

WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Wildlife and Natural Environment (Scotland) Bill introduced in the Scottish Parliament on 9 June 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 52-EN.

POLICY OBJECTIVES OF THE BILL

Overview

2. The overarching purpose of the Bill is to deliver a package of measures intended to ensure that the legislation which protects wildlife and regulates the management of the natural environment and natural resources is fit for purpose.

3. In addressing this policy area, the Scottish Government's intention is to:

- maintain the high quality of our natural environment and its biodiversity, which is vital to the economy of Scotland; and
- ensure that wildlife and natural environment legislation is responsive to the needs of economic and social development in Scotland.

4. The Bill modernises outdated statutes and addresses anomalies and weaknesses which have been identified in the current legal framework. The Bill will also enable Ministerial commitments on policy development to be delivered; for example, in relation to the steps to improve snaring practice outlined to the Scottish Parliament by the then Minister for Environment, Michael Russell MSP on 20 February 2008.¹

5. The substantive parts of the Bill relate to the following policy areas:

- **Game**

¹ Official Report 20 February 2008, Col 6077 – Col 6090.

The changes abolish outdated licensing systems and modernise game poaching statute.

- **Areas of Special Protection**

The changes abolish the Areas of Special Protection (ASP) designation.

- **Snares**

The changes implement Ministerial commitments to improve snaring practice.

- **Invasive and non-native species**

The changes are intended to improve the regulation of non-native and invasive species, by strengthening the offence of release of a non-native species, and creates new powers to prohibit the keeping of invasive species, to require notification of invasive species, and to control and eradicate invasive non-native species where required.

- **Species licences**

The changes increase the flexibility in the administration of licences to take, kill and carry out other prohibited activities in relation to protected species. They also allow licences in relation to certain species of plants and animals to be issued for new purposes.

- **Deer**

The changes set out improvements to current deer management structures and address competence in deer stalking.

- **Protection of badgers**

The changes strengthen the legislation which deals with badgers, seeking to make the offences more effective and the licence system more flexible.

- **Muirburn**

The changes are intended to increase the flexibility of how muirburn can be practised, and address a number of issues raised during consultation on the muirburn provision in the Climate Change (Scotland) Bill.

- **Sites of Special Scientific Interest**

The changes are intended to improve the operation of Sites of Specific Scientific Interest (SSSI) legislation.

6. Each policy area is addressed separately in this Policy Memorandum.

CONSULTATION

Public consultation

7. In June 2009 the Scottish Government published a consultation document² to obtain views on potential reform to a number of areas of wildlife and natural environment legislation. This consultation has informed the development of the Bill.

8. The consultation closed on 4 September 2009 and 456 responses were received from both individuals and organisations. An analysis of responses to the consultation document was prepared by Envirocentre Ltd and CAG Consultants and published in February 2010.³

Stakeholder engagement

9. In addition to the public consultation, other steps have been taken to ensure stakeholders have had the opportunity to discuss policy issues with the Scottish Government.

10. A formal Stakeholder Forum was established and met on three occasions at various stages of the Bill's development, prior to introduction in the Scottish Parliament.

11. The Minister for Environment met with stakeholder groups during December 2009 and January 2010 to discuss the prospective Bill with them directly.

12. A Liaison Group consisting of representatives from public bodies (Convention of Scottish Local Authorities, Deer Commission for Scotland, Forestry Commission Scotland, Scottish Environment Protection Agency, Scottish Natural Heritage "SNH") and the Scottish Government was established and met on three occasions. It is intended that the Liaison Group will continue to meet as the Bill progresses.

² Available at <http://www.scotland.gov.uk/Publications/2009/06/17133414/0>

³ Available at <http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/WildNatEnvBill/Analysis>.

13. The Scottish Government will continue to engage with stakeholders while the Bill is in the Scottish Parliament, and after it completes its progress.

Impact of consultation on the Bill

14. The views expressed in response to the consultation document and by stakeholders as part of ongoing dialogue with the Minister for Environment and the Scottish Government have been carefully considered and inform the content of the Bill.

15. The consultation responses reveal that overall the proposals met with a “significant level of agreement.”⁴ However there are some parts of the Bill that elicited strong stakeholder disagreement, notably deer and species licensing. It is clear that in some policy areas the views of consultation respondents are irreconcilably opposed.

16. The analysis of responses to the consultation document noted a number of recurring debates:

- Game as a commodity versus game as wildlife
- Increased regulation versus the status quo/voluntary agreements
- New legislation versus extending the scope of existing legislation
- Centralised versus devolved regulation
- Retaining the existing distribution of powers versus increased Ministerial authority
- List-based versus broad ‘catch all’ approaches for the definition of legal parameters
- Minimising the burden on rural economies versus enhancing the protection of wildlife.

17. Further detail on the consultation relating to each part of the Bill is noted below.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

18. The Bill has no effect on equal opportunities, either positive or negative.

Human Rights

19. The Scottish Government considers the Bill to be compatible with Convention rights.

20. There are a number of provisions in the Bill that engage Convention rights. A number of provisions engage rights under Article 1 Protocol 1 because they regulate how people are able to use their land. However, Article 1 Protocol 1 rights are not absolute, and may be interfered with

⁴ Analysis of Responses to the Consultation on the Wildlife and Natural Environment Bill, Envirocentre Ltd and CAG Consultants, February 2010 page 7.

if this can be justified in the public interest, is proportionate and is in accordance with the law. The Scottish Government considers that the interference is justified, proportionate and in accordance with the law.

21. The Bill will also create and amend a number of criminal offences. These provisions are considered compatible with Convention rights as they will not prevent an accused receiving a fair trial, as required by Article 6.

Island Communities

22. The Bill has no differentiating effect on island communities in comparison to other communities in Scotland. The subject matter of the Bill, covering as it does Scotland's wildlife and natural environment, does not have any particular impact on island communities.

Local Government

23. The Bill does relate to some of the work currently carried out by local authorities. In some cases, such as game licensing, the administrative process will be removed from local authorities. In others, such as in relation to deer, local authorities are obliged to have regard to guidance or advice of SNH. Where local authorities are affected, details are included in this Policy Memorandum.

Sustainable Development

24. The Bill supports sustainable development. In particular it recognises the importance of balancing the economic value of game shooting with conservation interests. The changes introduced by the Bill relating to species licensing may allow developments and projects to go ahead where that has previously not been possible.

GAME LAW

(PART 2 OF THE BILL)

Introduction

25. In common law, wild animals and birds have no owner but can become the property of anyone who catches them. However, every landowner has the right to exclusive use of their own land which includes the right to take those birds and animals which are on it. Over the years that right has become subject to statutory restrictions on the species which may be hunted, the methods which may be used to do that, and the times of the year when this may occur. Statutory rights have also been conferred to allow certain other people (notably occupiers) to take and kill certain species (generally those which can be considered pests) in certain circumstances. A number of 'game' species ('game birds', such as pheasants, partridge and grouse, and 'ground game' which are rabbits and hares) have traditionally been hunted for sport or for food. They usually have a higher commercial value relative to other species of bird and animal. Legislation has developed to reflect this recognition of commercial value, providing in particular for the 'poaching' of these species to be treated as a criminal offence – that is, it is an offence for someone to take or kill game where they do not have the legal right to do so or permission from

the person with that legal right. This part of the Bill does not deal with fish⁵ or deer (except insofar as repealing an element of game licensing which applies to deer)⁶, which are the other elements of game or sport species.

26. Game law is very old, with most of the legislation dating from the 19th Century. It has largely gone unchanged since that time. The archaic language and foundations of the legislation make it difficult to interpret and some provisions are in need of modernisation to bring them into line with modern social and legal norms. The Bill therefore seeks to replace the two main aspects of game statute – the element which deals with licensing (to shoot game and to deal in game) and the element which deals with poaching. Although the modernisation process will result in some changes to the current legal position, the Bill does not seek to change the common law on who has a right to take game in the first place. Nor does it seek to change statutory rights to take game (e.g. the Ground Game Act 1880) or statutory requirements to control certain species as pests (e.g. the Pests Act 1954).

Game licensing

Background

27. Currently, licences are required when (i) a person wishes to take or kill game or (ii) when a person wishes to deal in game.

28. These licensing systems were abolished in England and Wales in 2007.⁷ The Wildlife and Natural Environment Bill which was introduced to the Northern Ireland Assembly at the end of 2009⁸ proposes to abolish the equivalent licensing systems in that jurisdiction. This Bill proposes to abolish the licensing systems in Scotland.

Licence to take/kill game

29. Under the Game Licences Act 1860 (“the 1860 Act”), before anyone (with some statutory exceptions) may take or kill game they must obtain a licence to do so. The original basis for the licence is unclear, but may have been to help combat poaching and/or to limit the sport of shooting game to those who could afford the licence fee. The Scottish Government considers that the licence now represents a bygone age which has become redundant over the passage of time. It does not, for example, perform a conservation role as the licence does not impose any limit on the number of a species which can be taken. The Scottish Government believes that this area of law is suitable for deregulation and that the requirement to obtain this licence can be abolished without any negative effects.

Licences to deal in game and selling game out of season

30. The Game Act 1831 (“the 1831 Act”) and the 1860 Act regulate who can sell game and detail the conditions of being a licensed dealer. The original basis for the licences is again

⁵ The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 deals with similar issues in relation to fish.

⁶ Section 17 of the Deer (Scotland) Act 1996 creates poaching offences in relation to deer. Part 3 of the Bill deals with deer but does not alter poaching offences.

⁷ The Regulatory Reform (Game) Order 2007 S.I. 2007/2007

⁸ NIA Bill 5/09

unclear, but they are assumed to have been seen as a means of deterring poaching and/or to control the basis of game-dealing in general. With the advent of food standards legislation the licensing system is considered to be generally redundant and the Scottish Government believes that this area of law is suitable for deregulation and that the requirements to obtain these licences could be abolished without any negative effects.

31. A related issue is that section 4 of the 1831 Act provides that it is an offence to buy or sell game birds during the close season of the relevant species, and the Hares Preservation Act 1892 restricts the sale of hares for a certain period of the year. These restrictions are understood to have been implemented to ensure that there was no market for meat illegally obtained during the close season of the relevant species (although there is in fact no close season for hares). The restrictions do not apply to (dead) game which has been imported to the UK. Refrigeration options now mean that game which has been killed in Scotland during the open season could now be sold throughout the year. The Bill removes the restriction on selling game at certain times of year but provides that it is an offence to sell game which has been killed outside the open season or which has been poached.

