Tom Edwards

The Stage 3 debate on the Wildlife and Natural Environment (Scotland) Bill will take place on the 2 March 2011.

This briefing is intended to provide a summary of the main amendments to the Bill as proposed and agreed during Stage 2. It does not set out to describe every change that has been made to the Bill. This briefing should be read alongside SPICe Briefing 10/39 Wildlife and Natural Environment (Scotland) Bill (Edwards et.al 2010) which was written about the Bill as introduced.

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SUMMARY OF PROVISIONS IN THE BILL AS INTRODUCED

Part 2 of the Bill would repeal game licences and game dealers’ licences. “Game” in the context of the Bill are game birds – pheasants, partridge and grouse, and “ground game” – hares and rabbits. The Bill seeks to modernise poaching offences and bring game law within the scope of the Wildlife and Countryside Act 1981 (the 1981 Act). The Bill would create a new close season for killing or taking hares. The Bill would preserve the present position in relation to poaching offences, which is that convictions can be made on single witness evidence. Apart from illegally taking bird eggs, other offences under the 1981 Act require corroboration.

Section 4 of the Bill repeals the designation Areas of Special Protection (ASP). Originally known as “bird sanctuaries”, they provided protection for wild birds, their nests and their young. Scottish Natural Heritage has advised the Government that there is no need for an ASP in any of the eight areas currently designated.

Section 13 of the bill addresses snaring. Snaring is currently permitted in Scotland, but is regulated under section 11 of the 1981 Act and the Snares (Scotland) Order 2010. Provisions in the Bill would incorporate the provisions of the Snares (Scotland) Order 2010 into the 1981 Act. The Order brought four changes into effect earlier this year: that snares must be fitted with stops; that snares must be checked to ensure they are free-running; that snares must be staked or anchored in place; and that snares must not be set so that animals become suspended or drowned. The Bill would also introduce new provisions related to identification of snares with tags, training of snare operators and a presumption that the tag identifies the person setting the snare, should proceedings be brought.

Sections 14-17 deal with invasive non-native species. Non-native species are those which have been introduced outside their ‘natural’ or native ranges by humans. Invasive non-native species (INNS) are non-native species which cause unwanted environmental, economic or social impacts as a result of their ability to spread rapidly or become dominant in ecosystems. New offences in the Bill seek to ban the release of an animal or plant outwith its native range, or any other plant or animal specified by Scottish Ministers. This is known as a “general no-release approach. Section 15 inserts a new section into the 1981 Act which relates to a code of practice which may be produced to provide practical guidance on INNS and the requirements of the 1981 Act.

Section 16 introduces a series of new provisions related to species control orders. Species control orders would be made by a “relevant body”, and would identify the presence of a named invasive animal or plant at a particular location and specify that certain operations be undertaken by named individuals or organisations to control that species by particular dates. A “relevant body” refers to Scottish Ministers, Scottish Natural Heritage, the Scottish Environment Protection Agency or the Forestry Commission.

Sections 18 and 19 of the Bill deal with species licensing. A licence can authorise an act that would otherwise be unlawful. The Bill seeks to amend the sections on species licensing in the Wildlife and Countryside Act 1981 (section 16 and 26), and schedule 6 of that Act. The Bill would extend the circumstances for which a licence can be granted to include “any other social, economic or environmental purpose”. The licensing authority must also be satisfied that the licence authorises acts that would contribute towards social, economic or environmental benefit and that there is no other satisfactory solution. Scottish Ministers are the licensing authority. The Bill would provide that they may delegate this authority to SNH or a local authority.

The main proposals in Part 3 of the Bill on deer management are:
SNH will draw up a statutory code of conduct on sustainable deer management, which would be approved by Ministers and laid before Parliament.

Revisions to the powers of SNH to intervene in deer management where high deer numbers are causing damage to forestry, farming, natural heritage or the public interest or pose a risk to public safety or deer welfare.

