

# **ANIMAL HEALTH AND WELFARE (SCOTLAND) ACT 2006**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2 – Animal Welfare**

##### ***Section 16 – Animals to which this Part applies***

92. This section provides the definition of “animal” for the purposes of Part 2 of the Act, and thereby defines the living species which enjoy the protection afforded by Part 2. This is necessary at the outset as the definition of the term “animal” can potentially be extremely wide. For example, a zoologist might classify a microbe as an “animal”. For the purposes of this Part the term “animal” means a vertebrate other than man. Therefore insects, for example, are not “animals” for the purposes of this Part.
93. It should be noted that, by virtue of section 47, Part 2 of the Act does not apply in relation to anything which occurs by virtue of, or in accordance with, the Animals (Scientific Procedures) Act 1986 (the subject matter of which is reserved to the UK Parliament), or to anything which occurs in the normal course of fishing.
94. Subsection (2) provides that the provisions in Part 2 do not apply to an animal whilst it is in its foetal or embryonic form.
95. Subsection (3) provides that the Scottish Ministers will be able to make regulations to change this definition so that it can be extended to include invertebrates of any description or an animal at an earlier stage of its development.
96. Subsection (4) provides that the Scottish Ministers can only invoke the power to extend the definition once satisfied, on the basis of scientific evidence, that other creatures are capable of experiencing pain or suffering. This approach will enable the definition to be amended in line with scientific developments and knowledge, and without recourse to primary legislation.
97. Subsection (5) imposes a duty on the Scottish Ministers to consult interested persons before introducing regulations to amend the definition of animal under this section.

##### ***Section 17 – Protected animals***

98. Animals that are not of a kind commonly domesticated in the British Islands are only “protected animals” if they are under the control of man or are not living in a wild state. The term “not living in a wild state” is intended to cover circumstances where a non-native captive animal escapes. This would cover, for example, a penguin escaping from a zoo. The penguin would not be commonly domesticated in the British Islands, nor would it be under the control of man (as it had escaped). However, although it had escaped, it would not be living in a “wild state” and therefore would continue to be considered as a “protected animal”.

### ***Section 18 – Responsibility for animals***

99. The welfare provisions of the Act distinguish between the duties owed towards an animal by the man in the street and the duties owed by a person who is responsible for an animal. Naturally, the duties of the responsible person are greater. In order that it is clear whether a person is responsible for an animal or not, section 18 makes specific provision as to who is the person “responsible” for an animal for the purposes of the animal welfare provisions of the Act.
100. Responsibility for an animal is only intended to arise where a person can be said to have assumed responsibility for its day-to-day care, or for a specific purpose, or by virtue of owning it. The owner is always to be regarded as responsible for an animal. But, in addition, a person who is in charge of the animal is also responsible for it. This applies whether the person owns or is in charge of the animal on a temporary or permanent basis. If an animal is abandoned, the person responsible for it continues to be responsible for the animal even after it has been abandoned.
101. Where a person under 16 years of age is responsible for an animal, the person who has care and control of that young person is also responsible for their animal (subsection (4)). This seeks to ensure that an adult can normally be identified as a person responsible for an animal.
102. As noted above, responsibility for animals is a key concept in the welfare provisions, particularly in determining a person’s duties in relation to sections 19 (unnecessary suffering), 20 (mutilation), 21 (cruel operations) 22 (administration of poisons etc.), 24 (ensuring the welfare of animals), 25 (care notices) and 29 (abandonment). Similarly, the regulation-making power in section 26 (provision for securing welfare) can be exercised only in relation to animals for which a person is responsible. The same is true for the provisions allowing for the making of regulations about licensing and registration under section 27.

### ***Section 19 – Unnecessary suffering***

103. This section sets out the circumstances in which a person who causes a protected animal to suffer commits an offence. Unnecessary suffering can be caused in two ways: either by taking action which causes unnecessary suffering, or by failing to take steps to prevent unnecessary suffering. The concept of “unnecessary suffering” is central to the legal definition of cruelty and was previously included in the Protection of Animals (Scotland) Act 1912 (“the 1912 Act”). The infliction of pain, even if extreme, is not in itself sufficient to constitute unnecessary suffering, as pain may be caused for beneficial reasons such as in surgery or medicine. Therefore, consideration must be given to whether pain or suffering is necessary.
104. Subsection (1) provides that it will be an offence for any person, by an act, to cause unnecessary physical or mental suffering to a protected animal where the person committing the act knew or ought reasonably to have known, that the act would cause, or would be likely to cause, suffering.
105. Subsection (2) provides that a person who is responsible for an animal commits an offence if, by an act or omission, that person causes unnecessary suffering to their animal and the person responsible for the animal knew or ought reasonably to have known that the act or omission would cause, or would be likely to cause, suffering. It will not be necessary to show that an accused person actually knew that their act or omission would cause suffering, but only that they ought reasonably to have known.
106. Subsection (3) provides that a person who is responsible for an animal commits an offence if they let another person cause their animal to suffer unnecessarily, either by an act or by an omission, and the person responsible for the animal actively permits that to happen, or fails to take reasonable steps to prevent it from happening.