Poaching and Close Seasons

Background

32. At present a number of different statutes create offences and enforcement mechanisms in relation to the unlawful taking of game in Scotland. These do not apply consistent definitions of “game”. In addition some poaching offences apply to birds such as wild ducks, snipe and woodcock, which are not traditionally considered to be “game” species.

33. The Game (Scotland) Act 1772 sets close seasons for “muir fowl” (red grouse), “tarmagan” (ptarmigan), “heath fowl” (black grouse), partridge and pheasant. The Wildlife and Countryside Act 1981 (“the 1981 Act”) sets close seasons for other birds, which are often referred to as “shootable species”. There is no close season for hares but the Hares Preservation Act 1892 restricts their sale at certain times of year. There is no close season for rabbits, which are treated as a pest species under other legislation.⁹

34. There are poaching offences under the Game (Scotland) Act 1772, the Night Poaching Act 1828 and the Game (Scotland) Act 1832. The offences draw distinctions between daytime poaching, night-time poaching, group poaching, armed poaching and poaching in disguise. Most are based on concepts of trespassing on land. The 1828 and 1832 Acts and the Night Poaching Act 1844 give landowners and occupiers powers to question and apprehend suspected poachers and creates related offences, while the Poaching Prevention Act 1862 confers enforcement powers on constables. The Game Laws Amendment (Scotland) Act 1877 makes provision about prosecutions for offences under the various different Game Acts and provides that people cannot be prosecuted more than once under different statutes in respect of the same actions.

⁹ For example section 39 of the Agricultural (Scotland) Act 1948 and the Pests Act 1954.

Modernisation of game law

35. The Bill provides for the modernisation of game poaching offences. It does this by repealing the relevant game acts. It brings game birds (pheasants, partridges, grouse and ptarmigan) within the scope of the existing bird offences in the 1981 Act. It then creates close seasons for these birds and provides that they may be hunted at other times of year by those with a legal right to take or kill them or with permission from a person with the legal right to give such permission. Together, these offences, close seasons and exceptions replace the older offences of poaching game and will mean that anyone who takes or kills these birds without a legal right or permission to do so will commit an offence. The new provisions also cover a number of other bird species, including wild ducks, snipe and woodcock, which were already protected under the 1981 Act but were also covered by poaching offences. The Bill also creates new offences of taking hares and rabbits without the legal right or permission to do so. These operate in the same way as the provisions about game birds and replace existing poaching offences as set out above.

36. The Bill creates a new offence of taking and killing hares during the close season. It sets separate close seasons for brown and common hares. The rationale for these close seasons is to protect hares at times where there is likely to be the greatest welfare concern i.e. when the hares are lactating and have dependant young. Currently the protection of hares is limited to the Hares Preservation Act 1892 which restricts the sale of hares at certain times of year. The Scottish Government considers that this protection, with modern refrigeration options, no longer serves its intended purpose and accordingly this should be replaced with close seasons, in line with other game species.¹⁰ It also allows close seasons for other animal species to be set by order in future.

37. The poaching offences are simplified (by providing for the basic offence of poaching and creating a penalty ceiling which will enable the courts to determine the seriousness of the specific offence committed, instead of reproducing the distinctions between night and daytime poaching, armed poaching and poaching in disguise). The enforcement mechanisms are altered to be consistent with current norms (by providing for standard police enforcement powers under the 1981 Act to apply to poaching offences, and by removing the unique powers which landowners have to apprehend suspected poachers). The Bill maintains the current situation whereby poaching offences can be prosecuted on the basis of single witness evidence.

Alternative approaches

38. There are two main alternatives to the policy adopted in the Bill, to do nothing or to formulate a new single game law statute. The Scottish Government considers the current provisions on game licensing and poaching to be in need of modernisation and therefore that to do nothing would not be a suitable option. There was some support in the consultation responses for consolidating game law into a stand alone statute, however the majority support was to bring the game laws within the 1981 Act, and the Bill takes that approach.

39. The removal of the unique powers currently enjoyed by landowners and their employees (e.g. to apprehend suspected poachers) attracted the greatest degree of opposition of all the game law proposals. However the Scottish Government takes the view that these powers, as currently

¹⁰ As mentioned above, the exception to this is rabbits who are considered pest species in law.

expressed in statute, are exceptional without justification and should indeed be repealed. The Scottish Government was not persuaded by any evidence to justify retention of these powers.

40. The Bill maintains the current situation allowing prosecution on the basis of single witness evidence. This received strong support from stakeholders. Removing this position would fail to recognise the particular issues around enforcement of poaching offences, which makes single witness evidence appropriate.

41. An alternative to the Bill bringing game within the 1981 Act and extending the recognition of the economic value of game to quarry species would be to treat game birds separately. However it is considered that the option chosen provides for the best framework for balancing the clear economic value of game (particularly to rural communities) with ensuring that appropriate mechanisms are in place to support wildlife and the natural environment.

Consultation

42. In addition to the public consultation, meetings with stakeholders in the land management sector were conducted at official and Ministerial level.

43. The analysis of consultation responses commissioned by the Scottish Government provides a breakdown of views about the game law proposals. There was broad agreement amongst stakeholders to the proposals to modernise game law, although there was a clear divergence of approach from landowners and shooters (who viewed game as a valuable commodity/livestock which required active management) and conservation interests (who viewed game as wild birds and animals which should be protected in the same way as other wild creatures). This was reflected in the fact that the substantial majority of respondents supported abolition of the game licensing systems and modernisation of poaching statute, but diverged on whether game species should receive the same protections available to other wild birds (including 'quarry species', which are other 'shootable' birds not classed as 'game') in the 1981 Act.

AREAS OF SPECIAL PROTECTION (ASP)

(PART 2 OF THE BILL)

Introduction

44. There are eight areas of special protection (ASPs) in Scotland, as follows.

Name	Local Authority	Date of Designation
Horse Island	North Ayrshire	1 March 1963
Inchmickery	City of Edinburgh	1 March 1963
Fetlar	Shetland Islands	20 May 1968

Lady Isle	South Ayrshire	24 December 1955
Loch Eye	Highland	1 October 1974
Loch Garten	Highland	23 April 1960
Low Parks	South Lanarkshire	14 March 1958
Possil Marsh	Glasgow City	19 March 1956

45. The ASP was originally provided for in the Protection of Birds Act 1954, when such areas were known as “bird sanctuaries”. They are now designated under the 1981 Act.

46. The purpose of an ASP was to increase the protection afforded to birds beyond that which was already provided in species protection legislation. It also enables Ministers to restrict the public from entering the area, or part of it, during specified periods. Making an ASP does not affect the rights of owners, tenants or others having rights in the area covered by the order, such as rights to take game. It is an offence to fail to comply with a requirement of an ASP.

Repeal of ASP

47. The protective provisions of ASPs are now, with the exception of public access, duplicated by other provisions of the amended 1981 Act. The Land Reform (Scotland) Act 2003 gives everyone statutory access rights to most land if those rights are exercised responsibly. Powers to restrict access are currently available to Access Authorities (with Scottish Ministers’ approval) under section 11 of that Act and through bye-laws.

48. Having reviewed the above list, SNH is satisfied that there is no need for an ASP in any of the current areas, and that the orders in place can be abolished. The Bill will therefore repeal section 3 of the 1981 Act.

Alternative approaches

49. The alternative policy considered was not to repeal the ASP measures. This was not considered appropriate, as the last ASP was created in 1974, and enhanced protections when needed can be secured using the legislative and administrative tools developed in response to the Birds and Habitats Directives.¹¹

50. It is considered therefore that proposals in relation to ASPs will help to modernise and streamline wildlife protection rules, without any adverse effect on wild birds.

¹¹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

Consultation

51. The consultation responses revealed almost 90% support for this proposal. Some respondents made it clear that areas should have the same protection through other means. The Scottish Government believes that other legislation contains sufficient provision to ensure this protection, where the need for it is made out.

SNARING

(PART 2 OF THE BILL)

Introduction

52. Snares are currently used in Scotland in a number of different contexts, chiefly to catch foxes and rabbits. Most commonly they are used as part of population control measures (e.g. to reduce fox predation on other species or to protect crops from rabbits) but they are also used to harvest animals for food and to capture them for research. Snares involve the use of flexible materials to capture and restrain, and in this regard they have similarities to gill nets used for capture of sea fish and mist nets used in the capture of wild birds for ringing.

Background

53. At present, snaring in Scotland is permitted but is subject to restrictions under section 11 of the 1981 Act, as amended by the Nature Conservation (Scotland) Act 2004. The 2004 Act amended the 1981 Act to impose a number of restrictions on the usage of snares, including:

- a new offence of setting in position or otherwise using any snare calculated to cause unnecessary suffering;
- a modified offence of setting in position any snare, trap, electrical device or poison which is likely (rather than calculated) to cause injury to animals listed in Schedule 6 of the 1981 Act;
- a change to the requirement to inspect all snares at least once every day to ensure that no more than 24 hours elapse between any two sequential inspections;
- a new requirement, when carrying out such an inspection, to release or remove any animal caught in the snare whether it is alive or dead; failure to remove an animal is an offence in its own right, but the presence of a dead animal in any snare if it is clear that the animal has been there for more than 24 hours, may also constitute evidence of an offence;
- a new offence of possessing a self-locking snare, without reasonable excuse;
- a new offence of selling, or offering or exposing for sale, any self-locking snare; and
- two new offences of being in possession of a snare on any land, and of setting a snare on any land where the permission of the owner or occupier of that land has not been obtained.

54. The Scottish Executive launched a public ‘Consultation on Snaring in Scotland’ on 27 November 2006 to honour a commitment made during the passage of the 2004 Act. A total of 247 separate representations were received by the closing date for submissions. Of the responses received, 71 were against a ban and 172 supported a complete ban on use of snares, the remaining 4 were in favour of limited snaring within a licensing system.

Following further consultation with interested parties, the then Minister for Environment, Michael Russell MSP, announced that after careful consideration he had concluded that snaring should be retained for use as a land management tool. There remained a clear need for pest control to protect livestock and crops. Other methods of pest control such as shooting and trapping were not effective in certain circumstances. New measures would be introduced to improve the animal welfare aspects of snaring and raise the standards of snare operators in setting and monitoring snares. These measures were largely based on the findings of the Report of the Independent Working Group on Snares.¹² Work has been undertaken by the Partnership for Action against Wildlife Crime Scotland (PAW Scotland) Legislation, Regulation and Guidance Sub-Group to consider the practical implementation of the proposals. Two of these proposals are addressed for the first time in the Bill. Five others are already in force through the Snares (Scotland) Order 2010¹³ but are replaced by the Bill, to bring all requirements in relation to snaring into the 1981 Act itself.