Backstop powers for the Government to introduce a competence requirement for shooting deer if a voluntary approach to training and assessing competence does not work by 2014.

Making owner-occupiers rights’ to shoot deer to protect farmland / forestry subject to a general licence.

Section 27 of the Bill would amend provisions in the protection of Badgers Act 1992. The 1992 Act created offences of taking, injuring or killing badgers and offences relating to cruelty and selling of badgers. The Bill would insert sections to create new offences of “knowingly causing or permitting” such acts.

Section 28 of the Bill amends sections 23-27 of the Hill Farming Act 1946 related to muirburn. Muirburn is a (mainly upland) land management technique, and is the act of controlled burning of vegetation to stimulate new growth. A new section 23 would be inserted into the 1946 Act which would establish: a “standard muirburn season” (1 October until 15 April) and; an “extended muirburn season” (16 April until 30 April). This means that it would no longer ordinarily be permitted to make muirburn between 1 and 15 May on land situated more than 450 metres above sea level. Muirburn could be carried out under licence outwith the season.

Sections 29-32 relate to SSSIs and would amend the Nature Conservation (Scotland) Act 2004. SSSIs are those areas of land and water that SNH considers best represent Scotland’s natural heritage. The Bill would provide for the combination of two or more SSSI into a single site and allow the denotification of SSSIs that are no longer considered of special interest because of damage to or destruction of features as a consequence of authorised development. Section 32 relates to restoration notices. A restoration notice is a written notice which would be issued by SNH to the owner of a SSSI and would require that person to take steps to restore the damaged natural features “so far as is reasonably practicable”.

PARLIAMENTARY CONSIDERATION

The Bill was referred to the Rural Affairs and Environment Committee for Stage 1 consideration. During Stage 1 the Committee took evidence at six meetings between the 23 June and the 3 November 2010, and also carried out visits to Langholm Moor Demonstration Project, and to Alvie Estate and Abernethy Forest Reserve in Strathspey. The Committee’s Stage 1 report was published on the 25 November 2010, and contained 115 recommendations and conclusions (Scottish Parliament Rural Affairs and Environment Committee 2010a). The Scottish Government (2010a) provided its response to the Stage 1 report on 15 December 2010. The Stage 1 debate was held on the 2 December 2010 (Scottish Parliament 2010). The Committee considered the Bill at Stage 2 at three meetings on the 22 December 2010, and the 12 and 19 January 2011 (Scottish Parliament Rural Affairs and Environment Committee 2010 b, 2011 a & b).
AMENDMENTS TO THE BILL DURING STAGE 2

The table has some information about amendments proposed to the Bill during Stage 2.

Table 1 – Stage 2 Amendments to the Wildlife and Natural Environment (Scotland) Bill

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<th>Proposed</th>
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<tr>
<td>Government</td>
<td>68</td>
<td>65</td>
</tr>
<tr>
<td>Non-government</td>
<td>98</td>
<td>5</td>
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<td>Total</td>
<td>166</td>
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VICARIOUS LIABILITY

The most significant change to the Bill at Stage 2 was made through Government amendments to introduce vicarious liability. The change was made by Amendment 79 which inserted new section 20A into Part 2 of the Bill. During Stage 1 the Rural Affairs and Environment Committee heard evidence (e.g. Watson 2010) that gamekeepers persecute birds of prey because they are either explicitly or implicitly encouraged to do so by their employers. The current law includes an offence of “knowingly causing or permitting” but the Committee heard that it has rarely been possible to secure a conviction in such cases. Patrick Stirling-Aird of Scottish Raptor Study Groups told the Committee that in his view, the amendment was needed to resolve a moral issue, where employers were letting their employees “carry the can” for such offences. The Committee also heard evidence from Sheriff Drummond, who expressed reservations about the idea and suggested there might be problems trying to establish vicarious liability for wildlife crimes (Scottish Parliament Rural Affairs and Environment Committee 2010c & d).

