

# **ANIMALS AND WILDLIFE (PENALTIES, PROTECTIONS AND POWERS) (SCOTLAND) ACT 2020**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

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

#### ***Section 19 – Taking possession of animals: additional powers***

120. This section inserts new sections 32A to 32M into the 2006 Act.
121. New section 32A (powers of authorised person where animal taken into possession) gives certain powers to “authorised persons” in relation to animals that have been taken into possession for welfare reasons under section 32 (taking possession of animals) of the 2006 Act. The new powers enable authorised persons to take “relevant steps” in relation to such an animal, namely the giving of treatment, transferring ownership and, in limited circumstances, destruction of the animal. In this and the other new sections, an “authorised person” refers to certain inspectors and constables, and also certain other persons who are separately authorised by the Scottish Ministers to exercise the new powers (see definition of “authorised person” in new section 32A(10)). Such other persons could include bodies involved with enforcement of animal welfare matters, because the meaning of “person” includes a body of persons (see schedule 2 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379), which governs the interpretation of the 2006 Act).
122. The new powers under section 32A are subject to procedural requirements including the requirement that the authorised person must serve a notice (a “decision notice”) before taking any of the relevant steps (subsection (5)). Whether the authorised person may proceed with a relevant step depends on whether an appeal is made within a specified period and, if so, the outcome of that appeal.
123. New section 32B (decision notice for exercise of powers under section 32A: content) makes provision in relation to the content of decision notices, setting out the information which may and must be included in them.
124. New section 32C (decision notice: service) makes provision regarding the requirements for service of a decision notice. In particular, subsection (1) requires that the authorised person must either make reasonable enquiries to establish the identity of the owner or be satisfied that such enquiries have been made before serving a decision notice. Subsection (2) specifies the means by which a decision notice must be served on the owner of the animal. Subsection (3) provides that a single decision notice may be served in respect of multiple animals if certain conditions are met.

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125. New section 32D (appeal to the court in respect of decision notice) provides for the availability of an appeal to the court in respect of a decision notice, by the owner of the animal to which the decision notice relates and any other person appearing to the court to have a sufficient concern for the animal. Subsection (3) provides that the appeal may only be made before the expiry of 3 weeks after service of the decision notice. Subsection (5) lists the available grounds of appeal. Subsections (6) and (7) make provision for the orders that the court may make in an appeal. Subsection (8) has the effect that there is no possibility of a further appeal against the decision of the court (although there may still be recourse to the court under section 33 or 34, in the circumstances set out in sections 32E and 32F respectively). Subsection (9) has the effect that, if the court makes an order that a relevant step specified in the decision notice must not be taken, an authorised person may nonetheless resort to the powers under section 32A with a view to taking a different step in relation to the animal.
126. New section 32E (effect of decision notice on application under section 33) provides for the effects of the service of a decision notice on the ability of persons to apply for a release order under section 33 (release orders where animals taken) of the 2006 Act. An application under section 33 is a request to the court seeking release of an animal that has been taken into possession under section 32 (taking possession of animals) of the 2006 Act. The owner of the animal and certain other persons are ordinarily able to make such an application at any time after the animal has been taken into possession. Subsections (1) and (2) of section 32E provide that service of a decision notice in relation to an animal which specifies a relevant step or steps (other than treatment of the animal unless the treatment is accompanied with any other type of relevant step) will restrict the period for making an application to the court under section 33 in respect of the animal to the 3 weeks beginning with the date of service of the decision notice. Subsection (2)(b) provides that the ability to seek a section 33 order is restored upon the occurrence of one of the circumstances listed in subsection (3). Where the decision notice specifies only treatment of the animal as a relevant step, the ability of the owner of the animal and others to apply under section 33 is unaffected.
127. New section 32F (effect of decision notice on applications under section 34) provides for the effects of the service of a decision notice on the availability of applications under section 34 (disposal orders where animals taken) of the 2006 Act. An application under section 34 of the 2006 Act is a request to the court for a disposal order in relation to an animal that has been taken into possession under section 32 (taking possession of animals) of the 2006 Act. Such orders can authorise the treatment of the animal, its disposal (including by sale) or its destruction. Subsections (1) and (2) of section 32F provide that an application under section 34 cannot be made in relation to an animal after service of a decision notice which specifies a relevant step or steps (other than treatment of the animal when not combined with any other type of relevant step) in relation to that same animal until the occurrence of one of the circumstances listed in subsection (3). Where the decision notice specifies only treatment of the animal as a relevant step, the ability of the owner of the animal and others to apply under section 34 is unaffected (see related changes made by section 21 of the Act).
128. New section 32G (compensation notice for exercise of powers under section 32A) makes provision in relation to service of a “compensation notice”. Subsection (1) requires that the authorised person must serve a compensation notice following the taking of a relevant step under section 32A and specifies the information which it must include. Subsection (2) specifies steps that must be taken in relation to establishing the whereabouts of the owner before service of a compensation notice. Subsection (3) provides that the compensation notice must be served on the relevant owner of the animal and specifies the permitted means of service. Subsection (4) provides that a compensation notice must be served within 3 months of the taking of the step specified in the decision notice, subject to special provision in subsections (5) and (6) regarding circumstances in which the decision notice includes more than one step in relation to an animal. The “relevant owner” is the person who was the owner of the animal at the time it was taken into possession under section 32 (taking possession of animals) of the