107. Subsection (4) sets out a non-exhaustive list of considerations to which the courts are to have regard in determining whether suffering is unnecessary. These considerations include whether the suffering could reasonably have been avoided or reduced, compliance with any relevant enactment, licence or code of practice issued on a statutory basis, the purpose of the conduct, the proportionality of the suffering to the purpose, and whether the conduct was that of a reasonably competent and humane person.
108. Subsection (5) provides that nothing in this section applies to the appropriate and humane destruction of an animal. However the infliction of suffering over and above that necessarily caused by appropriate and humane destruction is not exempt.

### ***Section 20 – Mutilation***

109. This section prohibits the mutilation of any protected animal unless the purpose of the mutilation is medical treatment or the procedure is one carried out in accordance with regulations made by Scottish Ministers or in circumstances specified by Scottish Ministers. Subsection (6) imposes a duty on the Scottish Ministers to consult interested persons before making regulations under this section.
110. Subsection (3) makes it an offence to take (or cause another person to take) a “protected animal” from Scotland for the purpose of having a “prohibited procedure” undertaken.
111. Prohibited procedures are those which involve interference with the sensitive tissues or bone structure of the animal, for example, tail docking, castration and dehorning. Subsection (5)(b) provides that this section does not apply to certain procedures to be specified in regulations. It is intended that normal farming practices (such as castration of lambs) will be permitted under regulations made under this section.
112. The definition of “prohibited procedure” in subsection (4) is based on the definition of “mutilation” adopted by Royal College of Veterinary Surgeons.

### ***Section 21 – Cruel operations***

113. This provision supersedes section 1(1)(e) of the 1912 Act. Subsection (1) makes it an offence for a person to perform an operation on a protected animal without due care and humanity. Whilst it is difficult to envisage circumstances in which such an offence would be prosecuted except where it appeared that an animal had suffered, it is not necessary to *prove* that the animal suffered to establish the commission of the offence.
114. Subsection (2) provides that if a person who is responsible for an animal permits another person to perform an operation on that animal without due care and humanity or fails to take reasonable steps to prevent that from happening, then an offence is committed. Subsection (3) states that this section is subject to the Protection of Animals (Anaesthetics) Act 1954 (see amendment to Protection of Animals (Anaesthetics) Act 1954 in schedule 2 to the Act).

### ***Section 22 – Administration of poisons etc.***

115. This section makes it an offence for a person, without lawful authority or reasonable excuse, knowing a drug or substance to be poisonous or injurious to administer it to a protected animal, or to cause such a drug or substance to be taken by a protected animal.
116. Subsection (2) makes it an offence for a person who is responsible for an animal to permit another person to administer a poisonous or injurious substance or drug to that animal, or to cause such a substance or drug to be taken by that animal unless that person has lawful authority or reasonable excuse. Where a person knows a drug or substance to be injurious or poisonous that person must take reasonable steps to prevent any other person administering to any animal, for which the first person is responsible, that drug or substance or causing that drug or substance to be taken by that animal.

117. Under this section it is not necessary to show that the animal did in fact suffer as a result of the prohibited action in order to establish liability. But it is necessary to show that the person accused of the offence knew the poisonous or injurious nature of the substance administered to, or taken by, the animal.
118. By virtue of subsection (3), subsections (1) and (2) apply in cases where substances that are otherwise harmless have been administered in a harmful quantity or by a harmful method.

### ***Section 23 – Animal fights***

119. This section creates specific offences in relation to animal fights. In the 1912 Act provisions relating to animals fights were subsumed under the general heading of “offences of cruelty”. It is intended that anything done by a person in connection with an animal fight which would amount to a criminal offence under the existing law, will continue to amount to a criminal offence under the new provision.
120. The offences under section 23 replace the offences under section 1(1)(c), 1A and 1B of the 1912 Act.
121. Subsections (1) and (2) penalise various forms of involvement in animal fights. The majority of the specific offences contained in the 1912 Act such as advertising a fight, allowing premises to be used, and accepting money for admission to an animal fight are covered by subsection (2)(a) to (e). Some of the offences under this section can be committed without a fight having taken place, for example the offence of making arrangements for an animal fight would not depend on the fight subsequently taking place. An animal fight could be arranged which is later cancelled.
122. Subsection (4) sets out offences in relation to the video recording of an animal fight. It will be an offence to supply or publish a video recording of an animal fight, to show a video recording of an animal fight to another person, or to possess a video recording of an animal fight with the intention of supplying it to another person.
123. Subsection (5) restricts the offences created by subsection (4) to video recordings of an animal fight which took place in Great Britain after the date on which subsection (5) came into force.
124. Subsection (6) provides that subsection (4) does not apply to anything done by way of broadcasting, anything done for the purposes or in connection with law enforcement, and anything done in the course of any other lawful activity done in the public interest or with a view to the public interest being served. In consequence, no offence is committed under subsection (4) where the thing done falls within subsection (6).
125. Subsection (7) provides definitions for terms used in the above subsections in relation to video recordings of animal fights.
126. Subsection (9) defines an animal fight as an occasion on which a protected animal is placed with an animal or with a human for the purpose of fighting, wrestling or baiting. This means that an animal fight can be deemed to have taken place, even if both animals are wild animals, as the definition of protected animal in section 17 includes any animal under the control of man whether on a permanent or temporary basis.

