection (2)). The offences which may be specified are offences under

- the 1981 Act,
- orders and regulations made under the 1981 Act,
- the Bees Act 1980,
- orders made under the Bees Act 1980, or
- another enactment that the Scottish Ministers consider relates to animal health (including Acts of the Scottish Parliament which relate to bee health).

25. The offences that may be specified include offences contained in any future orders, regulations or enactments referred to in paragraph 24 which are made or passed after section 4 of the Bill comes into force (subsection (3)(a)). But the power may only be used to make provision for FPNs in relation to any such offence if the maximum penalty on conviction does not exceed

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imprisonment for a term of 6 months or a fine of level 5 of the standard scale, or both (subsection (3)(b)).

26. The new section makes it clear that the regulations may include provision for certain things (subsection (3A)). In particular, it makes it clear that the power may be used to create offences relating to obstruction of a person who is exercising functions in relation to FPNs, or a failure to provide information requested in relation to FPNs. But for any such offence, the maximum penalty that may be provided for is, on summary conviction, a fine not exceeding level five on the standard scale (subsections (3A)(t) and (3B)).

27. Although the power cannot be used to create new animal health offences, it may be used in conjunction with other powers which may create such offences. For example, the 1981 Act confers various powers on the Scottish Ministers to, by order, make provision to prevent infection and the spread of disease in connection with animal health. In consequence of such order, new offences may be created by virtue of section 73 of that Act. If the power in new section 76A were used in conjunction with any such order, provision could be made for FPNs in relation to any such new offence.

28. Where the new power is used to make regulations for the issuing of FPNs in relation to an offence, any FPN to be issued in pursuance of those regulations must identify the offence to which it relates and specify the reasonable particulars of the circumstances alleged to constitute the offence (subsection (3C)). Any such FPN must also state: the date on which it is issued, the amount of the fixed penalty, the person to whom payment may be made, the payment period, the method of payment, the effect of paying the fixed penalty within the payment period and the consequences of not doing so, and details of any procedure for challenging or appealing the fixed penalty notice (subsection (3D)).

29. Regulations made under new section 76A are subject to the affirmative procedure (subsection 5). Accordingly, any such regulations cannot be made unless a draft of the instrument containing them is laid before, and approved by resolution of, the Scottish Parliament.

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Wildlife offences: penalties

Section 5 – Wildlife and Countryside Act 1981: penalties for offences

30. This section amends sections 15A (possession of pesticides), 20(2) (summary prosecutions) and 21 (penalties) of the Wildlife and Countryside Act 1981 (“Wildlife Act”).

31. Section 15A(1) of the Wildlife Act provides that any person who is in possession of any pesticide containing one or more prescribed active ingredients shall be guilty of an offence. However, Section 15A(2) provides that person is not guilty of an offence if they can show that they had that substance for the purposes acting in accordance with either;

- any regulations made under section 16(2) of the Food and Environment Protection Act 1985 (FEPA), or
- Regulation (EU) No 528/2012 of the European Parliament and of the Council (Regulation 528/2012).

32. Section 15A(2) is amended to include reference to EU regulation: (EC) No 1107/2009, therefore extending the defence to products covered by that regulation.

33. Section 20(2) of the Wildlife Act currently provides that summary proceedings for an offence under Part 1 can be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the prosecutor’s knowledge; but no such proceedings can be brought more than three years after the commission of the offence or, in the case of continuous contravention, after the last date on which the offence was committed.

34. This time limit applies to all offences which are tried summarily under Part 1 of the Wildlife Act, whether the offence is capable of being tried by summary procedure only or whether the offence can be tried on indictment (but with the time limit applying only where the offence is tried summarily).

35. Section 20(2) is amended to provide that this time limit applies exclusively to proceedings which are triable summarily only. Therefore, there is no time limit for prosecution of offences which are triable either way under Part 1 of the Wildlife Act, being offences under:

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- sections 1(1)(a) (protection of wild birds) and (5C) (in relation to an act made unlawful by section 1(1)(a)) (knowingly causing or permitting an offence under section 1(1)(a));
- section 5(1)(a) to (d) (prohibition of certain methods of killing or taking wild birds) and (f) (in relation to an act made unlawful by section 5(1)(a) to (d) (knowingly causing or permitting an offence under section 5(1)(a) to (d));
- section 9(1) (protection of certain wild animals) and (5A) (in relation to an Act made unlawful by section 9(1)) (knowingly causing or permitting an offence under section 9(1));
- section 10A (protection of wild hares etc), section 11 (prohibition of certain methods of killing or taking wild animals);
- section 14 (introduction of new species etc.);
- section 14ZC (prohibition on keeping etc. of invasive animals or plants);
- section 14A (prohibition on sale etc. of invasive animals or plants);
- section 14K (offences in relation to species control orders); and
- section 19ZC(7) in relation to a wildlife inspector acting in exercise of the power conferred by subsection (3)(d) (the offence of intentionally obstructing a wildlife inspector entering and inspecting any premises for the purpose of ascertaining whether an offence under section 14, 14ZC, 14A, 14B or 14K is being or has been committed on premises).

