

# **WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) BILL**

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## **REVISED DELEGATED POWERS MEMORANDUM**

### **Purpose**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Wildlife and Natural Environment (Scotland) Wildlife and Natural Environment (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **OUTLINE OF BILL PROVISIONS**

3. The Bill makes a range of provision about wildlife and the natural environment. It consists of six Parts and a schedule, which make provision as explained below.
4. The following expressions are used throughout this memorandum:
  - “The 1946 Act” means the Hill Farming Act 1946;
  - “The 1981 Act” means the Wildlife and Countryside Act 1981;
  - “The 1992 Act” means the Protection of Badgers Act 1992;
  - “The 1996 Act” means the Deer (Scotland) Act 1996;
  - “The 2004 Act” means the Nature Conservation (Scotland) Act 2004;
  - “DCS” means the Deer Commission for Scotland, established under the 1996 Act and to be dissolved and its functions transferred to SNH on the commencement of section 1 of the Public Sector Reform (Scotland) Act 2010; and
  - “SNH” means Scottish Natural Heritage, established under the Natural Heritage (Scotland) Act 1991.

### **Part 1**

5. Part 1 contains defined expressions for the statutes amended by the Bill.

## **Part 2 – Wildlife under the 1981 Act**

6. Part 2 of the Bill makes amendments to Part 1 of the 1981 Act. Part 1 of that Act regulates the taking, killing, sale and possession of all wild birds and of the species of animals and plants which are specified in Schedules to the Act. Certain other species of animals and plants are protected separately under the Conservation (Natural Habitats &c.) Regulations 1994 (S.I.1994/2716). Part 1 of the 1981 Act also prohibits certain methods of taking and killing birds and animals and regulates the use of other methods (including snares). It also regulates the introduction of non-native species. Most activities prohibited under Part 1 are capable of being licensed for certain purposes under section 16 of that Act.

7. The amendments in Part 2 of the Bill add provisions about the protection and poaching of game species to the 1981 Act, abolish “areas of special protection” established under section 3 of that Act, impose restrictions on the use of snares to catch animals, reform and extend the regime for controlling non-native and invasive species, extend the scope of the licensing functions and enable the delegation by the Scottish Ministers of all such functions, and make consequential changes to licensing functions and the powers of wildlife inspectors.

## **Part 3 - Deer**

8. Part 3 of the Bill amends the 1996 Act. Part I (sections 1 to 4) of the 1996 Act places a duty on DCS to further the conservation, control and sustainable management of deer. Part II of that Act (sections 5 to 16) provides for the setting of close seasons and creates mechanisms for DCS to work with landowners to manage deer numbers. Part III (sections 17 to 26) of that Act creates offences in relation to deer, including poaching offences which make it an offence to kill deer without the legal right to do so. Part IV (sections 27 to 48) regulates venison dealing and contains enforcement and other miscellaneous provisions.

9. The functions of DCS under the 1996 Act are to be transferred to SNH by section 1 of the Public Services Reform (Scotland) Act 2010. Schedule 1 to the 2010 Act makes a large number of consequential amendments to the 1996 Act. These have been taken into account in drafting the Bill, which refers to SNH throughout. The same approach has been taken in this memorandum.

10. Part 3 of the Bill amends the 1996 Act to change the provisions which allow certain occupiers of land to shoot deer during close seasons. It requires SNH to prepare a code of practice in relation to deer management. It revises the purposes for and the circumstances in which SNH can exercise powers in relation to control agreements, control schemes and emergency measures to manage deer. It also enables Scottish Ministers to make provision by order to require persons who shoot deer to be registered as competent to do so. Such orders may also be used to make consequential changes to the arrangements for collecting data about numbers of deer killed (known as “cull returns”).

## **Part 4 – Other wildlife etc.**

11. Section 27 of the Bill amends 1992 Act. The 1992 Act prohibits a range of activities in relation to badgers, including the killing, taking and sale of badgers and disturbance to their setts. Some of these activities can be licensed for certain purposes. The Bill creates a number of new

offences under the 1992 Act and provides for certain offences to be triable on indictment as well as under summary procedure. It also makes provision for the delegation of licensing functions under the 1992 Act.

