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Wildlife Crime Penalties Review Group

Report

November 2015

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1. Executive summary

The Review Group was set up in the context of a Ministerial commitment to enhance the enforcement of wildlife crime particularly in relation to the level of penalties imposed. The Group focused its work on the wildlife crime priority areas identified by the Government (bat persecution, badger persecution, illegal trade in endangered species, freshwater pearl mussels, poaching and raptor persecution).

The Group conducted a limited form of public engagement through an electronic questionnaire and follow-up interviews with a representative sample of respondents. We reviewed existing wildlife legislation and the penalties which are available as well as considering the penalties which are actually imposed by the courts. We noted the extensive and fragmented legislation in the field of wildlife crime which encompasses conservation, poaching and welfare crimes and the range of penalties available.

The maximum penalties for many of the principal offences, for example, under the Wildlife and Countryside Act 1981 remain at £5,000 and/or up to 6 months imprisonment on summary conviction (i.e. by a sheriff alone) with no option of conviction on indictment (i.e. by a judge sitting with a jury) although there have been piecemeal increases for some species such as badgers and for some newer offences like damaging protected sites and conviction on indictment is available in some cases, again, such as certain badger offences.

Forfeiture penalties are available in relation to most wildlife offences although the wording and scope of the provisions is not identical across the range of offences. Community Payback Orders may also be imposed potentially requiring offenders to undertake up to 6 weeks unpaid work, amongst other requirements which may be imposed in the order. Proceeds of crime legislation can be used to target unlawful gains from offences. Disqualification provisions relating to firearms and keeping animals are available in some cases. We are aware too of links between the commission of wildlife crime and the loss of wider rights or benefits such as removing General Licences or penalising land managers by making reductions to their subsidy payment (through the Basic Payment Scheme).

The penalties imposed by courts in practice tend to be low but it must be remembered that the maximum penalties available will only ever be imposed in the most serious cases and that the courts must take account of the circumstances of the offender including whether he or she is a first offender, is otherwise of good character and his or her income when considering any penalty.

We also considered the use of impact statements whereby the prosecuting authorities lay before the court information regarding the wider impact of the offence on the species or ecosystem affected. These are similar to victim statements provided to the court in traditional criminal trials which the judge may take into account prior to sentencing.

The stakeholder engagement exercise demonstrated that many did not consider that current available penalties and penalties imposed always acted as a deterrent and there was strong support for an increase in the maximum penalties available and the wider use of alternative penalties such as forfeiture. In the case of animal welfare offences involving cruelty some respondents also suggested the use of attendance at empathy training along the lines of anger management training for those involved in domestic violence or speed awareness courses for those involved in speeding offences. Concerns were also expressed regarding the consistency and transparency of wildlife crime sentencing.

We took the view that it was appropriate to compare the available penalties and the penalties imposed in wildlife law with other areas of environmental law such as pollution control, on the basis that wildlife law is a branch of environmental law and that while many pollution offences are committed by corporate bodies, that is also true in wildlife law where badger sett or bat roost destruction, some damage to freshwater pearl mussels and some raptor crime is caused by corporate bodies in the course of commercial activity.

In contrast to the maximum penalties on summary conviction for many of the principal wildlife offences which have remained unchanged for over 30 years in some cases, the maximum penalties for the principal pollution offences have increased 20 fold from £2,000 to £40,000 and terms of imprisonment have been increased from up to 3 months to up to a year. In addition, conviction on indictment is available for all the principal pollution control offences with maximum penalties of an unlimited fine and/or up to 5 years imprisonment being available. The average fines imposed in pollution cases have also increased in a statistically significant way increasing approximately 6 fold between 1996/97 and 2011/12. Even taking into account the impact of inflation alone, the maximum fine on summary conviction of £5,000 available for many of the principal offences in the Wildlife and Countryside Act 1981 ought to have increased to just over £17,100. We also noted that in England and Wales, as a consequence of general reform of sentencing powers, the maximum fine on summary conviction for the principal Wildlife and Countryside Act 1981 offences was increased from £5,000 to a potentially unlimited fine earlier in 2015. It seemed to us that the developments in pollution control provided a system of penalties which could serve as a deterrent to a greater extent than those currently applying in wildlife law.

We noted the establishment of the Scottish Sentencing Council in October 2015 and the introduction in England and Wales of Sentencing Guidelines in relation to pollution offences. We considered that the introduction of Guidelines on wildlife crime sentencing could enhance the consistency and transparency of sentencing in wildlife cases.

We also considered if the establishment of a specialist environmental court might result in higher penalties being imposed.

Accordingly the Group concluded that there was a case for increasing the maximum penalties for wildlife offences, for developing a more systematic approach to the use of impact statements, for more consistent forfeiture provisions across wildlife legislation, for clearer links to be articulated between conviction for wildlife offences and the loss of benefits such as firearms and shotgun certificates and that the Crown should continue to use proceeds of crime legislation to the maximum extent possible in appropriate wildlife cases. Moreover, we concluded 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. Finally, we concluded that the fragmentation and inconsistency in the law could be addressed by legislative consolidation in the medium term. Our recommendations reflect our conclusions.

2. Context and commitment to establish group

1. The Review Group was set up in the context of a Ministerial commitment to enhance the enforcement of wildlife crime, in view of considerable public concern, particularly in relation to the level of penalties imposed by the courts (the full Ministerial statement can be found in Annex 1)¹.



Poisoned golden eagle © RSPB Scotland

Even apart from the impact on the conservation status of the particular species, persecution of raptors in particular is often said to be blighting Scotland's reputation and harming our tourism.

2. Wildlife crime continues despite the public revulsion and this suggests that current penalties are not serving as a sufficient deterrent. However, it is important to recognise that illegal persecution is not wholly to blame for the decline in species. Land management practices such as agricultural intensification, climate change, pollution, development impinging on habitats, and the introduction of non-native species are all significant causes in the decline of species and damage to habitats².

3. The Scottish Government undertook in the Wildlife and Natural Environment (Scotland) Act 2011 (WANE 2011) to produce an Annual Report on wildlife crime in Scotland. Reports have now been produced for 2012, 2013 and 2014. The first was intended to provide a baseline, subject to recognition that the availability of data needed to be improved. Although the annual reports cover all wildlife crime their focus is on the wildlife crime priorities:

- Bat persecution
- Badger persecution
- Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)
- Freshwater pearl mussels
- Poaching (including deer poaching, hare coursing, fish poaching)
- Raptor persecution

The work of this Group has also focused principally on these wildlife crime priorities.

¹ The Ministerial commitment follows on from a commitment in the S.N.P. Manifesto 2011, p. 39.

² Scottish Government, 2020 Challenge for Scotland's Biodiversity, 2013, pp18 & 45; R.S.P.B. & Others, State of Nature Report 2013, pp. 14, 76-77; K. V. Last, 'Habitat protection: has the Wildlife and Countryside Act 1981 made a difference?' J. Env. L. 1999, 11(1), 15-34

4. The figures in the annual reports come from a variety of sources including Police Scotland and NGOs and it is acknowledged that they do not necessarily show a complete picture. The data also reflect different recorded categories – incidents, investigations, crimes and those proceeded against – so while in a general sense they provide a picture of wildlife crime the datasets are not readily comparable.

5. NGOs have also produced data on prosecutions and penalties within their areas of interest³. Some of them consider that some official figures for wildlife crime are too low because the barrier to entry to the figures is high and because, it has been suggested, that much wildlife crime is unreported⁴. Subject to these qualifications⁵, the reports show that wildlife crime is still taking place at unacceptable levels.

³ See e.g. RSPB Birdcrime 2013 – Offences against wild bird legislation 2013, http://www.rspb.org.uk/Images/birdcrime_2013_tcm9-397885.pdf. The RSPB supplied the group with data principally but not exclusively on bird crime prosecutions from the late 1970s onwards although it is not clear how complete this data is.

⁴ See e.g. Scottish Environment Link, *Natural Injustice – Paper 2, Eliminating Wildlife Crime in Scotland* (2015), para. 1.3; RSPB, *Birdcrime 2013 – Offences against wild bird legislation in 2013*, p. 8.

⁵ Subject also to the caveats expressed in the Wildlife Crime Annual Reports themselves about the recording of wildlife crime.

3. Membership and remit

6. The membership of the group was as follows⁶:

- Professor Mark Poustie, University of Strathclyde Law School, Convenor
- Detective Chief Superintendent Robbie Allan - Police Scotland⁷
- Hugh Campbell Adamson - Stracathro Estates
- Hugh Dignon - Scottish Government
- Professor Jeremy Greenwood CBE - Former Director of British Trust for Ornithology
- Sara Shaw - Crown Office and Procurator Fiscal Service⁸



Prof. Mark Poustie

The group was supported by Karen Hunter, Scottish Government.

7. The remit of the group was as follows:

"To examine and report on how wildlife crime in Scotland is dealt with by the criminal courts, with particular reference to the range of penalties available and whether these are sufficient for the purposes of deterrence and whether they are commensurate with the damage to ecosystems that may be caused by wildlife crime.

To make recommendations on possible alternative ways of dealing with wildlife crime in the courts."

⁶ See <http://www.gov.scot/Topics/Environment/Wildlife-Habitats/paw-scotland/about/groups/penalties-review>.

⁷ Andy Mavin attended as an alternate when Robbie Allan was unavailable.

⁸ Alternative COPFS representatives attended when Sara Shaw was unavailable.

4. Process and methods

8. The group had 8 meetings up to and including the production of the first draft of this report⁹. The group considered a variety of sources of information including Scottish Government statistics on offences and penalties, NGO sources on wildlife crime, reports on sentencing guidelines and academic literature on environmental law enforcement. We were not able to consider penalties imposed in other states systematically because of lack of available data, lack of comparability of systems and time and resource limitations. However, some cases from other states have been drawn to our attention and we became aware of others through our research. These are considered in the appropriate sections of the report.

9. The Group considered it was important to seek stakeholders' views even though there was only limited time for this. A questionnaire was circulated to Partnership for Action Against Wildlife Crime (PAW) Scotland stakeholders and also placed on the PAW Scotland website so it could be accessed by the public. This was not intended to be a full consultation since if there are any legislative proposals which follow from the work of the Group there would be full consultation on those.

10. Follow-up interviews were arranged with a number of stakeholders on the basis of their questionnaire responses and to ensure a representative balance of governmental and non-governmental organisations, expert individuals and members of the public. These allowed the Group to explore in more detail views expressed in the questionnaire. The interviews were conducted by Professor Poustie with Karen Hunter in attendance. Quantitative and qualitative analysis of questionnaire and interview responses was undertaken as appropriate. Further details of methods are discussed in the introduction to the section on the questionnaires and interviews.

11. Letters were also received from some stakeholders and these have been considered as part of the Group's proceedings.

12. The Group is grateful to all those who responded to the questionnaire and participated in the interviews for giving their time and views in order to better inform the Group's proceedings. The draft report was prepared by the Convenor and discussed and revised to the satisfaction of the group as a whole. It represents the views of the Group not the Scottish Government.

⁹ Minutes of Group Meetings may be found on the PAW Scotland website at: <http://www.gov.scot/Topics/Environment/Wildlife-Habitats/paw-scotland/about/groups/penalties-review>

5. Categorisation and scope of wildlife legislation

13. Wildlife crime in its broadest sense has a long history¹⁰. Many early wildlife crime offences were essentially property crimes in relation to poaching but such laws also served to ensure some degree of sustainable exploitation of species – at least for those with the legal right to exploit. There were also some specific conservation laws from an early stage, for example, making it an offence to disturb salmon redds passed by James VI. It is only relatively recently that wildlife legislation has evolved to include both animal welfare legislation and purely conservation legislation, the latter initially encompassing species but then habitats also.



Snared badger © Scottish Badgers

14. It is thus useful to classify wildlife crime in 3 categories:

- Property-type crimes – e.g. salmon or deer poaching
- Welfare-focussed legislation – e.g. badgers
- Conservation legislation – e.g. protection of wild birds and habitats

15. There is clearly some overlap between these categories. For example, some anti-poaching legislation has a conservation purpose and some conservation legislation has welfare purposes. Snaring provisions also have animal welfare purposes.

16. There follows a brief outline of wildlife legislation. This is not intended to be comprehensive, but simply to give an indication of its wide scope and the range of offences provided for.

17. Current poaching legislation is largely encompassed within the Deer (Scotland) Act 1996 and the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 while the Wildlife and Countryside Act 1981 (WCA 1981) covers quarry species and snaring. Poaching on the River Tweed is dealt with under the Scotland Act 1998 (River Tweed) Order 2006. There is a wide range of offences provided for, including restrictions on methods of fishing, killing without right, using particular types of firearms or equipment and illegal possession of fish. All these provisions can also be seen as having a conservation purpose.

18. There is both general and specific anti-cruelty legislation. General anti-cruelty legislation can be found in the Wild Mammals (Protection) Act 1996 and the Animal Health and Welfare (Scotland) Act 2006, while specific welfare legislation in relation to hunting with dogs can be found in the Protection of Wild Mammals (Scotland) Act 2002 and in relation to badgers and their setts in the Protection of Badgers Act 1992.

¹⁰ See e.g. C. T. Reid, Nature Conservation Law, 3rd ed, 2009, ch. 1.

Restrictions on the use of types of snares and provisions on training in the use of permitted snares and the duty to inspect are contained in the WCA 1981.

19. Conservation legislation in relation to species is principally found in the much-amended WCA 1981 (particularly amended by the Nature Conservation (Scotland) Act 2004 and the Wildlife and Natural Environment (Scotland) Act 2011). There are extensive prohibitions on killing, taking, injuring of birds, killing them in particular ways, damaging their nests or taking their eggs, protection of certain plants and wild animals (sometimes just in the close season) and the introduction of non-native species. Killing birds may be permitted if they are quarry birds in season or under a general or specific licence provided for by WCA 1981. There are incidental provisions on giving false statements and **vicarious liability** in relation to wild birds. The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 also has substantial conservation purposes in addition to its anti-poaching content mentioned above. The Marine (Scotland) Act 2010 contains specific provisions on the conservation of seals.

Vicarious Liability

Vicarious liability is the doctrine whereby one person can be held liable for the actions of another. In particular it is used to make employers liable for the actions of their employees when the latter are acting within the scope of their employment.

20. European protected species¹¹ receive protection under the Conservation (Natural Habitats &c.) Regulations 1994. Formerly there was overlap with the protection provided by WCA 1981 but this has largely been eliminated. The 1994 Regulations, which were not integrated with WCA 1981 but rather overlaid on that regime, arguably created complexities. There are prohibitions on killing, taking or injuring European Protected Species.

21. The UK's international obligations under the Convention on International Trade in Endangered Species 1973 (CITES) to control such trade are found in the Control of Trade in Endangered Species (Enforcement) Regulations 1997. Trade is controlled through a system of import and export permits. However, this legislation is reserved as it relates to trade¹². While it is currently under review¹³, any possible changes to it are a matter for the Westminster government. While several proposals are included in the current review and the range of offences in the regulations is

¹¹ Species protected under Directive 79/409 on wild birds (OJ L 103/1, 25.04.1979); and Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (OJ L 206/7, 22.7.92)

¹² Scotland Act 1998, Sch. 5, Part II, C5.

¹³ See DEFRA, Consultation on proposed changes to the Control of Trade in Endangered Species Regulations, Feb. 2015 (https://consult.defra.gov.uk/biodiversity/changing-cotes-regulations/supporting_documents/COTES%20Review%20%20Consultation%20Document.pdf).

subject to consultation, the penalties are not, although higher penalties have been introduced for some new offences¹⁴.

22. Protection of habitats is also provided for. Provisions to protect Sites of Special Scientific Interest (SSSIs) from damaging operations may be found in the Nature Conservation (Scotland) Act 2004 and, in relation to European Protected Sites, in the Conservation (Natural Habitats &c.) Regulations 1994. In the marine environment, the Marine (Scotland) Act 2010 establishes Marine Protected Areas and seeks to protect damage to their features.

¹⁴ See para. 27 below.

6. Range of wildlife crime penalties

23. A range of wildlife crime penalties has been published alongside this report as a standalone document. This is not a comprehensive list but is designed to give the reader an idea of the wide extent of offences and the variety of available penalties. This section provides a narrative of, first, the fines and custodial sentences available and then the alternative penalties, such as forfeiture, that are available. The accompanying textboxes explain some key terms used in penalty provisions.



Pearl mussel shells © Lorne Gill/SNH

Fines and custodial sentences available

Summary Conviction and Conviction on Indictment

Offenders can either be convicted on summary conviction, that is, conviction by a judge sitting alone without a jury; or on conviction on indictment, that is, conviction by a jury. Where both options are available, it is up to the Crown whether a case is brought under summary or indictment procedure and the choice will normally be determined by factors including the seriousness of the offence. Some offences can be prosecuted either way but some can only be prosecuted summarily, reflecting their lesser seriousness. So penalty provisions in legislation will stipulate the maximum penalty available on summary conviction and, where applicable, on conviction on indictment.

The Standard Scale

On summary conviction, in some cases maximum fine penalties are specifically stated but in other cases the maximum is given by reference to the Standard Scale. The Standard Scale was originally provided for by the Criminal Justice Act 1982 (as amended by the Criminal Justice Act 1991) and rather than giving a sum it indicates that penalties are to be at Levels 1 to 5¹⁵. The Standard Scale in Scotland is now provided for by the Criminal Procedure (Scotland) Act 1995, s.225(1) and the setting of the Standard Scale is a devolved matter for the Scottish Government. The idea of the Standard Scale is that the Levels could be altered from time to time to reflect inflation and this would not require wide-ranging legislative change since only one piece of legislation specifying the levels would need to be altered. The Levels have not been updated since 1 October 1992, when the 1991 amendments took effect, with the result that the relative value of the penalties available is now much lower than it was in 1992 because of inflation.

¹⁵ Criminal Justice Act 1982, s.54 which inserted a new s.289G into the Criminal Procedure (Scotland) Act 1975, (as now substituted by the Criminal Justice Act 1991, ss.17, 101(1), Sch.12, para.6 and S.I. 1992/333, art.2(2), Sch.2).

The Statutory Maximum

In some cases, for offences that are triable either summarily or on indictment, the maximum fine available on summary conviction is expressed as the statutory maximum. The statutory maximum is defined by the Interpretation Act 1978 so as to correspond to the 'prescribed sum'. In England and Wales this is the same as the Level 5 on the standard scale but in Scotland the setting of the prescribed sum is provided for by the Criminal Procedure (Scotland) Act, s.225(8) and is a devolved matter for the Scottish Government. Thus, in Scotland, from 10 December 2007, the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 increased the "prescribed sum", and with it the "statutory maximum" from £5,000 to £10,000. However, it did not alter the level of fines on the Standard Scale.

The Impact of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007

This statute has a considerable impact on penalty levels for statutory offences where the offences are triable either way, that is that it is competent to prosecute either by summary complaint or on indictment. For such offences, all previous maximum fines rated at Level 5 of the Standard Scale or the statutory maximum were raised to £10,000 and prison sentences of up to 6 months increased to 12 months. However, these increases do not apply where, as is the case with many wildlife offences, the offences are only triable on summary complaint.