### ***Section 24 – Ensuring welfare of animals***

127. The welfare offence in this section and the regulation-making power in section 26 of the Act replace provisions in the Agriculture (Miscellaneous Provisions) Act 1968 and extend a similar level of protection to both farmed and non-farmed animals. Where someone is responsible for an animal, they have a duty to take such steps as are reasonable in all the circumstances to ensure its needs are met to the extent required by good practice (subsection (1)).

128. In considering whether a person has complied with section 24, the court is required to take into account all relevant circumstances. However, for the avoidance of doubt, subsection (2) specifies certain matters which the court is to take into consideration when deciding whether a person has committed an offence, namely, “any lawful purpose for which the animal is kept” and “any lawful activity undertaken in relation to the animal”. This provision recognises that some lawful practices may prevent or hinder a person from ensuring that certain welfare needs are met, and requires the court to take that into account when considering what is reasonable in the circumstances of each case. For example, a dog used for search and rescue purposes may be placed in a dangerous situation and such an activity would not give rise to an offence under subsection (2).
129. Subsection (3) lists examples of the needs of an animal for the purpose of this section. This list is not exhaustive.
130. Subsection (4) makes clear that the killing of an animal is not in itself inconsistent with the duty to ensure its welfare if it is done in an appropriate and humane manner.

### **Section 25 – Care notices**

131. **Section 25** provides inspectors appointed or authorised under the Act with the discretion to serve a care notice on a person responsible for an animal if that person is failing to secure the welfare of the animal and it appears to the inspector that this failure constitutes an offence under section 24. This provision recognises that there may be occasions when an inspector does not wish to pursue a prosecution immediately under section 24, and provides the opportunity to allow the person responsible for the animal to rectify the situation within a fixed period of time.
132. Subsection (2) outlines the information which must be included in a care notice. A care notice must specify the nature of the failure along with the reason that it appears to constitute an offence under section 24, and also the date on which the failure came to the notice of the inspector.
133. Once a care notice is served it will not be possible to prosecute the person who has been served with the notice for an offence under section 24 or for failure to comply with the care notice until the compliance period (set out in the care notice) has expired. Subsection (4) provides that where a person complies with a care notice no proceedings for the offence specified in the care notice may be taken in respect of the default period.
134. The compliance period of the notice is flexible. The inspector could specify a short time period (e.g. 24 hours) for urgent action to be taken or a longer period (e.g. 4 weeks) for a longer term solution. Subsection (6) provides the inspector with the flexibility to extend the compliance period.
135. Subsection (7) provides it is an offence to fail to comply in a material regard with a care notice without reasonable excuse.

### **Section 26 – Provision for securing welfare**

136. **Section 26** enables the Scottish Ministers to make regulations to secure the welfare of animals and their progeny, for which a person is responsible. The inclusion of progeny in this section enables regulations to be made governing, for example, animal breeding to protect the progeny as well as the parent.
137. Subsection (2) provides a non-exhaustive list of the type of provision which may be made in such regulations. The list includes requirements or prohibitions, provision for enforcement, provision in relation to offences and post conviction orders. Subsection (3) provides a non-exhaustive list of the matters to which requirements and prohibitions may relate and provides examples of the issues which may be addressed in such regulations including the prevention of suffering, the breeding and rearing of animals and the transportation of animals.



138. The power in subsection (2)(d) to apply a “post-conviction order” (as outlined in sections 39 to 43) in relation to an offence under the regulations enables the regulations to provide that conviction for certain offences may lead to consequences such as being disqualified from owning and keeping animals.
139. Subsection (5) imposes a duty on the Scottish Ministers to consult interested persons before introducing regulations under this section.

### ***Section 27 – Licensing etc. of activities involving animals***

140. **Section 27** makes provision enabling the Scottish Ministers to make regulations for the introduction of licensing and registration regimes in relation to activities involving animals for which a person is responsible for the purposes of securing the welfare of animals. It is intended that, with a view to securing animal welfare, certain activities involving animals for which a person is responsible (such as pet shops, animal boarding establishments, livery yards and riding establishments) will be made subject to a requirement that the person carrying out the activity be either licensed by, or registered with, a local authority or the Scottish Ministers. At present, licensing regimes contain many identical or similar provisions and are to be found in a variety of statutes and secondary legislation.
141. It is intended that registration will be used in cases where it is necessary for the enforcement authority to know of the existence and location of organisations or individuals who are keeping specific animals or carrying out particular activities. Registration may be required where it is considered that the additional controls and costs of a licensing regime are either unnecessary or would be unduly burdensome.
142. Subsection (4) sets out the types of provision that regulations for both licensing and registration may include: enforcement; the creation of offences; the imposition of penalties; post-conviction orders; the conferring of powers on specified individuals (such as powers of entry, search, inspection and seizure in connection with breaches and suspected breaches of provisions of the regulations); the creation of an offence of obstructing a person who is exercising their powers under this section; and for exemptions from or qualifications to an offence under the regulations.
143. Subsection (5) provides that the Scottish Ministers may by regulations make provisions about licences and registration for the purposes of this section.
144. Subsections (6) to (8) provide that the Scottish Ministers can set out procedures relating to: applying for licences or registration; granting and refusing applications; qualifications to be held by applicants; other matters that are to be taken into account when considering applications; the conditions that are to be set out in the licence or registration; the suspension or revocation of a licence or registration; appeals; and the making provision for fees or other charges.