12. Section 28 of the Bill amends the 1946 Act. Sections 23 to 27 of the 1946 Act regulate the practice of muirburn in Scotland, which is defined in section 39 of that Act as including “setting fire to or burning heath or muir”. The Bill replaces periods during which muirburn is prohibited with a positive season during which it is permitted. It also expands the power to amend muirburn seasons by order and provides for a new licensing regime in respect of out of season muirburn. Finally it reforms requirements to inform neighbours of intentions to make muirburn.

### **Part 5 – Sites of Special Scientific Interest**

13. Part 5 of the Bill amends the 2004 Act to make provision for the combination and denotification of SSSIs, operations which affect SSSIs and alternative procedure for securing reparation to SSSIs following illegal damage.

### **Part 6 - General**

14. Part 6 of the Bill contains general provision on Crown application and commencement.

### **Schedule**

15. The schedule contains repeals. These include the repeals of the 18<sup>th</sup> and 19<sup>th</sup> century statutes known as the Game Acts, which set close seasons for game birds, create poaching offences and establish requirements for game licences. The close seasons and poaching offences are replaced by provision under Part 2 of the Bill. The game licensing regime is repealed and not replaced, although it will be possible to grant licences in relation to game species for other purposes under the 1981 Act.

### **RATIONALE FOR SUBORDINATE LEGISLATION**

16. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Scottish Government has carefully considered whether and in what manner provisions should be set out in subordinate legislation rather than on the face of the Bill. In consideration of this, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:

- the likely frequency of amendment;
- the need to make proper use of Parliamentary time;
- ensuring sufficient flexibility to respond to changing circumstance; and
- the need to anticipate the unexpected which might otherwise frustrate the purpose of the provision in primary legislation.

17. The Bill amends primary legislation that contains delegated powers provisions. The level of scrutiny considered appropriate for the delegated powers provisions in the Bill are consistent with the level of scrutiny currently used for the delegated powers provisions in existing primary legislation.

## **DELEGATED POWERS**

18. This memorandum lists the delegated powers provisions of the Bill together with a short explanation of:

- what the power allows;
- who the power is conferred on;
- the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure (if any) to which the exercise of the power is to be subject, and why this procedure (if any) is considered appropriate.

### **Section 3(4B)**

#### *Amended section 26 of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution

#### *Provision*

19. Section 3(4B) amends section 26 of the 1981 Act. Section 26 of the 1981 Act sets out the procedure for making regulations, orders and notices under that Act. The effect of section 3(4B) of the Bill is that any Order removing black grouse, common pheasant, grey partridge, ptarmigan, red grouse or red-legged partridge from Part I of Schedule 2 to the 1981 Act is subject to affirmative resolution.

#### *Reason for taking power*

20. The Rural Affairs and Environment Committee recommended in their Stage 1 Report that the power to remove game birds from the list of species that may be killed or taken out with close seasons (listed in Schedule 2 of the 1981 Act) be subject to affirmative, rather than negative, resolution. The Government accepted this recommendation and proposed an amendment at Stage 2 that would make any Order to remove a game bird from Part I of Schedule 2 subject to affirmative procedure. This was agreed by the Rural Affairs and Environment Committee.

#### *Choice of procedure*

21. The Government accepted the Committee's recommendation that removal of a game bird from the list of species that may be killed or taken out with close seasons would be a significant step that would justify a greater degree of Parliamentary scrutiny.

### **Section 5(3)(d) – Power to make regulations about marking and ringing**

#### *Substituted section 6(5) and (5A) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution

#### *Provision*

22. Section 5(3)(d) amends section 6(5) (sale etc. of live or dead wild birds, eggs etc.) of the 1981 Act by substituting new subsections (5) and (5A). New subsection (5)(b) enables Scottish Ministers to make regulations about the marking and ringing of certain species of captive birds, while new subsection (5A) provides that such regulations may make different provision for different purposes. The provisions replace and do not extend the existing power to make such regulations under subsection (5).

