



Law Society  
of Scotland

# Consultation Response

## Proposed Dog Abduction (Scotland) Bill

January 2023



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to consider and respond to Maurice Golden MSP's consultation on a Proposed Dog Abduction (Scotland) Bill. We have the following comments to put forward for consideration.

## General Comments

We appreciate that the Bill specifically seeks to address dog abduction as opposed to pet abduction. We would caution that it seems inevitable that subsequent abduction legislation pertaining to pets may be called for as a result, particularly in light of similar UK Parliament proposals<sup>1</sup>. We are of the view that this could cause confusion regarding different types of legislation as well as with prosecution policies and sentencing.

As the consultation points out, the abduction of pet dogs, is already an offence under the common law offence of theft. "In the modern law it is theft to appropriate moveable, corporeal things belonging to another person, without the consent of that person, where the accused knows that those things belong to another and intends to deprive the owner of their use permanently, indefinitely or (in certain circumstances) temporarily."<sup>2</sup>

It is not necessary to prove that the accused gained from the appropriation. In the case of *Black and Penrice v Carmichael*, Lord Justice General Hope noted "It is the owner's loss and not the other's gain that is important."<sup>3</sup>

Corporeal moveable property includes dogs as well as any domestic or farm animal or birds.

We note that appropriation covers a wide range of circumstances such as removing the property from the owner's custody, preventing the owner from accessing their property, selling the property of another

<sup>1</sup> [Pet abduction to be made new criminal offence in crackdown on pet theft - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/pet-abduction-to-be-made-new-criminal-offence-in-crackdown-on-pet-theft)

<sup>2</sup> Timothy H Jones and Ian Taggart Criminal Law (7<sup>th</sup> edn W Green 2018) 10-02

<sup>3</sup> 1992 SLT 897

otherwise in the legitimate custody of the accused, and keeping items found by the accused in circumstances where steps could be taken to have them returned to the owner.

The law on this issue has developed over the last few decades. We note that until the late 1970s, the *mens rea* of theft, or the mental aspect of a crime which requires the intention or knowledge of an offence, was limited to the intention to permanently deprive the owner of the use of their property. However, in a series of cases decided between 1979 the mid-1990s, it was accepted that the *mens rea* of theft is the intention to deprive permanently<sup>4</sup>, indefinitely<sup>5</sup> or temporarily<sup>6</sup>. Appropriation and *mens rea* are usually established from the facts and circumstances of each case.

In the case of *MacMillan v Lowe*<sup>7</sup> the accused was convicted of the theft by finding of cheque books and cheque cards. He was found in possession the items which he claimed he had found several hours previously and which he had attempted to conceal from the police when they searched him. It was held that there was sufficient evidence to hold that the appellant had appropriated to items to his own use. The Appeal Court noted that it was a narrow case, but the Sheriff had done as he should and considered all the facts and circumstances in reaching his decision that the accused had appropriated the items to his own use. Applying this logic to the case of an alleged dog theft, the question of appropriation could turn on matter such as how long the dog was in the accused's possession, whether the dog was microchipped or was wearing a tag with its owners contact details on its collar for example, whether any means of identification had been removed and how far the accused was from a police station or rescue centre when apprehended.

The consultation appears to be predicated on the view that courts do not recognise, or that existing penalties are insufficient, to appropriately reflect the impact of theft on a dog's wellbeing and the distress caused to the owner. Rather than current prosecutions fail due to shortcomings in the common law of theft, or insufficiency of evidence. The consultation does not offer any evidence to show that prosecutions for dog theft are failing. In our view the consultation does not establish that there is a gap in the current law of theft which would be filled by a new statutory offence.

The accused is entitled to the presumption of innocence, and it is for the prosecution to prove the case beyond a reasonable doubt. If the accused claims that they had possession of the dog without the owner's consent solely with the intention of returning it to the owner, then they are entitled to test the evidence against them in court. It is difficult to see how a new statutory offence could be drafted that would not permit the accused to claim that they had a reasonable excuse for temporary possession of someone else's dog without their consent.

The consultation also offers no evidence to show that the courts in Scotland currently treat dog thefts purely in terms of the monetary value of the dog.