Snare stops and anchors, prohibited locations for setting and inspection requirements

55. The following requirements were set through The Snares (Scotland) Order 2010, which came into force on 11 March 2010, and will be replaced, with minor changes by the Bill. Failure to comply with these requirements will constitute an offence of setting a snare of such a nature or in such a way as to be calculated to cause unnecessary suffering:

- Snares must be fitted with effective stops to prevent nooses from closing too far.
 - Leporid (rabbit/hare) snares should be fitted with a stop 13cm from the running end.
 - fox snares should be fitted with a stop 23cm from the running end.

In practice, stops may be crimped on to the wire of the snare or the wire may be knotted. In all cases the stop should prevent the noose from closing beyond the stop when a force of the relevant breaking strain for the type of snare is applied. The Bill will change the way this measurement is expressed (so that the measurement mentioned above for each target species relates to the circumference of the noose of a snare, rather than the distance between the stop and the running end) but the effect is intended to be the same. In addition, the 13cm minimum circumference will apply to snares intended for all animals other than foxes (rather than just rabbits and brown hares). Anyone who wished to set a snare with a smaller noose would require a licence to do so.

- The action of each snare must be checked at least once every 24 hours to ensure that it is free running.

¹² James Kirkwood et al., 2005

¹³ S.S.I. 2010/8

This is to ensure that the snare is working correctly, in particular that the snare has not become self-locking, which is expected to improve animal welfare. The Snares (Scotland) Order 2010 was not intended to prescribe the nature of the check, but there were some concerns expressed that it might be interpreted as requiring more than a visual inspection and could require a physical check to be carried out every 24 hours.¹⁴ The Bill will replace the Order and the existing inspection requirements in the 1981 Act with a new section which will deal with both types of inspection (for the purposes of seeing whether an animal is caught in the snare and whether the snare is free-running). The Bill will also remove any distinction between inspections and checks. The intention is to ensure consistency and to make it clear that any kind of inspections can be relied on, provided that they are sufficient to allow the person to see whether a snare is free-running and whether an animal is caught in it.

- All snares that are not staked in place must be fixed with an effective anchor.

This is to ensure the operator will be able to locate the snare and quickly release any non-target species. It is also to ensure that captured animals do not suffer by dragging the snare and becoming entangled over fences or other objects.

- Snares must never be set in a place where an animal caught by the snare is likely to become fully or partially suspended or to drown.

The setting of snares on posts, over water courses, on planks or fences will be prohibited as this can cause unnecessary suffering to the target species. Snares set this way could enable entanglement or drowning, e.g. on fences or gates, or on objects spanning watercourses.

56. The Snares (Scotland) Order 2010 was made under the enabling powers in section 11 of the 1981 Act. However, these powers were not sufficient to allow the desired provisions about identification tags and training requirements to be included in the 2010 Order which is why these are being progressed through the Bill. It is also considered beneficial to incorporate all of the changes made by the 2010 Order in the Bill as this will bring together all the relevant legislation on snaring in a single place.

Identification Tags and Training

57. The Scottish Government's objectives in relation to snaring are to:

- improve the welfare of animals caught in snares,
- improve the standard of snaring operators and eliminate bad practice.

¹⁴ Concerns were expressed regarding the physical check because it may make the snare ineffective due to the transfer of human scent.

The Bill introduces new requirements relating to identification tags and training of snare operators to achieve these objectives.

58. The Bill will require all snares to be fitted with identification tags which show an identification number and indicate whether the snare is intended to catch foxes or rabbits/brown hares. The intention is that the identification number will allow the authorities to identify the person who set the snare, but will not allow identification by casual passers-by while the information about target species will make it easier to identify whether the stop has been fitted in the correct place. While each snare must carry a tag, it is not necessary for each snare to be uniquely identified i.e. each snare set by the same snare operator will contain the same identification number. The type of tag is not specified except that the tag and the identification marking should be weatherproof and not capable of being easily removed. The Bill allows further requirements about snare tags to be set by Order. It will be an offence to set a snare that does not carry an identification tag.

59. It will also be an offence for a person to set a snare without having obtained an identification number from the police. The police must be satisfied that the person is trained before issuing an identification number. Together, these provisions will ensure that it is a criminal offence for anyone to set a snare without having undertaken the specified training. The Scottish Ministers will be able to set training requirements by Order and, in practice the function of issuing identification numbers is expected to be carried out by local police force wildlife coordinators.

Alternative approaches

60. The two main policy alternatives of banning snaring or developing a licensing system were considered and rejected prior to a statement made to the Scottish Parliament in February 2008 by the Minister for Environment and the subsequent order. The arguments were that a ban would impose serious difficulties on land managers in their pest control activities, while a licensing system for snaring would impose cost and bureaucracy without providing any more assurance on improving animal welfare than the package of measures announced by the Scottish Government.

61. The consultation on the Bill proposed the introduction of a new offence of tampering with a legally set snare. However, it was decided not to include this in the Bill as the existing offences of vandalism (under section 52 of the Criminal Law (Consolidation) (Scotland) Act 1995) and aggravated trespass (under section 68 of the Criminal Justice and Public Order Act 1994 and which covers acts to obstruct or disrupt lawful activities) already cover the main situations which the new offence was intended to cover.

Consultation

62. In addition to formal consultation, meetings with stakeholders with an interest in snaring were conducted at official and Ministerial level. There was broad support, with caveats, for a snaring training requirements. Animal welfare groups were against the proposals as, in their opinion, this would condone a practice that they believe should be banned on animal welfare grounds.

INVASIVE AND NON-NATIVE SPECIES

(PART 2 OF THE BILL)

Introduction

63. The Scottish Parliament debated invasive non-native species issues at the end of 2008 and passed a motion which requested that the Scottish Government develop proposals to improve the legislative framework concerning non-native species.¹⁵ This part of the Bill delivers those improvements and has been informed by a Scottish Working Group including key policy interests from government, agencies, local government, research institutes, police, and environmental interests.

64. Many non-native species have been introduced deliberately and improve the quality of our lives whether as game, livestock, crops, garden plants or pets. A minority can have serious negative impacts on our environment, health and economy. These species are known as invasive non-native species.

65. As travel, trade, and tourism have increased, humans have facilitated the movement of plants and animals around the world, beyond natural barriers (such as oceans, mountain ranges and deserts). If plants and animals are introduced to areas which have similar environmental conditions to their native range, they have the potential to become established. As plants and animals are often introduced without their usual predators (e.g. pests and diseases) they can have an advantage over native species and may become invasive.

66. Some of the negative impacts on native species caused by invasive non-native species are laid out in table 1:

Table 1

Negative impact	Example in Great Britain
Outcompeting native species e.g. for food, nutrients, light, nest sites etc.	Aquatic plants such as New Zealand pigmyweed (<i>Crassula helmsii</i>) outgrow native species, lower light levels and remove oxygen and nutrients from the water
Preying upon native species	Ruffe (<i>Gymnocephalus cernuus</i>) eats eggs of the native powan (<i>Coregonus lavaretus</i>) in Loch Lomond

¹⁵ Motion S3M-2777, Scottish Parliament Official Report 30 October 2008, Coll. 11849-11985.

This document relates to the Wildlife and Natural Environment (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 9 June 2010

Transmitting disease	Grey squirrels (<i>Sciurus carolinensis</i>) pass on squirrel pox to red squirrels (<i>Sciurus vulgaris</i>)
Hybridising with native species	The native bluebell (<i>Hyacinthoides non-scripta</i>) hybridises with the Spanish (<i>Hyacinthoides hispanica</i>) to create an invasive hybrid bluebell
Suppressing (e.g. by toxins in soil) native species	<i>Rhododendron ponticum</i> produces toxic leaf litter which suppresses regeneration of native species.
Human health impacts, such as: - Respiratory issues - Noxious plants causing burns	The caterpillars of oak processionary moth (<i>Thaumetopoea processionea</i>) have irritating toxic hairs that cause serious irritation to the skin, eyes and bronchial tubes.
Costs to development industry	Japanese knotweed (<i>Fallopia japonica</i>) is required to be removed from development sites.
Fouling of aquaculture equipment and aquaculture beds	Carpet sea squirt (<i>Didemnum vexillum</i>)
Increasing the likelihood of flooding	Floating pennywort (<i>Hydrocotyle ranunculoides</i>)
Decreased fishing opportunities	North American signal crayfish (<i>Pacifastacus leniusculus</i>) eats baits on fishing lines as well as preying on fish eggs.
Problems navigating waterways	Floating pennywort (<i>Hydrocotyle ranunculoides</i>) clogs up waterways in England.

Background

Internationally agreed framework

67. The Scottish Government's approach to invasive non-native species is guided by the internationally recognised 3-stage hierarchical approach.¹⁶ Its key principles are:

- Prevention – preventing the release of all non-native species (both known invasives or otherwise) should be given the highest priority as the most effective and least environmentally damaging intervention.
- Rapid response (eradication) – where prevention fails, early eradication or removal should be the preferred response.
- Control and containment – once a species has become widely established, full-scale eradication is possible or cost effective in only a minority of cases. However, if the invasive non-native species has negative impacts then it may be necessary to mitigate their impacts or control or contain the population.¹⁷

68. The non-native provisions contained in the Bill are designed to deliver this approach in full; the existing legislative framework in Scotland does not do so. It will do this by improving the prevention of release of non-native species, and by ensuring that where they have been introduced into the wild that appropriate control and eradication measures can be taken.

Importance of prevention

69. Preventing non-native animals and plants becoming established is critical to a successful policy on invasive non-native species. This is because we can't predict with certainty what species will become invasive, and because invasive non-native plants and animals often display a lag effect where they can be present for many years before 'taking off' and causing problems. It can therefore be many years before the nature and scale of the threat is known. Many plants and animals already in the wild may still be in their lag phase.

70. Japanese knotweed is a good example of all these issues. It was introduced many years ago, when few people understood how harmful invasive non-native species can be. Its lag phase lasted for almost 100 years, as shown in Figure 1. It would currently be prohibitively expensive to eradicate it nationwide (estimated in 2003 to cost £1.56 billion) as well as practically difficult. It causes severe problems such as river bank erosion and structural damage, and is very expensive to control.

¹⁶ Convention on Biological Diversity: <http://www.cbd.int/invasive/background.shtml>

¹⁷ Some of the "best known" INNS such as grey squirrels, Japanese knotweed and American mink are at this stage of the approach.