36. Subsection (4) of section 5 of the Bill inserts new subsections (1), (1A), (1B), (1C), (4B), (4C), (4E) and (4F) into section 21 of the Wildlife Act. Section 21 is amended to make provision for two different penalty regimes for summary only offences and three different penalty regimes for offences which can be tried under summary or solemn procedure. Therefore, section 5 of the Bill inserts eight new subsections into section 21 of the Act to set out the new maximum penalties and which offences they apply to.

37. Section 21(1) of the Wildlife Act currently provides that a person who commits an offence under sections 1 to 13 and 14B of the Wildlife Act is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both. Section 21

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requires prosecution for any offence under sections 1 to 13 and 14B to proceed by way of summary rather than solemn procedure.

38. Section 21(4) and (4ZA) of the Wildlife Act provide that a person who commits an offence under section 14, 14ZC, 14A or 14K is liable on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding £40,000 or both and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both. Section 21(4) and (4ZA) allow prosecution for offences under sections 14, 14ZC, 14A or 14K to proceed by way of summary or solemn procedure.

39. New subsections 21(1) and (1A) of the Wildlife Act provide that a person guilty of an offence under the following sections is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale (or both):

- section 5(1)(e) (the offence of using any mechanically propelled vehicle in immediate pursuit of a wild bird for the purpose of killing or taking that bird);
- section 5(1)(f) (in relation to an act made unlawful by section 5(1)(e)) (knowingly causing or permitting an offence under section 5(1)(e));
- section 6(1)(b) (the offence of publishing or causing to be published any advertisement likely to be understood as conveying that they buy or sell, or intend to buy or sell, live or dead wild birds, eggs etc);
- section 6(2) (unregistered selling, offering or exposing for sale, or has in their possession, or transports for sale, any dead wild bird or publishes or causes to be published any advertisement likely to be understood as conveying that they buy or sell, or intend to buy or sell, any of those things);
- section 6(2A) (in relation to an act made unlawful by section 6(2)(a)) (knowingly causing or permitting an offence under section 6(2)(a));
- section 7 (registration etc of certain captive birds) (other than section 7(1) (the offence of keeping or having possession of or under their control any bird listed in schedule 4 which has not been registered and ringed or marked in accordance with regulations) and section 7(5A) (in relation to an act made unlawful by section 7(1) (knowingly causing or permitted an offence under section 7(1)));

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- section 9(5)(b) (the offence of publishing or causing to be published any advertisement likely to be understood as conveying that they buy or sell, or intend to buy or sell, any live or dead wild animal listed in Schedule 5);
- section 11A (snares: training, identification numbers, tags etc.);
- section 11C (snares: authorisation from landowners etc);
- section 11E (snares: record keeping);
- section 13 (protection of wild plants);
- section 14B (notification of presence of invasive animals or plants etc.);
- section 17 (false statements made for obtaining registration, identification number or licence etc.);
- section 19ZC (wildlife inspectors: Scotland) (other than an offence under section 19ZC(7) in relation to a wildlife inspector acting in exercise of the power conferred by section 19ZC(3)(d)) (the offence of intentionally obstructing a wildlife inspector entering and inspecting any premises for the purpose of ascertaining whether an offence under section 14, 14ZC, 14A, 14B or 14K is being or has been committed on premises) and;
- section 19ZD (power to take samples: Scotland).

40. The effect of this is that the offences under the above sections remain triable summarily only and subject to the same penalties as provided for in section 21(1) prior to amendment (a maximum term of imprisonment of six months, or a fine not exceeding level 5 on the standard scale or both).