### ***Section 28 – Prohibition on keeping certain animals***

145. This section gives the Scottish Ministers power to make regulations for animal welfare purposes to prohibit the keeping of certain types of animals at domestic or other premises. “Domestic premises” are defined as premises or a part of premises used exclusively as a dwelling house including any land or structure belonging to or enjoyed with or adjacent to the house (see section 50(2)). Subsection (2) allows the Scottish Ministers to define the meaning of “other premises” by regulations. A distinction is made between domestic and other premises as the facilities which can be provided for an animal can vary greatly between a small flat and a safari park. Subsection (2)(a) excludes zoos licensed under the Zoo Licensing Act 1981 from the premises in respect of which regulations prohibiting the keeping of an animal may be made under subsection (1)(b). Subsection (4) sets out examples of the types of provision which may be included in the subsequent regulations. These include provision for enforcement, offences, penalties, post-conviction orders, the conferring of powers on

specified individuals (such as powers of entry, search, inspection, and seizure) and for provision for exemptions from the regulations.

146. Subsection (5) provides that the Scottish Ministers must have regard to whether adequate provision is capable of being made and likely to be made for animals at the type of premises concerned before prohibiting the keeping of animals on such premises.
147. Subsection (6) imposes a duty on the Scottish Ministers to consult interested persons before introducing regulations under this section.

### ***Section 29 – Abandonment***

148. This section provides a specific offence of abandonment. The Act provides that a person commits this offence in two ways: in subsection (1), if they abandon an animal for which they are responsible in circumstances likely to cause it unnecessary suffering; and in subsection (2) if they leave unattended an animal for which they are responsible and fail to make adequate provision for its welfare. The latter provision is intended to cover a situation where an animal is not abandoned on a permanent basis but is left without adequate provision being made for its welfare.
149. Subsection (3) provides a non-exhaustive list of the factors that the court is to have regard to when considering whether adequate provision has been made for the animal. These include the kind of animal, its age, state of health, the length of time for which it has been left and its requirements for food and water, and shelter and warmth.

### ***Section 30 – Sale of animals to children***

150. The Pet Animals Act 1960 allowed children as young as 12 to be able to buy an animal and they could do so with neither parental consent nor knowledge.
151. Subsection (1) makes it an offence for a person to sell an animal to a person under the age of 16 years.
152. Subsection (2) provides a defence if the seller believed that the purchaser was 16 or over and was either shown evidence of the purchaser's age or had no reasonable cause to suspect from the purchaser's appearance that they were under 16.

### ***Section 31 – Offering animals as prizes***

153. This section creates an offence where a person offers or gives another person an animal as a prize with the only exception being where the prize is given within a family context. Under the Act it is an offence to offer or give goldfish in bags at funfairs. However, where a parent decides to give a dog to their child as a prize for success in exams or at a family event, that would not constitute an offence.

### ***Section 32 – Taking possession of animals***

154. This section makes provision as to the steps which an inspector or constable may take where they find a protected animal which appears to be suffering. Subsection (1) allows an inspector or constable who finds a protected animal suffering to take steps that need to be taken immediately to alleviate the animal's suffering. Subsection (2) specifies that subsection (1) does not authorise the destruction of a protected animal, which is dealt with in section 35. See section 17 for the definition of "protected animal" and section 49 for the definition of "inspector". Relevant powers of entry are conferred by schedule 1.
155. Subsection (3) gives an inspector or constable the right to take possession of a protected animal if a veterinary surgeon certifies that the animal is suffering or likely to suffer. In order to reach an opinion in this regard, the veterinary surgeon may examine and take samples from the animal (subsection (9)). Subsection (4) allows an inspector or constable to take this step without veterinary certification if it appears that the animal is suffering or likely to suffer and it is reasonable not to seek the assistance of, or

wait for, a vet. This would apply to circumstances when the action required is urgent, such as discovering an animal in danger of dehydration in a vehicle in direct sunshine. Subsection (5) provides that an inspector may also take into possession any dependent offspring. For example if it appears that a bitch with a young litter of puppies is suffering, then the bitch and the puppies could be taken into possession to ensure that the puppies' welfare needs can continue to be met.