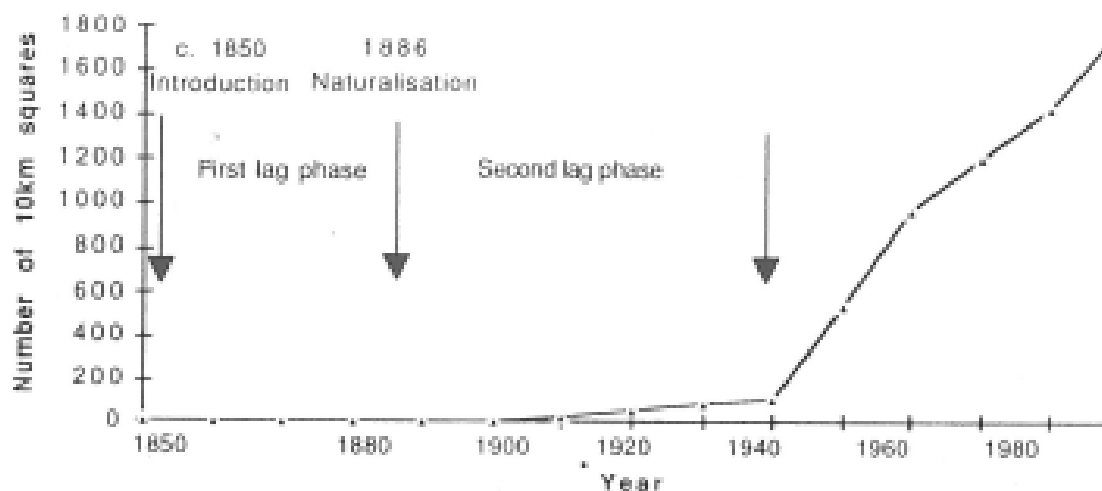


Figure 1: The Lag Phase of Japanese knotweed from, Child, L. and Wade, M. 2000. *The Japanese Knotweed Manual*. Packard Publishing Limited, Chichester.

71. This illustrates why preventing the introduction of non-native species should be given the highest priority, as opposed to waiting until an established plant or animal becomes invasive before instigating expensive control and mitigation measures. This emphasis on prevention is the approach advocated through the Convention on Biological Diversity and promoted through the Non-Native Species Framework Strategy for Great Britain.¹⁸

Prevention – regulating the release, keeping, and notification of invasive non-native species

Release

72. The current legal framework governing the release of species is made up of disparate and overlapping legislation.

73. The central provisions are in section 14 of the 1981 Act. This currently makes it an offence to release, or to allow to escape, animals which are not ordinarily resident in Great Britain, or to release from captivity any animal (native or non-native) listed in Schedule 9 to that Act, or to plant or cause to grow in the wild any plant (native or non-native) which is listed on that Schedule.

74. Some native animals are currently listed on Schedule 9 to the 1981 Act for the purpose of improving conservation or welfare. For example, in some cases uncontrolled release of native animals from captivity could harm their welfare (barn owls were listed in 1992) or a vulnerable wild population (capercaillie were listed in 1981).

75. Other legislation regulates the import, keeping or release of types of animal or plant. For example, the Destructive Imported Animals Act 1932 regulates the import and keeping of

¹⁸ <https://secure.fera.defra.gov.uk/nonnativespecies/index.cfm?sectionid=55>

specified mammals, and the Import of Live Fish (Scotland) Act 1978 regulates the import, keeping and release in Scotland of live fish.

76. The Bill strengthens the current release provisions, and consolidates the law where appropriate.

77. It is not presently an offence to release in Scotland an animal that is ordinarily resident elsewhere in Great Britain. It is not an offence to release an animal native to the south of England, although such an animal may be a non-native (and potentially invasive) in Scotland. It is not an offence to release on the Scottish islands an animal found only on the mainland, although such an animal may be non-native (and potentially invasive) on the island. It is not an offence to release an animal introduced by man, even it is invasive, if the animal has been here long enough to become 'ordinarily resident' (unless that animal is listed on Schedule 9 to the Act).

78. It is possible to ban the release or growing in Scotland of any problem species by using the power in the 1981 Act to change the Schedule 9 list. However, this often results in species being added to the Schedule and prevented from being released only once they are established and invasive.

79. The new offences in the Act will therefore ban the release of an animal or the growing of a plant outwith native range. This 'general no-release approach' is considered to be a much more effective way in which to prevent the release or growing of potentially harmful animals or plants.

80. The changes will also ensure flexibility, so that the release of beneficial non-natives can be permitted (if considered appropriate). The Bill makes it clear that certain non-native game birds can be released in Scotland. Further releases can be permitted where appropriate by order, or by a licence under section 16 of the 1981 Act.

81. This flexibility will also enable the Scottish Ministers to continue to regulate native releases for conservation or welfare purposes. The release of some animals like barn owls and sea eagles is banned so that the releases can be controlled as needed under a licence and the Bill will allow this to continue.

82. The release offences will be supported by a Code of Practice which explains key terms and concepts and provides guidance on relevant activities. This will help the public to understand the nature of the problem and what they should do to prevent harmful releases. The courts will be able to have regard to the guidance in the Code when considering relevant cases.

83. Penalties for non-compliance with a release notice reflect the penalties for the existing release and growing offences.

Keeping invasive animals and plants

84. The Bill provides for Scottish Ministers to list by order invasive animals and plants, keeping of which will be prohibited; which can either be an absolute prohibition, or allowed only under licence.

85. There are currently keeping provisions under various Acts, including for example a 2003 order under the Import of Live Fish (Scotland) Act 1978, and Orders from 1933 and 1937 relating to musk rats and squirrels under the Destructive Imported Animals Act 1932. In addition the Scottish Government has consulted on making orders banning the keeping of Chinese muntjac deer in Scotland, and the keeping of all deer (excluding red deer) on the refugia islands. Ministers will be able to consider what species to include in orders under the provisions in the Bill which amend the 1981 Act.

86. The power to make orders is not expected to be used widely, and is subject to consultation. They might for example be used to ban the keeping of the Chinese mitten crab, which could be released for the purpose of commercial exploitation, but which if released is likely to have a severe impact similar to that of the American signal crayfish.

87. It will be an offence to keep an animal when doing so is banned under an Order, unless a person accused of so doing can show that he or she took reasonable steps and exercised due diligence to avoid committing an offence. Penalties for non-compliance are in line with similar offences in the 1981 Act.

Notification

88. There is a very limited duty to notify certain destructive (i.e. invasive) animals in section 5 of the Destructive Imported Animals Act 1932.

89. The Bill therefore provides for Scottish Ministers to require by order the notification of specified invasive animals and plants. This will ensure that reports of plants and animals that are considered a significant risk to Scotland are reported to the appropriate authority, so that they can be investigated at an early stage, and control or eradication measures considered as necessary.

90. As with the keeping provisions, the notification provisions are not expected to be used widely and will only be used for high-risk *invasive* species.

91. In addition, the intention is that the duty to notify will only be applied to persons who might reasonably be expected to be able to identify the individual species. Table 2 illustrates species for which the notification power might be used, with examples of the kind of persons who might be required to notify the presence of the species.

Table 2

Species	Specified persons for notification
Chinese muntjac deer (<i>Muntiacus reevesi</i>)	Forestry/woodland managers; Professional stalkers; Agricultural and Environmental Officials
Cervus species (deer) excluding red deer (<i>Cervus elaphus</i>) on the refugia islands	Forestry/woodland managers; Professional stalkers; Agricultural and Environmental Officials
Carpet sea squirt (<i>Didemnum vexillum</i>)	Harbour Masters; Port Authorities; Agricultural and Environmental Officials
European and Canadian beavers (outwith trial reintroduction area)	District Salmon Fishery Boards; Water Bailiffs; Fisheries Managers; Agricultural and Environmental Officials
Floating pennywort (<i>Hydrocotyle ranunculoides</i>)	District Salmon Fishery Boards; Water Bailiffs; Fisheries Managers; Agricultural and Environmental Officials
Water primrose (<i>Ludwigia grandiflora</i>)	District Salmon Fishery Boards; Water Bailiffs; Fisheries Managers; Agricultural and Environmental Officials

92. It will be an offence to fail without reasonable excuse to notify the presence of a plant or animal when doing so is required by an order. Penalties for non-compliance are in line with similar offences in the 1981 Act.

Control - new framework to enable control of INNS

93. As noted previously, the current law provides partial controls on the release or growing of certain species and the keeping of certain animals. There are currently no comprehensive powers to control invasive non-native species. Once they become widely established, full-scale eradication is only feasible or cost-effective in a small number of cases. However, there are some situations where control action is very important and can be effective in reducing future impact.

94. If an invasive plant or animal is detected outwith its native range, and it will (or is likely to) cause significant harm to biodiversity, the environment, or social or economic interests, then

it should be possible to take action to prevent it from becoming established, or from spreading further.

95. Another situation where control action should be possible is where there is a broadly agreed strategic plan or programme of action in place (such as an agency-led voluntary catchment-wide eradication programme) and a landowner/occupier within the area is refusing to participate, thus putting the effectiveness of the programme at risk.

96. In both of the situations outlined above, if a voluntary control agreement cannot be reached, the effectiveness of national or regional preventative measures or control and eradication programmes could be compromised, and the long term biological and economic costs could be significant.

97. The Bill therefore introduces a new regime of Species Control Orders. This will enable relevant bodies (Scottish Ministers, SNH, the Scottish Environment Protection Agency and the Forestry Commission Scotland) to make a species control order setting out measures that must be taken to control or eradicate an invasive non-native animal or plant.

98. A species control order may be made where an owner or occupier has not entered into a control agreement, or has not kept such an agreement, or cannot be found. The Bill also sets out the process of making an order, including making an order in an emergency, the giving of notice of an order, the mechanism to appeal against an order, the date of effect, enforcement of an order (including powers of entry), and revocation of an order.

99. It will be an offence to fail to comply with an order, or obstruct the carrying out of an order. Penalties for non-compliance are in line with similar offences in the 1981 Act.

100. The Bill enables the costs of an order to be recovered from the owner or occupier, but does not require recovery. The intention is that costs will be recovered only where it is fair and proportionate to do so, in accordance with the polluter pays principle.