41. New subsections 21(1B) and (1C) of the Wildlife Act provide that a person guilty of an offence under the following sections, is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both:

- section 1 (protection of wild birds, their nests and eggs) (other than section 1(1)(a) and (5C) (in relation to an act made unlawful by section 1(1)(a)));
- section 6(1)(a), (2A) (in relation to an act made unlawful by section 6(1)(a) and (3) (sale etc. of live or dead wild birds eggs etc.);

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- section 7(1) and (5A) (in relation to an act made unlawful by section 7(1)) (registration etc. of certain captive birds);
- section 8 (protection of captive birds);
- section 9 (protection of certain wild animals) (other than section 9(1), (5)(b) and (5A) (in relation to an act made unlawful by section 9(1)));
- section 11B (snare: duty to inspect etc.);
- section 11G (prevention of poaching: wild hares, rabbits etc) and;
- section 11I (possession etc, of wild hares, rabbits etc, killed or taken unlawfully).

42. The effect of this is that the offences under the above sections remain triable summarily only but will be subject to the new maximum penalties.

43. New subsections 21(4B) and (4C) provide that a person guilty of an offence under sections 14ZC (prohibition on keeping etc. of invasive animals or plants), 14A (prohibition on sale etc. of invasive animals or plants), 14AA (Contravention of Invasive Alien Species Regulation) and 14K (offences in relation to species control orders) is liable on summary conviction to imprisonment for a term not exceeding twelve months, or a fine not exceeding £40,000 or both, and on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

44. The effect of this is that the offences under the above sections remain triable under summary or solemn procedure and are subject to the same penalties as currently provided for, but with the penalties being contained in new section 21(4B) rather than in two different subsections of section 21 of the Act.

45. New subsections 21(4D) and (4E) provide that a person guilty of an offence under the following sections is liable on summary conviction to imprisonment for a term not exceeding twelve months, or a fine not exceeding £40,000 or both, and on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both:

- 1(1)(a) (protection of wild birds) and (5C) (in relation to an act made unlawful by section 1(1)(a))(knowingly causing or permitting an offence under section 1(1)(a));

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- section 5(1)(a) to (d) (prohibition of certain methods of killing or taking wild birds) and (f) (in relation to an act made unlawful by section 5(1)(a) to (d)) (knowingly causing or permitting an offence under section 5(1)(a));
- section 9(1) (protection of certain wild animals) and (5A) (in relation to an act made unlawful by section 9(1)) (knowingly causing or permitting an offence under section 9(10));
- section 10A (protection of wild hares etc.);
- section 11 (prohibition of certain methods of killing or taking wild animals);
- section 14 (introduction of new species); and
- section 15A (possession of pesticides).

46. The effect of this is that the offences under the above sections are now triable under summary or solemn procedure and are subject to the higher maximum penalties.

47. Section 21(5) currently provides that the maximum fine imposed for any offence under sections 1 to 13 and 14B, which are currently triable by summary procedure only, committed in respect of more than one bird, nest, egg, other animal, plant or other thing, shall be determined as if the person convicted had been convicted of a separate offence in respect of each bird, nest, egg, animal, plant or thing.

48. Section 5(d) of the Bill amends section 21(5) so that it continues to apply to offences triable by summary procedure only, which are those now listed under new sections 21(1A) and (1C).

49. The effect of this is that where the offence was committed in respect of more than one bird, nest, egg, other animal, plant or other thing, the maximum fine which may be imposed on summary conviction for an offence under subsection (1) and (1B) shall be determined as if the person convicted had been convicted of a separate offence in respect of each bird, nest, egg, animal, plant or thing.

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Section 6 – Protection of Badgers Act 1992: penalties for offences

50. This section amends sections 12 (penalties) and 12A (time limit for bringing summary proceedings) of the Protection of Badgers Act 1992 (“1992 Act”).

51. Section 12(1) of the 1992 Act currently provides that a person who commits an offence under the following sections is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both:

- Section 2(1)(d) or section 2(3) (in relation to an act made unlawful by section 2(1)(d)) (cruelty),
- section 3(1)(a) to (c) or (e) or section 3(2) (in relation to an act made unlawful under section 3(1)(a) to (c) or (e)) (interfering with badger setts).

52. Section 6(2)(a) of the Bill amends section 12(1) to revise the penalties available to a court for the offences under the above sections to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 (or both).

53. The effect of this is that the offences under the above sections remain triable summarily only but are subject to the higher maximum penalties.

