

This document relates to the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill (SP Bill 56) as introduced in the Scottish Parliament on 30 September 2019

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

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## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### Outline of Bill provisions

2. 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.
3. Key provisions include:
  - Increasing the maximum available penalties for the most serious animal welfare and wildlife offences to a prison sentence of five years or an unlimited fine, or both, and making related procedural changes.
  - Increasing 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.
  - Giving the Scottish Ministers powers to make regulations for the issuing of fixed penalty notices in relation to less serious animal welfare and animal health offences.

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- Increasing the protection for service animals by making it easier to convict people of causing them unnecessary suffering (also known as “Finn’s Law”).
- Giving 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.

## Rationale for subordinate legislation

### Considerations

4. In deciding whether provision should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered the need to:
  - strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;
  - anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Scottish Parliament;
  - make proper use of valuable parliamentary time;
  - allow detailed administrative arrangements to be kept up to date within the basic structures set out in the Bill; and
  - take account of the likely frequency of amendment.
5. The relevant provisions are described in detail below. For each provision, the memorandum sets out:
  - The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
  - Why it is considered appropriate to delegate the power to make subordinate legislation and the purpose of each such provision; and

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- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

## Delegated Powers

Section 2 - inserting new section 46A into the 2006 Act (fixed penalty notices for certain offences relating to animal welfare)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

6. Section 2 inserts a new section 46A into the 2006 Act. New section 46A 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 animal welfare. In this section, an FPN means a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.
7. The new section 46A provides that the offences in relation to which FPNs may be issued must be specified in or by virtue of regulations. The offences which may be specified are offences under Part 2 (Animal Welfare) of the 2006 Act, under regulations made under section 26, 27 or 28 of that Part of the Act, or under another enactment that Scottish Ministers consider relates to animal welfare. 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).
8. The new section makes it clear that the regulations may include 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 5 on the standard scale.

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## Reason for taking power

9. The ability of enforcement authorities to issue FPNs when certain animal welfare offences are committed will be an important additional enforcement tool. FPNs are considered to be an effective and efficient means of addressing minor and technical breaches of animal welfare legislation.
10. But is not possible at this point to envisage all the potential situations in which an FPN might be appropriate as legislation on animal welfare is constantly being reviewed, updated, and improved and the details of any FPN regime will necessarily be influenced by the type of offence involved. In each case where it is proposed that the powers be used to make provision for FPNs in relation to one or more specified offences, it is envisaged that the Scottish Ministers will consult on the proposals, and thereafter lay draft regulations before the Scottish Parliament for scrutiny and approval. Parliament will therefore have the final say over whether to approve any such regulations.
11. Strict limits are placed on the power. The power may only be used to make provision for FPNs in relation to offences relating to animal welfare which are created by virtue of powers in other enactments. The power cannot itself be used to create new animal welfare offences (except insofar as it may create offences relating to obstruction of person or a failure to provide information). In addition, the power may only be used in relation to an offence if the maximum penalty does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale (or both).
12. The power may, however, be used in combination with other powers which may provide for such offences. For example, section 26 (provision for securing welfare) of the 2006 Act empowers the Scottish Ministers to, by regulations, make provision for the purposes of, and in connection with, securing the welfare of animals for which a person is responsible. Regulations made under this section may include provision that breach of a provision of the regulations is an offence. They could therefore be used to provide for such an offence and, if used in combination with the new power, the same regulations could also enable FPNs to be issued in relation to that new offence.

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13. Where the power is to be used in relation to any such offences, each offence must be specified in or by virtue of the regulations. In addition, under new subsection 46A(6), the FPN must itself identify the offence to which it relates and specify the reasonable particulars of the circumstances alleged to constitute the offence. Under new subsection 46A(7), the 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 and their address, the period for payment, the method of payment, the effect of paying the fixed penalty within the payment period and the consequences of not doing so, and the details of any procedure for challenging or appealing the FPN.
14. Examples of the types of offences that are likely to benefit from the use of FPNs include non-compliance with requirements for a licence, or non-compliance with record keeping, or animal identification rules. Whilst committing such offences might not impact directly on an individual animal's welfare, widespread non-compliance may put the welfare of the wider animal population at risk. It is therefore important to secure compliance with such requirements. Provision to enable enforcing authorities to issue FPNs in relation to such offences, and to accept the payment of such fixed penalties as an alternative to prosecution, will provide an additional route to securing compliance.
15. Other situations where FPNs might be considered appropriate are not yet legislated for. For example, regulations are currently being developed for a number of animal welfare policy areas. In these instances, the new power may be expected to be used in due course to specify additional situations in which FPNs may be issued having considered this as part of the policy development. In addition, any FPN regime established using the new power may itself require updating and refinement in light of experience. The new powers will enable provision in the FPN regulations (including the levels of fixed penalty) to be reviewed from time to time to determine whether they remain effective and fit for purpose.

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16. The new power is therefore thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances (including the creation of new animal welfare offences in exercise of powers conferred by other legislation, and the likely frequency of amendment) without the need for primary legislation.