24. In relation to poaching, organised offences involving 2 or more persons attract higher penalties than poaching by individuals. So where an individual kills a deer in contravention of the provisions of the Deer (Scotland) Act 1996 the maximum penalties are a fine of Level 4 on the Standard Scale (£2,500) per deer and/or up to 3 months imprisonment. However, in cases of organised poaching the maximum fine on summary conviction is the statutory maximum (£10,000) per deer and conviction on indictment is possible with a potentially unlimited fine and/or up to 2 years imprisonment being provided for. There are identical penalties (although not on a per fish basis) applicable in the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 and in the River Tweed Order although in the fisheries poaching legislation many offences attract smaller maximum fines on summary conviction with no imprisonment options.

25. In animal welfare cases the penalties are also varied. Under the general cruelty legislation, offences under the Wild Mammals (Protection) Act 1996 are punishable on summary conviction only with the maximum set at Level 5 on the Standard Scale (£5,000) and/or 6 months imprisonment, whilst under the Animal

Health and Welfare (Scotland) Act 2006¹⁶ the offences of causing unnecessary suffering to a protected animal or holding fights involving protected¹⁷ animals are punishable on summary conviction only by maximum fines up to £20,000 and/or 12 months imprisonment, with other offences (mutilation of protected animal, cruel operations on a protected animal or administration of poisons) being punishable on summary conviction only by maximum penalties of up to Level 5 on the Standard Scale (£5,000) and/or 6 months imprisonment in some cases. Under the Protection of Wild Mammals (Scotland) Act 2002 the maximum penalties on summary conviction only are a fine of up to Level 5 on the Standard Scale (£5,000) and/or 6 months imprisonment. By way of contrast under the Protection of Badgers Act 1992 the maximum penalties on summary conviction are a fine of the statutory maximum (£10,000) and/or imprisonment of up to 12 months and there is the possibility of conviction on indictment with provision for a potentially unlimited fine and/or up to 3 years imprisonment for the principal offences under the Act¹⁸.

26. The principal conservation legislation, the Wildlife and Countryside Act 1981 provides for maximum penalties of Level 5 on the Standard Scale (£5,000) on summary conviction and/or imprisonment of up to 6 months. The penalties for the principal offences under the Conservation (Natural Habitats &c.) Regulations 1994 are the same as for killing domestically protected species under WCA 1981. The principal offences in relation to conservation of seals under the Marine (Scotland) Act 2010 of killing or injuring seals have maximum penalties on summary conviction only of Level 5 on the Standard Scale (£5,000) and/or up to 6 months imprisonment.

27. The Control of Trade in Endangered Species (Enforcement) Regulations 1997 only provide for a maximum fine of Level 5 on the Standard Scale (£5,000) and/or imprisonment of up to 3 months on summary conviction with an unlimited fine and/or imprisonment of up to 2 years on conviction on indictment. New offences relating to the purchase or sale of a specimen of a species listed in the 1997 Regulations were subsequently introduced with a maximum fine of Level 5 on the Standard Scale (£5,000) and/or imprisonment of up to 6 months on summary conviction or an unlimited fine and/or up to 5 years imprisonment on conviction on indictment¹⁹. As noted above this legislation is a reserved matter and hence increasing penalties is a matter for the UK government.

28. Offences in the WCA 1981 relating to the introduction of non-native species amended by WANE 2011 provide for a maximum fine of £40,000 on summary

¹⁶ The 2006 Act was primarily intended to deal with the welfare of animals other than wild animals living in the wild, but certain provisions may extend to wild animals which, for example, have become trapped.

¹⁷ Within the meaning of section 17 of the 2006 Act, as distinct from an animal of a "protected species" in the context of wildlife legislation.

¹⁸ Protection of Badgers Act 1992, s. 12(1A) (as inserted by the Nature Conservation (Scotland) Act 2004 and as amended by the Wildlife and Natural Environment (Scotland) Act 2011).

¹⁹ This was effected by the Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2005 (S.I. 2005/1674). There are slightly lesser penalties on conviction on indictment introduced for making false statements in connection with the principal new offences.

conviction and/or imprisonment of up to 12 months and on conviction on indictment an unlimited fine and/or imprisonment of up to 2 years²⁰.

29. Protected sites tend to attract higher potential fines albeit these again are not consistent. Intentional or reckless damage to Sites of Special Scientific Interest (SSSI) attracts a maximum fine of £40,000 on summary conviction and an unlimited fine on conviction on indictment²¹ whereas contravention of restrictions on operations damaging a European site where a nature conservation order is in force only attracts a maximum of fine of the statutory maximum (£10,000) on summary conviction with the possibility of an unlimited fine on conviction on indictment²². However, in practice it is likely that a European Site will also be a SSSI so the higher penalty would be available for damaging the SSSI. Under the Marine (Scotland) Act 2010 contravention of a Marine Conservation Order made to protect a Marine Protection Area attracts a fine of up to £50,000 on summary conviction and a potentially unlimited fine on conviction on indictment²³.

Alternative or additional penalties available

Introduction

30. Generally, when an accused person is convicted of any offence, a court may order the forfeiture of any property in their ownership or possession or under their control at the time of the offence, or when they were arrested, if it was either used for the purpose of committing the offence or was intended to be used for that purpose²⁴. In certain circumstances too, the court may disqualify an offender from holding or obtaining a licence to drive a motor vehicle²⁵. In addition, alternative or additional penalties including specific forfeiture penalties are extensively available in wildlife crime legislation.

Forfeiture: conservation legislation

31. Thus, in conservation legislation under WCA 1981 the court must order the forfeiture of any bird, nest, egg, other animal, plant or other thing in respect of which the offence was committed; and has a discretionary power to order the forfeiture of any vehicle, animal, weapon or other thing that was used to commit the offence²⁶.

32. The Conservation (Natural Habitats &c.) Regulations 1994 also include forfeiture provisions in relation to offences concerning European protected species. These again follow the pattern of mandatory forfeiture of any animal, plant or other

²⁰ Wildlife and Countryside Act 1981, s. 21(4ZA) inserted by the Wildlife and Natural Environment (Scotland) Act 2011, s. 7(3)(c)(non-native species).

²¹ Nature Conservation (Scotland) Act 2004, s.19(4).

²² Conservation (Natural Habitats &c.) Regulations 1994, reg 23(3).

²³ Marine (Scotland) Act 2010, s.94(2).

²⁴ Proceeds of Crime (Scotland) Act 1995, s.21.

²⁵ Criminal Procedure (Scotland) Act 1995, ss.248 and 248A.

²⁶ Wildlife and Countryside Act 1981, s.21(6)(as amended).

thing in respect of which the offence was committed; and discretionary forfeiture of any vehicle, animal, weapon or other thing that was used to commit the offence²⁷.

33. In relation to offences under the Control of Trade in Endangered Species (Enforcement) Regulations 1997, the convicting court must order the forfeiture of any specimen or other thing in respect of which the offence was committed and has a discretionary power to order the forfeiture of any vehicle, equipment or other thing that was used to commit the offence²⁸.

34. The conservation provisions of the Marine (Scotland) Act 2010 in relation to seals contain forfeiture provisions linked to the offences of killing, injuring or taking seals. These provide a discretionary power to the convicting court to order forfeiture of any seal or seal skin in respect of which the offence was committed, or any thing that the person possessed or controlled at the time of the offence and that was capable of being used in connection with the offence²⁹.

Forfeiture and disqualification: animal welfare legislation

35. Under animal welfare legislation the Protection of Badgers Act 1992 provides that on convicting an offender the court must order the forfeiture of any badger or badger skin in respect of which the offence was committed and that it has a discretionary power to order the forfeiture of any weapon or article in respect of or by means of which the offence was committed³⁰. In addition where a dog has been used in or was present at the commission of an offence, the court, on convicting the offender, has the power, in addition to or in substitution for any other punishment, to make (a) an order for the destruction or other disposal of the dog; and/or (b) an order disqualifying the offender, for such period as it thinks fit, for having custody of a dog³¹.

36. Under the Wild Mammals (Protection) Act 1996, the convicting court is empowered, in addition to any other punishment, to order the confiscation of any vehicle or equipment used in the commission of the offence³².

37. The Protection of Wild Mammals (Scotland) Act 2002 contains almost identical provisions to the Protection of Badgers Act 1992 in relation to care or disposal and/or disqualification orders in relation to dogs involved in the commission of the offence³³.

²⁷ Conservation (Natural Habitats &c.) Regulations 1994, reg.103. Vehicle is defined to include aircraft, hovercraft and boat.

²⁸ Control of Trade in Endangered Species Regulations 1997, reg.11. Vehicle is again widely defined as in the 2004 Regulations noted above in note 32.

²⁹ Marine (Scotland) Act 2010, s.127.

³⁰ Protection of Badgers Act 1992, s.12(4).

³¹ Protection of Badgers Act 1992, s.13(1).

³² Wild Mammals (Protection) Act 1996, s.6(1). However, vehicle is not further defined.

³³ Protection of Wild Mammals (Scotland) Act 2002, s.9.

38. Under the Animal Health and Welfare (Scotland) Act 2006, a court may impose a deprivation and/or disqualification order “in respect of any animal in relation to which the offence was committed” on a person who has been convicted of a relevant animal welfare offence under the Act³⁴.

Forfeiture and disqualification: poaching legislation

39. Under the Deer (Scotland) Act 1996, if the offender has committed an offence under sections 17 to 23 the convicting court has the power to cancel any firearm or shotgun certificate held by the offender³⁵. Any deer illegally taken, killed or removed by an offender or in his possession at the time of the offence is liable to forfeiture³⁶. Conviction for offences in relation to deer and venison dealing also entitle the court to disqualify the person from holding a venison licence³⁷.

40. The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 also contains forfeiture provisions³⁸. Under these a person convicted of an offence under the Act shall be liable to forfeit not only any fish illegally taken or in that person’s possession at the time of the offence but also any instrument or article by which the offence was committed and any vehicle or boat used by that person to assist in the commission of the offence³⁹.

41. The Scotland Act 1998 (River Tweed) Order 2006 has identical forfeiture provisions in relation to offences committed on the Tweed⁴⁰.

Restoration and remediation

42. Under the Conservation (Natural Habitats &c.) Regulations 1994 the convicting court has the power to make an order to restore land to its former condition following damage to a protected site⁴¹.

43. The Nature Conservation (Scotland) Act 2004, which enhances the protection of SSSIs in Scotland, empowers courts to impose restoration orders on those who are convicted of the offences of intentionally or recklessly damaging an SSSI or causing or permitting the carrying out of a prohibited operation on land subject to a nature conservation order. Such restoration orders require the land to be restored to its former condition insofar as is reasonably practicable⁴².

³⁴ Animal Health & Welfare (Scotland) Act 2006, ss.39-40.

³⁵ Deer (Scotland) Act 1996, s.31(2)-(3).

³⁶ Deer (Scotland) Act 1996, s.31(4).

³⁷ Deer (Scotland) Act 1996, s.31(5).

³⁸ Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003, s.60(1).

³⁹ Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003, s.60.

⁴⁰ The Scotland Act 1998 (River Tweed) Order 2006, art.63.

⁴¹ Conservation (Natural Habitats etc) Regulations 1994, reg.26.

⁴² Nature Conservation (Scotland) Act 2004, s.40(1)

Proceeds of Crime

44. The Proceeds of Crime Act 2002 also potentially has a role in this context as it enables the court to impose an order to recover the amount equal to the accused's benefit from the conduct concerned⁴³.

Loss of rights or benefits under other legislation

45. In addition to the above penalties there may be considerable additional consequences for a convicted offender through loss of rights or benefits under other relevant legislation as a result of a conviction for a wildlife crime offence. These consequences are not penalties imposed by the sentencing criminal court but follow as a result of action by, for example, the Scottish Government, Scottish Natural Heritage (SNH) and Police Scotland.

46. Thus, the terms of general licences provide that a person convicted of a wildlife offence cannot use a general licence granted by SNH under WCA 1981, s.16 and this measure has been extended to include the possibility of removing the application of general licences from specified areas of land by administrative procedures. Such licences can enable measures to be taken for a variety of purposes where there is no other satisfactory solution, including measures to protect flora and fauna, to protect public health and to protect livestock, crops, fruits etc. from damage⁴⁴. The licence can make lawful an activity that would otherwise be unlawful (such as killing particular types of birds) and in that sense is conceptually akin to an environmental law permit granted to an industrial plant to allow it to emit to a certain level which can also be suspended or revoked in certain circumstances.

47. In addition these consequences could also include cross compliance whereby conviction for a wildlife offence leads to the withdrawal of a Single Farm Payment (now known as a Basis Payment) subsidy by the Scottish Government under EU rules. Although there has recently been a narrowing of the European rules on this to exclude compliance with general European wildlife legislation, the subsidy could still be withdrawn were a person to be convicted of possession of banned poisons.

48. Firearms certificates can be reviewed and revoked by the police if a wildlife offence involving firearms has been committed, even if there are no specific provisions to that effect in the relevant legislation. Generally, the Chief Constable for the area in which a certificate holder resides may revoke a certificate if, for example, the Chief Constable has reason to believe that the holder of a firearm certificate is not deemed fit to be entrusted with a firearm⁴⁵ or if satisfied that the holder of a shotgun certificate cannot be permitted to possess a shot gun without danger to the

⁴³ Proceeds of Crime Act 2002, Part 3.

⁴⁴ See generally <http://www.snh.gov.uk/protecting-scotlands-nature/species-licensing/bird-licensing/general/>

⁴⁵ Firearms Act 1968, s 30A

public safety or to the peace⁴⁶. However, firearms legislation is currently reserved and hence any amendments are a matter for Westminster.

Civil Penalties

49. Civil penalties are penalties imposed by the relevant regulator under a published scheme dealing with particular types of regulatory offences and were not imposed by a court following court process. Such schemes have been provided for in England and Wales in relation to environmental offences under the Regulatory Enforcement and Sanctions Act 2008 and there is now provision for the introduction of similar schemes in Scotland under the Regulatory Reform (Scotland) Act 2014.

⁴⁶ Firearms Act 1968, s 30C

7. Penalties imposed in wildlife crime cases

People with a charge proved in Scottish Courts for wildlife offences¹, by disposal

Crime group	Main Result of Proceedings	2009-10	2010-11	2011-12	2012-13	2013-14	All
Total convicted		24	37	48	56	60	225
Birds, offences involving	Custody	-	-	1	1	-	2
	Community sentence	-	-	1	3	2	6
	Monetary	3	3	10	9	4	29
	Other	2	1	-	3	1	7
Cruelty to wild animals	Community sentence	-	-	-	1	1	2
	Monetary	1	2	3	4	1	11
	Other	2	-	-	2	-	4
Deer (S) Offences	Community sentence	-	-	2	-	1	3
	Monetary	-	3	2	1	3	9
	Other	-	-	1	-	-	1
Hunting with dogs	Custody	-	-	-	-	1	1
	Community sentence	1	-	-	2	-	3
	Monetary	6	3	-	2	4	15
	Other	-	-	-	3	-	3
Offences involving badgers	Monetary	2	3	1	-	-	6
Other conservation offences	Monetary	1	-	1	-	-	2
Other wildlife offences	Community sentence	-	-	4	-	-	4
	Monetary	-	-	5	5	4	14
	Other	1	-	-	3	1	5
Poaching and game laws	Monetary	3	3	3	-	-	9
	Other	-	1	2	1	-	4
Possession of salmon or trout unlawfully obtained	Monetary	-	1	1	2	-	4
Salmon and freshwater fisheries offences	Community sentence	-	-	-	2	-	2
	Monetary	2	15	11	10	27	65
	Other	-	2	-	2	10	14

1. Where the wildlife offence was the main charge.

Source: Scottish Government Criminal Proceedings Database

People receiving fines in Scottish Courts for wildlife offences¹, by average fine

Crime group		2009-10	2010-11	2011-12	2012-13	2013-14	All
Total fines	N	18	33	37	33	43	164
	Average	637	308	462	389	402	420
Birds, offences involving	N	3	3	10	9	4	29
	Average	417	417	439	473	1,375	574
Cruelty to wild animals	N	1	2	3	4	1	11
	Average	450	170	450	261	500	335
Deer (S) Offences	N	-	3	2	1	3	9
	Average	-	717	300	750	583	583
Hunting with dogs	N	6	3	-	2	4	15
	Average	467	417	-	300	348	403
Offences involving badgers	N	2	3	1	-	-	6
	Average	2,150	367	400	-	-	967
Other conservation offences	N	1	-	1	-	-	2
	Average	1,000	-	480	-	-	740
Other wildlife offences	N	-	-	5	5	4	14
	Average	-	-	1,227	320	438	678
Poaching and game laws	N	3	3	3	-	-	9
	Average	473	93	213	-	-	260
Possession of salmon or trout unlawfully obtained	N	-	1	1	2	-	4
	Average	-	866	50	900	-	679
Salmon and freshwater fisheries offences	N	2	15	11	10	27	65
	Average	125	194	278	280	236	237

1. Where main charge.

Source: Scottish Government Criminal Proceedings Database

People receiving custodial sentence in Scottish Courts for wildlife offences¹, by length of sentence

		2005-06	2008-09	2011-12	2012-13	2013-14
Birds, offences involving	N	-	-	1	1	-
	Sentence in Days	-	-	91	182	-
Cruelty to wild animals	N	-	1	-	-	-
	Sentence in Days	-	80	-	-	-
Hunting with dogs	N	1	-	-	-	1
	Sentence in Days	60	-	-	-	182

1. Where the wildlife offence was the main charge.

Source: Scottish Government Criminal Proceedings Database

50. Looking at the 5 years from 2009-10 to 2013-14, total convictions have risen from 24 to 60. However, there is no evidence of a trend in average fines: although average fines decreased from £637 (based on 18 fines imposed) to £402 (based on 43 fines imposed), the figures in 2009-10 were skewed by 2 average fines of £2150 for offences involving badgers, omitting which reduces the average to £448. There were no custodial sentences imposed in 2006-07, 2007-08, 2009-10 or 2010-11 but in the two final years of figures two higher sentences were imposed of 182 days.

51. However, taking a much longer perspective on the data available, it is nonetheless fair to say that average fines are rising against a backdrop of what appears to be lower levels of convictions⁴⁷, although it is recognised that the cases captured reflect only those in which the wildlife offence was classified as the main charge. Thus, average fines have increased from £141 in 1989-90 to £402 in 2013-14 while the total numbers convicted for wildlife crimes has dropped from 487 (424 of which resulted in fines) in 1989-90 to 60 (43 of which resulted in fines) in 2013-14. The average custodial sentence for the thirteen cases in 1989/90 was 73 days, the one wildlife case involving a custodial sentence in 2013/4 was for 182 days.