54. Section 12(1A) of the 1992 Act currently provides that a person is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding the statutory maximum or both, and on conviction on indictment to imprisonment for a term not exceeding three years or to a fine or both, for the following offences under subsection (1B) of the 1992 Act:

- sections 1(1), (3) and (6) (injuring or killing badgers);
- section 2(1)(a) to (c) and section 2(3) (in relation to an act made unlawful by section 2(1)(a) to (c)) (cruelty);
- section 3(1)(d) or section 3(2) (in relation to an act made unlawful by section 3(1)(d) (interfering with badger setts)); and
- section 4(1) and (2) (selling and possession of live badgers).

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55. Section 6(2)(b) of the Bill removes reference to sections 1(1), 2(1)(a) to (c), and section 2(3) (in relation to an act made unlawful by section 2(1)(a) to (c)) from section 12(1B) of the 1992 Act, and section 6(2)(c) of the Bill introduces new subsections (1C) and (1D) .

56. New subsections (1C) and (1D) provide that a person is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both and on conviction on indictment to imprisonment for a term not exceeding five years, or to a fine or both, for offences under:

- sections 1(1) and (6) (in relation to an act made unlawful by section 1(1)) (taking, injuring or killing badgers);
- section 2(1)(a) to (c) and (3) (in relation to an act made unlawful by section 2(1)(a) to (c)) (cruelty).

57. The effect of this is that the offences under the above sections are triable under summary or solemn procedure and are subject to the higher maximum penalties.

58. Section 12A of the 1992 Act makes provision regarding the time limits for commencing all summary prosecutions for offences under sections 1 to 5 and 10(8) of the 1992 Act. The time limit in section 12A provides that proceedings may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the prosecutor's knowledge but no such proceedings may be brought more than three years after the commission of the offence, or in the case of a continuous contravention, after the last date on which the offence was committed.

59. Subsection (3) of section 6 of the Bill inserts new subsection (1A) into section 12A to list the provisions to which the time limit set out at section 12A applies.

60. The effect of this is to disapply section 12A(1) from summary proceedings for offences under sections 1(1) and (6) (taking, injuring or killing badgers), 2(1)(a) to (c) and (3) (in relation to an act made unlawful by section 2(1)(a) to (c)) (cruelty) so that there is no time limit for prosecution of these offences which are triable either way.

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Section 7 – Conservation (Natural Habitats, etc) Regulations 1994: penalties for offences

61. This section amends regulations 39 (protection of certain wild animals), 41 (prohibition of certain methods of taking or killing wild animals) and 102 (proceedings for offences: venue, time limits) of the Conservation (Natural Habitats, etc.) Regulations 1994 (“1994 Regulations”).

62. Regulation 39(12) currently provides that a person who commits an offence under regulation 39 (protection of certain wild animals) is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale.

63. The revised regulation 39(12) provides that a person who commits an offence under this regulation is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both, and on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both.

64. The effect of this is that an offence under regulation 39 is now triable under solemn or summary procedure and subject to the higher maximum penalties.

65. Regulation 41(6) currently provides that a person who commits an offence under regulation 41 (prohibition of certain methods of taking or killing wild animals) is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale.

66. The revised regulation 41(6) provides that a person who commits an offence under this regulation is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both, and on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both.

67. The effect of this is that an offence under regulation 41 is now triable under solemn or summary procedure and subject to the higher maximum penalties.

68. Regulation 102 (proceedings for offences: venue, time limits) of the 1994 Regulations makes provision regarding the time limits for commencing

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summary prosecution of offences under Part III of the 1994 Regulations. The time limit in regulation 102 provides that proceedings may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to his or her knowledge. But no such proceedings shall be brought by virtue of this paragraph more than two years after the commission of the offence.

69. Regulation 102 is amended by section 7(4) of the Bill to provide that the time limit does not apply to offences under regulation 39 (protection of certain wild animals) and regulation 41 (prohibition of certain methods of killing or taking wild animals). The effect of this is that there is no time limit for prosecution of offences under regulation 39 and 41 which are now triable either way, but the time limit will continue to apply to all other summary proceedings under Part III of the Regulations.

Section 8 – Deer (Scotland) Act 1996: penalties for offences

70. This section amends schedule 3 (penalties) of the Deer (Scotland) Act 1996 (“Deer Act”).

71. Schedule 3 (penalties) of the Deer Act sets out penalties for offences under sections 17(3), 21(5) and 22 of the Deer Act as follows:

Enactment	Penalty	
	(a) on summary conviction	(b) on conviction on indictment
17(3)	a fine of level 4 on the standard scale for each deer in respect of which the offence is committed or 3 months imprisonment or both	
21(5)	a fine of level 4 on the standard scale for each deer in respect of which the offence is committed or 3 months imprisonment or both	
22	a fine of the statutory maximum in respect of each deer killed, taken or injured or 6 months imprisonment or both	a fine or imprisonment for a term not exceeding 2 years or both

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72. Schedule 3 is amended to provide that a person who commits an offence under sections 17(3), 21(5) and 22 is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 (or both), and on conviction on indictment, to imprisonment for a term not exceeding five years or a fine (or both).