101. The two practical hypothetical examples below illustrate how the power to make an order might be used:

- A population of American bullfrogs is detected in a series of ponds on private land. The landowner has admitted to releasing the bullfrogs but refuses access to their land. This is the only known population of bullfrogs in Scotland. Bullfrogs are known to compete with native amphibians and pass on a disease which is one of the factors resulting in plummeting amphibian populations worldwide. Measures are required to prevent the bullfrogs spreading. As the landowner has refused to enter into a control agreement and has refused access to land, a control order is issued by SNH, which sets out the operations that SNH will undertake and the period over which this will take place. Costs will be recouped from the land-owner on the basis of the polluter pays principle, as the owner has admitted the release.
- A catchment scale eradication programme is underway for *Rhododendron ponticum* in Argyll. A number of landowners/occupiers are identified in the catchment that

have areas of *Rhododendron ponticum* on their land. Forestry Commission Scotland enters into voluntary control agreements with the various landowners and occupiers. One occupier refuses to control the *Rhododendron* as specified in his management agreement. This will leave a reservoir of the species in the catchment area, threatening the success of the whole programme. A control order is issued and the landowner abides by the terms of this order. Costs are not recovered as that is considered disproportionate in the particular circumstances, having regard to the nature of the default, and the fact that the owner did not introduce the species to their land.

Alternative approaches

102. There are a number of alternative options to those set out above. These are presented below.

Release

103. The main alternative to the proposals in the Bill is to maintain the current position. However, as noted above, there are a number of problems with relying on the current provisions. The most important weakness is that many species can in principle be released, and while it is true that their release can be banned by adding them to the Schedule 9 list, that is only a partial solution as species tend to be banned only once they are established in the wild and known to be causing problems. Given that prevention is the most important and most effective response, doing nothing would frustrate policy aims, and would be likely to lead to increased numbers of non-native species becoming established in the wild and having an invasive impact.

104. An alternative would be to keep the mechanism of a prohibited release list (like that currently provided by Schedule 9) but which could be used to list any non-native plant or animal – including those that are not yet established in Great Britain or Scotland. While this would be likely to be able to cover a greater number of plants and animals and be more preventative than the current mechanism, it would still be likely to need regular updating and may not always predict with certainty what is likely to arrive and become invasive. This may result in a similar situation to the present one where species are added to the list only once they are causing a problem. In addition, it would result in a very lengthy and complex list and would not address the problem of species that are native to some parts of Scotland but not others.

Keeping

105. The main alternative to the proposals in the Bill is to maintain the current position. However, the current controls are restrictive in that they cannot be applied to all types of species that might pose a risk. The Scottish Government considers that it is necessary to be able to regulate keeping of all potential high-risk invasive animals and plants and that the present situation does not therefore afford the required level of protection.

106. An alternative option would be to prevent the keeping of all known invasive species. This would require significant numbers of plants and animals which it would be an offence to

keep (unless under licence conditions) to be listed by order. The Scottish Government believes that this would be disproportionate, and would impact on significant numbers of people who for example have invasive plants in places where they present only a very minor risk, such as their garden.

Notification

107. The main alternative to the proposals in the Bill is to maintain the current position. However, being able to act to manage a species before it has established is key to the likely success of any control action. There are some species that are present in other parts of Great Britain, or that are known to present a risk of entry on known pathways, which can be expected to arrive in Scotland. For these high risk invasive species, the Scottish Government considers that the powers of notification for specified persons will complete the package of preventative proposals that will facilitate early effective control. Not having these powers (i.e. doing nothing) will mean that there is less certainty that high-risk species can be successfully controlled before they establish.

108. An alternative option would be to require the notification of all invasive non-native species. These would need to be listed by Order and would be likely to include several hundred plants and animals. The Scottish Government considers that this would be an unreasonable obligation. It would also be time consuming for relevant bodies to receive reports of widely established invasive species and receiving the information would be of limited value unless control action was a realistic possibility.

Control

109. The main alternative to the proposals in the Bill is to maintain the current position. However, the lack of any powers to enable the control of an invasive non-native species is a weakness of the current legislative framework. If the present situation is maintained and no control powers are provided then future control programmes (both national and regional) will have a reduced chance of success and new invasive non-native species are more likely to become well-established, causing long-term harm to both biodiversity and economic interests.

Consultation

110. The proposals for reform of non-native species legislation were developed by the Scottish Working Group on Non-Native Species. In addition to the formal public consultation on proposals conducted by the Scottish Government, meetings with stakeholders with an interest in non-native species issues were conducted at both Ministerial and official level.

111. The analysis of the consultation responses showed that response to the invasive non-native section of the consultation was very positive with over 80% of proposals receiving majority agreement and none receiving majority disagreement.

112. Areas where majority agreement was not reached included concern relating to release proposals, and the fact that these related to non-native species, rather than *invasive* non-native species (the importance of preventing the introduction of non-native species is outlined above).

While respondents agreed with the principle of access to land, there was concern regarding powers to require individuals to carry out control (30.8% in agreement, 38.3% with caveats). Concerns were mainly in relation to the fact that the powers should be used as a last resort once voluntary approaches had failed (the requirement to attempt to enter into a voluntary control agreement fulfils this). There were also concerns relating to the penalising of individuals who were not responsible for the introduction of the species in question (the discretion to recover costs addresses this).

113. 24% disagreed with the proposals relating to cost recovery (50.8% agreeing with caveats and 18.3% agreeing outright). Concerns were primarily that the system should be fair and transparent and that there should be an appeals mechanism. As noted above, it is intended to recover costs in accordance with the polluter pays principle, and the appeals process is set out in the Bill.

SPECIES LICENSING

(PART 2 OF THE BILL)

Introduction

114. The current law gives certain animal and plant species special protections, including making it an offence for protected animal species to be taken, killed or disturbed, or for protected plants to be uprooted.

115. There may however be good reasons for taking action that causes harm to a protected animal or plant. For example, a bird may need to be killed to prevent damage to crops, a plant may need to be uprooted for the purpose of introducing it to another area, an animal may need to be killed to prevent the spread of disease or a bird or animal may need to be marked or otherwise disturbed for research purposes. In general, therefore, a licence can authorise an act that would otherwise be an offence (a 'species licence').

116. Protected species licensing activity in Scotland is carried out under four pieces of legislation: the 1981 Act, the Conservation (Natural Habitats, &c.) Regulations 1994 (which implement the Habitats Directive) ("the 1994 Regulations"), the Protection of Badgers Act 1992 ("the 1992 Act"), and the Conservation of Seals Act 1970 ("the 1970 Act").

117. The Bill makes changes to the 1981 Act as considered here and to the 1992 Act as considered below. The intention would be to amend the 1994 Regulations after the Bill has been passed so as to ensure appropriate consistency with the 1981 Act, as amended. The 1970 Act will be repealed and replaced with a new licensing regime for Scotland when Part 6 of the Marine (Scotland) Act 2010 is brought into force.

Administration of species licensing under the 1981 Act

118. Section 16 of the 1981 Act allows most activities prohibited by that Act to be licensed for certain purposes. Administration of these licences is currently shared between the Scottish Ministers and SNH. In general, SNH is responsible for issuing licences for scientific, research or

educational purposes, and the Scottish Government is responsible for issuing licences for wider public safety or land management purposes.

119. The Bill provides for the Scottish Government to become the Appropriate Authority for all licensing matters within the 1981 Act, with the power to delegate the administration of those licences to SNH by written direction or to local authorities by Order. By becoming the default authority for species licences, with the power to delegate that authority, the Scottish Government will maximise flexibility within the licensing system, so helping to ensure that the most efficient and cost-effective service is delivered. The intention is that only those licences related to development planning would be considered appropriate to delegate to local authorities. Local authorities already consider species licensing as part of their consideration of applications for planning permission therefore if licensing functions were delegated in this way the process should be more efficient and streamlined.

Purposes of species licences

120. The licensing system is currently applied in an inconsistent way to otherwise similar situations. The 1981 Act protects certain species listed in Schedules 5 (animals) and 8 (plants) including red squirrels, pine martens and water voles. At present, there is no listed purpose which permits prohibited activities to be licensed in order to allow development activities.

121. In contrast, the 1994 Regulations protect species protected under EU law such as the otter. They allow a species licence to be granted where doing so is justified by “imperative reasons of over-riding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment”. This enables licences to be issued for development purposes providing the impact on species is proportionate to the activity and not an undue risk to conservation of the species.

122. The Scottish Government considers that there is no good reason why species which are protected by domestic legislation but not under EU law should have a higher degree of protection than species which are protected under EU law. The Bill therefore allows activities affecting the species of animals and plants protected by the 1981 Act to be licensed for social, economic or environmental purposes, provided that this will contribute to a significant social, economic or environmental benefit and there is no other satisfactory solution.

Removal of certain species from Schedule 6

123. The 1994 Regulations prohibit the killing and taking of animals and plants which are listed in Schedules 2 and 4 of the Regulations. These species are protected under the Habitats Directive and are known as European protected species. Some European protected species were originally protected under Schedule 5 to the 1981 Act and Schedule 5 was amended in 2007¹⁹ to remove the duplication.

124. The 1994 Regulations (regulation 41) also protect European protected species and certain other animals (those listed in Schedule 3 to the Regulations) from being taken by certain

¹⁹ See S.S.I 2007/80

methods. Section 11(2) of the 1981 Act provides similar protection to animals listed in Schedule 6 to the Act. Some European protected species and some species listed in Schedule 3 to the 1994 Regulations remain in Schedule 6 to the 1981 Act. There remains therefore some duplication with the protection offered under the 1994 Regulations for these animals.

125. The Bill therefore removes horseshoe bats, typical bats, wildcats, bottle-nosed dolphins, common dolphins, dormice, common otters and harbour (or common) porpoises, all of which are European protected species, from Schedule 6 to the 1981 Act. It also removes pine martens and polecats, which are listed under Schedule 3 of the 1994 Regulations, from Schedule 6. These species will continue to receive the necessary legal protection under the 1994 Regulations.

Alternative approaches

126. In relation to the administration of licensing, the proposed changes already take account of any alternatives. The Bill provisions would enable species licences to be granted by any or all three of the Scottish Ministers, SNH or local authorities.

127. The only alternative to adding a licensable purpose for Schedule 5 and 8 species is not to do so. The lack of this provision is already thought to have limited otherwise beneficial projects.

128. Retaining the current list of species in Schedule 6 would mean that some species remained protected under two overlapping pieces of legislation. The two pieces of legislation are very similar, in that they regulate broadly the same activities and are intended for the same purpose (wildlife protection) but they are not identical. The differences arise because one (the 1994 Regulations) is required to implement European legislation (the Habitats Directive) while the other was developed as a purely domestic wildlife protection regime. Applying both regimes to one species lacks legal clarity and could cause confusion for those dealing with that species.

Consultation

129. In the public consultation the transfer of all licensing administration to SNH was broadly supported although a number of respondents supported the idea that licensing should remain either shared or be dealt with by the Scottish Government. The proposal that local authorities should have a role in the licensing procedure was almost unanimously rejected, however this may have been partly due to uncertainty about the licensing process and what roles the various authorities already have, that is local authorities currently must consider species licensing in their role as planning authority. In recognition of this the Bill contains a requirement that a local authority with delegated licensing functions must consult SNH.