52. The reduction in the total number of convictions over this longer period seems to be the result of far fewer poaching and salmon and freshwater fisheries offences. However, it may be that the figures have been impacted by the reclassification of offences. For example, the category "Offences involving birds" formerly excluded what were game offences e.g. poaching pheasants but are now birds offences under section 1 of the 1981 Act by virtue of WANE 2011 amendments. The classification of offences is to some extent subjective as, for example, hunting deer with dogs could be regarded as a deer offence or a hunting with dogs offence. Additionally, in terms of the increased average fine between 1989-90 and 2013-14 inflation could be argued to account for the whole increase.

Community Payback Orders

The system of Community Payback Orders (CPOs) is provided for by the Criminal Justice & Licensing (Scotland) Act 2010 which inserts new provisions into the Criminal Justice (Scotland) Act 1995. CPOs replace community service orders, probation orders and supervised attendance orders for offences committed on or after 1 February 2011. CPOs may impose any of the following:

- Unpaid work or other activity requirement
- Offender supervision requirement
- Compensation requirement
- Programme requirement
- Mental health treatment requirement
- Drug treatment requirement
- Alcohol treatment requirement
- Residence requirement
- Conduct requirement

⁴⁷ Scottish Government Criminal Proceedings Database.

Where a person is convicted by an offence punishable by imprisonment the court may, instead of imposing imprisonment, impose a CPO on the offender (Criminal Justice (Scotland) Act 1995, s.227A(1)).

A CPO may be imposed instead of or as well as imposing a fine (Criminal Justice (Scotland) Act, s.227A(4)). In such a case the CPO may only impose one of the following:

- Offender supervision requirement
- Level 1 (that is, for no more than 100 hours) unpaid work or other activity requirement
- Conduct requirement.

Factors involved in sentencing

53. It is important to bear in mind the principles that, first, the court may sentence only in respect of the charge or charges to which the accused person has pled guilty or of which he or she has been found guilty. Second, the maximum sentence available is what could be imposed for the very worst offence, committed by a persistent offender, and, third, a court must take into account both aggravating and mitigating factors when imposing a sentence. Aggravating factors could include the seriousness of the offence, the deliberate or reckless nature of the offence possibly involving cruelty and the impact on the conservation status of a rare species. Mitigating factors could include the explanation given for the offence, the offence being the offender's first, the individual being otherwise of good character and their income being so low that they could not pay a substantial fine. It is therefore uncommon for a court to impose a maximum sentence in practice. Where imprisonment is available, restrictions are imposed on courts on passing such a sentence⁴⁸ and legislation provides that the court may impose a Community Payback Order⁴⁹. We noted that shortly before the publication of this report, the Scottish Government published a consultation on proposals to extend the current presumption against sentences of imprisonment of three months or less.⁵⁰

Impact statements

54. Impact statements are now routinely used in the criminal justice system, involving the victim providing a statement on the impact of the crime on them to the court for the judge to take into account before sentencing⁵¹. An earlier evaluation of a pilot victim statement scheme in Ayr, Edinburgh and Kilmarnock produced fairly

⁴⁸ Criminal Procedure (Scotland) Act 1995, s.204

⁴⁹ Criminal Procedure (Scotland) Act 1995, s.2227A

⁵⁰ <http://news.scotland.gov.uk/News/Proposals-for-bold-action-on-reoffending-1d98.aspx>

⁵¹ See Criminal Justice (Scotland) Act 2003, s.14 as amended by the Victims and Witnesses (Scotland) Act 2014, s.23.

positive results: “a number of sheriffs and procurators fiscal commented that the information they received in victim statements was useful”⁵².

55. Further research in England and Wales conducted for the Commissioner of Victims and Witnesses suggests that judges and other legal professionals are now more positive about the use of such statements than they were when the provisions were introduced⁵³. In a study (Leverick et al 2007a) “interviews with a range of legal professionals in Scotland... concluded ... “there were very few objections to the victim impact statement scheme among criminal justice professionals” (p. 90). Judges, in particular, reported finding victim impact statements to be a useful way of learning about the seriousness of the crime.” Nonetheless there is no evidence that sentencing patterns have changed as a result of the introduction of impact statements.

56. It appears therefore fair to say that victim statements are generally regarded as useful by the judiciary in terms enhancing their contextual knowledge prior to sentencing.

57. Impact statements in the context of wildlife crime are obviously different as the creatures or ecosystems cannot speak for themselves. Nonetheless impact statements have become relatively common in pollution prosecutions. We address later the questions as to who should prepare these statements in the context of wildlife crimes, their contents and whether (as with victim statements) they require legislative underpinning.

⁵² <http://www.scotland.gov.uk/Publications/2007/03/27152708/0>.

⁵³ <http://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf>.

8. Stakeholder engagement questionnaires and interviews: summary of responses

Methods

58. The Group sought a range of stakeholder views on penalties. This was not intended to be a full public consultation and timescales for responses were more restricted than would have been the case for a full consultation. If the Scottish Government does decide to take forward any of the recommendations in this report it is understood that full consultations will be carried out on any proposals as appropriate.



Damaged bat roost © John Haddow

59. The questionnaire was sent to PAW Scotland stakeholders and put on the PAW website so that it was publicly available. 68 responses were received to the questionnaire, 20 from governmental and non-governmental organisations and 48 from individuals. Respondents identified themselves variously as being based in Scotland, England, Wales, Great Britain, the UK and the Republic of Ireland.

60. Eighteen questionnaire respondents were invited to interview. A representative sample of respondents was chosen from governmental and non-governmental organisations and individuals. In the interviews respondents were asked to elaborate on or explain their questionnaire responses around the level of penalties, whether they were a deterrent, what types and levels of penalties might act as a deterrent and what alternative penalties or approaches might be considered. It became apparent in the interviews that some questionnaire rankings had been mistakes: thus one respondent had ranked badger baiting as lower than snaring but had meant to rank it higher⁵⁴. In addition, given that penalties are only a part of the context of wildlife crime, interviewees were also asked more general questions about their views of the prevention of wildlife crime to provide a wider perspective. Several respondents had raised such issues in their questionnaire responses and it therefore seemed appropriate to follow these up.

61. We undertook that we would not identify respondents to the questionnaire survey or interviewees and have simply referred to them here by a questionnaire response number or an organisation or individual interview number reference. We have cited responses in interviews in the following paragraphs where appropriate in order to indicate whether a preponderance of interviewees favoured or did not favour a particular approach or point and how that broke down between individual interviewees and those interviewees representing organisations. However, this is

⁵⁴ Organisation 13.

merely to give an indicative impression of the range of views. Letters were also received from three organisations.

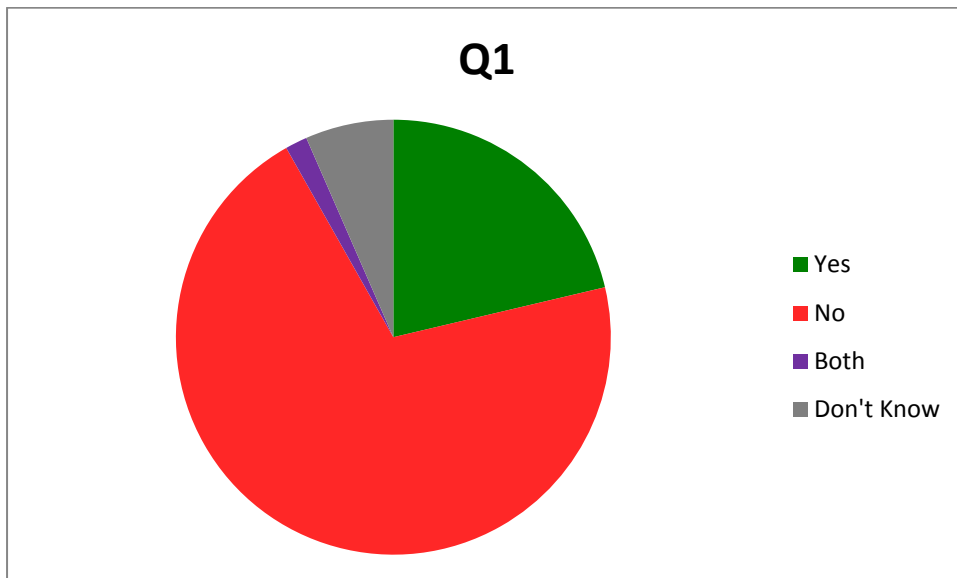
62. In presenting the results of the stakeholder engagement we have attempted to group responses thematically around a number of issues.

63. Not every respondent answered each question, nil responses have been excluded from the graphs and the graph segments represent the proportion of comments made.

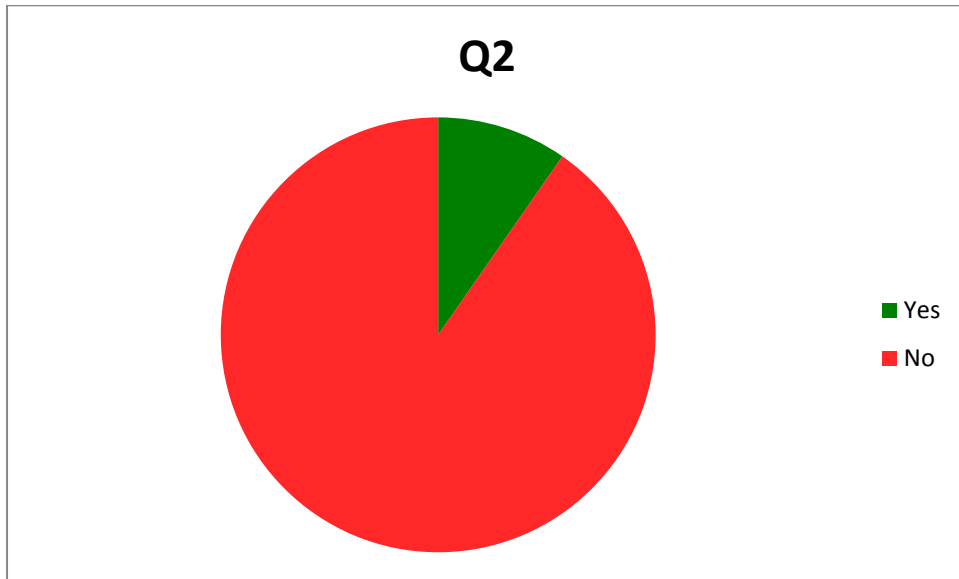
64. It is important to note that in the following paragraphs of this chapter we present the views expressed by stakeholders in responding to the questionnaire or in the interviews. These paragraphs do not represent the views of the Review Group itself. Our views are presented in Chapter 9, below.

Deterrent effect of penalties and their appropriateness

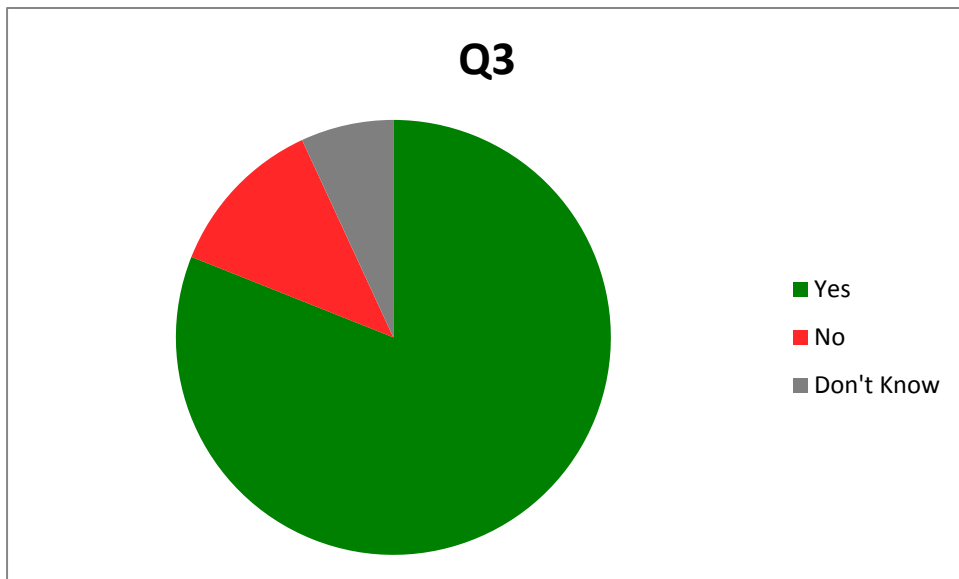
Q1. Do you consider that the penalties available to the courts for wildlife crime in general are a deterrent?



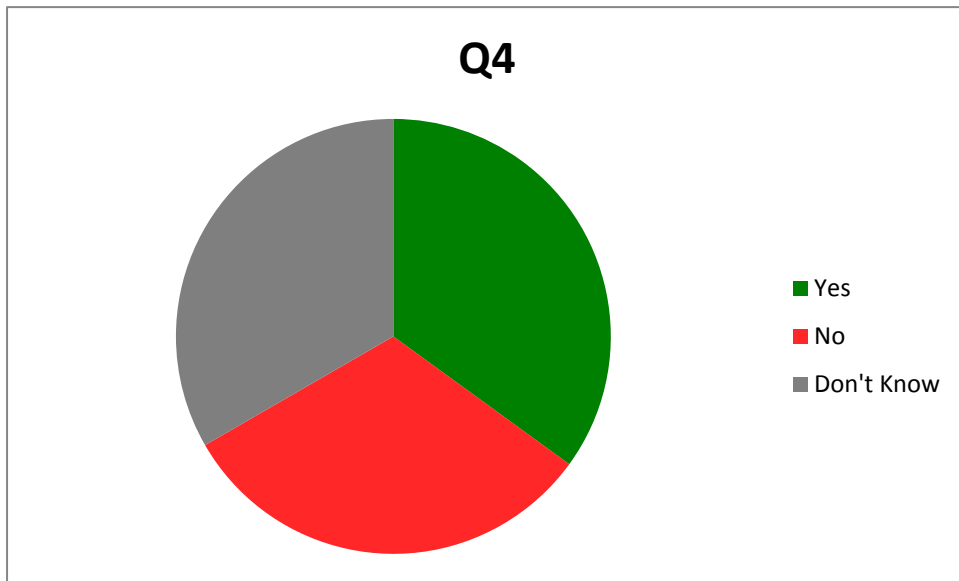
Q2. Do you consider that the penalties imposed by the courts for wildlife crime in general are a deterrent?



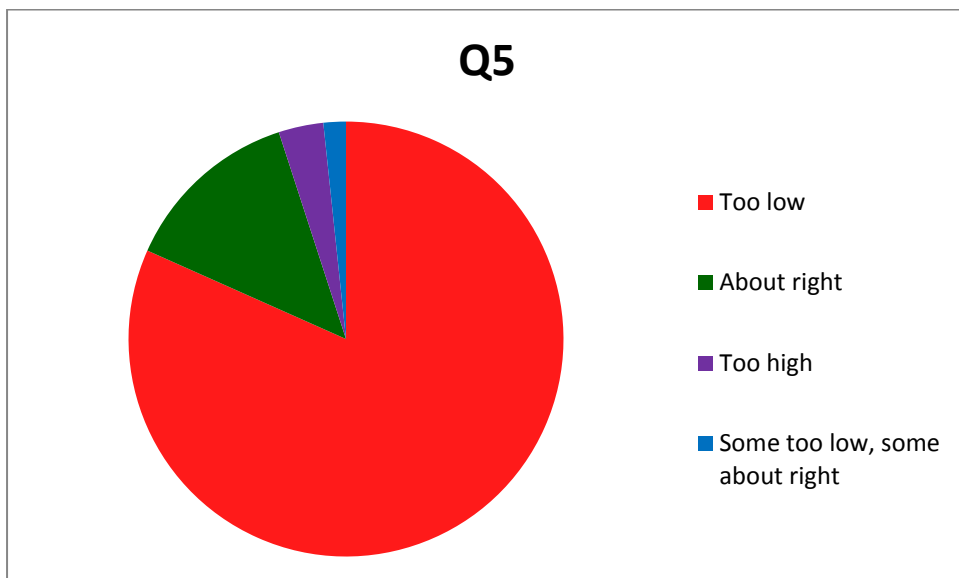
Q3. Are there any particular sorts of wildlife crime where you believe the penalties imposed are not appropriate?



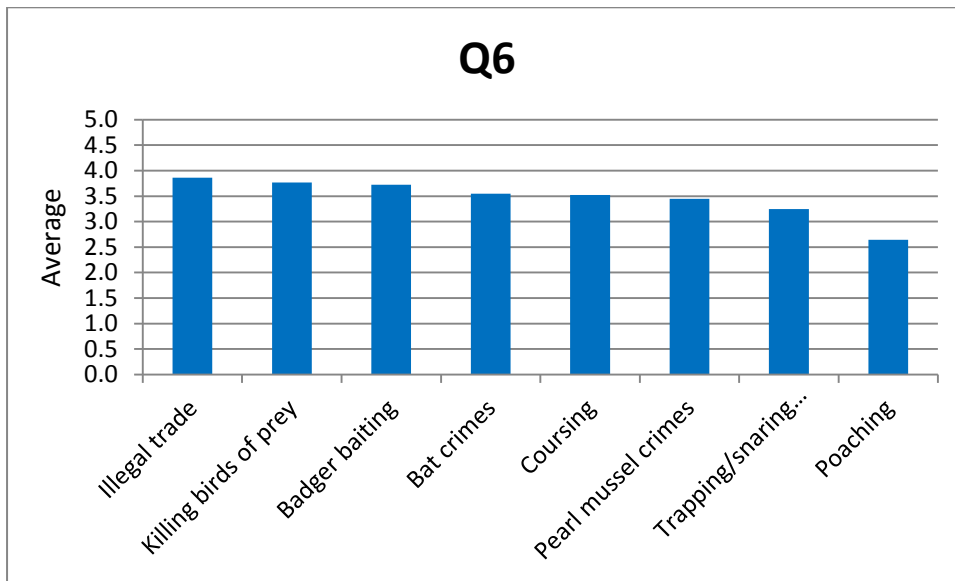
Q4. Are there any particular sorts of wildlife crime where you believe the penalties imposed are appropriate?