73. The effect of this that the offences under sections 17(3), 21(5) and 22 are now triable under summary or solemn procedure and subject to the higher maximum penalties.

Section 9 – Wild Mammals (Protection) Act 1996

74. This section amends section 5 (penalties) of the Wild Mammals (Protection) Act 1996 (“1996 Act”). Section 5(1) (penalties) currently provides that a person who commits an offence (mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering) under the 1996 Act shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale, or a term of imprisonment not exceeding six months or both.

75. Section 9 of the Bill substitutes section 5(1) of the 1996 Act with a new section 5(1). The new section provides that a person who commits an offence under the 1996 Act is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both, or on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both.

76. The effect of this is that the offences under the 1996 Act are now triable under summary or solemn procedure and subject to the higher maximum penalties.

Section 10– Protection of Wild Mammals (Scotland) Act 2002: penalties for offences

77. This section introduces a new section 7A and amends section 8 of the Protection of Wild Mammals (Scotland) Act 2002 (“2002 Act”).

78. The statutory time bar (limit) for prosecution of offences imposed by section 136 of the Criminal Procedure (Scotland) Act 1995 previously applied to the offences under the 2002 Act. This means that prosecutions for offences

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under the 2002 Act require to be brought within six months after the contravention occurred or in the case of a continuous contravention, within six months after the last date of such contravention.

79. Section 10(2), of the Bill inserts a new section 7A into the 2002 Act to introduce a time limit for bringing summary proceedings for offences under section 1(2) (an owner or occupier of land knowingly permitting another person to enter or use it to commit an offence under subsection (1), being to deliberately hunt a wild mammal with a dog) and 1(3) (an owner of, or a person having responsibility for, a dog knowingly to permit another person to use it to commit an offence under subsection (1)) and provides that proceedings may be brought within a period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the prosecutor's knowledge. However, no such proceedings shall be brought by virtue of this section more than three years after the commission of the offence or, in the case of a continuous contravention, after the last date on which the offence was committed.

80. Section 8 of the 2002 Act previously provided that a person who commits any offence under the 2002 Act is liable on summary conviction to imprisonment for up to six months or a fine of up to level 5 on the standard scale or both.

81. Section 10(3), of the Bill amends section 8 of the 2002 Act to increase the penalties available to a court for offences under section 1(1) (deliberately hunting a wild mammal with a dog) by providing that a person who commits an offence under section 1(1) is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both and on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both.

82. The effect of this is that an offence under section 1(1) (deliberately hunting a wild mammal with a dog) of the 2002 Act is now triable under summary or solemn procedure and subject to the higher maximum penalties.

83. Section 10(3)(1A), of the Bill amends section 8 of the 2002 Act to increase the penalties available to a court for offences under sections 1(2) (an owner or occupier of land knowingly permitting another person to enter or use it to commit an offence under subsection (1), being to deliberately hunt a wild mammal with a dog) and (3) (an owner of, or a person having responsibility

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for, a dog knowingly to permit another person to use it to commit an offence under subsection (1)) to provide that a person who commits an offence under section 1(2) or (3) is liable on summary conviction to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both.

84. The effect of this is that an offence under section 1(2) or (3) remains triable summarily only but is subject to the higher maximum penalties.

Section 10A – Fixed penalty notices for certain wildlife offences

85. This section confers a power on the Scottish Ministers to make provision by regulations for, or in connection with, the issuing of fixed penalty notices (FPNs) in relation to certain offences relating to wildlife (subsection (1)). For the purposes of this new section, a FPN is a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.

86. The offences in relation to which FPNs may be issued must be specified in or by virtue of the regulations (subsection (2)). The offences which may be specified are offences under: Part 1 of the Wildlife and Countryside Act 1981, the Protection of Badgers Act 1992, the Deer (Scotland) Act 1996, or under another enactment that the Scottish Ministers consider relates to wildlife, including under any such future regulations or other enactment (subsection (3)(a)). But the power may only be used to make provision for FPNs in relation to any such offence if the maximum penalty on conviction does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale, or both (subsection (3)(b)).