<sup>4</sup> *Herron v Best* 1976 SLT (Sh Ct) 80,

<sup>5</sup> *Kivlin v Milne* 1979 SLT (Notes 2) *Fowler v O'Brien* 1994 SCCR 112

<sup>6</sup> *Milne v Tudhope* 1981 JC 53, *Kidston v Annan* 1984 SLT 279

<sup>7</sup> 1991 JC 13

The Scottish Sentencing Council's Sentencing Process Guideline<sup>8</sup> requires sentencers to consider and assess the seriousness of the offence as the first step in the process. Seriousness is judged against the criteria of culpability and harm. The greater the culpability or harm then the more serious the offence.

In assessing culpability, the court will look at issues such as whether the crime was premeditated or planned in advance<sup>9</sup>. In assessing harm, the court will take into account the impact on any victim or victims, in this case the dog's owners<sup>10</sup>. Paragraph 14 of the Sentencing Process Guideline states that harm is to be interpreted broadly and includes offences where harm is caused to an individual or to property<sup>11</sup>. Therefore, in the specific case of crimes where the 'property' involved is a live animal, the court may legitimately consider the impact on the dog's health and wellbeing as well as the distress caused to the owner. Paragraph 16 of the Sentencing Process Guideline also lists some factors which may be relevant to the assessment of harm. They include "in property offences high value including sentimental value of property to the victim or a substantial consequential loss (e.g., where theft of equipment causes serious disruption to a victim's life or business)," for example where an assistance dog is stolen. We consider that this should avoid any suggestions that the theft of a rescue dog is treated less seriously than the theft of a pedigree because one had low/no monetary value and the other had a high value.

Even though there are currently no offence specific sentencing guidelines for theft, and victim statements can be made only in respect of a list of prescribed offences<sup>12</sup>, the court is not precluded from taking into account the evidence of the victim or from thinking other than in terms of simple monetary value.

We commend the good intentions underlying the proposed bill. We do not dispute the strength of a dog owner's emotional attachment to their beloved pet, the feelings of anxiety and distress that are experienced when a beloved pet is taken or goes missing, or the grief of those whose dogs are never found.

However, it is not clear that there is a need for the legislation proposed in this consultation. It may be that support for the changes proposed in this consultation can be made without primary legislation. We consider that it may be useful to seek Scottish Government support for further research to accurately gauge the extent of the problem in Scotland and whether there is a need for a new offence.

<sup>8</sup> <https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf>

<sup>9</sup> [the-sentencing-process-guideline-d.pdf](https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf) ([scottishsentencingcouncil.org.uk](https://www.scottishsentencingcouncil.org.uk)) at paragraph 10

<sup>10</sup> [the-sentencing-process-guideline-d.pdf](https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf) ([scottishsentencingcouncil.org.uk](https://www.scottishsentencingcouncil.org.uk)) at paragraph 13

<sup>11</sup> [the-sentencing-process-guideline-d.pdf](https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf) ([scottishsentencingcouncil.org.uk](https://www.scottishsentencingcouncil.org.uk)) at paragraph 14

<sup>12</sup> [Criminal Justice \(Scotland\) Act 2003](https://www.legislation.gov.uk/ukpga/2003/14) ([legislation.gov.uk](https://www.legislation.gov.uk)) at section 14 and [The Victim Statements \(Prescribed Offences\) \(Scotland\) Order 2009](https://www.legislation.gov.uk/uksi/2009/1000) ([legislation.gov.uk](https://www.legislation.gov.uk))

## Consultation questions

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### Question 1 – Which of the following best expresses your view of the proposed Bill?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Do not wish to express a view

#### Please explain the reasons for your response

Neutral – We are of the view that there is insufficient evidence available to show that there is a gap in the current law that could be remedied by the creation of a new statutory offence. The true extent of dog theft is not known due to limitations in current data gathering and recording processes. Is there evidence that the courts are treating cases of dog theft purely in terms of the pecuniary loss sustained by the owner? Are the police not pursuing cases because, for example, evidence of appropriation or the *mens rea* of theft is lacking?

We consider that these issues should be fully explored before the creation of a new statutory offence.