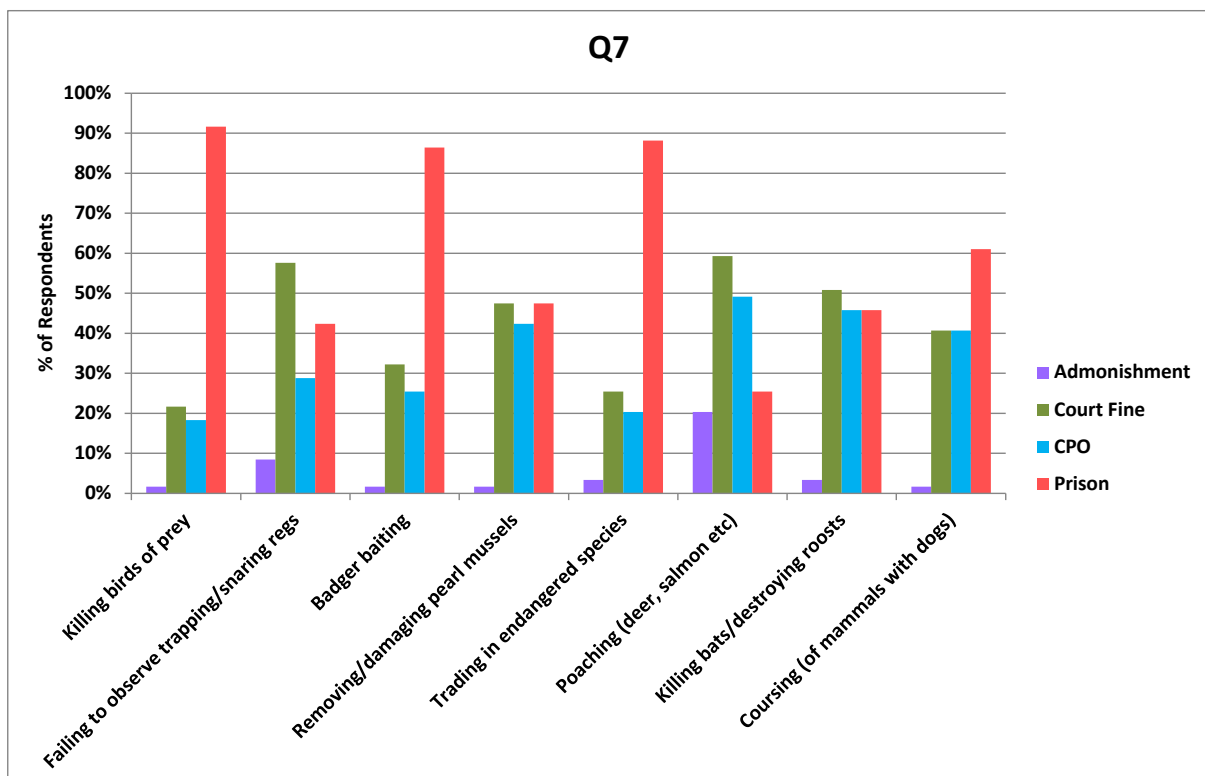
Q5. Are wildlife crime penalties:



Q6. On a scale of 1 to 5, where 1 represents minor regulatory offences and 5 represents the most serious offences such as murder, where would you place the following offences?



Q7. Which of following [court admonishment, court fine, community payback order (CPO), prison] would be appropriate for the following offences?



Questionnaires

65. The responses to Question 1 demonstrate a widespread majority view amongst respondents that the penalties available to the courts for wildlife crime were not a deterrent. Reasons given by respondents included that the potential benefits of the offence to the offender could significantly outweigh deterrent effect of penalties and that corporate developers, for example in relation to bat crime, tended to comply with the law because of reputational concerns rather than the deterrent effect of the penalty.

66. For Question 2 an even larger majority of respondents than in Question 1 considered that the penalties imposed by the courts for wildlife crime were not a deterrent. Probing further regarding the appropriateness of penalties imposed, in answer to Question 3, a majority of 71% considered they were not appropriate in particular sorts of wildlife crime. However, in answer to Question 4 around one third (32%) of respondents indicated that there were areas of wildlife crime where the penalties imposed were appropriate. A slightly smaller proportion (29%) considered that this was not the case and a similar proportion indicated they did not know (30%). However, when asked in Question 5 if the penalties imposed for wildlife crime were too low, about right or too high, nearly three-quarters of respondents indicated that they were too low. Concern was again expressed that the economic benefit from the crime may outweigh the penalty.

67. These answers suggest that there is a perception that, within a range of penalties which are widely perceived as inadequate in terms of their deterrent effect, the courts are failing to make full use of the penalties that are available. This is reinforced by comments made by respondents to Question 2. It is nonetheless clear that, while in general terms there is a clear perception that penalties imposed are too low, there are some areas where it is considered that the penalties imposed are appropriate. Given the breadth of wildlife crime and the relative seriousness with which respondents viewed different wildlife crimes relative to each other and non-wildlife crimes, this is not surprising.

68. In relation to relative seriousness of types of wildlife crime in Question 6, while there was not much distinction between the respondents' top-rated wildlife crimes (trading in endangered species, killing of birds of prey and badger baiting) the lowest rated crime is clearly poaching.

69. In relation to Question 7 the types of penalties considered appropriate roughly reflect the respondents' views of seriousness of types of wildlife crime, albeit that prison is seen as the most appropriate option for killing birds of prey by 92% of respondents while 88% saw it as appropriate for trade in endangered species and 86% for badger baiting. Prison was seen as least appropriate for poaching (25%) in line with its position as the least serious wildlife crime of those mentioned. Admonishment was seen as appropriate by the smallest proportion of respondents

who answered this question, with only 20% seeing it as appropriate for poaching offences – again reflecting the fact these are seen as the least serious wildlife crime. (The figures total more than 100% for each category of wildlife crime as respondents were able to select more than one option for each category).

Interviews

Extent to which criminal penalties and other considerations deter wildlife crime

70. Amongst the interviewees there was a general view that some recent developments could ensure that the law had a greater deterrent effect. In particular, the custodial sentence imposed on a gamekeeper and the knock-on consequences of that (loss of employment etc.), the vicarious liability conviction and a perception of greater use of appropriate forfeiture provisions⁵⁵. Vicarious liability had made landowners more aware of their responsibilities⁵⁶ and some considered it more important to target organisational bad practice rather than employees who might not know any better⁵⁷. Nonetheless there were mixed views on the deterrent impact of large fines on landowners or shooting tenants with some saying this was a deterrent for the wealthy along with the shame of conviction.⁵⁸ However, other interviewees indicated such fines were not a deterrent as some landowners and shooting tenants were not so concerned about their public image as, for example, corporate entities which might commit pollution offences under other areas of environmental law⁵⁹. Only loss of subsidies and/or a shooting licence (if such a thing were to be introduced) would be a deterrent for such offenders. Landowners were also now more aware of the knock-on effects relating to cross compliance⁶⁰. Fines were not seen as a deterrent for raptor crimes because there was a perception that gamekeepers convicted of offences had these paid by their employers⁶¹. They were also not always seen as a deterrent because they could be paid off over a period⁶² or simply because those involved in activities such as badger baiting simply could not pay significant fines⁶³. However, some indicated that there was a case for higher maximum penalties where the impact was greater, such as the introduction of non-native species or crimes involving European Protected Species⁶⁴. Fines were also often lower than the economic benefit from the crime such as badger sett interference for otherwise lawful forestry, agricultural or development activities⁶⁵.

⁵⁵ Organisation 13; Organisation 8; Organisation 5; Individual 1; Organisation 9; Individual 2; Organisation 12.

⁵⁶ Organisation 10; Organisation 12.

⁵⁷ Individual 1.

⁵⁸ Individual 1.

⁵⁹ Individual 4.

⁶⁰ Ibid. See section on alternative penalties below.

⁶¹ Organisation 13; Individual 5; Organisation 7.

⁶² Organisation 5.

⁶³ Organisation 10.

⁶⁴ Organisation 13 – and there are already higher maximums now available for introduction of non-native species.

⁶⁵ Organisation 10.

Some respondents considered that short custodial sentences for gamekeepers convicted of offences were not seen as a deterrent per se but rather the consequences of such sentences (e.g. loss of accommodation, job etc.)⁶⁶. Custodial sentences were seen as having been a major deterrent for egg collectors as egg collecting offences had declined markedly since custodial sentences were first imposed a decade ago⁶⁷. Custodial sentences were also generally seen to be appropriate for cases involving significant deliberate cruelty⁶⁸ but the lack of re-education offered in such cases was also criticised⁶⁹. One interviewee noted that prisons were already overcrowded so custodial sentences were not always desirable⁷⁰. Another interviewee took the view that custodial sentences were only appropriate for CITES offences because of the deliberate and often large scale nature of the wrongdoing⁷¹. Community Payback Orders were seen as more appropriate by one individual as they could ensure some degree of re-education of the offender in terms of damage to an ecosystem or local tourism⁷². The shame of a conviction was seen by some as a potential deterrent regardless of the level or nature of penalty imposed⁷³.

71. The risk of getting caught was seen as a deterrent but a number of interviewees noted both that it was difficult to get the evidence for a conviction and that those involved in organised wildlife crime were well aware of this, with a high number of 'No comment' interviews given to the police⁷⁴. The introduction of legal presumptions was proposed, for example, that possession of a banned poison might be presumed to be evidence of its use if a bird on a particular estate had been killed by that type of poison⁷⁵.

72. Limits to the deterrent effect of any penalties were also acknowledged in the discussion of the deterrent effect of penalties and one organisation noted that beyond deterrence might lie the possibility of re-education on the same basis that those committing speeding offences might be required to attend education courses on the impact of speeding⁷⁶.

Appropriateness of level of penalties imposed by courts

73. A general view discerned in the answers of interviewees is that sheriffs need to be able to impose appropriate penalties to reflect the nature and seriousness of

⁶⁶ Organisation 5; Organisation 12; Individual 2; Organisation 9.

⁶⁷ Organisation 9.

⁶⁸ Eg Organisation 2; <http://news.stv.tv/tayside/271711-brandon-robb-and-benjamin-murray-appeared-at-kirkcaldy-sheriff-court/>.

⁶⁹ Organisation 7.

⁷⁰ Organisation 8.

⁷¹ Individual 1.

⁷² Individual 1.

⁷³ Individual 1.

⁷⁴ Organisation 13, Individual 5; Organisation 8; Organisation 9.

⁷⁵ Organisation 8.

⁷⁶ Organisation 7.

the crime⁷⁷ and in turn this was seen as requiring a greater maximum to encourage and enable sheriffs to impose higher penalties where justified (not least to ensure that the fine level exceeded the economic benefit from the crime or its perceived seriousness⁷⁸). This was despite the fact that existing penalties did not approach the present maximum sentences. There was certainly a view that sheriffs were not imposing appropriate penalties at present.⁷⁹ This suggested that in the case of individuals at least, sheriffs were actually imposing the right fine levels⁸⁰. Public lack of awareness of these issues was seen as a reason why there was public criticism of the judiciary, which was not always justified⁸¹. Inaccurate reporting of cases by the media also did not help public understanding⁸². However, another possible factor in the imposition of low penalties was that the impact of the offences had not been adequately explained to the court⁸³.

74. Harmonisation of penalty levels within wildlife crime was needed to enhance the appropriateness of penalties imposed and hence their deterrent effect. This could be informed by what has occurred in other areas of environmental law⁸⁴. Some interviewees noted that waste law might be a good parallel since offences there ranged from the accidental to the deliberate money-saving and even to organised and violent crime⁸⁵. It had to be recognised that there were many types of offenders with different motives committing wildlife crimes which makes having the same set of rules very difficult⁸⁶. One interviewee also pointed out that while commercial entities were commonly involved in environmental crime and fines of £10,000 or more would mean little to such bodies such organisations were rarely involved in wildlife crime⁸⁷. More than one interviewee indicated that prosecution on indictment should be more widely available in wildlife crime⁸⁸.

75. The fact that the main summary conviction fine levels had not been updated in 34 years was noted, even to account for inflation⁸⁹. However, another aspect of this was that in some cases neither fines nor custodial sentences were appropriate but rather, for example, forfeiture of dogs and banning individuals from keeping dogs in the case of badger baiting or vehicles, animals used and equipment in case of

⁷⁷ Individual 5; Organisation 13; Organisation 5; Organisation 2; Individual 6. Seriousness might include, for example, where the offence involved cruelty.

⁷⁸ Organisation 13; Organisation 10; Organisation 5; Organisation 7; Organisation 1; Individual 6; Organisation 3.

⁷⁹ Individual 4; Individual 2; Organisation 12.

⁸⁰ Organisation 12.

⁸¹ Organisation 7.

⁸² Individual 2.

⁸³ Organisation 1.

⁸⁴ Individual 6; Organisation 3; Individual 2.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Individual 2.

⁸⁸ Ibid.

⁸⁹ Organisation 13; Organisation 7.

poaching⁹⁰. The inconsistency of available penalties and, for example, the availability and extent of forfeiture penalties was noted by some⁹¹.

76. Some interviewees indicated that the right penalties were in place but that the full range was not being used⁹². They also considered that the wider consequences of conviction on the likelihood that a gamekeeper would lose his job and/or his firearms licence should not be lost sight of⁹³. The police were seen as being more proactive in revoking firearms certificates following convictions even where no firearms were involved⁹⁴.

Comparative seriousness of wildlife crime

77. Not all interviewees were questioned about this. Questions were asked where the particular interviewee's response was out of line with the average questionnaire results.

78. Although poaching had tended to be ranked lower in the questionnaire responses than other forms of wildlife crime, some had ranked it at the same level because it could involve significant and deliberate cruelty⁹⁵.

79. Some government organisations ranked certain wildlife crime higher than some NGOs which had taken a more measured approach accepting that wildlife crime could be dealt with by custodial sentence but was clearly not as serious as murder⁹⁶. Another NGO indicated that its members' views on relative seriousness of wildlife crimes were more severe and that influenced its questionnaire response but that the NGO itself took a less severe view⁹⁷.

80. Another NGO ranked all wildlife crime at the same mid-ranking level⁹⁸. By way of explanation the NGO indicated that there was a range of conduct within each offence category so that while poaching might be seen as less serious it could nonetheless involve organised crime. Furthermore while other offences could involve premeditation and hence be viewed as more serious nonetheless there might be mitigating factors operating in some cases.

81. A further NGO ranked all wildlife crime in their questionnaire response at the highest level, on a par with murder. However, in the interview they did concede that there could be variations and that certain wildlife crime was less serious. Thus, for example, they saw deer coursing as being worse than the illegal, but clean shooting of deer.

⁹⁰ E.g. Organisation 10; Organisation 5; Organisation 2; Organisation 7; Individual 6; Organisation 12.

⁹¹ Organisation 2; Organisation 3.

⁹² E.g. Organisation 11; Individual 5.

⁹³ Ibid.

⁹⁴ Ibid; and Organisation 8.

⁹⁵ Individual 5; Organisation 2.

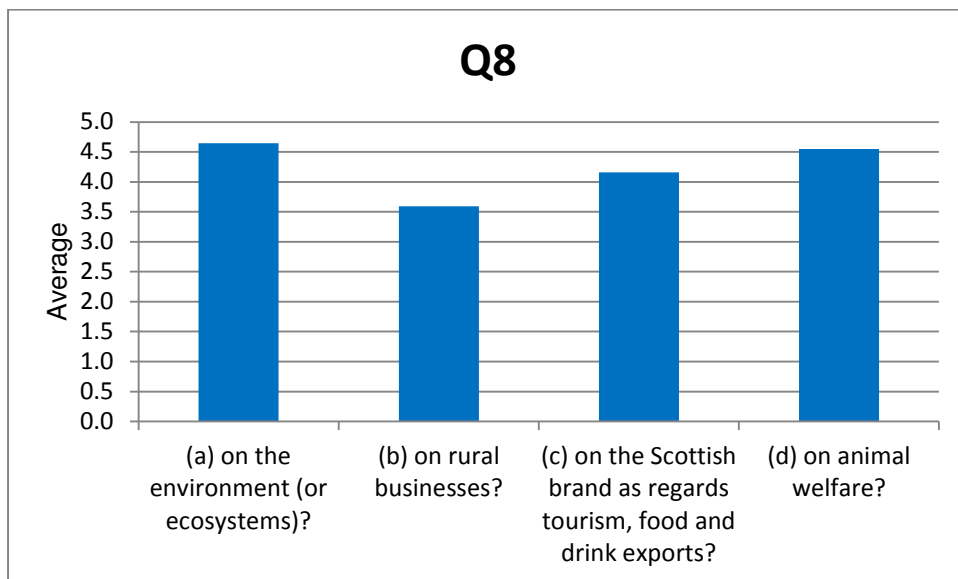
⁹⁶ Organisation 8, Organisation 9.

⁹⁷ Organisation 10.

⁹⁸ Organisation 9.

Impact

Q8. On a scale of 1 to 5, where 1 represents “not at all” and 5 represents “completely”, to what extent do you think that Scottish criminal courts should take into account the impact of wildlife crime when sentencing?



Questionnaires

82. As can be seen from the answers to Question 8 above, there was widespread support from respondents for the greater use of impact statements in wildlife crime prosecutions. Respondents were generally positive in their support for impact statements particularly in relation to the conservation/ecological impact. Some commented that where the impact of the offence was presented to the court the penalties tended to be more of a deterrent.

Interviews

83. There was strong support for the use of impact statements as a matter of course in wildlife crime cases⁹⁹. It was noted that, where impact statements were provided, the perception was that they were effective. However it was noted that this was not a consistent practice, although it was not made clear by the interviewees which parties were responsible for this¹⁰⁰. The focus was very much on the use of such statements in the context of the impact on the conservation status of the species or the relevant ecosystem. It was pointed out that it was difficult for police, procurators fiscal or sheriffs to understand the impact of the destruction of Fresh Water Pearl Mussels on a river ecosystem without an impact statement¹⁰¹. It was also noted that the conservation impact of a crime might differ considerably

⁹⁹ Organisation 8; Individual 6.

¹⁰⁰ Organisation 8; Organisation 9; Organisation 13; Individual 2.

¹⁰¹ Organisation 8; Organisation 9 made a similar point in a more general context.

depending on the location¹⁰². Impact statements could also be appropriate in the context of welfare or cruelty cases that were not a conservation concern¹⁰³.

84. However, all interviewees recognised it was difficult to present evidence about, for example, the economic impact of crimes on eco-tourism or even the economic benefit that might accrue in some cases from unlawful conduct. Although this had been done in some cases there needed to be reliable information which could be substantiated¹⁰⁴. This was seen as easier to estimate in the context of, for example, destruction of bat roosts as part of a new development¹⁰⁵. However, an NGO did indicate that the economic value of raptor crime to a sporting estate ought to be estimated¹⁰⁶. It was also noted that work had been done in Finland to place an economic value on wildlife and hence to inform the setting of penalties.¹⁰⁷ (This is considered elsewhere in the report¹⁰⁸). Even if there might be an impact on Scotland's 'brand' or as a tourist destination, hard evidence of this was extremely difficult to produce¹⁰⁹.

85. It was the view of some interviewees that the practice of plea adjustment – plea bargaining – could and sometimes did undermine the value of impact statements as the impact related to charges which were dropped as part of the adjustment¹¹⁰. Thus, although a guilty plea might be obtained through this process, the charges and thus the penalties imposed might not fully reflect the actual impact. However, other interviewees noted that members of the public might not understand this aspect of the criminal justice system¹¹¹.

86. Those interviewed were also asked about who might prepare such statements. Interviewees generally considered that SNH should provide conservation/ecosystem impact statements as it would be considered impartial in contrast to NGOs which had vested interests¹¹². However, it was also suggested that the body with the greatest expertise should provide the impact statement or at least assist in doing so¹¹³ or that environmental consultants or community partnerships in former privately –owned estates might be seen as impartial in those areas¹¹⁴. It was clear though that NGOs had been invited to produce impact statements or opinions or to act as expert witnesses on occasion where they were seen as experts¹¹⁵.

¹⁰³ Organisation 10.

¹⁰⁴ Organisation 3.

¹⁰⁵ Organisation 1.

¹⁰⁶ Organisation 9. Individual 4 made a similar point.