#### *Reason for taking power*

23. The original power enables the identification and tracking of certain captive birds, the power in the Bill replaces that power, but does not extend it. The only substantive change to the legal effect of the current subsection (5) is the addition of subsection (5)(c) but that does not relate to the enabling power. The other changes are considered necessary for drafting purposes. The Bill does not make other changes in relation to marking or ringing captive birds.

#### *Choice of procedure*

24. Section 26(2) of the 1981 Act has the effect that regulations made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

25. In line with other regulations under the 1981 Act and the procedure which currently applies to regulations under section 6(5) of the 1981 Act, negative resolution is considered the appropriate level of scrutiny.

### **Section 6(2) and (3) – Power to vary the close season for any animal listed on Schedule 5A**

#### *New section 10A(3) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Negative resolution

#### *Provision*

26. Section 6(2) inserts new section 10A in the 1981 Act. This new section provides for a close season for certain wild animals (brown hares and mountain hares) listed on new Schedule 5A of the 1981 Act. Section 10A(3) allows Scottish Ministers to vary the period of the close season during which the wild animals listed cannot be killed or taken. An order may be made for all or part of Scotland. Section 26(4)(b) of the 1981 Act has the effect that Scottish Ministers must consult with SNH before making an order.

*Reason for taking power*

27. This power allows Scottish Ministers to balance shooting and conservation interests by taking into account changes in the wild animal population and factors that might affect those populations such as disease or bad weather.

*Choice of procedure*

28. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

29. The negative resolution procedure is considered appropriate to allow Scottish Ministers to react to changing circumstances that may require prompt response. The negative resolution procedure is currently in place for the power contained in section 2(5) of the 1981 Act which allows changes to close seasons for certain species of birds. It is considered that this procedure is sufficient for those purposes and therefore the procedure for this new analogous power should be consistent. In addition, there is a requirement to consult on the face of the Bill.

**Section 6(2) – Power to protect any animal listed on Schedule 5A outside the close season.**

*New section 10A(4) of the 1981 Act*

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Orders made by statutory instrument**  
**Parliamentary procedure: None**

*Provision*

30. Section 6(2) inserts new section 10A in the 1981 Act. This new section provides for a close season for certain wild animals (brown hares and mountain hares) listed on new Schedule 5A of the 1981 Act. Section 10A(4) allows Scottish Ministers to extend protection to the wild animals listed on Schedule 5A outside of the close season for a period of up to 14 days. Before making any such order Scottish Ministers are required to consult such representatives of organisations representing those with an interest in killing or taking the wild animal in question as they consider appropriate. An order may be made for all or part of Scotland.

*Reason for taking power*

31. This power allows Scottish Ministers to provide for short term protection of hares. This may be required due to circumstances such as adverse weather in all, or some parts, of Scotland.

*Choice of procedure*

32. Section 6(3) of the Bill amends section 26(2) of the 1981 Act with the effect that orders made under this provision will be subject to no procedure in the Scottish Parliament.

33. The nature of such an Order is that it may be required in emergency or urgent circumstances. The Order is to cover a short period of time. It is considered that this should not require use of parliamentary time and scrutiny. In addition there are requirements to consult those with an interest in killing or taking the relevant animal and SNH (in section 26 of the 1981

Act). Section 2(6) of the 1981 Act contains an analogous power which allows Scottish Ministers to make cold weather orders for certain species of birds. That power is not subject to any parliamentary procedure and it is considered that this is sufficient and that the same approach should be taken to this new analogous power in relation to animal species.

**Section 10(a) and (b) – Power to vary Schedules to the 1981 Act and prescribe close seasons.**

*Amended section 22 of the 1981 Act*

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Orders made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

*Provision*

34. Section 22 of the 1981 Act allows Scottish Ministers to vary the Schedules attached to that Act. These Schedules list the birds, animals and plants which are protected by different provisions in the 1981 Act. Section 10(a) of the Bill adds new Schedules 5A and 6A to those which may be varied under section 22 of the 1981 Act. Section 10(b) inserts a new section 22(2ZA) providing that an order adding an animal to Schedule 5A (which protects listed animals during their close seasons) may prescribe a close season for that animal. Therefore this section extends the current enabling power in section 22 of the 1981 Act.