130. The addition of a licensable purpose to allow development or other similar works which would be of significant social or economic benefit was strongly supported as long as levels of protection were still maintained within the licensing system.

131. The removal of European protected species and other species protected under the 1994 Regulations from Schedule 6 was fully supported as there would be no effect on the level of protection of those species.

DEER

(PART 3 OF THE BILL)

Introduction

132. Deer are an iconic species for Scotland, bringing significant benefits in terms of tourism, sport and food. They also have the potential to impact adversely on natural habitats, public safety and the economic value of woodlands and agricultural crops. With no natural predators in Scotland, wild deer populations will tend to increase in numbers and range. Deer therefore need to be managed because of their interaction with other land-use and management objectives.

133. Consultation on the proposed merger of SNH and Deer Commission for Scotland (DCS)²⁰ revealed a broad consensus that key elements of the Deer (Scotland) Act 1996 (“the 1996 Act”) (which is based largely on its predecessor the Deer (Scotland) Act 1959) were out of date and in need of reform.

134. In 2008, the then Minister for Environment, Michael Russell, asked DCS to review the 1996 Act and to make recommendations to improve the management of wild deer across Scotland. DCS identified a number of deficiencies in the 1996 Act and made recommendations for improved mechanisms for: tackling the impacts which deer can have on important features of the natural environment; delivering and support local deer management; and improving deer welfare and delivery of other public benefits. The Scottish Government consulted on these proposals and they form the basis of this part of the Bill.

135. The Scottish Government’s objectives in relation to deer management are to:

- modernise the legislative framework for managing deer;
- develop a system that delivers public benefits in environmental management as well as sustainable recreational stalking and venison industries;
- put in place arrangements to deal with urban deer; and
- ensure the highest standards of deer welfare.

Deer management structures

136. Wild deer are like other wild animals and birds in that they are not owned but landowners have certain rights in relation to them. These arise as part of the landowner’s general right to exclusive use and enjoyment of their own land and they include the right to take wild animals which are on the land. Over the years that right has become subject to statutory restrictions about the methods which may be used to hunt deer and the times of the year when this may occur. Statutory rights have also been conferred to allow certain other people (including

²⁰ DCS and SNH are scheduled to merge in 2010. SNH will inherit DCS’ functions under the 1996 Act by virtue of section 1 of the Public Services Reform (Scotland) Act 2010 (asp 8).

occupiers, who are not necessarily landowners) to take and kill deer in certain circumstances.²¹ Apart from restrictions on when deer may be taken or killed, and the means by which that may be done, few other obligations are placed on landowners about how wild deer should be managed.

137. In practice, the principal mechanism for the joint management of red deer in the uplands of Scotland is the Deer Management Group (DMG). DMGs have tended not to develop in the lowlands.

138. The DMGs are non-statutory and are a voluntary mechanism by which local land managers come together to manage deer (which frequently range across land ownership boundaries) in specific geographic areas. Whilst these arrangements have proved to be effective in situations where land managers have a common objective, they are of limited value where objectives differ and are considered not to have delivered the optimal public benefit.

139. The Scottish Government believes that wild deer management will continue to be best delivered on a non-statutory basis. However, better guidance and support is required for land managers to ensure that deer management is proactive, efficient and effective, and that the backstop powers for when voluntary mechanisms fail are credible and effective. The Bill therefore includes what the Scottish Government considers to be a number of improvements to the deer management structure in the 1996 Act:

- *Statutory code of practice to support deer management* – To ensure that all relevant landowners engage with their role in managing deer on their land in a suitable (and, where appropriate, collaborative) manner, a new duty will be placed on SNH to develop and monitor implementation of a statutory Code of Practice. This code will set out responsible deer management practice in a range of settings and will set out the practical steps which can be taken by landowners to deliver it. The code is not binding, but SNH will monitor compliance with the code and take this into account when assessing whether to exercise its statutory intervention powers to ensure delivery of effective deer management.
- *Urban deer management* – Deer numbers in the urban and peri-urban (between the suburbs and the countryside) environment are increasing. Their presence in these environments presents unique management issues and they can be a significant contributory factor in road traffic accidents. The new statutory Code of Practice will set out expectations for how deer should be managed in the urban and peri-urban environment. In addition, the Bill will amend SNH deer management functions under the 1996 Act to make clear that it should seek to further urban deer management across Scotland. Additionally, in light of their significant interests in urban land management, the Bill will place a duty on public authorities to have regard to advice issued by SNH on deer management to ensure that they take the necessary steps to manage deer on their land in an appropriate manner. This duty to have regard to advice of SNH could include the Code of Practice.
- *Amended powers of statutory intervention to ensure delivery of effective deer management* – Currently, DCS may intervene to ensure effective deer management

²¹ Section 29 of the Deer (Scotland) Act 1996

through control agreements (voluntary measures, agreed under section 7 of the 1996 Act) and control schemes (compulsory measures, specified under section 8 of the 1996 Act). These powers may be exercised by DCS in situations where deer are causing damage to forestry, agriculture, the natural heritage or where they have become a danger to public safety. There is strong stakeholder support for improving these backstop measures to make them more credible and effective, and the Bill makes a number of amendments to how they operate for those purposes. In particular, SNH must have regard to the Code of Practice when considering how to use its powers. The triggers for control agreements and control schemes will also be aligned so that in cases where the triggers are met to allow SNH to seek a control agreement but either no agreement can be reached or an agreement is reached but not implemented, those triggers can be relied on by SNH as a basis for seeking a control scheme. The Bill also provides for time limits for actions to be taken by landowners to be embedded into control agreements and schemes.

- *Support for collaborative deer management* – The role of SNH in providing advice to third parties will be enhanced by amending section 3 of the 1996 Act to provide a power to assist any person or organisation in reaching agreement with a third party. This could be used to assist people (including DMGs) in reaching purely voluntary deer management agreements, without having recourse to more formal deer control agreements and control schemes. Furthermore, the limit of nine on the number of members of a deer panel, appointed under section 4 of the 1996 Act to provide DCS with advice on deer management issues, is removed in order to provide the maximum flexibility for the operation of such panels.

Competence requirement in deer stalking

140. The consultation proposed a mandatory competence requirement for those who wish to shoot deer unsupervised, or supervise the shooting of deer. However, Ministers have recognised the strength of feeling against this proposal expressed by stakeholders in consultation responses and meetings. Furthermore, several representative organisations within the deer and game sector expressed their doubts about the proposal, and offered to work with Government to secure high standards in deer stalking and to support the provision of voluntary training.

141. The Scottish Government believes that voluntary arrangements will work best, if they can be made to work. They therefore intend to give the industry a fair chance to self-regulate and work with them to develop a voluntary framework. The Bill will enable the Scottish Ministers to introduce a competence requirement by Order at any time in the future, should that be needed. If the Scottish Ministers have not used this power by 1 April 2014, SNH will conduct a review of standards of competence amongst those who shoot deer.

142. If the competence requirement was introduced, the current policy is that this would require stalkers to demonstrate skills in and knowledge of deer stalking, and to ensure their names were listed on a register of fit and competent persons to be maintained by SNH. The objective would be to ensure deer welfare and public confidence. A system of recognition for foreign hunting qualifications, held by visitors to Scotland wishing to stalk deer, would also be developed.

143. Linked to the competence register, the original proposal would have removed the obligation on owners and occupiers to submit cull returns to DCS/SNH and passed this requirement on to those on the competence register, in respect of deer they shot or supervised in shooting. This provision is also included in the enabling power described above and could be implemented if the power was exercised.

Occupier exemptions

144. The Scottish Government has decided to proceed with a modified version of the proposal to remove the automatic exemption under section 26 of the 1996 Act which allows occupiers to shoot deer during close seasons for the purpose of protecting crops, pasture or enclosed woodland, without authorisation.

145. The Bill will replace the automatic exemption with a responsive authorisation system under section 5 of the 1996 Act. It will do so by amending sections 5 and 37 to allow SNH to issue general authorisations to shoot in the close season without carrying out a separate assessment of whether individual applicants are “fit and competent” to be so authorised. The intention is to issue a general authorisation to allow occupiers to shoot during close seasons for certain purposes (protecting crops, pasture or enclosed woodland), provided that they comply with certain conditions. Conditions are likely to include requirements to provide certain information to SNH (e.g. contact details and cull returns) and restrictions on the deer which can be shot (so the authorisation would not cover female deer at times of greatest welfare concern i.e. when they have dependant young).

Alternative approaches

146. The two main alternatives to the proposals set out in this section are either to maintain the status quo, or to institute a Scotland-wide statutory deer management system.

147. The Scottish Government believes that the 1996 Act is in need of modernisation if effective management of wild deer across Scotland is to be achieved. The range of factors which need to be taken into account in deer management, and the range of relevant land-managers involved, has grown since the 1996 Act was put in place. The deer sector comprises a complex and diverse range of interests with differing and often opposing management objectives. Without the reforms proposed in this part of the Bill, there is a strong risk that the legislative framework will be unable to reconcile those diverse interests and effective management of wild deer will be frustrated.

148. The Scottish Government considers that the creation of a Scotland-wide network of statutory deer management groups would be disproportionate. Significant new funding would be required to establish and maintain a statutory framework and would potentially involve a fundamental shift in day to day control of deer management from private landowners to public bodies. Where they have worked, voluntary deer management structures have proved to be efficient and effective and the Scottish Government considers that the most appropriate way forward is to provide better support and assistance for these voluntary mechanisms.

149. The alternatives to the enabling power to introduce competence registration requirements were to maintain the current position or to implement a mandatory competence regime within the Bill. Ministers are mindful of the advice from DCS of evidence of some poor performance in deer stalking. However, Ministers are also keen to avoid a regulatory and bureaucratic burden on the rural economy if this can reasonably and responsibly be avoided. The Scottish Government considers that the compromise solution of including an enabling power in the Bill therefore represents the best approach.

150. Other proposals are not being pursued, either because reasonable concerns were expressed in the consultation, or because they were linked to the introduction of the competence register. The proposed change to authorising night shooting (to authorise deer stalkers through the competence register rather than occupiers of particular land) will not be introduced but if a competence register is introduced as a later date, the enabling power will allow Ministers to provide that people registered as competent will automatically be considered “fit and competent” for the purpose of a night shooting authorisation. The proposed changes to controls on driving deer with vehicles will not be introduced due to concerns expressed in the responses to the consultation about formulating a workable offence. Changes to the legislation requiring Ministers to set a female close season and enabling Ministers to set a male close season are not being taken forward in the Bill, in recognition of the views expressed in the consultation responses.