¹⁰⁷ Organisation 3.

¹⁰⁸ See paras. 143-146.

¹⁰⁹ Organisation 13.

¹¹⁰ Organisation 13; Individual 2; Organisation 9; Organisation 3.

¹¹¹ Organisation 10.

¹¹² Organisation 5; individual 6; Organisation 3; Organisation 12; Organisation 4; Individual 4.

¹¹³ Organisation 5; Individual 6.

¹¹⁴ Individual 1.

¹¹⁵ Organisation 1; Organisation 3; Organisation 4; Organisation 10.

Provision of impartial and factual information was seen as key¹¹⁶. In this context one interviewee noted the difference between campaigning NGOs and those which simply commission, collate and publish information such as the British Trust for Ornithology: the latter could be seen as reputable and neutral sources of information¹¹⁷. It was noted that SNH had provided 5 impact statements within the last year and that it had the specialists and resources to undertake this role¹¹⁸. Natural England had been doing this for years and it had resulted in higher penalties¹¹⁹. However, others took the view that SNH was under severe resource constraints¹²⁰ and was unlikely to be able to do this perhaps outside European Protected Areas¹²¹. In welfare or cruelty cases interviewees considered that a vet could provide the relevant impact statement¹²².

87. NGO representatives indicated that they had been invited to act as experts and were willing to do so or to work in partnership with others in providing impact statements¹²³. Some NGOs indicated that while they worked with the police south of the border this did not happen in Scotland¹²⁴.

88. In terms of ensuring systematic provision of impact statements a legislative change was seen as preferable to a new administrative practice¹²⁵. It was also pointed out that the Court could order its own independent impact statement and that this could be done at the stage when pleas had been negotiated and so could reflect a reduced number of charges¹²⁶.

¹¹⁶ Individual 4.

¹¹⁷ Individual 1.

¹¹⁸ Organisation 13.

¹¹⁹ Ibid.

¹²⁰ Organisation 12.

¹²¹ Individual 1.

¹²² Organisation 5, Organisation 7

¹²³ Organisation 10; Organisation 9; Organisation 5; Organisation 2.

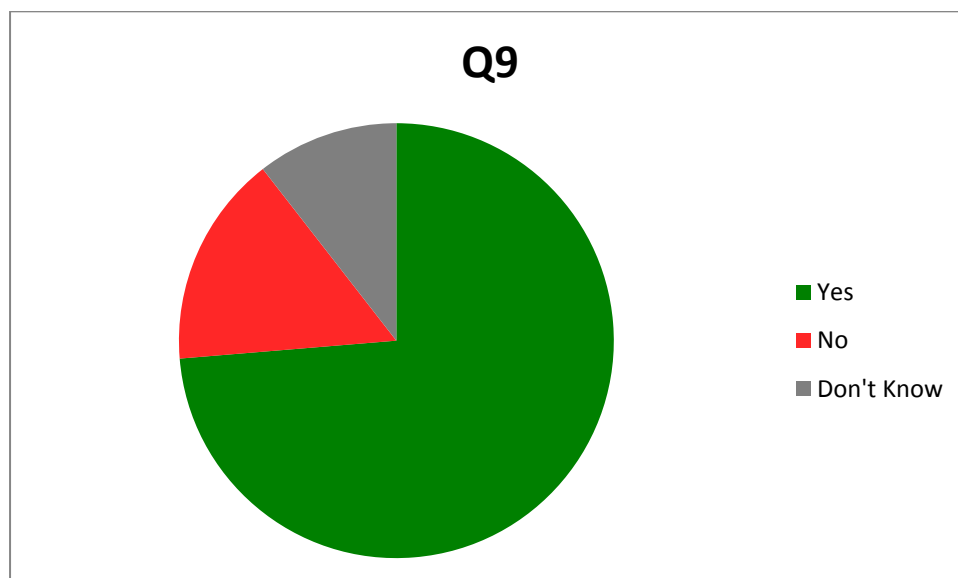
¹²⁴ Organisation 5.

¹²⁵ Organisation 3.

¹²⁶ Organisation 3.

Alternative penalties

Q9. Do you think that different or additional penalties, other than those listed in Q7, should be available to the Scottish criminal courts to deal with wildlife crime?



89. In the case of some offences it is clear that it is not the threat or imposition of a fine or custodial sentence that acts as a deterrent but it is the additional penalties which the court has the power to impose that act as a more significant deterrent. These might include the seizure of equipment, vehicles or animals involved in the commission of the offence and have been discussed above in some detail.

90. There was strong support from questionnaire respondents for the use of alternative penalties. These included forfeiture provisions, cancelling firearms and shotgun certificates, cross compliance issues but also potential re-education and rehabilitation.

91. In their letter to the group the PAW Legislation, Regulation and Guidance Group made a representation for more systematic links between the commission of wildlife crimes and the granting or continuation of holding various forms of official permits¹²⁷. Noting that while there was a clear link in the case of General Licences which cannot be held or continue to be held by those convicted of such offences, the position was less clear, for example, in relation to firearms.

92. There was extensive discussion of alternatives in most of the interviews and we present these discussions under a number of headings reflecting various alternatives below.

¹²⁷ PAW Legislation, Regulation and Guidance Group Letter to the Wildlife Crime Penalties Review dated 10 September 2014. See Annex 2

Forfeiture and disqualification

93. There was considerable support for the use of forfeiture provisions in wildlife crime and their extension to areas where they are not currently available or only available to an extent. Forfeiture was also seen as the most appropriate penalty in some cases, notably in the context of dog forfeiture in relation to badger baiting and deer poaching¹²⁸. There were some caveats regarding the potential effects of long-term kennelling on forfeited dogs¹²⁹ and a suggestion that, given these dogs' care needed to be paid for by the SSPCA at present, a legal obligation on the former owner was introduced to pay for the care¹³⁰. Disqualification from owning dogs followed on from forfeiture but it was seen as difficult to monitor this¹³¹ although a dog ownership licensing system was proposed by one interviewee¹³². Forfeiture of dogs also had an economic impact on some offenders given the value of some dogs in stud breeding¹³³. Greater consistency in forfeiture provisions across the range of legislation was seen as a positive and necessary step¹³⁴. However, in relation to vehicle forfeiture in the context of deer poaching, it was noted that in some cases poachers were simply stealing vehicles to avoid the impact of these provisions¹³⁵.

Proceeds of Crime Legislation

94. Greater use of this was favoured by a number of interviewees although there was a recognition that it might be hard to estimate the benefit deriving from the crime, for example, the value of extra grouse shot following the killing of a raptor¹³⁶. There was also a view that game shoots make very little money in practice in any event¹³⁷. One organisation also made the point that POCA could be used to secure forfeiture of property such as vehicles where offences were committed under legislation that did not specifically provide for such forfeiture¹³⁸. In a bat case in England a POCA order had been made in relation to the whole value of a property developed following the destruction of a bat roost although the case was under appeal¹³⁹.

¹²⁸ Organisation 12; Organisation 2; Organisation 7; Individual 5; Individual 6; Organisation 10; Organisation 5.

¹²⁹ Organisation 7.

¹³⁰ Organisation 2; Organisation 5.

¹³¹ Organisation 10.

¹³² Organisation 5.

¹³³ Organisation 7.

¹³⁴ Organisation 11.

¹³⁵ Individual 6.

¹³⁶ Individual 6, Organisation 1; Individual 5, Individual 4; Organisation 3.

¹³⁷ Organisation 12.

¹³⁸ Organisation 3.

¹³⁹ Organisation 1.

Restoration Orders and Restorative Justice

95. These were seen by some organisations as having value where there was damage to SSSIs¹⁴⁰ and also possibly in relation to the re-introduction costs of species which had been killed in an area¹⁴¹.

96. Nonetheless similar restorative justice solutions might be feasible in cases where there was no formal power to impose a restoration order. Thus, such a solution had been deployed in at least one case involving bats in terms of a payment to an NGO to foster bat roost conservation work¹⁴². It was suggested that this approach could be achieved through the practice of suspending sentence until restorative work had been carried out¹⁴³.

Loss of benefits under other legislation as a result of the commission of wildlife crime

97. Potential loss of firearms and shotgun certificates were also seen as a strong deterrent not only for gamekeepers¹⁴⁴ but also for deer poachers¹⁴⁵.

98. Potential loss of General Licences was also seen as a major deterrent¹⁴⁶. It was also suggested that where other licences depended on the applicant being and remaining 'a fit and proper person' then a wildlife crime conviction could be taken into account in determining whether to grant or suspend or revoke that other licence¹⁴⁷.

99. Loss of farm subsidies was also seen as a strong deterrent and easier to achieve than use of proceeds of crime legislation¹⁴⁸.

Community Payback Orders

100. Some scepticism was expressed about the value of these in relation to wildlife crime¹⁴⁹ but others saw them as a possible imaginative remedy¹⁵⁰ and not least a means by which re-education of offenders might be secured¹⁵¹. There was a parallel drawn with requiring speeding offenders to attend a course on the impact of speeding and perpetrators of domestic violence to attend programmes such as anger management to reduce risk of re-offending. Some organisations took the view that cognate programmes could be applicable particularly in connection with

¹⁴⁰ Organisation 1; Organisation 13.

¹⁴¹ Organisation 13.

¹⁴² Organisation 1.

¹⁴³ Organisation 1.

¹⁴⁴ Organisation 12.

¹⁴⁵ Individual 5.

¹⁴⁶ Organisation 8; Organisation 13.

¹⁴⁷ Individual 6.

¹⁴⁸ Individual 4.

¹⁴⁹ Organisation 2

¹⁵⁰ Organisation 12.

¹⁵¹ Organisation 12; Organisation 5.

convictions for animal cruelty and could encompass the teaching of empathy and awareness of links between cruelty to animals and interpersonal violence¹⁵².

Civil penalties

101. These were not seen as appropriate for wildlife crimes not least because they are designed to deal with technical regulatory breaches not where actual harm is caused as is the case with nearly all wildlife crime offences¹⁵³. The enforcing body might also be seen as too one-sided¹⁵⁴.

Tagging and curfew

102. According to one interviewee, these penalties were apparently used in England and Wales in relation to badger sett digging and baiting but were perhaps of limited utility given badger sett digging tended to happen in daylight hours¹⁵⁵.

ASBOs

103. Anti-social behaviour orders (ASBOs) could potentially be used in wildlife cases and had indeed apparently been used on one occasion but the legislation was not designed for interference with wildlife and a better solution might be the introduction of specific Wildlife-ASBOs¹⁵⁶.

¹⁵² Organisation 7; Organisation 5.

¹⁵³ Individual 6.

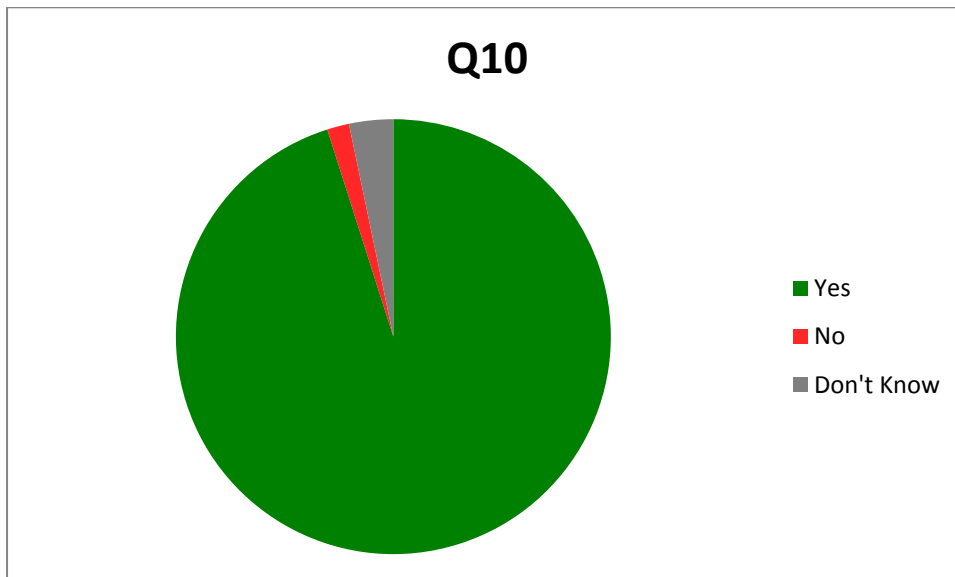
¹⁵⁴ Individual 6.

¹⁵⁵ Organisation 10.

¹⁵⁶ Organisation 3.

Transparent court decisions

Q10. Should Court judgements provide background information on why certain penalties have been imposed?



104. There was a clear majority of respondents to the questionnaire who took the view that there should be greater transparency when sheriffs impose a sentence, in terms of explaining the reasons for the sentence. A number of respondents indicated that this would help to dispel unrealistic public expectations about sentencing as it would make clear that sheriffs need to take into account a range of mitigating and aggravating factors as noted above¹⁵⁷. In that sense respondents indicated it would serve to enhance public confidence in the judicial system and that appropriate penalties were actually being imposed. However, it was also put to us that given the judicial workload in summary conviction cases (perhaps 75 cases per day) written judgments are not provided (although if there was an appeal the sheriff would state the case) and it would therefore be a significant workload imposition to require this¹⁵⁸. Nonetheless a respondent noted that sheriffs might choose to explain their reasoning orally but this was very much a matter of personal choice at present and even if they did so their comments may not be published¹⁵⁹. Given the high profile nature of some of the cases one respondent indicated that it could be a positive step for sheriffs to do this¹⁶⁰. However, it was also put to us that were written judgments to be required in wildlife cases, it would seem odd for such a requirement not to be imposed across the board as it would be hard to justify giving such a priority to wildlife cases¹⁶¹. So, as one respondent indicated, while this might be a useful

¹⁵⁷ See para. 53.

¹⁵⁸ Individual 2.

¹⁵⁹ Individual 2.

¹⁶⁰ Ibid.

¹⁶¹ Individual 6.

exercise it would nonetheless potentially slow down the giving of judgments which in turn could have wider implications for the justice system and resources¹⁶². That respondent also noted that given sentencing was a matter for the courts it was not appropriate for the Scottish Government to indicate what was taken into account or not; rather it might be a matter for which the Scottish Sentencing Council should issue guidelines¹⁶³.

Other issues / Wider context

105. Respondents and interviewees raised a number of other issues in the questionnaires and interviews. These included issues relating to the investigation and prosecution of offences, judicial attitudes to wildlife crime, coherence of wildlife crime legislation, adaptive management and preventive measures which included forms of licencing, training and education. Our focus in the review group was on penalties and we have therefore not included most of these issues in our report. We recognise that the issues we have not included are nonetheless important in terms of the wider context of the enforcement of wildlife crime and its prevention. We consider that the comments made on judicial attitudes to wildlife crime and the coherence of wildlife crime legislation are relevant to our review.

Judicial approaches to wildlife crime/environmental court

106. Some views were expressed on the need for more judicial training on wildlife crime issues although this would clearly be a matter for the Judicial Institute for Scotland and it was noted that certain organisations did produce good training material¹⁶⁴. The current extent of judicial training on these matters was not clear¹⁶⁵. It was noted that sheriffs appeared to be taking wildlife crimes more seriously and there was some indication that this was because of the level of public and governmental concern¹⁶⁶. One organisation took the view that a specialist court or nominated sheriffs would help to ensure greater knowledge of the law and expertise in the field¹⁶⁷. However, most interviewees took the view that the use of impact statements helped sheriffs to have a better understanding before sentencing¹⁶⁸.

107. It was noted that the sheriff originally allocated to deal with the case of ***Procurator Fiscal v George Mutch***, in which the accused was sentenced at Aberdeen Sheriff Court, 12 January 2015 had recused herself on the basis that she was a member of the RSPB. There was some questioning of whether sheriffs who were members of relevant sporting organisations had ever declared a conflict of

¹⁶² Ibid.

¹⁶³ Ibid. See also para. 148 below.

¹⁶⁴ Organisation 7.

¹⁶⁵ Individual 6.

¹⁶⁶ Organisation 13.

¹⁶⁷ Organisation 8.

¹⁶⁸ This is dealt with in the section on impact statements above.

interest in a case connected to game sports¹⁶⁹. One organisation noted that it would be a matter for the sheriff to declare such an interest and recuse themselves¹⁷⁰.

Coherence of wildlife crime legislation

108. The coherence of wildlife legislation was raised in a number of interviews partly because those interviewees had raised the issue in their questionnaire responses. This was in the context of ensuring that the law could be more readily understood and that its deterrent effect would be enhanced for that reason. All those who commented on this indicated that greater coherence was required. One individual indicated that this area of law needed to be tidied up and that it was disappointing that the Scottish Law Commission had not selected this area as a topic to consider for consolidation¹⁷¹. Two organisations also indicated support for consolidation¹⁷². The complexity of the law and the need to check amendments to WCA 1981 when consulting the legislation was criticised¹⁷³. There was concern expressed by one individual that those who needed to understand the legislation, such as gamekeepers, could not do so because it was so complex¹⁷⁴.

109. It was also suggested that codification rather than simply consolidation was required¹⁷⁵. Codification would be a more systematic approach to legislative reform setting out clear purposes and guiding principles as well as incorporating operational controls. However, there was a recognition that even consolidation would help to clarify the purposes of the legislation¹⁷⁶. As a minimum, greater consistency in penalty levels across the legislation was seen as valuable¹⁷⁷.

¹⁶⁹ Organisation 13.

¹⁷⁰ Organisation 3.

¹⁷¹ Individual 6.

¹⁷² Organisation 3, Organisation 1.

¹⁷³ Organisation 1.

¹⁷⁴ Individual 2; Organisation 1.

¹⁷⁵ Individual 2.

¹⁷⁶ Organisation 3.

¹⁷⁷ Organisation 5.

9. Discussion

110. In this chapter we present our views on the issues raised during the review. For convenience, we have structured the discussion around the same headings as we used in the previous chapter in which we presented the views of the stakeholders who participated in the review. In addition there are some further issues which we considered as part of our deliberations that were not discussed with stakeholders and are mentioned at the end of this section, notably on valuing wildlife crime and sentencing guidelines.

Fines and custodial sentences available

111. The policy reasons for the varied maximum fine levels in wildlife crime are not always easy to discern but the historic significance of poaching offences as a crime against the property of significant landed interests may help to explain the wide range of offences in those cases. Organised criminal activity also understandably attracts higher penalties, hence the higher penalties for organised poaching. Successful lobbying by particular animal welfare groups may also account for the higher penalties available in, for example, cases of cruelty to badgers¹⁷⁸ in contrast to general animal welfare legislation. Damage to protected habitats generally attracts higher maximum fines on summary conviction than killing or injuring members of a species which generally appears appropriate, but the maximum fine levels again vary between legislative regimes with no clear policy justification¹⁷⁹. However, the maximum fine level for most WCA 1981 offences remains Level 5 on the Standard Scale which is £5000. One uprating of penalties which did occur was the introduction of a potential 6 months imprisonment to WCA 1981 offences by the Nature Conservation (Scotland) Act 2004. Higher maximum penalties for some new Control of Trade in Endangered Species offences have also been introduced in recent years as noted above¹⁸⁰ no doubt because of the increasing seriousness with which they are viewed¹⁸¹. Where legislation has been recently amended as in the case of the introduction of non-native species there has been a tendency to impose higher maximum penalties¹⁸². These recently set maximum fines are generally in line with those available for land and freshwater pollution offences under environmental legislation, as noted below¹⁸³.