156. Subsection (6) provides that where an inspector or constable has taken possession of an animal, an inspector or constable may remove it, or arrange for it to be removed, to a place of safety (such as an animal welfare centre). Alternatively, they may care for the animal at the place where it was found (in which case they can make use of any equipment taken or found at the place, see subsection (8)). Subsection (7) allows that where a constable or inspector takes possession of an animal, the inspector or constable may use a mark, microchip or other method to identify the animal.
157. Subsection (11) provides that any reasonable expenses incurred by an inspector or constable in taking steps to alleviate suffering or taking possession of an animal under this section can be recovered from the owner or other person responsible for that animal.
158. [Schedule 1](#) paragraph 15(1)(a) makes it an offence for a person to intentionally obstruct an inspector or constable from using any of the powers conferred on him by this section.

### ***Section 33 – Release orders where animals taken***

159. [Section 33](#) makes provision for a court, on summary application by the owner or any other person appearing to the court to have sufficient concern for the animal, to make an order as to the person to whom an animal taken under the previous section is to be delivered.
160. Subsection (3) describes who is entitled to be heard in relation to such an application. These are the owner, an inspector, a constable who took the animal into possession, is caring for the animal or arranged for its care, a person with whom an arrangement for the care of the animal has been made and who is authorised to be heard by the Scottish Ministers in relation to the application, and a person who appears to the court to have a sufficient concern for the animal.
161. In determining what order to make, the court must take into consideration the desirability of protecting the value of the animal and of avoiding any increase in the expenses which may need to be reimbursed by a person responsible for the animal.

### ***Section 34 – Disposal orders where animals taken***

162. This section sets out the disposal orders which a court can make in relation to animals that have been taken into possession under section 32. The court may order that specified treatment be administered to an animal, and/or order that the animal be: destroyed, sold, or disposed of in another manner (subsection (1)).
163. Subsection (4) specifies the persons who are entitled to make an application to the court under this section (the owner, an inspector, a constable who took the animal into possession, is caring for the animal or arranged for its care, a person with whom an arrangement for the care of the animal has been made and who is authorised by the Scottish Ministers to make the application and any other person appearing to the court to have sufficient concern for the animal).
164. Subsection (5) specifies the persons entitled to be heard in relation to such an application. These are broadly the same as those entitled to make an application to the court. In addition, a person with whom an arrangement for the care of the animal has been made under section 32 may be heard if they have been authorised by the Scottish Ministers. Subsection (6) provides that the court may not make a disposal order involving the destruction of an animal unless it is satisfied on the evidence of a



veterinary surgeon (given orally or in writing) that destruction would be in the interests of the animal.

165. In addition, before a court makes an order under this section, it must give the owner of the animal the opportunity to make representations unless it is not practicable to do so (subsection (7)).
166. Subsection (8) provides that in determining what order (if any) to make, the court must have regard to the desirability of protecting the value of the animal, and of avoiding any increase in the expenses which may need to be reimbursed by a person responsible for the animal. The order made by the court may appoint a person to carry out the terms of the order, make provision for the reimbursement of any expenses and make other provision as appropriate (subsections (2) and (3)).
167. Subsection (9) provides that if the owner of the animal is subject to any liability under section 32(11) or subsection (3) of this section, any sum due to the owner from any proceeds of the sale of the animal under this section may be used to repay that liability.
168. [Schedule 1](#) paragraph 15(1)(b) makes it an offence for a person to intentionally obstruct an inspector or constable from using any of the powers conferred on him by an order under subsection (1) of this section.

### ***Section 35 – Resort to destruction of animals***

169. This section replaces and modernises the power currently contained in section 10 of the 1912 Act.
170. In terms of subsection (1), an inspector or constable may destroy or make arrangements for the destruction of a protected animal where a veterinary surgeon certifies the condition of the animal is such that destruction is appropriate. Subsection (3) allows a veterinary surgeon to examine and take samples from an animal with a view to forming an opinion in this regard.
171. In terms of subsection (2), an inspector or constable may destroy or take steps for destroying an animal without veterinary certification if the following conditions are met: (a) it appears that the condition of the animal is such that there is no reasonable alternative to destroying it; and (b) it is reasonable in the circumstances not to seek or wait for veterinary advice.
172. Subsection (4) provides that any reasonable expenses incurred by an inspector or a constable in destroying an animal are recoverable from the owner or other person responsible for the animal.
173. [Schedule 1](#) paragraph 15(1)(c) makes it an offence for a person to intentionally obstruct a person exercising a power conferred by this section.

### ***Section 36 – Animal welfare bodies***

174. [Section 36](#) provides a regulation-making power to allow the Scottish Ministers to establish a body to provide them and such other persons as the Scottish Ministers may direct with advice on such animal welfare matters as are specified in regulations.
175. Subsection (2) provides that the Scottish Ministers can also issue regulations in order to facilitate or improve co-ordination between bodies which have functions relating to the welfare of animals.

### ***Section 37 – Animal welfare codes***

176. Codes of practice are already widely used to promote the welfare of farmed animals and the Act provides for their use to be extended to non-farmed animals. The existing codes on the welfare of farmed animals (which have been made under section 3 of the Agriculture (Miscellaneous Provisions) Act 1968) will continue in force.

