



CROWN OFFICE
& PROCURATOR
FISCAL SERVICE

SCOTLAND'S PROSECUTION SERVICE

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Rural Affairs and Islands Committee
The Scottish Parliament
Edinburgh
EH99 1SP

f.a.o. Beth McCulloch, Committee Assistant

By email: rural.committee@Parliament.Scot

Dear Beth,

Wildlife Management and Muirburn (Scotland) Bill: SSPCA powers

Written Evidence from the Crown Office & Procurator Fiscal Service

I would like to express my thanks to the Committee for inviting me to give evidence at the hearing on 8 November 2023. In advance of that hearing, I thought it would be helpful to provide initial written evidence to outline the current views of COPFS officials on the proposals for additional powers for the SSPCA under the Wildlife Management and Muirburn (Scotland) Bill.

COPFS officials are of the view that we can neither endorse or object to the proposals for additional powers for the SSPCA at this stage in the absence of a detailed legislative proposal and drafts of any proposed safeguards such as a formal Memorandum of Understanding between Police Scotland and the SSPCA.

However, if some form of extension to the SSPCA's powers were to be implemented then COPFS officials can advise at this stage how we would prefer such an extension to be applied and give an indication of what safeguards we would wish to see in place.

COPFS' overall requirements

In COPFS, we are committed to the robust and effective prosecution of wildlife crime and we recognise the benefits that come from working with partners who share that aim. The key things that we require from a reporting agency are as follows:

- That all evidence, whether incriminating the accused or exonerating them, is recorded and provided to COPFS in line with the disclosure obligations contained in the Criminal Justice and Licensing (S) Act 2010.
- Knowledge and awareness of the law covering the offences being investigated, the rules of evidence and the extent and limits of their investigative powers. This is to ensure that all evidence is obtained properly, fairly and lawfully to ensure it is admissible in court.
- Cases should be reported to COPFS timeously, with particular awareness of statutory time limits.
- Reports to COPFS should be of sufficient quality, outline all of the relevant facts, circumstances and evidence and should allow COPFS to assess whether there is sufficient evidence against an accused to take action against them and whether it is in the public interest to do so and, if we do decide to take action against them, what charges should be libelled.
- An ongoing commitment to submit all evidence to COPFS effectively and to pursue reasonable lines of enquiry as required throughout the life of a case.

COPFS' view on the proposals for additional powers for the SSPCA will ultimately depend on whether the proposed changes are likely to improve, or at least maintain, the current standards of evidence gathering and reporting in wildlife cases.

Form of the extension to the SSPCA's powers

If the SSPCA's powers were to be extended COPFS would be in favour of the proposed limitation that any additional powers granted to the SSPCA could only be exercised when an inspector (as defined by section 49(2) of the Animal Health and Welfare (Scotland) Act 2006 ("the 2006 Act")) is already on premises exercising an existing power under schedule 1 of that Act and that their further powers would be limited to:

- search for and search or examine any thing that may be found at the premises if there is reasonable cause to suspect that evidence of the commission of a relevant offence under the Wildlife and Countryside Act 1981 ("the 1981 Act") or the Wildlife Management and Muirburn (Scotland) Bill 2023 ("the 2023 Bill") may be found in or on that thing; and
- seize and detain for the purposes of proceedings under the 1981 Act or the 2023 Bill any thing which may be evidence of the commission of an offence under Part 1 of the 1981 Act or sections 1 and 2 of the 2023 Bill or may otherwise be liable to be forfeited under section 21 of that Act.

COPFS would also support the following conditions previously outlined by Police Scotland during consultation in relation to this Bill:

- That the SSPCA are responding to time critical circumstances only (i.e. where there is a significant risk of evidence being lost or compromised by waiting for Police Scotland to respond);
- That the SSPCA provide any evidence of wildlife crimes to Police Scotland as soon as practicably possible, and Police Scotland will continue to have primacy over offences under the 1981 Act and will progress investigations;
- No powers of arrest, search of persons or to crave a search warrant are given.

Police Scotland to retain primacy for cases involving wildlife offences

Police constables in Scotland undergo two years of training, the first 11 weeks of which involve robust and dedicated training and examination at Tulliallan Police College covering topics such as evidence gathering and sending reports to COPFS.

The volume of cases a Police Officer will investigate and report to COPFS from the start of their career is likely to be significantly greater than that of staff within SRAs.

Against this background there is a general expectation by COPFS that reports received from Police Scotland will be of a higher quality than those received from SRAs. The quality of a report can impact on the further work necessary for COPFS and can therefore result in delays in obtaining essential information before a case can be progressed.

As well as their knowledge and experience, another key advantage in the investigation of crime that Police Officers have over staff in SRAs is their access to intelligence databases. This both allows Police Officers to see the bigger evidential picture before attending at the scene of a reported crime and also allows certain precautions to be taken when required to ensure the safety of police officers and the wider public.

In light of the above factors, COPFS' preference would be for reports which include any offences under the 1981 Act or the 2023 Bill to be reported by Police Scotland and for Police Scotland to be granted primacy for such investigations by the SSPCA after the initial seizure of evidence.

We would be in favour of a voluntary formal Memorandum of Understanding which would set out the handover details of evidence between the SSPCA and Police Scotland and we would also be in favour of clear protocols and procedures for flagging wider crime investigations which would mean that the SSPCA should stand-down unless requested to assist by Police Scotland.