¹⁷⁸ See the Protection of Badgers Act 1992 – conviction on indictment introduced by the Nature Conservation (Scotland) Act 2004.

¹⁷⁹ Thus damaging a SSSI can attract a fine of up to £40,000 on summary conviction (Nature Conservation (Scotland) Act 2004, s.19(4)) but contravening a Marine Conservation Order in place to protect a Marine Protection Area can attract a fine of up to £50,000 (Marine (Scotland) Act 2010, s.94(2)). See also para. 29 above.

¹⁸⁰ See para. 27.

¹⁸¹ See Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2005, S.I. 2005/1674, Explanatory Memorandum, paras. 3,4 and 7.

¹⁸² See Wildlife and Countryside Act 1981, s.21(4ZA) as inserted by the Wildlife and Natural Environment (Scotland) Act 2011, s.17.

¹⁸³ See para. 114.

112. However, the fragmentation of wildlife legislation and the offences contained within it stand in contrast to the increasing coherence and integration of other areas of environmental law. There has been a concerted effort to integrate environmental legislation substantively and to achieve greater administrative integration. Alongside this has been an increasing harmonisation of penalties available and a fairly frequent uprating of those penalties.

113. Thus, industrial pollution control legislation has been largely substantively integrated over a number of years in Scotland commencing with the Environmental Protection Act 1990, Pt 1 and culminating in the Pollution Prevention and Control (Scotland) Regulations 2012. The process has been taken further in England and Wales with the Environmental Permitting (England and Wales) Regulations 2010 which set up a single permitting regime for a wide range of activities¹⁸⁴. Furthermore there has been a regular uprating of penalties accompanying the increased harmonisation. Thus, maximum penalties for various pollution offences were generally raised in 1991 from £2000 to £20,000 on summary conviction (and/or up to 3 months imprisonment in some cases) and on conviction on indictment a potentially unlimited fine and/or imprisonment of up to 2 years (5 years in the case of offences involving hazardous waste) was made available¹⁸⁵. The Antisocial Behaviour etc. (Scotland) Act 2004 then raised the maximum on summary conviction in most cases to £40,000 with the Clean Neighbourhoods and Environment Act 2003 making similar provision for unlawful waste deposit in England and Wales but to a maximum of £50,000¹⁸⁶. Meanwhile up to 6 months imprisonment on summary conviction for the principal pollution offences was introduced¹⁸⁷. Subsequently prison sentences of up to 12 months on summary conviction have replaced 6 month sentences for the principal pollution offences in the latest key pollution legislation in Scotland, the Pollution Prevention and Control (Scotland) Regulations 2012 and the Water Environment (Controlled Activities)(Scotland) Regulations 2011¹⁸⁸. Meanwhile, on

¹⁸⁴ Scotland has now paved the way for a similar approach through the Regulatory Reform (Scotland) Act 2014.

¹⁸⁵ See e.g. Control of Pollution Act 1974, s.31(7) (as inserted by the Water Act 1989, s.169 and Sch.23 which set the maximum fine on summary conviction for the principal water pollution offences as the statutory maximum (then £2,000) which was increased to £20,000 from 1 January 1991 by the Environmental Protection Act 1990, s.145(2). S.31(7) was then replaced from 1 April 1996 by s.30F(6) as a result of amendments by the Environment Act 1995 but the maximum fine on summary conviction remained the same. However, s.30F(6) was amended by the Antisocial Behaviour etc. (Scotland) Act 2004, Sch. 2, para. 2(2) to double the maximum penalty on summary conviction to £40,000 which came into force on 28 October 2004. These provisions were then replaced by the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (S.S.I. 2005/348) from 1 April 2006 which in turn were replaced by the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (S.S.I. 2011/209) from 31 March 2011 but the maximum fine on summary conviction remained the same. This note also illustrates the complexity of tracking the increases in penalties.

¹⁸⁶ See Antisocial Behaviour etc. (Scotland) Act 2004, s.66 and Sch.2; Clean Neighbourhoods and Environment Act 2005, s.41(1) (with the latter also increasing the maximum period of imprisonment on summary conviction to 12 months and 5 years on conviction on indictment).

¹⁸⁷ See e.g. the Pollution Prevention and Control (Scotland) Regulations 2000, reg.30(2)(a).

¹⁸⁸ See Water Environment (Controlled Activities) (Scotland) Regulations 2011, reg.44(2)(a); Pollution Prevention and Control (Scotland) Regulations 2012, reg.67(2)(a).

conviction on indictment maximum prison sentences of up to 5 years have replaced 3 years as the norm¹⁸⁹.

114. The processes of substantive and administrative integration and regular uprating of penalties that have occurred in other areas of environmental law, have not occurred to nearly the same extent in the area of wildlife crime. There is greater administrative coherence for wildlife conservation, with SNH taking over the functions of the Deer Commission for Scotland for example¹⁹⁰. However, the principal conservation legislation, the Wildlife and Countryside Act 1981 (WCA 1981) remains unconsolidated after numerous amendments brought about, for example, by the Nature Conservation (Scotland) Act 2004 and WANE 2011 and, as has been noted, the maximum fine level for most WCA 1981 offences remains Level 5 on the Standard Scale which is £5000.

115. What is perhaps particularly noteworthy here in comparing the developments in penalties in other areas of environmental law with nature conservation law is that the pre-1991 maximum fine levels on summary conviction for these pollution offences were less than half the maximum fine then available on summary conviction for WCA 1981 offences. Yet while the maximum fines on summary conviction for the principal pollution offences have been increased 20 fold between 1991 and now, the maximum fine on summary conviction for most wildlife crimes under WCA 1981 has remained the same. The impact of inflation alone would mean that a £5,000 fine in 1981 would now be valued at nearly £17,119¹⁹¹.

116. It may be objected that nearly all pollution offences are commercial offences and hence ought to attract a higher penalty whereas wildlife offences are mainly non-commercial so the environmental law comparison may not be appropriate. However, it is clear that some wildlife crime is commercial in nature.

117. Bat crime is almost entirely commercial in that it normally involves property development and some badger crime is commercial in that it involves otherwise lawful agricultural and forestry activities. Some raptor crime is also commercial in that it takes place to further the sporting interests of shooting estates. Damage to habitats may well be to further commercial activity through, for example, the construction of hill tracks. Damage to freshwater pearl mussels is also usually for commercial reasons - engineering operations, convenient waste disposal, or pearl-fishing. In addition organised criminal activity such as trading in parts of endangered species, poached animals or fish clearly has a commercial purpose. Accordingly we consider that the comparison with environmental law crime is valid and that it also justifies a higher maximum to reflect the fact that at least some wildlife crime is

¹⁸⁹ See e.g. Water Environment (Controlled Activities) (Scotland) Regulations 2011, reg.44(2)(b); Pollution Prevention and Control (Scotland) Regulations 2012, reg.67(2)(b).

¹⁹⁰ Public Services Reform (Scotland) Act 2010, s.1.

¹⁹¹ According to the Bank of England inflation calculator (<http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/index1.aspx>), £5000 in today's terms would be £17,118.64 as at 23 October 2015.

commercial in nature. We consider our position on this is strengthened by the fact that the EU Directive on the protection of the environment through criminal law requires a variety of conduct involving wildlife including (1) the killing, destruction, possession or taking of specimens of protected wild fauna and flora species; (2) trading in specimens of protected fauna and flora species; and (3) any conduct which causes significant deterioration of a habitat within a protected site, to be criminalised alongside conduct involving pollution and disposal of waste¹⁹².

118. The piecemeal nature of the offences, the piecemeal uprating which has occurred, their lack of coherence internally within wildlife law and their lack of coherence vis-à-vis other areas of environmental law should be readily apparent. We consider that these issues need to be addressed to ensure that the law is clearer and more readily understood and that potential penalties have a greater deterrent effect.

119. There have also been recent developments in England and Wales in relation to sentencing which are worth noting. The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.85 which was brought into force on 12 March 2015 amends a raft of legislation removing £5,000 limits on fines on summary conviction and empowering magistrates to impose potentially unlimited fines as is the case on conviction on indictment. This includes the penalties under the Wildlife and Countryside Act 1981¹⁹³. The rationale for the removal of the limit was explained by the UK Justice Minister Mike Penning who said:

“Dangerous criminals will always belong in prison but it is important that magistrates, who sentence the majority of offenders who come through our courts, have the power to hand down the appropriate punishment with the severity they see fit. Criminals should be in no doubt that if they break the law they will face consequences and where a fine is the most appropriate sentence this could run into several thousands.”¹⁹⁴

120. This appears to us to provide a strong justification for a similar move in Scotland. While an increase in the maximum fine on summary conviction to the norm for the principal environmental offences in Scotland, £40,000, would be an option, the Scottish Government should consider a move to unlimited fines as has just occurred in England and Wales, albeit that we recognise that the latter change would require wider legislative amendment, the merits of which would need to be considered. A further option would be to revalorise the levels applicable in the Standard Scale. For example, this could mean that a Level 5 fine of £5,000 could become £10,000 or £20,000. However, given Level 5 encompasses a host of lesser

¹⁹² Directive 2008/99/EC on the protection of the environment through criminal law (OJ L328/28, 6.12.2008), Art.3.

¹⁹³ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015, reg.4 and Sch.4.

¹⁹⁴ See <https://www.gov.uk/government/news/unlimited-fines-for-serious-offences>

offences, a revalorisation is unlikely to result in the maximum levels of penalties being raised to the same level as those which currently apply in the case of the major pollution offences which currently stands at £40,000. In addition such a move would have implications for a whole range of offences, not simply wildlife offences. It may thus be impractical to make progress on that issue in the short to medium term. Accordingly we do not consider that there is merit in recommending the revalorisation of the Standard Scale at present.

121. We have noted above the fragmentation, lack of uniformity of wildlife crime penalties and the general failure to raise them even in line with inflation. We consider that this undermines their deterrent effect. This view was shared by the majority of respondents to the questionnaire survey and the majority of interviewees. We therefore consider that the maximum penalties on summary conviction should be raised, at least for the more serious offences, and that conviction on indictment should be more widely available across the range of wildlife offences. Since wildlife law is part of wider environmental law, we consider that the starting point for this exercise should be the approach and levels used in other areas of environmental law. We consider that this applies in the case of both fines and terms of imprisonment to give as full a range as possible so that appropriate penalties may be imposed to reflect the nature of the crime and whether the perpetrator was an individual or corporate entity.

Fines and custodial sentences imposed

122. Sentencing for environmental and wildlife crime has been under the spotlight for a number of years. In environmental law, criticisms were made of the prosecution system in that it was argued that Procurators Fiscal lacked knowledge of environmental law and deprioritised it. Criticisms were also made of the Scottish Environment Protection Agency (SEPA) and its predecessors for failings in reporting¹⁹⁵. This was seen not only to impact on bringing prosecutions but also on sentences imposed as the impact of an incident might not be well represented to the court. However, very considerable progress has been made through, for example, the signing of a Memorandum of Understanding between SEPA and the Crown Office and Procurator Fiscal Service (COPFS), the development of a National Network of Environmental Law Prosecutors in 2004 and, in 2011, the establishment of a national Wildlife and Environmental Crime Unit.

Case Study 1

Location:

Wisconsin, USA

**Description:**

A father and son were charged after an investigation into the poisoning of wildlife on their land over a number of years, which included bald eagles, a black bear and a bobcat killed with Carbofuran. Both men pled guilty to charges of conduct relating to possession of an American bald eagle.

Penalties:

\$30,000 and \$10,000 fines
\$100,000 each in restitution costs
Seven and five year bans on hunting, fishing and trapping privileges
One year probation each
Four months home confinement (one of the convicted parties only)

Case Study 2

Location:

Cantabria, Spain

**Description:**

A farmer was found guilty of laying out poisoned baits and poisoning at least 11 red kites, five dogs, six foxes, a cat, a raven, a buzzard and four vultures.

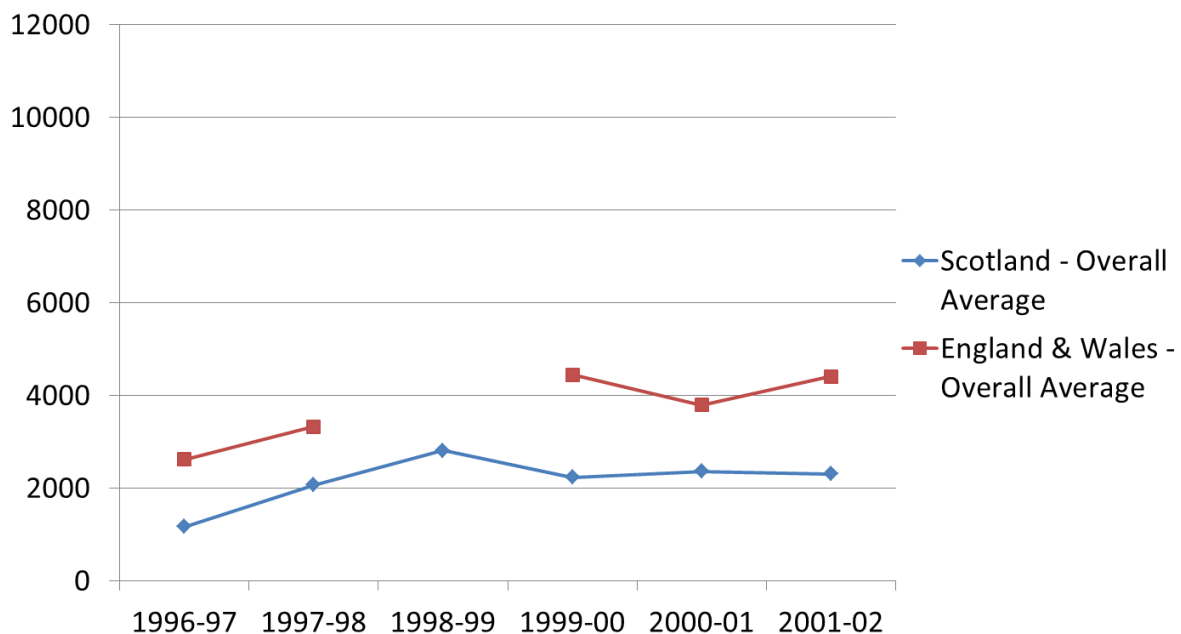
Penalties:

2 years imprisonment
2 years disqualification from farming or any other profession relating to animal husbandry
4 years disqualification from hunting
90,270 Euros compensation to Cantabria for the loss of value of the wildlife
28,500 Euros for the cost of monitoring the wintering population and breeding season of the red kites for the next 3 years in the area.

¹⁹⁵ See e.g. M. Poustie, 'Environment', Stair Memorial Encyclopaedia of the Laws of Scotland, 2007, para. 107.

123. In addition, criticisms have consistently been made of the levels of sentences imposed for environmental and wildlife crime both north and south of the border¹⁹⁶. However, average fines for environmental offences (excluding wildlife offences) have increased both north and south of the border as the following graphs illustrate (see Figures 1 and 2 below). Nonetheless it will be apparent that the average fine levels are nowhere near the maximum levels available even on summary conviction. This reflects the fact that the highest penalties are considered only for the most serious offences and represent the starting point for judicial consideration of the appropriate level of penalty. In our discussion of factors involved in sentencing below, we consider further the kinds of factors which judges can take into account¹⁹⁷.

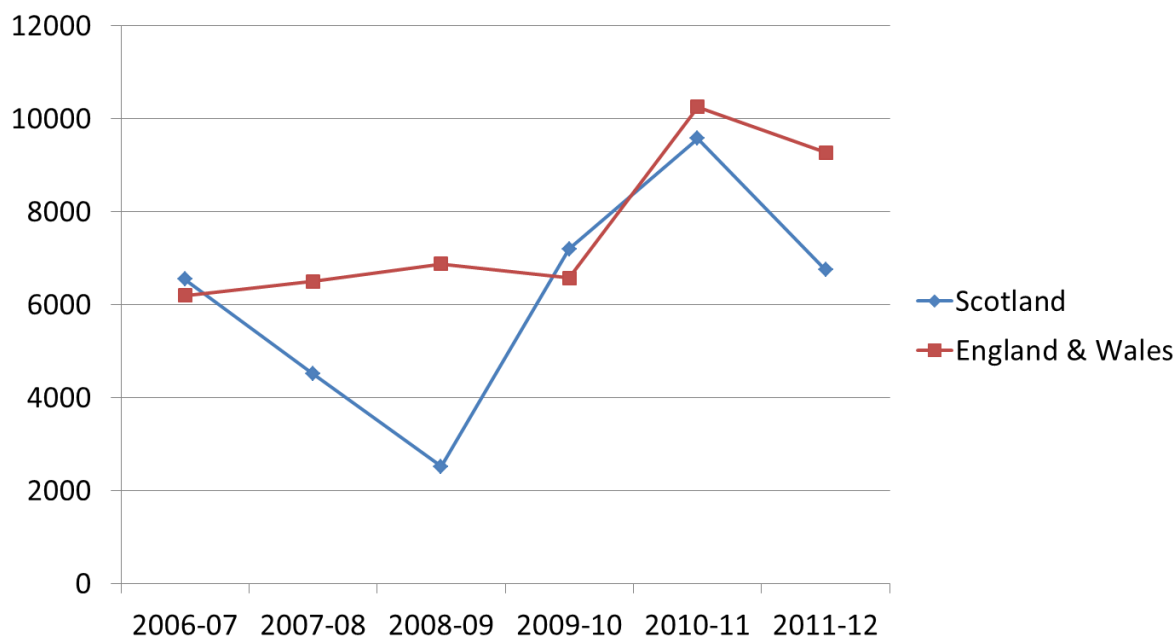
Figure 1 – Comparative average fines for environmental law pollution control offences 1996/7-2001/02



¹⁹⁶ See e.g. P. De Prez "Excuses, Excuses: The Ritual Trivialisation of Environmental Prosecutions" [2000] 12 J.E.L. 65; C. Lovat, "Environmental Prosecutions in Scotland – the figures" [2004] Env. Liability CS14; M. Poustie, 'Environment', Stair Memorial Encyclopaedia of the Laws of Scotland, 2007 paras. 107-116.

¹⁹⁷ See paras. 131-134 below.

Figure 2 - Comparative average fines for environmental law pollution control offences 2006/7-2011/12



Source: Mark Poustie: Data taken from SEPA enforcement reports and EA Annual Reports to create Figures 1 and 2. Please note the following caveat: fines imposed may not be in the same year as the successful prosecution.