177. This section gives Scottish Ministers the power, after appropriate consultation, and subject to the approval of Parliament, to issue and revise codes which provide practical guidance in relation to the provisions of the animal welfare part of the Act or regulations made under that part. Subsection (5) makes provision regarding the publicising of any animal welfare code made under this section.
178. Subsections (6) and (7) provide that an animal welfare code when being made or revoked is subject to affirmative Parliamentary procedure.
179. Whilst failure to comply with a provision of an animal welfare code is not in itself an offence (subsection (8)), the courts can refer to the appropriate codes when making a judgement as to whether an offence has been committed under the welfare provisions of the Act or regulations made under section 26 or 27. Owners and keepers of animals may therefore find the codes a useful resource by which to inform their understanding of acceptable welfare standards.

### **Section 38 – Animal welfare guidance**

180. This section allows Scottish Ministers to issue general statutory guidance on issues which relate to the securing of animal welfare. Unlike the guidance which can be made under section 37, this guidance does not require to be directed to persons responsible for protected animals. This section allows for more general guidance which can be produced with a view to securing the welfare of protected animals.

### **Section 39 – Deprivation orders**

181. This section enables a court on convicting a person of a relevant offence to make an order, in addition to or instead of any other penalty, depriving an animal owner of possession or ownership (or both) of an animal. Section 39(9) requires the court, where practicable, to allow the owner an opportunity to make representations before the court makes an order. The animal in respect of which the order can be made is the animal in relation to which the offence was committed. In the case of animal fights, section 23(8) provides that this is the animal involved in the animal fight concerned. Section 39(8) requires the court to be satisfied, before ordering the destruction of an animal, that the making of such an order is in the interests of the animal to which it applies except in the case of an offence under section 23 (animal fights).
182. The relevant offences, conviction of which can give rise to the making of such an order are: causing unnecessary suffering, (section 19); mutilation (section 20); cruel operations (section 21); administration of poisons etc. (section 22); animal fights (section 23); failing to ensure the welfare of an animal (section 24); failure to comply with a care notice (section 25(7)); abandonment (section 29) and owning or keeping an animal in breach of a disqualification order (section 40(11)).
183. Subsection (2) provides as to the order which the court has power to make in terms of subsection (1). It is an order which deprives the offender of ownership or possession (or both) of the animal to which it relates and also orders the destruction, sale or other disposal of the animal. Subsection (5) allows the order also to make provision in respect of the dependent offspring of the animal.
184. Subsection (3) provides that the court has to explain its reasons for not making a deprivation order except where it has imposed a disqualification order under section 40.
185. Subsection (6) makes further provision as to what can be included in a deprivation order. This includes the provision for appointing someone to carry out the deprivation order, requiring delivery of relevant animals, conferring powers of entry on the person appointed to carry out the order and such other provision as the court considers appropriate.
186. Subsection (8) requires (except in the case of animal fights) that a veterinary surgeon provides evidence in relation to the destruction of an animal, either orally or in writing,

before a deprivation order involving the destruction of an animal is made by a court. A veterinary surgeon does not necessarily require to attend the court in person but can provide evidence via alternative methods (such as video link, teleconferencing or in writing).

### **Section 40 – Disqualification orders**

187. This section enables a court on convicting a person of a relevant offence to make an order in addition to, or instead of, any other penalty and disqualifying that person from one or more activities relating to animals.
188. The relevant offences, conviction of which can give rise to the making of such an order, are: causing unnecessary suffering (section 19); mutilation (section 20); cruel operations (section 21); administration of poisons etc. (section 22); animal fights (section 23); failing to ensure the welfare of an animal (section 24), failure to comply with a care notice (section 25(7)), abandonment (section 29) and failure to comply with a disqualification order (section 40(11)).
189. A disqualification order disqualifies a person from participating in one or more of a range of animal-related activities. These activities are: owning or keeping animals (or both); dealing in animals; transporting animals; working with or using animals; riding or driving animals; providing any service relating to animals which involves taking possession of animals (this could include dog walking or pet grooming businesses); taking possession of an animal for the purpose of an activity in respect of which one of the foregoing disqualifications is imposed; and taking charge of animals for any, or any other, purpose.
190. Subsection (3) provides that disqualification from any animal-related activity disqualifies the person subject to the order from any participation in that activity. Paragraphs (a), (b) and (c) give examples of the kind of participation from which a person subject to an order is disqualified.
191. Subsection (4) provides an exception where a disqualification order includes disqualification from taking charge of animals for any (or any other) purpose under subsection (2)(h). A person subject to such a disqualification may take charge of an animal if no other arrangements for its care are reasonably available and the disqualified person takes charge of the animal for the purpose of alleviating suffering, or, with the consent of the owner for the purposes of caring for the animal.
192. Subsection (5) provides that the court has to state its reasons for not making a disqualification order on convicting a person of a relevant offence.
193. Subsection (6) provides that a disqualification order may be made in addition to or instead of any other penalty or order which may be imposed in relation to the relevant offence.
194. Subsection (7) provides that disqualification may be imposed in relation to animals generally or animals of a particular kind. Thus a court may, for example, use its discretion under this subsection to disqualify a person who has been convicted for failure to ensure the welfare of livestock only from keeping livestock, but not domestic pets.
195. Subsection (8) allows a court to make a disqualification order to restrict the number of animals of a particular kind (or kinds) which a person may own or keep (instead of prohibiting the owning or keeping of all such animals). This is intended to cover the situation where a person is convicted of a relevant animal welfare offence but the court considers it appropriate to make an order restricting the number of animals that the person can keep, rather than prohibiting the person from keeping animals altogether.