*Reason for taking power*

35. The extended power under section 22(1)(b) allows Scottish Ministers to add or remove animals from the list in Schedule 5A of animals protected by close seasons under inserted section 10A and the list in Schedule 6A of animals protected by poaching offences under inserted section 11E. The power in new section 22(2ZA) allows Scottish Ministers to set the necessary close seasons for any new animal which is to be added to Schedule 5A. This will enable Scottish Ministers to balance shooting and conservation interests and to react to changing circumstances relating to animals for example populations and welfare.

*Choice of procedure*

36. Section 26(2) of the 1981 Act has the effect that orders made under the amended provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

37. The existing powers in section 22 of the 1981 Act which allow Scottish Ministers to vary the other Schedules to the Act are subject to negative resolution. It is considered that this is an appropriate level of scrutiny and therefore the new provision in Bill should be consistent with this.

**Section 13(3) – Power to make provision as regards training, identification numbers, tags etc. for snares.**

*New section 11A(8) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Orders made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

*Provision*

38. Section 13(3) inserts new section 11A into the 1981 Act. The new section 11A makes provision for tags containing identification numbers and other information to be attached to snares. The identification numbers will be provided by the police provided they are satisfied that the applicant for an identification number has completed a training course. Section 11A(8) provides that Scottish Ministers may by order make provision regarding:

- when a person has been trained;
- how chief constables can be satisfied that a person has been so trained;
- the manner in which a tag is to be fitted including the material from which the tag is made;
- the manner in which an identification number and statement is to appear on a tag;
- form and manner of an application for an identification number;
- any fee that may accompany an application and the charging of such a fee;
- the issuing of identification numbers;
- the keeping of records of identification number issued and the sharing of information from such records; and
- any other appropriate matter relating to training, tags and identification numbers.

*Reason for taking power*

39. The power enables the practical details relating to the operation of training, tagging and identification numbers to be prescribed in detail and varied, if required, in light of experience in operating the scheme.

*Choice of procedure*

40. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

41. Negative resolution procedure is considered to be an appropriate level of scrutiny for setting out the technical and practical detail of the tagging scheme and training requirements. The Scottish Government aims to ensure that the practical detail of the scheme supports the policy aim contained in the Bill, this procedure will allow a considerable amount of specification, together with flexibility to alter details should this be required.

**Section 14 – Powers to specify native animals which it is an offence to release, or to allow to escape from captivity, and non-native plants or animals which may be released**

*New sections 14(1)(a)(ii) and 17(6)(c) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

42. Inserted section 14(1)(a)(ii) and (2C) of the 1981 Act makes provision for Scottish Ministers to specify by order animals which it is an offence to release, or to allow to escape from captivity (unless done under a licence under section 16(4) of the 1981 Act).

43. Section 26(4A) and (4B) of the 1981 Act (inserted by section 17(6)(c) of the Bill) has the effect that the Scottish Ministers may only make an order under this provision where they have consulted SNH and any other person appearing to Scottish Ministers to have an interest in the making of an order, except where Scottish Ministers consider it necessary to make the order urgently and without consultation.

44. Section 26(4)(c) and (5) of the 1981 Act has the effect that Scottish Ministers may cause a public inquiry to be held before making an order, and the making of the order shall be published by the Scottish Ministers in the Edinburgh Gazette.

*Reason for taking power*

45. The new power relates to the release of an animal within its native range. This power replaces the list of animals that must not be released under section 14(1A) of and Schedule 9 to the 1981 Act. It enables the release of native species to continue to be regulated. It will be used to prevent the release of animals or control (under licence) the release of animals where that is necessary for conservation or welfare reasons, such as capercaillie, barn owl and sea eagle currently listed on Schedule 9.

*Choice of procedure*

46. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This is the same level of scrutiny given to orders amending the Schedule 9 list.