The consultation document itself accepts that detection, in circumstances where a dog has been abducted or stolen, is extremely low and refers to Kennel Club research, which states that 98% of dog abductions result in no one being charged<sup>13</sup>. There are likely to be many reasons for this including limited police resources. We would query whether, in today's climate, is it likely that detection rate will improve as the result of a new statutory offence.

### Question 2 – Do you think legislation is required, or are there are other ways in which the Bill's aims could be achieved more effectively?

#### Please explain the reasons for your response.

We are not opposed to the creation of a new offence in principle; however, we are of the view that more research and evidence is required to demonstrate a need for it. As indicated in the general comments set out above, we consider that there are other ways the Bill's aims could be achieved.

<sup>13</sup> [finaldogabduction-pd.pdf \(parliament.scot\)](#) at page 12

We recognise that the main aim of the proposed Bill is to make dog abduction a specific crime in Scotland. It is claimed that the new offence is necessary to alter the fundamental reason for punishing the offender to the welfare of the animal and the impact of the loss on the owner rather than the financial value of the dog<sup>14</sup>. However, the consultation document provides no evidence to show that this is not happening as part of the sentencing process at present.

The consultation suggests that the creation of a new offence would lead to:

- A requirement for the proper recording of dog thefts and more effective collection of data
- The full impact of the theft on the owner and the welfare of the animal being reflected in sentencing

Scottish Ministers have the power to make regulations to amend aspects of section 14 of the Criminal Justice (Scotland) Act 2003 (Victim Statements). The list of prescribed offences<sup>15</sup> could be altered for example to include prosecutions where a live animal is stolen.

The proposal to create a new offence as a mechanism to require the Police, Crown Office and Procurator Fiscal Service (COPFS) and Scottish Courts and Tribunal Service (SCTS) to accurately record the number of reported cases of dog theft seems, in a logical sense, to be doing things in reverse order. In our view, it would be more effective to refine police data gathering processes. If there is a way in which it could be recorded that a theft case involved a dog, or for that matter any category of live animal, we consider that this would be a much more effective means of establishing the true extent of the problem of dog theft in Scotland. Furthermore, it could provide an evidence-based case for primary legislation in this area in future.

Additionally, the Scottish Sentencing Council could be invited to consider issuing guidelines on thefts involving live animals for approval by the High Court of Justiciary. The Scottish Sentencing Council is currently developing guidelines on environmental and wildlife crime.

It is worthy of note that guidelines issued by the Scottish Sentencing Council are published after detailed consideration and consultation and are informed by current sentencing practice. Alternatively, if a dog theft case was to be considered on appeal by the High court or Sheriff Appeal court, the courts have the power under section 118 and 189 of the Criminal Procedure (Scotland) Act 1995<sup>16</sup> to issue a guideline judgement to clarify sentencing practices.

### **Question 3 – What is your view on the proposal that introducing a specific offence of dog abduction, as set out in the consultation document, will ensure that the crime is treated as primarily a matter of welfare rather than monetary value?**

<sup>14</sup> [finaldogabduction-pd.pdf \(parliament.scot\)](#) at page 11

<sup>15</sup> [The Victim Statements \(Prescribed Offences\) \(Scotland\) Order 2009 \(legislation.gov.uk\)](#)

<sup>16</sup> [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#) at section 118 and 189

- Fully agree
- Partially agree
- Neutral (neither support nor oppose)
- Partially disagree
- Fully disagree
- Unsure

Partially disagree. The consultation document has provided no evidence to show that the judiciary do not take animal welfare into account<sup>17</sup>.

Stage 1 of the Scottish Sentencing Council's Sentencing Process Guideline<sup>18</sup> requires the court to assess the seriousness of the offence during the sentencing process. Thereafter, the seriousness or severity of the offence is assessed by judging the culpability of the accused and the harm caused or the risk that harm could have been caused.

As stated in our general comments above, the courts currently have scope to consider the welfare of the animal rather than its straightforward monetary value at the point of sentencing. The court would be required to follow this same 7 step process in sentencing a person convicted of a potential new statutory offence of dog abduction.