The amendment means that where a person has committed certain offences against wild birds, or set traps for them or possessed poisons illegally under the Wildlife and Countryside Act 1981, that person’s employer, principal (in an agency relationship) or someone to whom that person is providing services (whether this is done through another or not) can be charged with the same offence.

The amendment provides a defence if the employer (for example) is able to show that they did not know that their employee, agent or person providing services was committing the offence, and they had taken all reasonable steps and exercised all due diligence to prevent the offence. In debate on the amendment the Minister explained that the terms “reasonable” and “all due diligence” were well understood and defined in Scots law, and that while the Government could provide guidance as to how they would be construed in this context, it would be unhelpful to do that on the face of the Bill.

The Committee divided on the amendment, and voted 7:1 in favour.

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1 The offences are listed in subsection 18A(6) which would be inserted into the 1981 Act by new section 20B of the Bill.
OTHER AMENDMENTS TO PART 2 OF THE BILL

The Bill would consolidate game law into the Wildlife and Countryside Act 1981. Game birds would be added to Part 1 of Schedule 2 to the Act which lists certain birds which can be killed or taken in season. That Schedule can be amended under the negative procedure, which raised a concern that game shooting could be banned in this way. In response to a recommendation in the Rural Affairs and Environment Committee’s Stage 1 report, the Government lodged an amendment (4) which will make any amendments to remove any of the game species from the list of birds that can be killed or taken subject to the affirmative procedure (Col 3640-41 Scottish Parliament Rural Affairs and Environment Committee 2010b).

Peter Peacock MSP proposed an amendment (48) which was designed to provide an additional means of deterring bird of prey prosecution, in the event that it proved difficult to secure convictions under the vicarious liability provisions. The amendment would have given Government power to declare areas within which they have reasonable cause to believe there has been bird of prey persecution. Owners of land within this area would be required to produce an action plan to address bird of prey prosecution. If monitoring showed that bird persecution was continuing, the Government would have powers to restrict the shooting of game in the area. Following debate on the amendment, it was withdrawn. In withdrawing the amendment Peter Peacock MSP said that he would continue to pursue the point, and would reflect on the issues raised in the debate (Col 3649-56, Scottish Parliament Rural Affairs and Environment Committee 2010b).

As introduced, the Bill preserves the current position in relation to game poaching offences, which is that a conviction can be made on single witness evidence. This means the evidence of one witness alone, without any corroborating evidence or testimony. The Rural Affairs and Environment Committee heard evidence during Stage 1 that cases were rarely brought, if ever, which turned on the evidence of one witness alone, but also that there was inconsistency in that single witness evidence was possible for poaching and egg-stealing, but not other wildlife crimes. A majority of the Committee called for there to be consistency on the matter, either by allowing single witness evidence for other wildlife crimes, or by making it inadmissible for all wildlife crimes (Scottish Parliament Rural Affairs and Environment Committee 2010a). Elaine Murray MSP proposed an amendment which would have extended single witness evidence to a number of other offences under the Wildlife and Countryside Act 1981. The Minister explained that Lord Carloway was undertaking a review of the criminal law of evidence, and that that would be the best way to resolve the matter. The amendment was withdrawn. In withdrawing the amendment Elaine Murray MSP said that there may be a need to debate a different approach to resolving the inconsistency in relation to single witness evidence and wildlife crime at Stage 3 i.e. to remove the provisions which allow single witness evidence for poaching and egg-stealing offences (Col 3687-88, Scottish Parliament Rural Affairs and Environment Committee 2011a).

The Committee debated a number of amendments on snaring. Marilyn Livingstone MSP proposed an amendment which would have banned snaring. Elaine Murray MSP proposed amendments which would give Ministers powers to ban snaring through subordinate legislation. Liam McArthur MSP proposed amendments which would have required snares to be marked with an individual identification number. These amendments were withdrawn or not-moved. A Government amendment (10) was agreed to which will require a review of snaring to be carried out by 31 December 2016 at the latest (Col 3673-83 Scottish Parliament Rural Affairs and Environment Committee 2011a).