87. Subsection (4) makes it clear that the regulations may include provision for certain things. In particular, it makes it clear that the power may be used to create offences relating to obstruction of a person who is exercising functions in relation to FPNs, or a failure to provide information requested in relation to FPNs. But for any such offence, the maximum penalty that may be provided for is, on summary conviction, a fine not exceeding level five on the standard scale (subsections (4)(u) and (5)).

88. Where the power is used to make regulations for the issuing of FPNs in relation to an offence, any FPN to be issued in pursuance of those regulations must identify the offence to which it relates and specify the reasonable particulars of the circumstances alleged to constitute the offence (subsection (6)). Any such FPN must also state: the date on which it is issued, the amount

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of the fixed penalty, the person to whom payment may be made, the payment period, the method of payment, the effect of paying the fixed penalty within the payment period and the consequences of not doing so, and details of any procedure for challenging or appealing the fixed penalty notice (subsection (7)).

89. By virtue of subsection (9), regulations under section 10A are subject to the affirmative procedure. Accordingly, any such regulations cannot be made unless a draft of the instrument containing them is laid before, and approved by resolution of, the Scottish Parliament.

Chapter 2 – Animal welfare: powers in relation to animals taken into possession

Section 11 – Taking possession of animals: additional powers

90. This section inserts new sections 32A to 32L (animal welfare: powers in relation to animals taken into possession) into the 2006 Act.

91. New section 32A (powers of authorised person where animal taken into possession) gives certain powers to “authorised persons” in relation to animals that have been taken into possession for welfare reasons under section 32 (taking possession of animals) of the 2006 Act. The new powers enable authorised persons to take “relevant steps” in relation to such an animal, namely the giving of treatment, transferring ownership and, in limited circumstances, destruction of the animal. In this and the other new sections, an “authorised person” refers to certain inspectors and constables, and also certain other persons (which may include bodies involved with enforcement of animal welfare matters) who are separately authorised by the Scottish Ministers to exercise the new powers (see definition of “authorised person” in new section 32A(9)).

92. The new powers under section 32A are subject to procedural requirements including the requirement that the authorised person must serve a notice (a “decision notice”) before taking any of the relevant steps (subsection (5)). Whether the authorised person may proceed with a relevant step depends on whether an appeal is made within a specified period and, if so, the outcome of that appeal.

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93. New section 32B (decision notice for exercise of powers under section 32A: content) makes provision in relation to the content of decision notices, setting out the information which may and must be included in them.

94. New section 32C (decision notice: service) makes provision regarding the requirements for service of a decision notice. In particular, subsection (1) requires that the authorised person must either make reasonable enquiries to establish the identity of the owner or be satisfied that such enquiries have been made before serving a decision notice. Subsection (2) specifies the means by which a decision notice must be served on the owner of the animal. Subsection (3) provides that a single decision notice may be served in respect of multiple animals if certain conditions are met.

95. New section 32D (appeal to the court in respect of decision notice) provides for the availability of an appeal to the court in respect of a decision notice, by the owner of the animal to which the decision notice relates and any other person appearing to the court to have a sufficient concern for the animal. Subsection (3) provides that the appeal may only be made before the expiry of three weeks after service of the decision notice. Subsection (5) lists the available grounds of appeal. Subsections (6) and (7) make provision for the orders that a court may make in an appeal. Subsection (8) has the effect that there is no possibility of a further appeal against the decision of the court. Subsection (9) has the effect that, if a court makes an order that a relevant step specified in the decision notice must not be taken, an authorised person may nonetheless resort to the powers under section 32A with a view to taking a different step in relation to the animal.

96. New section 32E (effect of decision notice on application under section 33) provides for the effects of the service of a decision notice on the ability of persons to apply for a release order under section 33 (release orders where animals taken) of the 2006 Act. An application under section 33 is a request to the court seeking release of an animal that has been taken into possession under section 32 (taking possession of animals) of the 2006 Act. The owner of the animal and certain other persons are ordinarily able to make such an application at any time after the animal has been taken into possession. Subsections (1) and (2) of section 32E provide that service of a decision notice in relation to an animal which specifies a relevant step or steps (other than treatment of the animal unless the treatment is accompanied with any other type of relevant step) will restrict the period for making an application to the court under section 33 in respect of the animal to the three weeks beginning

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with the date of service of the decision notice. Subsection (2)(b) provides that the ability to seek a section 33 order is restored upon the occurrence of one of the circumstances listed in subsection (3). Where the decision notice specifies only treatment of the animal as a relevant step, the ability of the owner of the animal and others to apply under section 33 is unaffected.