However, if the proposed changes were to allow the SSPCA to report cases to COPFS which include offences under the 1981 Act or the 2023 Bill, COPFS would seek assurances that the SSPCA have sufficient resources to cope with an increase in cases and that there would not be a negative impact on their ability to carry out investigations effectively, report cases to us timeously or to carry out further work throughout the life of the case.

Common pitfalls for SRAs

SRAs including the SSPCA provide an important role in the investigation and reporting of specialist offences which are often technical in nature, and their expertise in a particular area can be of considerable benefit.

Where there are differing levels of training and experience in criminal investigation between Police Officers and staff from SRAs however, there is an increased risk in cases investigated by SRAs that certain actions carried out during the course of the investigation may negatively impact on the admissibility of evidence and ultimately COPFS' ability to take proceedings against an accused person.

The following difficulties can be encountered in reports from SRAs:

Admissibility of evidence

Not all evidence which is discovered and seized can be used as evidence in a trial. Only admissible evidence can be used against an accused at trial. In Scottish criminal trials, evidence is admissible if it is relevant, if it was fairly and lawfully obtained and is not excluded by any exclusionary rule.

The starting point for any assessment of whether evidence was fairly and lawfully obtained is often whether the investigating agency had lawful authority to enter the premises and whether they acted within the confines of their powers whilst there. Any evidence obtained whilst the investigators are not acting within their prescribed powers may be deemed to be inadmissible and, depending on the other evidence in the case, the Procurator Fiscal may have to take no proceedings.

Whilst SRAs may have prescribed powers of entry outlined within legislation, an alternative commonly employed approach is for entry to be gained to a premises having received the permission of the occupier. The law surrounding entry based on permission is generally covered by the issue of fairness, which is governed by common law. Entry by permission can cause problems at trial, particularly if the permission and the context in which it was given were not accurately recorded at the time. If best practice is followed, staff from SRAs should outline to occupiers, prior to permission being granted, the SRA's role as a reporting agency to COPFS, that the purpose of entry may be to gather evidence and that the individual has the right to refuse permission at that initial stage or at any point thereafter.

Issues of fairness also regularly come up in relation to interviews. In cases where an individual is considered to be a suspect, any questioning should always be in the form of a formal interview under caution. If initial enquiries are simply being conducted but during the course of them an individual becomes a suspect, then at that stage the reporting agency should inform the person that they will not be asking them any more questions at that time, but that they may subsequently invite them to attend a formal interview under caution. The individual should be advised of their right to seek legal advice.

Proof of Offence

A criminal offence in Scotland requires to be corroborated. The basic requirement is that the crucial features of a case, the fact that the offence was committed and

that it was committed by the accused, must be established by evidence from at least two sources.

This rule does not require every piece of evidence to have been viewed or seized by two witnesses in every case, but problems can arise when staff from SRAs attend at a premises on their own and there is no opportunity to corroborate the case. It is therefore essential for staff from reporting agencies to have clear knowledge and understanding of the rules of evidence.

Staff from SRAs also need to give careful consideration to potential forensic opportunities and preserve any relevant evidence seized accordingly.

Evidence obtained whilst exercising other functions

Because SRAs tend to have various other functions in addition to being a reporting agency to COPFS, in the majority of occasions where staff from SRAs attend at a premises they will not anticipate that the end result will be a report to the Procurator Fiscal and that they will require to gather evidence for that purpose. This can result in the aforementioned standards, such as lawful/fair entry and corroboration, not being met. The impact of this is that a criminal offence may be detected but the evidence found will not be gathered in a manner which allows prosecutors to consider and potentially take criminal proceedings against an accused person.

It is therefore essential for SRAs to adhere to the standards required of them by COPFS and the law, regardless of the function they are carrying out.

Potential Safeguards

We consider that it is important to highlight to the Committee the potential increased risks of SRA staff conducting criminal investigations as opposed to the police. If the SSPCA are given extended powers to allow them to investigate offences under the 1981 Act and the 2023 Bill then those potential increased risks will apply in relation to those additional offences.

These potential increased risks could be mitigated with the implementation of further safeguards including, but not limited to, the following:

- Establishing further conditions and training requirements that would need to be satisfied prior to an individual receiving authorisation from the Scottish Ministers under section 49(2)(a) of the 2006 Act to be an inspector;
- Increased accountability for SSPCA staff in the form of additional formal procedures to enable independent scrutiny of SSPCA's handling of cases (discussed further below).

Formal procedures to enable independent scrutiny of SSPCA's handling of cases

It is essential, in our view, that any extension of the SSPCA's investigative powers should be affected in such a way as to maintain public confidence in the continued impartiality and accountability of investigations into wildlife crime.

Police officers are public officials, who are subject to a comprehensive disciplinary scheme; and operate within a system which is structured to secure both discipline and accountability.

By contrast it is worth noting that the SSPCA does not have the power to provide authorisations for conduct under the Regulation of Investigatory Powers (Scotland) Act 2000. There is not the same independent complaints process, nor the robust regulatory regime that exists via the statutory arrangements of PIRC in relation to the police.

COPFS would be in favour of any steps taken to further enable independent scrutiny of SSPCA's handling of cases as this would only serve to enhance public confidence in the investigations and prosecution of wildlife crime more broadly.

Your sincerely,

Iain Batho

Head of the Wildlife and Environmental Crime Unit (WECU)

Crown Office and Procurator Fiscal Service