#### Choice of procedure

17. By virtue of section 51(3) of the 2006 Act, regulations under new section 46A will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

#### Section 3 - inserting section 19(4C) into the 2006 Act (power to modify the meaning of 'relevant officer' for the purposes of new section 19(4A) and (4B))

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

#### Provision

18. Section 3 inserts new subsections (4A) to (4C) into section 19 (unnecessary suffering) of the 2006 Act.
19. New subsection (4C) gives the Scottish Ministers power to, by regulations, add to the categories of persons specified in subsection (4B) other categories of person in the public service of the Crown, or vary or remove any category of person for the time being specified in that subsection.

#### Reason for taking power

20. Section 19 (unnecessary suffering) sets out the circumstances in which a person who causes a protected animal to suffer commits an offence. Subsection (4) sets out a non-exhaustive list of considerations to which the courts are to have regard in determining whether suffering is unnecessary. These considerations include whether the conduct was for a legitimate purpose including, for example, the purpose of protecting a person, property or another animal.

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21. New subsection (4A) requires a court to disregard the fact that the conduct was for the purpose of protecting a person, property or another animal if:
  - a) the animal concerned was under the control of a “relevant officer” at the time of the conduct,
  - b) 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
  - c) that “relevant officer” is not the person accused of committing the offence under section 19(1).
  
22. By virtue of new subsection (4B), “relevant officer” in new subsection (4A) means:
  - a) a constable,
  - b) a special constable within the meaning of section 9 of the Police and Fire Reform (Scotland) Act 2012 (“2012 Act”),
  - c) a 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 (within the meaning of section 99(1) of the 2012 Act),
  - d) a prisoner custody officer within the meaning of section 114 of the Criminal Justice and Public Order Act 1994.
  
23. The definition of “relevant officer” is considered to provide appropriate protection for service animals normally deployed in Scotland at this time. However, there could be circumstances arising in future that require service animals to be used in the service of the Crown by other persons.
  
24. The power is therefore sought to enable the Scottish Ministers to, by regulations, extend protection to such animals should the need arise. In addition, some categories of persons currently defined in new subsection (4B) as “relevant officers” may in future cease to exist or cease to use service animals, and the power is also therefore sought to enable these categories to be adjusted.
  
25. This is considered to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation.

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### Choice of procedure

26. By virtue of section 51(3) of the 2006 Act, regulations made under section 19(4C) will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

### Section 4 – inserting new section 76A into the Animal Health Act 1981 (fixed penalty notices for certain offences relating to animal health)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

27. Section 4 inserts a new section 76A into the Animal Health Act 1981.

28. New section 76A 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 animal health. In this section, an FPN means a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.

29. The new section provides that the offences in relation to which FPNs may be issued must be specified in or by virtue of regulations. The offences which may be specified are offences under the Animal Health Act 1981, under orders or regulations made under that Act, or under another enactment which the Scottish Ministers consider relates to animal health. 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).

### Reason for taking power

30. The ability of enforcement authorities to issue FPNs when certain animal health offences are committed will be an important additional

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enforcement tool. FPNs are considered to be an effective and efficient means of addressing minor and technical breaches of animal health legislation.

31. But is not possible at this point to envisage all the potential situations in which an FPN might be appropriate as legislation on animal health is constantly being reviewed, updated, and improved and the details of any FPN regime will necessarily be influenced by the type of offence involved. In each case where it is proposed that the powers be used to make provision for FPNs in relation to one or more specified offences, it is envisaged that the Scottish Ministers will consult on the proposals, and thereafter lay draft regulations before the Scottish Parliament for scrutiny and approval. Parliament will therefore have the final say over whether to approve any such regulations.
32. Strict limits are placed on the power. The power may only be used to make provision for FPNs in relation to offences relating to animal health which are created by virtue of powers in other enactments. The power cannot itself be used to create new animal health offences. In addition, the power may only be used in relation to such an offence if the maximum penalty does not exceed imprisonment for a term of 6 months or a fine of level 5 of the standard scale (or both).
33. The power may, however, be used in combination with other powers which may provide for such offences. For example, section 73 (general offences) of the Animal Health Act 1981 provides that a person is guilty of an offence if the person, without lawful authority or excuse, does anything in contravention of an order or regulations made under that Act. Among other things, the 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. Any such order may therefore result in new offences being created under section 73. If these powers are used in parallel with the new power in section 76A, provision could be made for FPNs to be issued in relation to any such new offence.
34. Where the power is to be used in relation to any such offences, each offence must be specified in or by virtue of the regulations. Examples of the types of offences that are likely to benefit from the use of FPNs include non-compliance with requirements for labelling waste in relation

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to animal by-products, or non-compliance with requirements for biosecurity during a period of heightened risk from avian influenza. Whilst committing such offences might not impact directly on an individual animal's health, widespread non-compliance may put the health of the wider animal population at risk. It is therefore important to secure compliance with such requirements. Provision to enable enforcing authorities to issue FPNs in relation to such offences, and to accept the payment of such fixed penalties as an alternative to prosecution, will provide an additional route to securing compliance.