#### **Question 4 – This proposal suggests imposing a maximum sentence of five years imprisonment for dog abduction; what is your view on this?**

- Fully agree
- Partially agree
- Neutral (neither support nor oppose)
- Partially disagree
- Fully disagree
- Unsure

**Please explain the reasons for your response including any other comments on the potential sentences for the proposed offence.**

Neutral - If a new statutory offence were to be created, we consider that the penalty should correspond with other statutory offences.

At present, many statutory offences are triable in the Sheriff Courts by either summary complaint or on indictment each with their own sentencing parameters. In summary proceedings, in most circumstances unless there is specific legislative provision stating otherwise, the maximum penalty of imprisonment is 12 months with a 5 year maximum in solemn proceedings. The consultation speaks of "a 5-year maximum" as

<sup>17</sup> [About sentencing \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk) and [Scottish Sentencing Council Sentencing Factors](https://www.scottishsentencingcouncil.org.uk)

<sup>18</sup> [the-sentencing-process-guideline-d.pdf \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk) at page 5

a starting point for sentencing meaning that the proposed new offence would therefore be triable on indictment under solemn procedure.

### **Question 5 – What is your view on the suggestion that having a specific offence of dog abduction set out in law will act as a deterrent?**

- Fully agree
- Partially agree
- Neutral (neither support nor oppose)
- Partially disagree
- Fully disagree
- Unsure

**Please explain the reasons for your response.**

Neutral, it is debateable whether the availability and use of stringent penalties does indeed act as a deterrent to convicted or would be dog thieves or indeed other offenders<sup>19</sup>.

The Scottish Sentencing Council's guideline on The Principles and Purposes of Punishment<sup>20</sup> offers a non-exhaustive, unranked list of the purposes of punishment. Deterrence is mentioned in that list as a means of achieving protection of the public but is not listed as one of the Scottish Sentencing Council's stand-alone aims of punishment.

### **Question 6 – What is your view on whether these proposals will help to tackle the fear of the crime of dog abduction?**

- Fully agree
- Partially agree
- Neutral (neither support nor oppose)
- Partially disagree
- Fully disagree
- Unsure

**Please explain the reasons for your response.**

Unsure – We are unsure whether these proposals would assist in tackling the fear of the crime of dog abduction.

<sup>19</sup> Susan Easton and Christine Piper Sentencing and Punishment the Quest for Justice Chapter 4 (3<sup>rd</sup> edition Oxford University Press 2012) and [Five Things About Deterrence | National Institute of Justice \(ojp.gov\)](#)

<sup>20</sup> [guideline-principles-and-purposes-of-sentencing.pdf \(scottishsentencingcouncil.org.uk\)](#)



**Question 7 – What is your view on the proposal to treat incidents of dog abduction, regardless of the number of dogs involved, the function of the dog or their value, under this new offence with its associated penalties?**

- Fully agree
- Partially agree
- Neutral (neither support nor oppose)
- Partially disagree
- Fully disagree
- Unsure

**Please explain the reasons for your response. If there are circumstances where you believe that the offence should be considered as the theft of property under the existing common law offence, please set these out.**

Neutral – We do not believe that a case has been made, at this point, to show that there is a pressing need for a new statutory offence.

The consultation offers no evidence to show that the courts in Scotland currently treat dog thefts purely in terms of the monetary value of the dog. The Scottish Sentencing Council’s Sentencing Process Guideline<sup>21</sup> requires sentencers to consider and assess the seriousness of the offence as the first step in the process. Seriousness is judged against the criteria of culpability and harm. The greater the culpability or harm then the more serious the offence. In assessing culpability, the court will look at issues such as whether the crime was premeditated or planned<sup>22</sup>. In assessing harm, the court will consider the impact on any victim or victims, in this case the dog’s owners<sup>23</sup>. Paragraph 14 of the Sentencing Process Guideline states that harm is to be interpreted broadly and includes offences where harm is caused to an individual or to property<sup>24</sup>. Therefore, in the specific case of crimes where the ‘property’ involved is a live animal, the court may legitimately consider the impact on the dog’s health and wellbeing as well as the distress caused to the owner. Paragraph 16 of the Sentencing Process Guideline also lists some factors which may be relevant to the assessment of harm. They include “in property offences high value including sentimental value of property to the victim or a substantial consequential loss (e.g., where theft of equipment causes serious disruption to a victim’s life or business),” for example where an assistance dog is stolen. We consider that this should avoid any suggestions that the theft of a rescue dog is treated less seriously than the theft of a pedigree because one had low/no monetary value and the other had a high value.