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196. Subsection (9)(b) allows the court to specify the length of time which must pass before the person who is the subject of a disqualification order may apply to have it terminated or varied.
197. Subsection (10) allows the court to suspend the operation of the disqualification order to enable practical arrangements to be made for the animals affected or for the period while an appeal may take place.
198. Subsection (11) makes it an offence to breach a disqualification order.
199. Subsection (12) provides that where a disqualification order restricting the number of animals that a person may own or keep is breached, all animals that the person owns or keeps are to be treated for certain purposes as being owned/kept in breach of the order. This provision is necessary for the proper operation of any subsequent deprivation orders. Without such a provision, disputes could arise as to which particular animals are kept in breach of the order.

***Section 41 – Seizure orders where disqualification breached***

200. This section gives the court power, where it is satisfied that a person subject to a disqualification order owns or keeps any animal in breach of that order, to make an order that the animals so owned or kept be seized.
201. Subsection (2) provides for a seizure order to be made following summary application to the court by an inspector where it appears that a person is owning or keeping animals in breach of a disqualification order. The order may be made by the court even if proceedings have not, or are not, or are not likely to be, taken against the person for an offence under section 40(11).
202. Subsection (3) provides that a seizure order made under subsection (1) may deprive a person of possession or ownership of an animal (or both) and provide for the destruction, sale or other disposal of the animal.
203. Subsection (4) sets out provisions which may be included in a seizure order. These are: appointing the person who is to carry out the order; requiring delivery of the animal in question; and by virtue of subsection (5) requiring the disqualified person to reimburse any reasonable expenses incurred in carrying out the order. The seizure order may also include provision authorising a person appointed to carry out the order, and anyone acting on their behalf, to enter any premises where the animal subject to the seizure order is kept.
204. Subsection (4)(c) provides that the order may include such other provision as the court considers appropriate. Examples of the kind of provision which might be included are given in subsection (5).
205. Subsection (6) provides that the court may not make a seizure order involving the destruction of an animal unless it is satisfied on the evidence of a veterinary surgeon that destruction would be in the interests of the animal. A veterinary surgeon may provide evidence in relation to the destruction of an animal, either orally or in writing, before a seizure order is made by a court. Therefore a veterinary surgeon does not necessarily require to attend the court in person but can provide evidence via alternative methods (such as video link, teleconferencing or in writing).
206. Subsection (7) requires the court to give the owner of the animals concerned the opportunity (where practicable) to make representations to the court prior to making a seizure order.
207. Subsection (8) requires the court to consider both protecting the value of any animal and avoiding increasing expenses when determining whether to make a seizure order.
208. Subsection (9) provides for the making of an interim order pending the final determination of a seizure order. The court may make an interim order in relation to the

keeping of an animal before the application for a seizure order is determined and which has effect until such time as the application and any appeal is determined. Subsection (10) provides that subsections (4), (5)(a) and (8), which relate to seizure orders, also apply to interim orders.

### ***Section 42 – Termination or variation of disqualification***

209. This section sets out the procedure under which a person may request to have a disqualification order terminated or varied. The request must be made to the court which made the disqualification order.
210. Subsection (2) provides time limits within which an application may not be made.
211. Subsection (4) outlines particular issues which the court must look at when considering such a request.

### ***Section 43 – Appeals against orders***

212. This section provides the rights of appeal available in relation to the orders made under sections 39, 40 and 41.
213. Subsection (1) provides that when a deprivation or disqualification order is imposed it is to be treated for the purposes of any appeal as part of the convicted person's sentence. Any appeal will follow the appeal procedure set out in the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#) for appeals against sentence.
214. Subsection (2) provides that in relation to a deprivation order, as well as those who may appeal in accordance with subsection (1), any person who has an interest in the animal to which the order applies may appeal to the High Court of Justiciary against the order by the same procedure as in subsection (1).
215. In relation to a seizure order, the disqualified person or any person who entered the process prior to the making of the order may appeal to the Sheriff Principal (subsection (3)).
216. Subsection (4) suspends the operation of any deprivation or seizure order until the periods for appeal against the order and conviction have expired and any appeal has been withdrawn or determined.
217. Subsection (5) provides that where the operation of a deprivation or seizure order is suspended or inexecutable the court may make an order making interim provision in relation to any animal to which the suspended order applies for as long as the suspended order remains suspended or inexecutable. Subsection (6) lists examples of the kind of provision which could be made in such an interim order and includes provision to enter premises where an animal to which the order applies is kept.
218. Subsection (8) provides that where the operation of a deprivation order has been suspended, an offence is committed if the person disposes of a relevant animal.