35. Other situations where FPNs might be considered appropriate may not yet be legislated for. For example, orders and regulations are expected to be developed for a number of animal health policy areas. In these instances, the new power may be expected to be used in due course to specify additional situations in which FPNs may be issued having considered this as part of the policy development. In addition, provision for FPNs (including the levels of fixed penalty) will be reviewed from time to time to determine whether it remains effective and fit for purpose. Any FPN regime established using the new power is therefore likely to require updating and refinement in light of experience.
36. The new power is therefore thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances (including the creation of new animal health offences in exercise of powers conferred by other legislation, and the likely frequency of amendment) without the need for primary legislation.

#### Choice of procedure

37. By virtue of new section 76A(5), regulations made using the new power will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

**Section 11 – inserting new section 32L into the 2006 Act  
(modification of powers over animals)**

**Power conferred on:            the Scottish Ministers**

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## Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

38. Section 11 inserts new section 32L into Part 2 of the 2006 Act.
39. Subsection 32L(1)(a) confers a power on the Scottish Ministers to make provision by regulations about the content and service of decision notices and compensation notices, including the matters which must be specified in the notice, the person on whom the notice must be served, the method by which service of a notice must be effected and the date of service.
40. Subsection 32L(1)(b) confers a power on the Scottish Ministers to make provision by regulations about the calculation and payment of compensation, including the person to whom the compensation amount may or must be paid, the timing and procedure for payment of the compensation amount and forfeiture of compensation.
41. Subsection 32L(1)(c) confers a power on the Scottish Ministers to make provision by regulations about appeals in relation to decision notices and compensation notices, including the timing and procedure for an appeal and the orders which a court may make on appeal.

### Reason for taking power

42. Section 11 also inserts new sections 32A to 32K into the 1981 Act.
43. The powers to make regulations in new section 32L are sought to enable further or alternative provision to be made in relation to the matters referred to in those powers without the need for primary legislation.
44. New section 32A gives powers to authorised persons (certain inspectors and constables and other persons authorised by the Scottish Ministers) in relation to animals that have been taken into possession for welfare reasons under section 32 of the 2006 Act. Section 32C requires the authorised person to serve a notice (“the decision notice”) on the owner of the animal before exercising the new powers in section 32A

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and specifies the permitted means of effecting service. Section 32G requires that the authorised person serve a compensation notice after exercise of the new powers in section 32A and specifies the permitted means of effecting service. The new powers in section 32L(1)(a) are sought to enable the Scottish Ministers to, by regulations, specify alternative ways of serving decision notices and compensation notices including, for example, where the identity of the owner is unknown or where the owner cannot be reached at an address. It is presently uncertain as to whether this will ever be necessary in practice or whether the powers will only be used in circumstances where the existing notice provisions are sufficient. Therefore, the regulation making power is wanted to allow further refinement of the notice provisions in light of experience of the powers being used.

45. New section 32H provides for the calculation of the compensation amount which may become payable following exercise of the powers in the new section 32A and is required to be specified in the compensation notice. Section 32J determines when the compensation amount becomes payable. Section 32K gives a court, in criminal proceedings for certain offences, the power to order forfeiture of the compensation amount in particular circumstances. The new powers in section 32L(1)(b) are sought to enable the Scottish Ministers to make provision to adapt the provisions relating to compensation payable to the owner of the animal. For example, the power will enable the Scottish Ministers to further restrict the availability of compensation (or the amount of compensation) in particular circumstances if appropriate justification for doing so is identified in future. The power will also enable the Scottish Minister to adapt provisions regarding the timing and procedure for payment of the compensation amount in order to take into account any changes made regarding service of compensation notices, or appeals regarding compensation (see below).

46. New section 32D provides for appeals in respect of a decision notice, and new section 32I provides for appeals in respect of a compensation amount. The new power in section 32L(1)(c) is sought to enable the Scottish Ministers to adapt the provisions relating to appeals including any changes needed: in consequence of other provision made under section 32L, to take into account experience from operation of the new powers conferred on authorised persons in section 32A, and to address

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changes in circumstance such as future availability of alternative judicial procedures.

47. The new power is thought to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation.

### Choice of Procedure

48. By virtue of section 51(3) of the 2006 Act, regulations made using the new power will be subject to the affirmative procedure. This will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made.

### Section 14 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

### Provision

49. Section 14(2) provides that the provisions of the Act, apart from section 14 (commencement) and 15 (short title) which come into force on the day after Royal Assent, will come into force on such day as the Scottish Ministers may appoint by regulations. By virtue of section 14(3), such regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

### Reason for taking power

50. The power will enable the Scottish Ministers to bring each remaining provision of the Act into force on appropriate days, along with any necessary transitional, transitory or saving provision.

### Choice of procedure

51. By virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, regulations made using the new power must be laid before the Scottish Parliament as soon as practicable after they are made (and, in any event, before they are due to come into force). The

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regulations may only appoint the days on which agreed provisions of the Act are to come into force (along with any transitional, transitory or saving provision). Parliament will be able to consider and comment on any such instrument. This is thought to be appropriate for such instruments.

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## Delegated Powers Memorandum

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