<sup>21</sup> <https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf>

<sup>22</sup> [the-sentencing-process-guideline-d.pdf](https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf) ([scottishsentencingcouncil.org.uk](https://www.scottishsentencingcouncil.org.uk)) at paragraph 10

<sup>23</sup> [the-sentencing-process-guideline-d.pdf](https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf) ([scottishsentencingcouncil.org.uk](https://www.scottishsentencingcouncil.org.uk)) at paragraph 13

<sup>24</sup> [the-sentencing-process-guideline-d.pdf](https://www.scottishsentencingcouncil.org.uk/media/2118/the-sentencing-process-guideline-d.pdf) ([scottishsentencingcouncil.org.uk](https://www.scottishsentencingcouncil.org.uk)) at paragraph 14

Even though there are currently no offence specific sentencing guidelines for theft, and victim statements can be made only in respect of a list of prescribed offences<sup>25</sup>, the court is not precluded from taking into account the evidence of the victim or from thinking other than in terms of simple monetary value.

### **Question 8 – What is your position on the suggestion that the proposals set out in this consultation will help improve the quality of the data collected and recorded regarding incidences of dog abduction?**

- Fully agree
- Partially agree
- Neutral (neither support nor oppose)
- Partially disagree
- Fully disagree
- Unsure

#### **Please explain the reasons for your response.**

Neutral – We believe that further data should be obtained prior to the creation of legislation. The creation of a new offence may improve the quality of the available data on the extent of the crime of dog abduction. However, creating the offence in order to require the collection of data appears to be putting the cart before the horse. It is our view that the current law of theft deals with cases where dogs are deliberately taken from their owner without the owner's consent the intention to deprive them permanently deprive them of their pet, or otherwise deprive them of their animal temporarily or indefinitely.

It should be possible for steps to be taken to improve data collection and recording without also creating an additional criminal offence. If the Police, COPFS and the Scottish Courts and the SCTS can adapt their systems to record that property stolen in theft and robbery cases included a dog, then that should be done independently of creating a new statutory offence of dog abduction.

We note that reference to insufficient data is made throughout the consultation document. We note that the UK Government considered the issue of pet theft in 2021, with a pet theft taskforce being set up in May that year<sup>26</sup>. A report was published in September 2021<sup>27</sup>. That report highlighted the limited availability of reliable data on pet theft. Whilst the report made several recommendations including the creation of a new offence of pet abduction, it is noted that no such legislation has been forthcoming.

<sup>25</sup> [Criminal Justice \(Scotland\) Act 2003 \(legislation.gov.uk\)](#) at section 14 and [The Victim Statements \(Prescribed Offences\) \(Scotland\) Order 2009 \(legislation.gov.uk\)](#)

<sup>26</sup> [Taskforce launched to investigate reported rise in pet thefts - GOV.UK \(www.gov.uk\)](#)

<sup>27</sup> [Pet theft taskforce report - GOV.UK \(www.gov.uk\)](#) – see data limitations

**Question 9 – Any new law can have a financial impact which would affect individuals, businesses, the public sector, or others. What financial impact do you think this proposal could have if it became law?**

- a significant increase in costs
- some increase in costs
- no overall change in costs
- some reduction in costs
- a significant reduction in costs
- skip to next question

**Please explain the reasons for your answer, including who you would expect the financial impact of the proposal, and if there are any ways you think the proposal could be delivered more cost-effectively.**

We have no comment to make.

**Question 10 – Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law?**

**If you do not have a view skip to next question.**

**Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.**

We have no comment to make.

**Question 11 – Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations.**

**Do you think the proposal could impact in any of these areas?**

**If you do not have a view then skip to next question.**

**Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?**

We have no comment to make.



**Question 12 – Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?**

We have no comment to make.

**For further information, please contact:**

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