### ***Section 44 – Proceedings for animal fighting offences***

219. This section provides for proceedings for section 23 (animal fights) and extends the time limits within which prosecution for offences under that section may be brought and sets out maximum periods after which proceedings for such an offence cannot be brought. It also makes provision as to when proceedings are deemed to be commenced.
220. Unless otherwise provided, proceedings for a statutory offence must normally be brought within 6 months *of the offence being committed* if the offence may only be tried summarily (i.e. by a sheriff without a jury) (Criminal Procedure (S) Act 1995 s.136). For offences under section 23, the maximum period is 6 months *from the date on which evidence sufficient in the prosecutor's opinion to justify proceedings came to the knowledge of the prosecutor* (section 44(1)). A certificate by the prosecutor setting out



the date on which such evidence came to the prosecutor's knowledge is to be conclusive evidence of that fact (section 44(4)).

221. Subsection (2) limits the period set out in subsection (1) by providing that no proceedings can be brought more than 3 years after the commission of the offence, and 3 years after the last date on which the offence was committed in the case of a continuous contravention. Nevertheless, in the case of a continuous contravention, the whole period of contravention may be included in the offence charged (even if part of it occurs outwith the time limits specified in subsections (1) and (2) (see subsection (3)).
222. Subsection (5) provides that proceedings are deemed to be commenced on the date on which a warrant to apprehend or to cite the accused is granted, provided that the warrant is executed without undue delay.

### ***Section 45 – Offences by bodies corporate etc.***

223. This section makes provision for circumstances where an offence is committed under Part 2 of the Act by a company, a corporate body managed by its members, or a Scottish partnership with the consent or connivance, or due to the negligence, of specified persons responsible for managing its affairs. In those circumstances, not only is the company, other corporate body or Scottish partnership liable for the offence, but so too is the officer (or member) of the company or other corporate body or the partner, as the case may be.

### ***Section 46 – Penalties for offences***

224. This section makes provision as to the penalties for an offence under Part 2 of the Act or regulations made under it. Except in the case of an animal fight offence (section 23) or an offence under section 19 (unnecessary suffering), a person who commits an offence under Part 2 is liable on summary conviction to imprisonment for up to 6 months or to a fine up to level 5 (currently £5,000) on the standard scale, or to both (subsection (2)). For animal fighting and unnecessary suffering, a person who commits an offence is liable on summary conviction to imprisonment for up to 12 months or to a fine not exceeding £20,000 or to both.
225. A person who commits an offence under regulations made under Part 2 of the Act is liable on summary conviction to the penalty specified in the regulations, but these penalties cannot exceed imprisonment of up to 6 months or a fine up to level 5 on the standard scale, or both (subsection (3)).

### ***Section 47 – Exclusions***

226. Section 47 excludes from the application of Part 2 (a) anything done by virtue of, or in accordance with the Animals (Scientific Procedures) Act 1986, the subject matter of which is reserved to the UK Parliament by Head B.7 of Schedule 5 to the Scotland Act 1998, and (b) anything done in the normal course of fishing. The latter is intended to exclude sea fishing and angling from the provisions of Part 2, but not fish farming.

### ***Section 48 – Suffering***

227. This section provides that the term “suffering” throughout Part 2 includes both physical and mental suffering

### ***Section 49 – Vets, inspectors and constables.***

228. Subsection (1) defines the term “veterinary surgeon”.
229. Subsection (2) provides that an “inspector” for the purposes of any provision of Part 2 of the Act, is either appointed or authorised as inspector by the Scottish Ministers, or appointed as inspector by a local authority. These inspectors will not incur civil or criminal liability for anything which they do in purported exercise of any functions

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conferred on them, if they have reasonable grounds for such action and act in good faith. This does not affect any liability of any other person in respect of any action undertaken (subsections (4) and (5)).

230. Subsection (7) provides that the powers in relation to inspectors and constables are set out in schedule 1 to the Act.

### ***Section 50 – Premises***

231. Subsection (1) defines “premises” for the purposes of Part 2 of the Act as including any land or building, or any other place including a vehicle or vessel, tent or moveable structure.
232. Subsection (2) defines “domestic premises” for the purposes of Part 2 of the Act as meaning premises or parts of premises used exclusively as a dwelling house and as including land or structure belonging to or usually enjoyed with the house. This could include, for example, a garage, garden or garden shed.

### ***Section 51 – Regulations***

233. This section provides that the Scottish Ministers’ power to make regulations under Part 2 of the Act must be exercised by statutory instrument (subsection (1)), and that a draft of the instrument must be laid before, and approved by resolution of, the Scottish Parliament (subsection (3)).
234. Subsection (2) provides that such regulations may include further provisions for the purposes of or in connection with the regulations as the Scottish Ministers consider necessary or expedient and allows the Scottish Ministers to make different provisions for different purposes or for different cases or classes of case (e.g. for different types of animals).