97. New section 32F (effect of decision notice on applications under section 34) provides for the effects of the service of a decision notice on the availability of applications under section 34 (disposal orders where animals taken) of the 2006 Act. An application under section 34 of the 2006 Act is a request to the court for a disposal order in relation to an animal that has been taken into possession under section 32 (taking possession of animals) of the 2006 Act. Such orders can authorise the treatment of the animal, its disposal (including by sale) or its destruction. Subsections (1) and (2) of section 32F provide that an application under section 34 cannot be made in relation to an animal after service of a decision notice which specifies a relevant step or steps (other than treatment of the animal when not combined with any other type of relevant step) in relation to that same animal until the occurrence of one of the circumstances listed in subsection (3). Where the decision notice specifies only treatment of the animal as a relevant step, the ability of the owner of the animal and others to apply under section 34 is unaffected (see related changes made by section 13 of the Bill).

98. New section 32G (compensation notice for exercise of powers under section 32A) makes provision in relation to service of a “compensation notice”. Subsection (1) requires that the authorised person must serve a compensation notice following the taking of a relevant step under section 32A and specifies the information which it must include. Subsection (1A) specifies steps that must be taken in relation to establishing the whereabouts of the owner before service of a compensation notice. Subsection (2) provides that the compensation notice must be served on the relevant owner of the animal and specifies the permitted means of service. Subsection (3) provides that a compensation notice must be served within three months of the taking of the step specified in the decision notice, subject to special provision in subsections (4) and (5) regarding circumstances in which the decision notice includes more than one step in relation to an animal. The “relevant owner” is the person who was the owner of the animal at the time it was taken into possession under section 32 (taking possession of animals) of the 2006 Act. Subsection (6) specifies when a single compensation notice may be served in relation to two or more animals.

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99. New section 32H (compensation amount) makes provision regarding calculation of the compensation amount to be specified in the compensation notice. Where the only relevant step specified in a decision notice (for the exercise of powers under section 32A) is to give the animal treatment, the compensation amount is an amount equivalent to any decrease in the market value of the animal caused by the giving of the treatment, less any relevant expenses. Where the relevant step or steps involve transfer of ownership or destruction, the compensation amount specified in the compensation notice is calculated by deducting the sums mentioned in subsection (4) from an amount equivalent to the greater of the following: the market value of the animal at the time it was taken into possession under section 32; the market value of the animal at the time immediately before the last relevant step; and any proceeds of sale of the animal. The sums that may be deducted are any compensation specified in an earlier compensation notice and any relevant expenses to the extent that they are not excluded under section 32H(4)(b).

100. New section 32HA (application of proceeds of sale) makes provision in relation to the proceeds of sale that may arise from taking the relevant step of transferring ownership of an animal. Subsection (2) specifies the way in which any proceeds of sale are to be applied to meet the relevant owner's liability to reimburse any relevant expenses and to meet any liability of the authorised person to pay any compensation amount to the relevant owner.

101. Subsection (3) clarifies that the owner's entitlement to the compensation amount is instead of any entitlement any owner has to any proceeds of sale of the animal. This clarification rules out the possibility that the owner would be entitled to the proceeds of sale in addition to the compensation amount.

102. New section 32I (appeal to court in respect of compensation amount) provides for appeals by the relevant owner of an animal in relation to the compensation amount specified in the compensation notice. Subsection (2) provides that such an appeal may normally only be made before the expiry of three months beginning with the date of service of the compensation notice, or the last compensation notice if more than one has been served by virtue of section 32G(4) or (5). Subsection (3) provides for an exception to the rule in subsection (2), where payment of compensation has been deferred under new section 32J(3). Subsection (3A) provides that certain persons, in addition to the relevant owner, are entitled to be heard in relation to an appeal under subsection (1). Subsection (4) provides for the orders that a court may make in such an appeal in respect of the compensation amount. Subsection (5) has

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the effect that there is no possibility of appeal against the decision made by a court under new section 32I.