Consultation

151. In developing its proposals for reform of the 1996 Act, DCS consulted a wide range of stakeholders. Meetings with stakeholders in the deer management sector were conducted at official and Ministerial level.

152. The analysis of consultation responses commissioned by the Scottish Government provides a breakdown of views about the deer management proposals. Out of all the deer proposals in the consultation document, those which related to deer management structures generated the highest levels of support amongst respondents. Almost all (96%) of respondents supported the maintenance of a default voluntary deer management system, although five (50%) of the conservation organisations which commented on this section advocated moving to a statutory deer management system. Many respondents recognised that some sort of enforcement mechanism was needed as a backstop where the voluntary approach broke down.

153. The responses on the proposed competence requirement were split fairly evenly with only a small majority disagreeing with the proposed offence of shooting deer without being registered as competent. The deer and game sector was keen to promote competence but on a voluntary basis. On the related question of cull returns, a very large majority of respondents expressed concern about the proposed change, with 73% of unique responses (and 83% of those responses including statements in support of a representative body) opposing the change. The Scottish Government has also taken note of the strength of feeling over the proposed changes to the legislation regarding the setting of close seasons for female and male deer and for the proposal for setting a local male season. Respondents overwhelmingly opposed these changes and therefore this is not included in the Bill.

BADGERS

(PART 4 OF THE BILL)

Introduction

154. Badgers are a common species in Scotland and can be found in any type of habitat including woodland, urban and agricultural settings. Because of their adaptability to survive in these varied habitats, badgers are susceptible to a range of offences including badger baiting and destruction of setts.

155. The protection of badgers from unlawful persecution, exploitation and disturbance is covered by the 1992 Act. The Scottish Government considers that the 1992 Act provides an effective legislative framework for the protection of badgers, however there are anomalies which this Bill provides the opportunity to address.

Knowingly causing or permitting an unlawful act

156. Sections 1 to 5 of the 1992 Act contain five types of offences in relation to badgers. These are taking, injuring or killing badgers, cruelty, interfering with badger setts, selling and possession of live badgers, and marking and ringing.

157. Section 3 (interference with badger setts) was amended by the 2004 Act to specify that an offence was committed where a person undertook the activity directly or knowingly caused or permitted the act to be done. The Bill extends sections 1, 2, 4 and 5 of the 1992 Act so that it is an offence for a person to knowingly cause or permit any of the offences to which those sections relate. The offence of knowingly causing or permitting does not, however, apply to the offence of refusing to leave land or refusing to give personal details under section 1(5) of the 1992 Act.

Administration of species licensing under the 1992 Act

158. Section 10 of the 1992 Act allows a number of prohibited activities in relation to badgers to be licensed for certain purposes. As with licences under the 1981 Act, administration of these licences is currently shared between the Scottish Ministers and SNH. The Bill provides for the Scottish Ministers to become the licensing authority for all licences under the 1992 Act, with the power to delegate the administration of those licences to SNH by written direction or to local authorities by Order. This is consistent with the changes in relation to species licensing under the 1981 Act, as set out in Part 2 of the Bill and will ensure that species licensing for badgers is consistent with other species licensing.

Penalties

159. The penalties which apply to offences in relation to badgers are contained in section 12 of the 1992 Act. The Scottish Government considers that it is an anomaly that the maximum penalty for killing a badger (which can be dealt with only on summary procedure) is less than that for other offences, such as digging for a badger (which can be dealt with by summary procedure or on indictment).

160. The Bill amends the 1992 Act so that the offences committed under sections 1(1) and (3) of that Act, relating to the taking, injuring or killing of badgers and the possession of dead badgers, are included within the category of offences that may be tried by summary procedure or indictment. This will result in the law properly reflecting the serious nature of these offences.

Alternative Approaches

161. The main alternative to the Bill is to do nothing. However the Scottish Government considers the Bill presents an opportunity to address known anomalies in the protection of badgers.

Consultation

162. The consultation responses revealed that responses were positive towards the proposed amendments to strengthen the existing legislation, although some of the land management groups were concerned as to how this would affect badger population control if required to prevent the spread of bovine TB.²²

MUIRBURN

(PART 4 OF THE BILL)

Introduction

163. Muirburn is the act of burning vegetation (such as heather, gorse and grass) on open semi-natural habitats, including heath and moor. It is practised throughout the Scottish uplands as a tool to facilitate habitat management for economically important species, including red grouse and livestock. It is thought to play a role in managing the risk of wildfires by preventing the build up of older vegetation which can act as a source of fuel. More recently, prescribed burning has been used to manage habitats for conservation objectives and there is interest in exploring the role of muirburn in pest and disease control.

164. Muirburn is regulated under sections 23 to 27 of the Hill Farming Act 1946 (“the 1946 Act”), as amended by the Climate Change (Scotland) Act 2009 (“the 2009 Act”). Under the 1946 Act, muirburn is only permitted within the defined season (1 October until 15 April). It is possible to extend this season, with the landowner’s permission, until 30 April at altitudes below 450m and until 15 May at altitudes above 450m. The 2009 Act allows Scottish Ministers to vary the permitted muirburn dates where necessary or expedient in relation to climate change. Regulation in legislation is complemented by best practice guidance in the Muirburn Code, which is included in the cross compliance obligations for recipients of the Single Farm Payment²³.

165. Consultation on the proposed muirburn provision in the 2009 Act suggested that muirburn legislation needed to be reviewed to reflect changes in the objectives and practice of

²² On 8 September 2009, Scotland became officially tuberculosis free, as recognised by [Commission Decision 2009/761](#).

²³ See the Common Agricultural Policy Schemes (Cross-Compliance) (Scotland) Regulations 2004 (S.S.I. 2004/518) and Article 5 of Council Regulation (EC) No 1782/2003 for cross compliance requirements.

prescribed burning since the 1946 Act was introduced. Suggestions focused on support for introducing further flexibility in the regulation of muirburn dates, as well as other changes to muirburn legislation outwith the scope of the 2009 Act. Views were sought on these proposed changes in the Bill consultation.

166. The Scottish Government wishes to facilitate well-managed muirburn, to ensure adverse environmental impacts are avoided, and to allow prescribed burning to be used for new beneficial purposes. The current regulation of muirburn under the 1946 Act is too restrictive to allow these objectives to be met effectively.

167. The Bill therefore proposes a number of improvements to the 1946 Act.

Variation of the muirburn season

168. Ministers may currently vary the dates of the muirburn season only where necessary or expedient in relation to climate change, but there is broad support for allowing variation of the season for other purposes. The following additional purposes are included in the Bill: conserving, restoring, enhancing and managing the natural environment, and public safety. It also proposes allowing variation of the season on a geographical basis, to reflect variation in conditions over Scotland, and on a phased basis, to allow a gradual change of permitted dates over a number of years. Ministers will not be able to reduce the number of available burning days when exercising this power.

Removing the May extension to the muirburn season

169. Currently, muirburn is permitted between 1 October and 15 April. This period may be extended, with the landowner's permission, until 30 April on lands below 450m, and until 15 May on lands above 450m. Evidence suggests that many moorland bird species have started nesting by 15 May and that nesting attempts may be disrupted by burning at this time. It is therefore proposed that the last date to which the muirburn season may be extended (with landowner's permission) will be 30 April, regardless of altitude. This will help to minimise impacts on nesting birds and also simplify the permitted muirburn dates by removing altitudinal variation.

Licensing out of season muirburn

170. This would allow licensed out of season burning to be used for new beneficial purposes, such as habitat restoration or recovery from heather beetle infestation, where the optimum times for burning are outwith the muirburn season. It would also allow research into the impacts of burning at different times of year, to improve understanding of wildfire behaviour and explore new potential uses for muirburn (such as pest and disease control).

Neighbour notification requirements

171. Under the 1946 Act, it is an offence to make muirburn without providing written notice of the date, location and approximate extent of the burn to neighbouring proprietors at least 24

hours before burning. This does not allow practitioners the flexibility to respond to changeable weather conditions. However, the proposal to remove the legal notification requirement received mixed views in the consultation. The Bill therefore proposes a more flexible notification requirement, where practitioners must notify the proprietor of the land, and the occupiers of land within 1km of where muirburn is planned, of their intention to burn during a muirburn season. They are only required to provide further details of the dates, place and extent of burns where requested by neighbours. Where there are ten or more neighbouring occupiers to notify, notification may alternatively be made by placing a notice in a local newspaper. Neighbours also have the opportunity to opt out of being notified of the intention to burn, avoiding unnecessary notifications.

Alternative approaches

172. The two main alternatives to the proposals set out in this section are either to maintain the status quo, or to change the dates of the muirburn season under primary legislation.

173. Allowing muirburn only within a rigidly-defined burning season which may not be varied (unless a clear link with climate change can be demonstrated) could result in a number of risks.

174. Firstly, practitioners report that a shortage of suitable burning days within the current muirburn season is constraining good practice and making it difficult to carry out sufficient muirburn. This may result in an increased risk of wildfire, if practitioners are forced to burn in less suitable conditions, and less managed habitats of lower quality for livestock, grouse and other wildlife. Constraints on the number of burning days also increase the pressure on practitioners to burn in the spring, when there may be risks to nesting birds. For these reasons, it may be beneficial to extend the muirburn season into September to increase the window of opportunity for burning. The current lack of provision for licensing out of season muirburn also prevents its use for new beneficial purposes, such as habitat restoration, where the optimum time for burning is outwith the muirburn season. Evidence suggests that maintaining the ability to burn until 15 May (above 450m) is likely to disrupt the nesting attempts of many moorland bird species. Finally, the current neighbour notification requirement is impractical and compromises flexibility.

175. Some stakeholders expressed the view that the muirburn season should be extended into September in primary legislation. However, the Scottish Government considers that further evidence of the environmental impacts of September burning (e.g. on the risk of peat fires, or on species not normally exposed to burning at this time) will be required before varying the season in this way. It may be necessary to carry out research, through licensed burning in September, in order to assess these impacts. Allowing variation under secondary legislation also allows for greater flexibility in the dates of the muirburn season, allowing the dates to be altered in response to future evidence or changes.

Consultation

176. In addition to the formal public consultation on proposals for the Bill, meetings with stakeholders with an interest in muirburn (including members of the Moorland Forum's Muirburn Group) were conducted at official and Ministerial level.