124. Aside from the obvious difference in average fines imposed for pollution offences and wildlife offences demonstrated by these graphs¹⁹⁸, their inclusion is meant to illustrate a key point which is that the increase in maximum fines available in pollution control legislation has resulted in a statistically significant increase in the average fines imposed. This adds weight to our contention that an increase in the maximum fine levels available for wildlife offences should have some effect in pushing up average fines for wildlife offences. We have also noted that while many wildlife crimes are committed by individuals who may be unable to pay substantial fines, nonetheless some are committed by commercial entities as is the case with most pollution offences.

Alternative or additional penalties: Community Payback Orders

125. Although these were generally seen as a soft option by respondents and interviewees, in our view their use has merit and that CPOs may well be an appropriate penalty in appropriate circumstances. We consider that, amongst the requirements which may be imposed¹⁹⁹ the requirement to carry out up to 6 weeks unpaid work (which would be undertaken on top of the offender's employment and other commitments) is a significant penalty. We also see merit in requiring wildlife

¹⁹⁸ See para. 50 for the table providing details of average fines for wildlife offences.

¹⁹⁹ See eg Criminal Justice (Scotland) Act 1995, s.227A

crime offenders to attend retraining courses, including courses on empathy, in appropriate cases, a point which was raised by some interviewees. See too, our comments on suspended sentences in the section on restorative sentences, below.

Alternative or additional penalties: Forfeiture Orders

126. The Scottish Government already views these additional penalties as having the potential to have a real impact on wildlife crime reduction in some cases such as badger baiting where the forfeiture of dogs used can have a significant economic impact on the perpetrators²⁰⁰. However, it will be apparent that while forfeiture provisions are common in wildlife legislation, nonetheless there are variations between them. While differences may be justifiable, we take the view that harmonisation is a good thing in that it makes the law simpler and shows a commitment to a considered, coherent approach to penalties for wildlife crime. Thus, for example, we cannot see why the Deer (Scotland) Act 1996 does not contain express provisions relating to forfeiture of vehicles or other items involved in the commission of deer offences or indeed forfeiture of the weapons themselves rather than simply the cancelling of firearms' certificates. Equally vehicle is widely defined as including aircraft, hovercraft and boat under the Conservation (Natural Habitats &c.) Regulations 1994 but not in other legislation. We therefore consider that a recommendation relating to the harmonisation of forfeiture provisions is justified. This should include forfeiture of any vehicle, weapon, equipment, item and animal used in the commission of the offence; that vehicle should be defined widely as it is in the 1994 Regulations.

Alternative or additional penalties: Proceeds of Crime

127. We recognise that there are difficulties in using proceeds of crime legislation in this context. Thus, while it may be possible to identify the benefit in the case of, for example, a development damaging a bat roost or a badger sett or from trade in endangered species what would be much harder to establish might be the benefit to a shooting estate of the killing of a raptor given it would be difficult to establish how much of the 'bag' following such a kill was lawful and how much due to the killing²⁰¹. We were given one example of the use of POCA in England and Wales in a bat case where the whole value of the redeveloped property was confiscated although the case was apparently under appeal²⁰². We were informed that the use of confiscation orders under the Proceeds of Crime Act 2002 was routinely considered by the Crown Office where appropriate in the context of wildlife crime. We consider that the use of POCA legislation is potentially valuable and we recommend that the Crown continue and, if possible, develop further its practice of considering the use of POCA in appropriate cases.

²⁰⁰ See Wildlife Crime Annual Report 2013, p.13.

²⁰¹ Interview with Organisation 3.

²⁰² Interview with Organisation 1.

Alternative or additional penalties: Loss of rights or benefits under other legislation

128. The withdrawal of licences under WCA 1981 could have a significant economic impact on farms and estates and individual gamekeepers who would potentially lose their ability to work if their rights under such licences were withdrawn. Cross compliance provisions have also been used effectively in cases where wildlife crimes have been committed.

129. We are persuaded of the merits of the use of such provisions. Just as we see merit in extending and making consistent the forfeiture provisions across the range of wildlife legislation as appropriate. We also see merit in having clearer links between the commission of wildlife crimes and the loss of certain rights or benefits. This is already clear-cut in relation to the withdrawal of General Licences issued by SNH under WCA 1981 but we consider that it should be clearer across the board in relation to the withdrawal of firearms and shotgun certificates. At present it is possible for the Chief Constable to withdraw the certificate for a firearm if the person is not deemed fit to be entrusted with a firearm. The commission of a wildlife crime with a rifle could thus already justify the withdrawal of such a certificate. However, in the case of shotguns, the certificate can only be withdrawn if there is a danger to the public safety or to the peace. This does not clearly encompass the scenario of a wildlife crime and we consider that it should also be possible for the Chief Constable to remove shotgun certificates in cases where they have been used in wildlife crimes and there is a threat to wildlife in addition to the existing grounds. Nonetheless we recognise that the legislation involved is reserved and that any amendment could not be made without the consent of the UK Parliament. This may therefore take time to achieve. We therefore consider that, where firearms including shotguns are used in the commission of any offence, the court should have the power to cancel the relevant certificates as is the case in the Deer (Scotland) Act 1996. This would be easier to achieve in the short term as it is within devolved competence.

Alternative or additional penalties: restorative sentences

130. Where there has been corporate wildlife offending, while restoration orders might not always be available under legislation (although this could be legislated for) one approach might to encourage the practice of deferring (suspending) sentence until forms of restoration had been undertaken by the offender. It should be noted that this practice has been relatively common in environmental law cases involving pollution for some time²⁰³. In such cases the penalty ultimately imposed will reflect the degree of remediation carried out by the convicted polluter. Indeed this could also be one route in relation to requiring individual offenders to undertake re-education courses. The penalty might then be adjusted to reflect the restoration work or re-education undertaken. We recognise that some of these recommendations cannot be implemented by Government as they fall within the remit of the judiciary

²⁰³ Wilson v Transorganics 1996 S.L.T. 1014 sets out limits on the use of the practice.

but we would encourage the Judicial Institute for Scotland to develop training for sheriffs in this regard.

Factors involved in Sentencing

131. A potentially significant Appeal Court case in relation to corporate offending in the Scottish context is ***HMA v Doonin Plant Ltd*** [2010] HCJAC 80. Doonin involved the unlawful and extensive deposit of waste on a former colliery site over a period of time. The prosecution was on indictment and the maximum penalty was an unlimited fine. The fine of £9000 imposed by the sentencing sheriff was increased tenfold on appeal. In increasing the sentence to £90,000 the Appeal Court indicated that the following, amongst other factors, were significant in sentencing:

- There was a legitimate public concern about the impact of such cases on the environment;
- There was also public concern that companies might fail to comply with their environmental responsibilities if it cost them less to pay the penalty than it would to install proper safeguards or to desist from the conduct in question
- A fine in such a case required to be large enough to send a message to those who manage and are shareholders in such companies that the statutory provisions designed to protect the environment, must be taken seriously by them; and
- The fine imposed by the sheriff in this case, having regard to the financial position of the respondents was unlikely to meet these objectives.

132. The Appeal Court also held that the observations in ***HMA v Munro & Sons (Highland) Limited*** 2009 SCCR 265, a conviction of a company under health and safety legislation, applied equally to cases involving convictions for environmental offences. Namely, that where a company had been convicted of an offence in respect of which its financial position would be relevant in determining the level of fine, it was for the company to place before the court sufficiently detailed information about its financial position to enable the court to see the complete picture. In addition to lodging all relevant documents, it might in some cases, also be necessary to lead the evidence of an accountant.

133. The Regulatory Reform (Scotland) Act 2014 also includes a provision requiring courts in determining fine levels for relevant offences to have regard to any financial benefit which has accrued or is likely to accrue to the person convicted²⁰⁴. A relevant offence is one specified as such in an Order made by the Scottish Ministers and while it appears these will focus on environmental law offences in areas other than wildlife crime, the rationale behind the provisions reflects the observations in ***Doonin Plant*** which are arguably of wider significance and could potentially encompass those committing wildlife crime.

²⁰⁴ Regulatory Reform (Scotland) Act 2014, s.35.

134. The Group considers that it is important first, that the public are aware of the factors, examples of which are given above, that are taken into account by sheriffs in sentencing so that their expectations are not unrealistic. Second, where the factors which applied in the **Doonin Plant** and **Munro** cases are relevant in any case, the prosecutor should bring the decisions to the notice of a sentencing sheriff.

Impact statements

135. The potential value of impact statements seems clear at least in relation to the impact of an offence on the conservation status of a species, the possible wider ecological impact, and the impact on a creature in welfare terms in a welfare/cruelty offence. Impact statements are clearly being provided in wildlife cases to some extent. There was widespread support amongst respondents for a more systematic approach to the provision of such impact statements in wildlife crime cases. There was a clear preference for SNH to provide conservation/ecological impact statements because of its impartiality although there were mixed views on whether it had the resources to provide such statements to a greater extent than it currently does. Impact statements from NGOs were seen as being potentially partial except in cases where the NGO was an information- providing NGO rather than a campaigning one. In addition, welfare impact statements could be provided by a vet. However, we are not persuaded that impact statements in relation to the impact on a local economy or more widely on the reputation of Scotland are feasible because of the lack of reliable information which could be presented in relation to this. Views on such value and feasibility of such impact statements were also much more mixed amongst respondents and interviewees. It became clear through stakeholder engagement that the Crown Office's Wildlife and Environmental Crime Unit has been largely responsible for driving forward the use of impact statements to date. The Crown Office is convinced that where impact statements have been provided they have generally contributed to higher sentences being imposed²⁰⁵. We consider that it is worth sounding a slightly cautionary note in that there exists a possible evidential difficulty in relation to the provision of this information. It may not be relevant to the proof of the charge(s), so strictly speaking may not be admissible in a trial. In the absence of specific legislation the entitlement of the prosecutor to provide wider contextual information to the court following conviction is not entirely clear. We therefore consider legislation for the use of impact statements to be advisable.

136. We acknowledge the views of a number of interviewees that the value of impact statements generally may be affected by the practice of plea adjustment. However, we consider that this is not an accurate perception. It appears to us that it is too narrow. It appears to us that the point is the variance between an observed wildlife or environmental harm and the extent to which culpability is attributable to an individual. The starting point of a number of respondents and interviewees was that an impact statement should be based on what has gone wrong and that plea

²⁰⁵ Communication from Crown Office, 3 June 2015.

adjustment breaks the link. However, the correct starting point is that the criminal justice system can deal only with a criminal offence where sufficient and admissible evidence exists to prove that an offence known to the law of Scotland was committed and that an identified individual or organisation was responsible for committing it²⁰⁶. That test applies at every stage in criminal proceedings. So, the charges brought against an accused person may be fewer than or different to what was reported to COPFS and any conviction may be less than or different to what was charged in the complaint. The latter could reflect:

- that the final evidential position (established after further inquiry or in evidence) was not as strong as was suggested in the initial report and witness statements provided to COPFS;
- or that the evidence was not strong enough to establish guilt beyond reasonable doubt (for example, because of issues about the credibility or reliability of witnesses);
- or that a defence was established.

The prosecutor may take these factors into account in deciding to accept an adjusted plea of guilty and the court will take them into account in determining guilt or innocence²⁰⁷.

137. We also recognise that our suggestion that impact statements should be put on a more formal footing assumes that relevant information will be available. However, this is not always the case and the Crown Office indicated to us that it had had real difficulty in some cases obtaining information from the appropriate regulatory body²⁰⁸. Sometimes the information is simply not available and no official view is held. In some cases proving that certain offences have been committed may already require the production of an impact statement. For example, regulation 41(2) of the Conservation (Natural Habitats &c.) Regulations 1994 makes it an offence to take or kill certain animals by a means which is *inter alia* capable of causing the local disappearance of, or serious disturbance to, a population of such animals. If information about local populations of relevant animals is not available, the fact that such conduct is criminal cannot be established.

138. While background information is invariably useful, we recognise that it is unlikely that a formal impact statement will assist in minor cases, such as poaching. We also acknowledge that there may be difficulty in providing an impact statement where there is sensitivity about releasing information about a protected site or species into the public domain.

²⁰⁶ See e.g. Crown Office Procurator Fiscal Service, Prosecution Code, pp. 3-5. (http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf) and Book of Regulations, chapter 23 (http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Book%20of%20Regulations%20-%20Chapter%2023%20-%20Plea%20Adjustment.PDF)

²⁰⁷ Ibid, Prosecution Code, p 11.

²⁰⁸ Communication from the Crown Office, 3 June 2015.

139. Nonetheless we recommend that the use of conservation/ecological impact statements and animal welfare impact statements are put on a more systematic basis than at present. This might initially be done on an administrative basis with the prosecution seeking these wherever possible in appropriate cases from SNH or a vet. However, for the medium term, putting this on a legislative footing along the lines of the requirement for courts to consider victim statements where these are provided before sentencing in other areas of criminal law, seems to us to make good sense and could also resolve doubts about the legitimacy of the prosecution providing wider contextual information to the sentencing court. However, we wish to express one caveat in relation to this recommendation. We do not propose making the requirement to obtain an impact statement a mandatory one for the reason that we consider it may hamper prosecutions in some cases if there was a requirement to obtain an impact statement prior to the case coming to court. So an obligation should be put on the sentencing court to take account of the impact statement where one is provided before passing sentence. We also recommend that it be open to the sentencing court at its own discretion, to require production of an impact statement by the appropriate regulatory agency which it would take into account before passing sentence.

Transparent court decisions

140. We consider that, while transparency would be desirable and many respondents and interviewees supported such a move, it would not be practical within the context of wildlife crime alone and raises significant judicial workload issues which are beyond the scope of the review. We accordingly make no recommendation on this issue. However, we note that transparency of sentencing could be enhanced by the development of sentencing guidelines²⁰⁹.

Wider context

141. Many of the issues raised by respondents did not relate directly to penalties but are potentially significant in the wider context of trying to reduce wildlife crime. We invite the Minister to note these issues but we do recommend that the issue of the coherence of wildlife legislation is addressed in the medium term not simply through harmonisation across legislative regimes but more directly by a consolidation exercise.

Judicial approaches to wildlife crime/environmental court

142. It was suggested by a small number of respondents²¹⁰ that the establishment of an environmental court might be a way of enhancing penalties imposed for wildlife and indeed other environmental offences. The idea is that given the technical and specialist nature of environmental cases, a specialist court could better develop and deploy expertise to deal with such cases and, if the court had a criminal jurisdiction,

²⁰⁹ See para. 148 below.

²¹⁰ See para. 106 above.

that might then lead to the imposition of more consistent and proportionate penalties on offenders²¹¹. The establishment of an environmental court has been under consideration in Scotland intermittently since 2006 when the then Executive published a consultation paper on the issue²¹². More recently the SNP included a manifesto commitment to consider establishment of an environmental court in Scotland²¹³. South of the border a comprehensive report was produced in 2000 for the then Department of Environment, Transport and the Regions on the establishment of an environmental court²¹⁴. This reviewed the then existing environmental court models worldwide. Considerable scholarship has been devoted to the subject since then not least in the light of the growing number of environmental courts and tribunals worldwide²¹⁵. The longest established specialist environmental court is the Land and Environment Court in New South Wales. However, there are now specialist courts in a wide range of countries including Sweden, New Zealand, USA, India and China²¹⁶. An Environmental Tribunal was also established in England and Wales in 2010 but its jurisdiction was originally limited to hearing appeals against the imposition of civil penalties by the Environment Agency and Natural England,²¹⁷ although it has been extended to cover certain other statutory appeals in relation to Nitrate Vulnerable Zones and the Greenhouse Gas Emissions Trading Scheme following a review into its role²¹⁸. Further transfers of functions have been proposed although they are not yet implemented²¹⁹. Importantly for our purposes, it has no criminal jurisdiction. The Tribunal was set up more because of regulatory reform following the Hampton Review²²⁰ rather than because of a specific desire to establish an environmental court or tribunal²²¹.

143. Within the Scottish context, such a court is perhaps unlikely to be established in the short-term. Many issues remain to be resolved including the jurisdiction of the court. Would it have a criminal or civil jurisdiction or both? Would it encompass pollution cases, wildlife cases and land use planning cases or just some of these?

²¹¹ See e.g. B. Preston, 'Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study' (2012) 29 *Pace Env'tl. L. Rev.* 396.

²¹² Scottish Executive, *Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland* (November 2006).

²¹³ See S.N.P. Manifesto 2011, p. 39.

²¹⁴ See M. Grant, *Environmental court project: final report* (DETR, 2000).

²¹⁵ See eg G. Pring and C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009).

²¹⁶ See G. Pring and C. Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009); and B. Preston, 'Characteristics of Successful Environmental Courts and Tribunals' [2014] 26 *J.E.L.* 365-393.

²¹⁷ For a good account of the background to the establishment of the Environmental Tribunal in 2010, see R. Macrory, 'The Long and Winding Road – Towards an Environmental Court in England and Wales' [2013] 25 *J.E.L.* 371-381.

²¹⁸ See R. Macrory, *Consistency and Effectiveness – Strengthening the New Environmental Tribunal* (UCL, 2011).

²¹⁹ D.E.F.R.A., *Environmental Permitting Consultation on draft Environmental Permitting (England and Wales) (Amendment) Regulations 2013* (D.E.F.R.A., Feb 2013).

²²⁰ P. Hampton, *Reducing Administrative Burdens – Effective Inspection and Enforcement* (H.M. Treasury, 2005).

²²¹ *Regulatory Enforcement and Sanctions Act 2008; Tribunals and Courts Act 2007.*

Given that Scotland is a small country, unless the court had a relatively wide jurisdiction it is unlikely that it would have sufficient business. That indeed was the key reason for the then Executive deciding not to progress the court proposed in 2006 which was principally intended to have a criminal jurisdiction. As a result although we recognise that such a court might have the potential to assist in the imposition of more consistent and proportionate sentences in wildlife crime cases, we make no recommendation on the issue. We consider that there are too many uncertainties associated with such a court to enable us to make a practical recommendation at this time although the issue may be worth revisiting if such a court were to be established and encompassed a criminal jurisdiction.

Valuing wildlife

144. This would be an alternative way of providing a basis for particular fine levels. This issue is raised directly in the remit of the group which provides:

"To examine and report on how wildlife crime in Scotland is dealt with by the criminal courts, with particular reference to the range of penalties available and whether these are sufficient for the purposes of deterrence and whether they are commensurate with the damage to ecosystems that may be caused by wildlife crime.

This requires a value to be placed on the damage to species and/or ecosystems and could be reflected in the fine imposed.

145. This is a controversial area since views will inevitably differ on both the methodologies to be employed in calculating the value of a particular member of a particular species and the actual monetary value to be placed on particular species²²². While restoration costs for particular damaged site may be estimated with greater accuracy (albeit that exact restoration will never be possible), the value of lost environmental services provided by a damaged ecosystem may well evade accurate representation not least because that value is contestable at least in monetary terms. Nonetheless some states have adopted this approach in their sentencing for wildlife crime in relation to the killing of members of particular species. Finland, in setting sentences in wildlife crime has opted to try to place a value on wildlife and set penalties based at least in part on that value²²³. Values range between €17 for common species to over €7000 for rare species. The fine comprises both this value and a penalty element.