103. New section 32J (payment of compensation amount) determines when the compensation amount becomes payable, subject to any order of forfeiture under new section 32K. Subsection (2) provides for when the compensation amount normally becomes payable. If there is no appeal under section 32I, the compensation amount becomes payable when the period for making such an appeal has expired. If there is an appeal under section 32I, the compensation amount will become payable when the court decides the appeal and orders payment of compensation. Subsection (3) gives the authorised person the ability to defer payment of the compensation amount in either of two scenarios. The first scenario is where criminal proceedings for certain offences which arise from the circumstances which led to the protected animal being taken into possession under section 32 (taking possession of animals) of the 2006 Act have been commenced against the relevant owner and have yet to conclude. The second scenario is where the authorised person is of the opinion that the relevant owner is at risk of prosecution for such offences. Subsection (4) provides for the circumstances in which the compensation amount becomes payable after deferral of the compensation amount. Subsection (5) has the effect that, if it has become payable, the compensation amount must be paid within three weeks of the provision of bank account details by the relevant owner of the animal. Subsection (6) provides for the means by which the identity of the relevant owner of the animal is determined for the purposes of this section. Subsection (7) gives the authorised person the ability to apply to the court for an order as to the disposal of the compensation amount when the authorised person is unable to pay the compensation amount to the relevant owner of the animal.

104. New section 32K (forfeiture of compensation) makes provision for forfeiture, in whole or in part, of the relevant owner's right to payment of the compensation amount in certain circumstances. Subsection (1) provides that such forfeiture may be ordered by a criminal court upon conviction for certain offences provided that such conviction arises from the circumstances which led to the animal being taken into possession under section 32 (taking possession of animals) of the 2006 Act. Subsection (3) provides that an order of forfeiture under subsection (1) may include such other provision the court considers appropriate, including for the disposal of any proceeds of sale which would otherwise be used of in the manner required by section 32HA(2)(b). Subsection (4) gives the Scottish Ministers the power to make provision by

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way of regulations for, or in connection with, the disposal of any proceeds of sale under subsection (3).

105. New section 32L gives the Scottish Ministers the power to, by regulations, make further or alternative provision about the content and service of decision notices and compensation notices, the calculation and payment of the compensation amount, and appeals in relation to such notices. By virtue of section 51(3) (regulations) of the 2006 Act, regulations under this new section are subject to the affirmative procedure. Accordingly, any such regulations cannot be made unless a draft of the instrument containing them is laid before, and approved by resolution of, the Scottish Parliament.

Section 12 - Taking possession of animals: amendment of existing powers

106. This section amends section 32 (taking of animals into possession) of the 2006 Act.

107. Paragraph (a) amends section 32(2) to make clear that the power to alleviate suffering of a protected animal conferred on inspectors and constables by section 32(1) of the 2006 Act does not extend to destruction of the animal, for which new section 32A and existing section 35 (resort to destruction of animals) make provision.

108. Paragraph (b) amends section 32(6) to give inspectors and constables the power to, in limited circumstances (and without service of any notice or obtaining any court order), administer or arrange treatment (as defined in new section 32A(9)) to animals taken into possession under that section.

Section 13 - Disposal orders where animals taken: restriction of application

109. This section amends section 34 (disposal orders where animal taken) of the 2006 Act.

110. Paragraph (a) amends section 34(4) so as to ensure that every authorised person (defined by new section 32A) is able to make a summary application to the court for a disposal order under section 34(1) (in relation to animals that have been taken into possession under section 32 of the 2006 Act).

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111. Paragraph (b) inserts new subsection (4A) into section 34, the effect of which is to prevent any person mentioned in section 34(4) (apart from the owner of the animal, and any other person appearing to the court of have sufficient concern for the animal in question) from seeking a disposal order under section 34 in relation to that animal unless a decision notice cannot be served under section 32C(2). Accordingly, an authorised person must pursue, where possible, the decision notice route under section 32A. But if this is not possible, the authorised person may apply for a disposal order under section 34.

112. Paragraph (c) amends section 34(5) to ensure that every authorised person (defined by new section 32A) is entitled to be heard in relation to an application for a disposal order under section 34.

Chapter 3 - General

Section 14 – Commencement

113. This section would bring sections 14 (commencement) and 15 (short title) of the Bill into force on Royal Assent. It also confers a power on the Scottish Ministers to bring the other provisions of the Bill into force on such days as they may by regulations appoint. Any such regulations may include transitional, transitory or saving provision, and make different provision for different purposes.

114. By virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, any instrument containing such regulations would have to be laid before the Scottish Parliament as soon as possible after the legislation is made (and in any event before the legislation is due to come into force).

Section 15 – Short title

115. This section provides that the short title of the Bill, on becoming an Act, would be the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020.

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

[As Amended at Stage 2]

Revised Explanatory Notes

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