177. The analysis of consultation responses commissioned by the Scottish Government provides a breakdown of views about the muirburn proposals. There was broad support for allowing Scottish Ministers to vary the dates of the muirburn season for reasons other than adaptation to climate change (including on a geographical basis), and introducing a system of out of season licensing for muirburn. Views on the proposal to remove the May extension to the muirburn season were mixed, with a narrow majority in support of the proposal. Views on the proposal to remove the legal neighbour notification requirement were also mixed, with an equal proportion of respondents agreeing, agreeing-with-caveat and disagreeing with the proposal. The Bill therefore proposes to retain a more flexible notification requirement.

SITES OF SPECIAL SCIENTIFIC INTEREST (SSSI)

(PART 5 OF THE BILL)

Introduction

178. Sites of Special Scientific Interest (SSSIs) are the main statutory nature conservation designation in Scotland (and in Great Britain). SSSIs are areas of land or water which, in the opinion of SNH, are of special interest by reason of their flora or fauna or geological or geomorphologic features.

179. The SSSI designation was originally created by the National Parks and Access to the Countryside Act 1949, and amended by the 1981 Act. The 1981 Act gave sites greater legal protection and allowed the payment of compensation to landowners/occupiers. Notably, it also ensured the involvement of landowners/occupiers in the management of the site. The Nature Conservation (Scotland) Act 2004 made important changes to legislation governing the notification, management and protection of SSSIs. The 2004 Act addressed many of the recognised shortcomings of the 1981 Act and reflected Government policy to promote care for Scotland's biodiversity. SSSIs notified under the 1981 Act continue under the 2004 Act. The following considerations do not apply to the 13 SSSIs that remain notified only under the 1949 Act.

180. Criteria for the selection of SSSIs are published on the Joint Nature Conservation Committee's website. At the current time, there are 1,442 (2004 Act) SSSIs, covering 1,033,056 ha (approximately 13% of Scotland). These affect approximately 7,500 owners and occupiers, the majority of whom are private landowners (some sites are publicly owned). When SNH wishes to designate land as SSSI, it must notify a range of interested parties. These include:

- owners and occupiers
- Scottish Ministers
- the relevant local, National Park, regulatory and planning authorities
- relevant community councils and statutory undertakers
- any community body having expressed an interest in the land under the Land Reform (Scotland) Act 2003

181. The notification comprises a description of the natural features to be protected, a map showing the boundary of the designated land and a list of those operations requiring consent from SNH or a regulatory authority.

182. The main changes introduced by the 2004 Act in relation to SSSIs related to the following: statutory purpose and wider consultation, site management statements, improved protection, Nature Conservation Orders (NCOs), reduced regulation, compensation, better dispute resolution, Land Management Orders (LMOs), duties of public bodies, consent mechanisms for operations on a SSSI, better enforcement and more realistic penalties.

Combining SSSIs

183. There are instances where two or more SSSI notifications apply to the same land or are adjacent to each other. In such instances, there are also two or more different lists of operations requiring consent relating to the same land. This can be confusing for owner/occupiers and increases the risk of (inadvertent) non-compliance and possible damage to protected natural features. There are also costs associated with the maintenance and listing of each SSSI notification in corporate databases, the SSSI register, periodic statutory documentation review and maintenance of boundary maps.

184. It would therefore be expedient to provide a means by which the boundaries (and associated administrative burdens) associated with such sites may be rationalised in a manner which is not disproportionate. Existing statute does not allow this.

185. The Bill will allow SNH to combine 2 or more SSSIs into a single SSSI such that the original SSSI notifications cease to have effect. SNH must notify the interested parties and also give public notice of the new combined site in such other manner as it thinks fit (e.g. on the internet). This provision will not enable the notification of any land as a SSSI which was not already notified, or allow SNH to add anything to the list of operations requiring consent which was not already on one of the component SSSI lists of operations requiring consent.

De-notification of SSSIs in Certain Circumstances

186. The Bill has provision to streamline the procedure for the de-notification of SSSIs by SNH in certain circumstances. Those circumstances are when all or any part of an SSSI is no longer of special interest due to damage to, or destruction of, a natural feature as a consequence of authorised relevant development, (on the basis that consultation with the interested parties and SNH will already have taken place under procedure associated with the consideration of the development at the application stage). In such circumstances, SNH will be able to de-notify all or part of a SSSI without having to execute the procedure provided in Schedule 1 to the 2004 Act.

Third party operations on SSSIs permitted by public bodies

187. Section 16 of the 2004 Act requires non-public body owners and occupiers to apply for consent before they “carry out, or cause or permit to be carried out” certain operations. Such activities could be, for example, mass participation or motorised events or other recreational

activities (beyond responsible access rights). However, section 13 of the 2004 Act only requires public bodies to apply for consent from SNH before they carry out certain operations and does not require them to obtain consent from SNH for the “causing or permitting” of such operations.

188. Consequently, the statute doesn't deal with the position where a public body SSSI owner or occupier is requested to give permission to a third party for an operation likely to damage the protected natural features of the SSSI. The Bill will therefore align more closely the provisions for public bodies causing or permitting a damaging operation, with those for other owners and occupiers.

Additional exemptions from the need for SSSI consent

189. A fundamental aim of the 2004 Act was to streamline procedures and reduce the bureaucratic and regulatory burden on owners and occupiers of SSSIs. One of the key provisions for owners and occupiers other than public bodies was the listing in section 17(1)(a) to (e) of those situations in which consent from SNH was not required.

190. The Bill makes provision for the extension of the list of situations in which SNH consent is not required in order to streamline the control regime for operations on SSSIs where this can be achieved without diminishing the protection afforded to such sites. It is intended that the power be used to specify operations authorised by an existing process when that process allows sufficient input by SNH such that it can be satisfied that the operations are acceptable without the need for a separate formal consent. The nature of the provision is such as to provide flexibility for a possible range of situations where separate SNH consent is not required (an example at the present time is the granting of contracts under the Rural Priorities scheme) and also to provide flexibility to accommodate operations which might be carried out under regimes created by future legislation (and also account for regimes which may not continue indefinitely). The intended result is a reduction in the burden on SSSI owners and occupiers and SNH and achieve better integration of Government regulatory services.

191. The Bill will also extend the list of exempted operations to include deer control operations being carried out in accordance with a control scheme under section 8 of the 1996 Act.

192. Compliance with a restoration notice is also added to the list of exemptions from the need for SSSI consent. This is analogous to the current provision whereby compliance with a Land Management Order is exempt (section 17(1)(e)).

Restoration notices

193. Where there has been illegal (i.e. unconsented, reckless or intentional) damage to the natural features of an SSSI, it is a priority for SNH to secure the restoration of the natural features, as far as is possible.

194. Currently, there are two options available:

- i) seeking voluntary restoration by the offender (responsible party); or
- ii) by way of a restoration order made by the courts under section 40 of the 2004 Act (should a person be convicted of an offence).

195. Securing a restoration order requires successful investigation and prosecution, and for a Court to decide that a restoration order is an appropriate part of the sentence. This process is likely to be protracted and costly with no certainty of outcome.

196. Provisions for a “middle” option are therefore included in the Bill to provide a more compelling legal requirement for reparations to be made following illegal damage on a SSSI (with prosecution being avoided). Similar statutory notice arrangements are already provided in other statutes in relation to

- Forestry Commissioners in the Forestry Act 1967 (sections 17A and 24) and the Environmental Impact Assessment (Forestry) (Scotland) Regulations 1999 (reg 20);
- Scottish Ministers in the Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006 (regs 25, 27);
- Scottish Environment Protection Agency in the Water Environment (Controlled Activity) Regulations 2005 (reg 28);
- DCS in the 1996 Act (section 8);
- local planning authorities in Town and Country Planning legislation.

197. The Bill will amend the 2004 Act to include provision for SNH to issue restoration notices requiring the responsible party to restore the damaged natural features (if that person accepts the notice). Prosecution could only follow if a person who has accepted a restoration notice fails to comply with it.

198. A restoration notice is a written notice which would be issued by SNH to the owner or occupier of land or to a public body having exercised its function in relation to land notified as an SSSI. The notice would require the person to take steps to restore the damaged natural features of an SSSI caused by non-compliance with the requirements of the 2004 Act, so that the position is restored as far as possible to what it would have been if no damage had occurred. The degree to which this can be achieved will depend on the circumstances of each case.

Procedure

199. A restoration notice will specify:

- the damaged natural feature(s) to be restored
- the actions required to bring about restoration
- a time limit for completion of the works
- the person to whom the Notice applies

200. The person on whom it is proposed to serve a restoration notice will be given the opportunity to make representations to SNH. SNH must then consider any representations that it receives before deciding whether to serve the restoration notice.

Enforcement

201. It will be an offence to fail to comply with the terms of a Restoration Notice.

202. SNH will have the right to carry out restoration works specified in a notice in the event of non-compliance and to recover costs from the responsible party. SNH currently has a similar right under the Land Management Order provisions in the 2004 Act.

203. SNH will be granted a right of entry in order to determine what works are required before making a restoration notice, to monitor compliance with a Notice, and if necessary to carry out works.

204. The responsible party will not need to apply to SNH for consent to carry out the works required by a restoration notice, and so sections 14 and 17 of the 2004 Act are to be amended accordingly. This will be similar to existing provision for land management orders, where no consents are needed for operations required by a LMO.

205. This provision will apply to both public body and private owners and occupiers. (Public bodies already have an obligation to restore damage caused in certain circumstances under section 14(5) of the 2004 Act).

Alternative Approaches

206. In practice, the 2004 Act has been effective at delivering protection for Scotland's SSSIs and wildlife. However, some scope for improvement has been identified in the form of

- i) delivering administrative streamlining where possible and
- ii) additional provision to facilitate the restoration of illegal damage without having to seek prosecution in the first instance.

207. It is therefore considered that the 2004 Act remains fit for purpose and major revision is unnecessary; the provisions in Part 5 of the Bill result from specific issues which have been identified and the range of alternatives is therefore limited.

208. Provision to allow for boundary rationalisation of multiple adjoining SSSIs (without providing for the notification of any additional land) are not considered to represent a substantial departure from current policy. New powers for denotifying SSSIs will be exercisable only when the features have been lost/destroyed beyond recovery or where part of an SSSI is deemed to be no longer of special interest following the execution of a consent in relation to which SNH have already been consulted .

Consultation

209. A range of views was expressed in consultation responses. These were largely positive with regard to proposals to streamline and better regulate potentially damaging activities on SSSIs. Land managers expressed some concerns about the proposed provisions relating to combining and de-notifying SSSIs. It is considered that the provisions in the Bill are robust enough to allay any reasonable concerns.

This document relates to the Wildlife and Natural Environment (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 9 June 2010

WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) BILL

POLICY MEMORANDUM

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley

ISBN 978-1-4061-6554-8



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