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2006 Act. Subsection (7) specifies when a single compensation notice may be served in relation to two or more animals.

129. New section 32H (compensation amount) makes provision regarding calculation of the compensation amount to be specified in the compensation notice. Where the only relevant step specified in a decision notice (for the exercise of powers under section 32A) is to give the animal treatment, the compensation amount is an amount equivalent to any decrease in the market value of the animal caused by the giving of the treatment, less any relevant expenses. The relevant expenses are the expenses of caring for the animal since it was taken into possession, and the expenses of taking any relevant step in relation to the animal (for example, the cost of the treatment administered to the animal). Where the relevant step or steps involve transfer of ownership or destruction, the compensation amount specified in the compensation notice is calculated by deducting the sums mentioned in subsection (4) from an amount equivalent to the greater of the following: the market value of the animal at the time it was taken into possession under section 32; the market value of the animal at the time immediately before the last relevant step; and any proceeds of sale of the animal. The sums that may be deducted are any compensation specified in an earlier compensation notice and any relevant expenses to the extent that they are not excluded under section 32H(4)(b).
130. New section 32I (application of proceeds of sale) makes provision in relation to the proceeds of sale that may arise from taking the relevant step of transferring ownership of an animal. Subsection (2) specifies the way in which any proceeds of sale are to be applied to meet the relevant owner's liability to reimburse any relevant expenses and to meet any liability of the authorised person to pay any compensation amount to the relevant owner.
131. Subsection (3) clarifies that the owner's entitlement to the compensation amount is instead of any entitlement any owner has to any proceeds of sale of the animal. This clarification rules out the possibility that the owner would be entitled to the proceeds of sale in addition to the compensation amount.
132. New section 32J (appeal to court in respect of compensation amount) provides for appeals by the relevant owner of an animal in relation to the compensation amount specified in the compensation notice. Subsection (2) provides that such an appeal may normally only be made before the expiry of 3 months beginning with the date of service of the compensation notice, or the last compensation notice if more than one has been served by virtue of section 32G(5) or (6). Subsection (3) provides for an exception to the rule in subsection (2), where payment of compensation has been deferred under new section 32K(3). Subsection (4) provides that certain persons, in addition to the relevant owner, are entitled to be heard in relation to an appeal under subsection (1). Subsection (5) provides for the orders that the court may make in such an appeal in respect of the compensation amount. Subsection (6) has the effect that there is no possibility of appeal against the decision made by the court under new section 32J.
133. New section 32K (payment of compensation amount) determines when the compensation amount becomes payable, subject to any order of forfeiture under new section 32L. Subsection (2) provides for when the compensation amount normally becomes payable. If there is no appeal under section 32J, the compensation amount becomes payable when the period for making such an appeal has expired. If there is an appeal under section 32J, the compensation amount will become payable when the court decides the appeal and orders payment of compensation. Subsection (3) gives the authorised person the ability to defer payment of the compensation amount in either of two scenarios. The first scenario is where criminal proceedings for certain offences which arise from the circumstances which led to the protected animal being taken into possession under section 32 (taking possession of animals) of the 2006 Act have been commenced against the relevant owner and have yet to conclude. The second scenario is where the authorised person is of the opinion that the relevant owner is at risk of prosecution for such offences. Subsection (4) provides for the circumstances in which