146. The Group takes considers that this approach is fraught with difficulties not least in that the setting of such values is highly contestable both in principle and in

²²² See e.g. A. Ogus, *Regulation – Legal Form and Economic Theory* (Oxford, 1994), p. 247.

²²³ See: http://translate.google.co.uk/translate?hl=en&sl=sv&u=http://www.ymparisto.fi/sv-FI/Natur/Arter/Fridlysta_arter&prev=/search%3Fq%3DFridlysta%2Barter%26start%3D10%26safe%3Dstrict%26sa%3DN%26biw%3D1280%26bih%3D907.

relation to specific species²²⁴. Whether such values in themselves could act as a deterrent without an additional penalty for the offence itself is also unclear. It could also result in a shift downwards in penalties, for some species, which would not be the intended outcome. The debate is similar to that involved in setting environmental taxes. It is either possible to set the tax at a level to compensate for the loss of the resource or to make good the environmental damage caused by an activity or at a level which will encourage certain conduct. This is the difference between a 'rectification tax' or a 'nudging tax'²²⁵. The UK Landfill Tax was originally set as a rectification tax with the level set by reference to the cost of environmental damage from landfills. However, this proved untenable because of the difficulties of estimating accurately what the rectification costs would be and an overt switch was made to basing the level of the tax at a level which would encourage a reduction in landfill. The same approach could be taken in the setting of penalties – the key idea is to ensure the penalty is a deterrent (i.e. nudging) rather than trying to reflect accurately the damage or loss caused (i.e. rectification).

147. It should be noted that restoration orders are already available in wildlife law to deal, for example, with damage to a habitat²²⁶. These provisions are cognate with preventive/remedial provisions in environmental pollution law²²⁷. In this context costs can be estimated with reasonable accuracy and we fully support the use of such provisions where appropriate. They can be imposed in addition to penalties by a sentencing court.

Sentencing Guidelines

148. One way in which penalties for wildlife crimes could be made more consistent and transparent is through the use of sentencing guidelines. The Sentencing Council for England and Wales is an independent non-departmental body of the Ministry of Justice and was set up to promote greater consistency and transparency in sentencing through the development of guidelines which the courts are required to follow, unless it is in the interests of justice not to do so²²⁸. The Sentencing Council has developed definitive guidelines for environmental (but not wildlife) offences in England and Wales²²⁹. They divide offences into different categories of seriousness and provide that key issues of culpability, namely whether the conduct was deliberate, reckless, negligent or of low or no culpability and whether the offence was

²²⁴ See e.g. A. Ogus *Regulation: Legal Form and Economic Theory* (Clarendon Press, Oxford, 1994), chs. 11 & 16.

²²⁵ See e.g. A. Ogus, "Nudging and rectifying: the use of fiscal instruments for regulatory purposes" [1999] *Legal Studies* 245.

²²⁶ See e.g. Nature Conservation (Scotland) Act 2004, s.40.

²²⁷ See e.g. Pollution Prevention and Control (Scotland) Regulations 2012 (S.S.I. 2012/360), reg.57; Water Environment Controlled Activities (Scotland) Regulations (S.S.I. 2011/209), regs.32-33.

²²⁸ The Sentencing Council for England and Wales was established by the Coroners and Justice Act 2009, Part 4. It replaced the Sentencing Advisory Panel and the Sentencing Guidelines Council from April 2010. See www.sentencingcouncil.org.uk.

²²⁹ Sentencing Council, *Environmental Offences, Definitive Guideline*, February 2014 (www.sentencingcouncil.org.uk).

committed by an organisation or individual are taken into account. They provide a step by step approach for judges and suggest penalty bandings as well as the use of proceeds of crime legislation. There is evidence that the Guidelines have had an impact in terms of increasing penalties imposed²³⁰. We note that the Scottish Sentencing Council (SSC)²³¹ which was established in October 2015²³² has the objectives of promoting consistency and transparency in sentencing practice, assist in developing sentencing policy, encourage better understanding of sentences across Scotland and will be responsible for producing sentencing guidelines for the judiciary. We recommend that one area of the SSC's work should be to develop sentencing guidelines for wildlife (and other environmental offences) to enhance consistency and transparency in sentencing in the field of wildlife offences.

²³⁰ See R v Thames Water Utilities [2015] EWCA Crim 960.

²³¹ See the Criminal Justice and Licensing (Scotland) Act 2010, Part 1.

²³² See: <http://news.scotland.gov.uk/News/Scottish-Sentencing-Council-date-announced-1614.aspx>.

10. Conclusions

149. Reducing wildlife crime is not simply a question of raising penalty levels. While this is part of the package needed, the key issue has to be that the type and level of penalty has to be appropriate. We have noted that wildlife crimes vary considerably and the types of perpetrators and their motives also vary. Some involve commercial offending and some do not. This means that penalties that may act as a deterrent for some types of crime may not work in others. Take, for example, crimes related to badger baiting. While tough financial penalties or custodial sentences might appear appropriate and desirable, it appears clear from our work that in fact forfeiture of dogs and a ban on keeping dogs are likely to be the most appropriate penalties. However, higher financial penalties might serve as a deterrent for those engaging in otherwise lawful commercial forestry and agricultural operations which cause the destruction of badger setts. Higher financial penalties may be appropriate in some cases where there is significant economic gain from the crime such as destruction (deliberate or otherwise) of bat roosts to enable development or redevelopment. Custodial sentences may serve as a greater deterrent where perpetrators are otherwise law-abiding and the wider consequences of conviction and imprisonment even for a short time may be very significant.

150. We note that in general, penalties for wildlife crimes have not been raised for many years, except in the case of new offences or legislation. This stands in contrast to other areas of environmental law such as pollution control where penalties have been raised regularly and largely harmonised across different legislation as a result of (1) increasing public concern reflected in the actions of the UK and Scottish Parliaments; (2) the impact of inflation; and (3) a clear desire to harmonise the legislation as much as possible. Yet wildlife law remains much less coherent and penalties vary widely and it is not always clear that there are good reasons for this. Since 1991 the maximum fine on summary conviction for the principal environmental pollution offences has been raised twenty-fold from £2,000 to £40,000 while at the same time maximum fine on summary conviction for the principal WCA offences has remained unchanged at £5,000. Even in relation to inflation we noted above that a penalty of £5,000 in 1981 would equate to over £17,100 today. We consider that this situation needs to be addressed.

151. We recognise that maximum penalties will not necessarily often be imposed because of the need to take into account the circumstances of the offender and other mitigating or aggravating factors but the evidence from the significantly rising average fines imposed for environmental pollution offences shows that sheriffs in Scotland and magistrates in England and Wales have responded to increased maxima by imposing heavier penalties on average. It has also given judges in those cases a much wider range of potential penalties to reflect offences of differing seriousness and whether commercial activity is involved. This strongly suggests to us that a similar approach in the area of wildlife crime is desirable.

152. Above all we consider that an appropriate range of penalties should be available to the courts to ensure maximum deterrent impact to deal with the range of offenders from corporate entities to individuals with few or no resources. This means having both a broader scale of penalties but also a wider range of types of penalties available. Part of the exercise we consider is required is to extend provisions such as forfeiture across the full range of wildlife crimes and to ensure that in all crimes involving firearms there are penalty provisions enabling the court to cancel the relevant certificates and order forfeiture of the weapons. However, we do also consider that there is a case for a wider scale of financial and custodial sentences, essentially in line with the increases which have occurred in other areas of environmental law such as pollution control. We consider that it is appropriate that courts have a wider scale of penalties at their disposal in order that where a defendant is capable of paying a higher fine in an appropriately serious case that penalty can be imposed and that where there is an serious case where a fine is not an appropriate penalty, then a custodial sentence of up to a year on summary conviction can be imposed. We also consider that there is an argument for extending the possibility of conviction on indictment to a wider range of wildlife crimes – again in line with other areas of environmental law – in appropriately serious offences. We consider that it is appropriate to match the maximum penalties available in other areas of environmental law as certain wildlife crimes are as significant in conservation or animal welfare terms as the environmental impact of a water, air or waste pollution offence. However, we must stress that in doing this we are not suggesting in any way that maximum penalties should be imposed on a regular basis – we are seeking to ensure that appropriate penalties are imposed taking account of the nature of the offence and the circumstances of the offender. At present we consider that the courts do not have the power to impose appropriate penalties in all cases and we consider that that needs to be rectified.

153. We also consider that the establishment of the Scottish Sentencing Council will provide an opportunity to develop sentencing guidelines to enhance the consistency and transparency of sentencing in this field.

154. In supporting such an approach, we also consider that there should be a more systematic approach to the provision of impact statements in relation to the conservation/ecological impact and/or welfare impact of an offence and that ultimately, this needs to be underpinned by legislation. This is the case for victim statements in other areas of criminal law. We consider that SNH is best placed to provide conservation statements and vets in relation to statements on welfare.

11. Recommendations

Levels of fines and custodial sentences

1. That maximum penalties available on summary conviction at least for the more serious offences, are raised to at least a £40,000 fine and up to 12 months imprisonment. That conviction on indictment is more commonly made available across the range of wildlife offences with a maximum term of imprisonment of up to 5 years. This would not necessarily require a stand-alone Act but could be achieved as part of the next Criminal Justice or Criminal Proceedings Act.

SHORT TERM

Use of impact statements

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

SHORT TERM

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

MEDIUM TERM

Alternative penalties

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

SHORT TERM

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

SHORT TERM

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

MEDIUM TERM

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

SHORT TERM

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

SHORT TERM

Legislative coherence

9. That wildlife legislation should be consolidated.

MEDIUM TERM

Sentencing Guidelines

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

MEDIUM TERM

ANNEX 1 – Ministerial Commitment

"Since I took on responsibility for this portfolio, I have been clear that one of my priorities is to bear down on the illegal persecution of raptors that continues to blight the Scottish countryside and tarnish Scotland's reputation. These outdated, barbaric and criminal practices put at risk the conservation status of some of our most magnificent wildlife. They also harm our reputation as a country which values its environment and wildlife and undermine the growing tourism sector that is built on that reputation.

"We have achieved much since 2007. We have a robust legal framework that protects birds of prey and their nests, including the new vicarious liability provisions. We have dedicated resources in Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS). We are leading the way in the UK in the development of wildlife crime forensics work, and we continue to work at building a broad-based alliance through the Partnership for Action Against Wildlife Crime (PAW Scotland).

"In 2012 we saw a very welcome reduction in poisoning cases. However a number of recent reports, some of which are in the public domain and some of which are still subject to police enquiries, suggest that there is still a problem with the use of poison as well as cases involving illegal trapping and shooting. I have decided therefore that the time is right to bring forward some further measures which I hope will deter those involved in illegal activities.

"Wildlife crime, and raptor persecution in particular, often takes place in remote locations or in the dark of night. By its very surreptitious nature, the likelihood of being seen by a member of the public who can report the matter to the authorities is small.

"I have spoken with the Lord Advocate, who maintains a close personal interest in all wildlife crime. We are both keen to maximise the opportunity for offences to be detected and offenders to be tracked down.

"The Lord Advocate has instructed the specialist prosecutors in the Wildlife and Environmental Crime Unit to work with Police Scotland to ensure that law enforcement utilises all investigative tools at their disposal in the fight against wildlife crime.

"This work will take place within the National Wildlife Crime Co-ordinating Forum – a group attended by police Wildlife Crime Liaison Officers from across Scotland and the police's full-time Scottish Wildlife Crime Co-ordinator, as well as senior police officers, the National Wildlife Crime Unit, Scottish Government officials and the specialist prosecutors from the Wildlife and Environment Crime Unit within COPFS.

"Secondly, in my capacity as Chair of PAW Scotland, I intend to establish a group to carry out a review and report to me on how wildlife crime is treated within the criminal justice system, including examining whether the penalties available for wildlife crime properly reflect the seriousness of the damage caused to vulnerable wildlife and fragile habitats and ecosystems.

"Thirdly, I will be asking Scottish Natural Heritage in their capacity as the authority for licensing decisions under section 16 of the Wildlife and Countryside Act to examine how and in what circumstances they can restrict the use of General Licences to trap and shoot wild birds on land where they have good reason to believe that crimes against wild birds have taken place. These General Licences allow the holders to carry out actions that would otherwise be unlawful if undertaken, without any reference to SNH. We regard the use of General Licences as a privilege that should not be extended in circumstances where there is evidence that their use may be facilitating illegal activities.

"In putting together these measures I have sought to focus only on those individuals and businesses where there are very good reasons to believe they are involved in illegal practices. I am very keen to avoid anything that places an unfair burden on the majority of shooting businesses that are law-abiding and responsible members of the rural community. I should also say that I think it is important that wildlife crime is treated in exactly the same way as other types of crime. This means information about cases should be handled in the same way as in other types of crime and that the police and prosecutors are allowed the time and space to carry out whatever investigations they believe to be necessary according to their own professional judgement. We should not descend into allowing trial by leak and accusation. There is a responsibility on us all to avoid that.

"In conclusion I wish to reiterate that eradicating raptor persecution in Scotland remains a high priority for the Scottish Government. It is not however the sole responsibility of the Scottish Government. Law enforcement clearly has a key role to play and I am confident that we are ratcheting up the pressure on those committing acts of illegal persecution. However, everyone involved in the Scottish countryside, and in particular those involved with shooting, should make abundantly clear their disapproval to the minority whose actions are tarnishing the reputation of Scotland's country sports."

ANNEX 2 – Letter from PAW Scotland Legislation, Regulation & Guidance Group

Environment and Forestry Directorate

Natural Resources Division

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Professor Mark Poustie

10 September 2014

Dear Mark,

Wildlife Crime Penalties Review

I am writing to you on behalf of Professor Colin Reid, in his capacity as Chair of the Legislation, Regulation and Guidance Group of the Partnership for Action against Wildlife Crime (PAW) – Scotland. One issue which was on our agenda when Colin took over as Chair earlier this year was the question of whether a conviction for a wildlife offence has any impact on a person being considered suitable to retain, or be granted, a shotgun certificate or other firearms licence. This may be an important issue in practice as shooting may be a significant element in the employment or leisure activities of those concerned. As you can see from the enclosed letter, we are formally asking the Chief Constable of Police Scotland for information on the current position.

This, however, raises a wider issue in relation to the connection between convictions for wildlife offences and various forms of official permits, licences or registrations, and it seems appropriate to draw this to your attention and to ask that you include this as an aspect of your current review of the penalties for wildlife crime (as it may well already be). To some extent the position has already been given consideration. The General Licences issued under the Wildlife and Countryside Act expressly do not extend to authorising actions taken by those with recent wildlife crime convictions, whereas by contrast the snaring regime does not allow such matters to be taken into account in what was, we gather, consciously conceived as being simply a registration, rather than a permitting, scheme.

In the current Air Weapons and Licensing (Scotland) Bill it is thought that the requirement that a gun can be held “without danger to the public safety or to the peace” (s.5) would allow (but not require) such convictions to be taken into account.

There are doubtless many other forms of official approval/ certificate/ licence/ permit/ authorisation/ registration which may also be relevant.

Since in the context of wildlife offences limitations on the right to hold certain authorisations may be a very important sanction in practical terms, it seems appropriate that this issue is given attention and a conscious and consistent approach (which need not result in a uniform outcome) taken to this possible consequence of a conviction. The PAW Legislation Group feels that your review seems the most appropriate current vehicle for considering the issue – indeed it may already be part of the work.

The PAW Legislation Group looks forward to seeing the outcome of the review in due course and Colin and I shall be very happy to assist you further on this or related matters if we can.

Yours sincerely,

Karen Hunter
Wildlife Crime Policy Officer

ANNEX 3 – Background tables for questionnaire responses

Q1. Do you consider that the penalties available to the courts for wildlife crime in general are a deterrent?

Answer	Number of Respondents	Percentage
Yes	13	21%
No	43	70%
Both	1	2%
Don't Know	4	7%
Total	61	

Q2. Do you consider that the penalties imposed by the courts for wildlife crime in general are a deterrent?

Answer	Number of Respondents	Percentage
Yes	6	10%
No	56	90%
Don't Know	0	0%
Total	62	

Q3. Are there any particular sorts of wildlife crime where you believe the penalties imposed are not appropriate?

Answer	Number of Respondents	Percentage
Yes	47	81%
No	7	12%
Don't Know	4	7%
Total	58	

Q4. Are there any particular sorts of wildlife crime where you believe the penalties imposed are appropriate?

Answer	Number of Respondents	Percentage
Yes	21	35%
No	19	32%
Don't Know	20	33%
Total	60	

Q5. Are wildlife crime penalties:

Answer	Number of Respondents	Percentage
Too low	49	82%
About right	8	13%
Too high	2	3%
Some too low, some about right	1	2%
Total	60	

Q6. On a scale of 1 to 5, where 1 represents minor regulatory offences and 5 represents the most serious offences such as murder, where would you place the following offences

Offence Type	Average
Killing birds of prey	3.8
Failing to observe trapping or snaring regulations	3.2
Badger baiting	3.7
Removing or damaging freshwater pearl mussels	3.5
Trading in endangered species	3.9
Poaching (deer, salmon etc)	2.6
Killing bats / destroying bat roosts	3.5
Coursing (of mammals with dogs)	3.5

Q7. Which of following (court admonishment, court fine, community payback order (CPO), prison) would be appropriate for the following offences?

Offence Type	Number (and %) of Respondents				
	Admonishment	Court Fine	CPO	Prison	Total
Killing birds of prey	1 (2%)	13 (22%)	11 (18%)	55 (92%)	60
Failing to observe trapping/snaring regs	5 (8%)	34 (58%)	17 (29%)	25 (42%)	59
Badger baiting	1 (2%)	19 (32%)	15 (25%)	51 (86%)	59
Removing/damaging pearl mussels	1 (2%)	28 (47%)	25 (42%)	28 (47%)	59
Trading in endangered species	2 (3%)	15 (25%)	12 (20%)	52 (88%)	59
Poaching (deer, salmon etc)	12 (20%)	35 (59%)	29 (49%)	15 (25%)	59
Killing bats/destroying roosts	2 (3%)	30 (51%)	27 (46%)	27 (46%)	59
Coursing (of mammals with dogs)	1 (2%)	24 (41%)	24 (41%)	36 (61%)	59

Note: Respondents could select more than one appropriate penalty for each type of offence and so the sum of the percentages in each row is greater than 100%.

Q8. On a scale of 1 to 5, where 1 represents “not at all” and 5 represents “completely”, to what extent do you think that Scottish criminal courts should take into account the impact of wildlife crime when sentencing?

	Average
(a) on the environment (or ecosystems)?	4.6
(b) on rural businesses?	3.6
(c) on the Scottish brand as regards tourism, food and drink exports?	4.2
(d) on animal welfare?	4.5

Q9. Do you think that different or additional penalties, other than those listed in Q7, should be available to the Scottish criminal courts to deal with wildlife crime?

Answer	Number of Respondents	Percentage
Yes	42	74%
No	9	16%
Don't Know	6	11%
Total	57	

Q10. Should Court judgements provide background information on why certain penalties have been imposed?

Answer	Number of Respondents	Percentage
Yes	58	95%
No	1	2%
Don't Know	2	3%
Total	61	



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