A number of Government amendments were agreed to the provisions on invasive non-native species (INNS). These include an amendment (71) which responded to a recommendation in the Committee’s Stage 1 report that the Code of Practice on INNS should be subject to
In Stage 1 evidence, the Committee heard concerns that public spending cuts could reduce police resources to enforce wildlife crime. The Scottish Society for the Prevention of Cruelty to Animals employs Inspectors, who have certain powers to investigate animal welfare issues. It was suggested that these powers could be extended to allow them to have a wider role in investigating wildlife crimes. Peter Peacock MSP proposed an amendment (91) which would have given the Government a power to extend the role of SSPCA inspectors or others by order. The amendment would have required a public consultation before making an order, and would have made such orders subject to the super-affirmative procedure. Responding to the debate the Minister said that the amendment raised significant issues of accountability, in that the SSPCA was a campaigning organisation, not a neutral one, and was not publicly accountable in the same way as the police. She argued that the issue would be better to be taken forward through primary legislation, rather than an order making power. In response to concerns that opportunities for environmental legislation are limited, the Minister said that she thought the amendment could be taken forward in a future Criminal Justice Bill. The amendment was withdrawn.

AMENDMENTS TO PART 3 OF THE BILL

A number of amendments were proposed to Part 3 of the Bill. The proposals in Part 3 of the Bill to amend the Deer (Scotland) Act 1996 were based on the advice of the former Deer Commission Scotland. The functions of the Commission have now transferred to SNH. The Commission had proposed that owners and occupiers of land should be under a duty to manage deer sustainably. Following consultation the Government decided not to proceed with the proposal because of concerns about ECHR implications.

The Bill contains a requirement for SNH to draw up a code of practice on sustainable deer management. Non-compliance with the code would be taken account of by SNH in exercising its powers under the 1996 Act to negotiate a control agreement or impose a control scheme to secure sustainable deer management. During Stage 1 the Committee received evidence from former Deer Commissioners that this did not really improve the status quo, because SNH’s powers of intervention will remain resource intensive to use. At Stage 2, Robin Harper MSP proposed an amendment that would have placed a duty on owner-occupiers to further sustainable deer management by complying with the code of practice. After debate, the amendment was withdrawn. In deciding to withdraw the amendment Robin Harper MSP said he would give further consideration to the issues raised in the debate and consider whether to bring the amendment back at Stage 3.

Wild deer move across boundaries, and Deer Management Groups are voluntary groups which have been formed to coordinate deer management, particularly on the open hill range of red deer. The Committee heard evidence at Stage 1 that there can be problems securing the cooperation of all the owners and occupiers in a Deer Management Group area, and that some groups have not agreed a deer management plan. Liam McArthur MSP proposed an alternative approach to Robin Harper’s amendment, which would have allowed SNH to require owners and occupiers of land in a particular area to work together to produce a deer management plan, and to produce a plan itself if one was not produced within a year. After debate, the amendment was not moved. Liam McArthur MSP said that he would consider bringing the amendment back at Stage 3.
The Committee did agree an amendment proposed by John Scott MSP (158) which makes the code of practice on sustainable deer management subject to parliamentary procedure. The amendment means that the first version of the code, and any replacement to it, would be subject to the affirmative procedure. Revisions of the code would be subject to the negative procedure. The amendment was agreed to on division by 5:3. The Government had proposed amendments (118-120) which would have made the code subject to the negative procedure, but they were pre-empted by John Scott’s amendment (Col 3753-57 Scottish Parliament Rural Affairs and Environment Committee 2011b).

**SOURCES**


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RELATED BRIEFINGS

SB 10-55 Wildlife Crime (601KB pdf)

SB 10-39 The Wildlife and Natural Environment (Scotland) Bill (732KB pdf)

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