the compensation amount becomes payable after deferral of the compensation amount. Subsection (5) has the effect that, if it has become payable, the compensation amount must be paid within 3 weeks of the provision of bank account details by the relevant owner of the animal. Subsection (6) provides for the means by which the identity of the relevant owner of the animal is determined for the purposes of this section. Subsection (7) gives the authorised person the ability to apply to the court for an order as to the disposal of the compensation amount when the authorised person is unable to pay the compensation amount to the relevant owner of the animal.

134. New section 32L (forfeiture of compensation) makes provision for forfeiture, in whole or in part, of the relevant owner's right to payment of the compensation amount in certain circumstances. Subsection (1) provides that such forfeiture may be ordered by a criminal court upon conviction for certain offences provided that such conviction arises from the circumstances which led to the animal being taken into possession under section 32 (taking possession of animals) of the 2006 Act. Subsection (3) provides that an order of forfeiture under subsection (1) may include such other provision the court considers appropriate, including for the disposal of any proceeds of sale which would otherwise be disposed of in the manner required by section 32I(2)(b). Subsection (4) gives the Scottish Ministers the power to make provision by way of regulations for, or in connection with, the disposal of any proceeds of sale under subsection (3). Such regulations could, for example, provide that such proceeds of sale are to be paid to the authorised person or to an animal welfare charity. The power to make regulations is a permissive one and if no regulations are made, the court will retain the discretion to decide how the proceeds of sale are to be disposed of.
135. New section 32M gives the Scottish Ministers the power to, by regulations, make further or alternative provision about the content and service of decision notices and compensation notices, the calculation and payment of the compensation amount, and appeals in relation to such notices. By virtue of section 51(3) (regulations) of the 2006 Act, regulations under this new section are subject to the affirmative procedure. Accordingly, any such regulations cannot be made unless a draft of the instrument containing them is laid before, and approved by resolution of, the Scottish Parliament.

### ***Section 20 - Taking possession of animals: amendment of existing powers***

136. This section amends section 32 (taking possession of animals) of the 2006 Act.
137. Paragraph (a) amends section 32(2) to make clear that the power to alleviate suffering of a protected animal conferred on inspectors and constables by section 32(1) of the 2006 Act does not extend to destruction of the animal, for which new section 32A and existing section 35 (resort to destruction of animals) make provision.
138. Paragraph (b) amends section 32(6) to give inspectors and constables the power to, in limited circumstances (and without service of any notice or obtaining any court order), administer or arrange treatment (as defined in new section 32A(9)) to animals taken into possession under that section.

### ***Section 21 - Disposal orders where animals taken: restriction of application***

139. This section amends section 34 (disposal orders where animal taken) of the 2006 Act.
140. Paragraph (a) amends section 34(4) so as to ensure that every authorised person (defined by new section 32A) is able to make a summary application to the court for a disposal order under section 34(1) (in relation to animals that have been taken into possession under section 32 of the 2006 Act).
141. Paragraph (b) inserts new subsection (4A) into section 34, the effect of which is to prevent any person mentioned in section 34(4) (apart from the owner of the animal, and any other person appearing to the court of have sufficient concern for the animal in question) from seeking a disposal order under section 34 in relation to that animal unless

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a decision notice cannot be served under section 32C(2). Accordingly, an authorised person must pursue, where possible, the decision notice route under section 32A. But if this is not possible, the authorised person may apply for a disposal order under section 34.

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