47. Negative resolution procedure is considered appropriate, given that a power to list animals that may be released is relatively limited in scope, requires to be exercised in a flexible and responsive manner, is subject to consultation (except in the case of an emergency), is consistent with the general level of scrutiny in Part 1 of the 1981 Act, and is the same level as the power being replaced.

**Section 14(2) – Power to specify animals and plants which may be released or grown outwith their native range**

*New section 14(2B), (2BA) and (2C) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

48. Inserted sections 14(2B), (2BA) and (2C) of the 1981 Act makes provision for Scottish Ministers to specify by order animals, plants, persons or conduct undertaken or authorised by or under any enactment to which the release provisions in sections 14(1)(a)(i), 14(1)(b) and 14(2) (the “release provisions”) do not apply. The Scottish Ministers must consult on and publish a release order in the same way as a no-release order, and may also cause a public inquiry to be held.

*Reason for taking power*

49. The release provisions have the effect that it is an offence to:

- release, or allow to escape from captivity, an animal to a place outwith its native range;
- cause an animal outwith the control of any person to be at a place outwith its native range; or
- plant, or otherwise cause to grow, any plant in the wild at a place outwith its native range.

It will not be an offence to release or plant any such type of animal or plant if the type is specified in an order made under this provision.

50. At present, an animal is treated as a native animal that may be released if it is “ordinarily resident” in Great Britain. It is therefore lawful to release many types of animal introduced by man that have become established in the wild. The effect of the provisions in the Bill is that it will be unlawful to release an animal introduced by man even if it has established a presence in the wild. This reform will help to ensure that invasive non-native species do not spread into unaffected areas.

51. However, the release of non-native species may have no harmful impact, and may indeed deliver a positive benefit. Examples include the release of non-native game birds, or the release of animals for conservation purposes. The power will enable Scottish Ministers to make lawful the release of non-native animals where that is appropriate having regard to legitimate interests. It could for example be used to permit the release or growing of non-native species that were formerly native to any part of Scotland, such as the European beaver on the mainland of Scotland.

*Choice of procedure*

52. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

53. Negative resolution procedure is considered appropriate, given that a power to list animals or plants that can be released or grown is relatively limited in scope, requires to be exercised in a flexible and responsive manner, is subject to consultation (except in the case of an emergency), and is consistent with the general level of scrutiny in Part 1 of the 1981 Act. Negative resolution procedure is also considered appropriate for the power to disapply section 14(1) or 14(2) to a person, or conduct undertaken or authorised in pursuance of legislation. This may, for example, be used to disapply activities already authorised (for example by Forestry Commission).

**Section 14(3) – Power to specify invasive animals and plants which it is an offence to keep, have in a person’s possession, or have under a person’s control**

*New section 14ZC(1) of the 1981 Act*

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

*Provision*

54. Inserted section 14ZC(1), (2) and (5) of the 1981 Act make provision for Scottish Ministers to specify by order invasive animals and plants which it is an offence to keep, have in a person’s possession, or have under a person’s control. An order may provide for the payment of compensation to people who can no longer keep an animal or plant as a result of the making of an order. The Scottish Ministers must consult on and publish a keeping order in the same way as for a no-release order, and may also cause a public inquiry to be held.

*Reason for taking power*

55. There are some invasive non-native species which pose a high-risk to biodiversity, the wider environment, and social and economic interests. Regulating their keeping will help to prevent their introduction into and spread in the wild.

*Choice of procedure*

56. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

57. Negative resolution procedure is considered appropriate, given that a power to ban the keeping of animals or plants is relatively limited in scope, requires to be exercised in a flexible and responsive manner, is subject to consultation (except in the case of an emergency), and is consistent with the general level of scrutiny in Part 1 of the 1981 Act.

**Section 14(4) – Power to specify invasive animals and plants which it is an offence to sell or market**

*Amended section 14A(1) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

58. Inserted section 14A(1) and (3) of the 1981 Act make provision for the Scottish Ministers to specify types of invasive animals and invasive plants that it is an offence to sell or market. The Scottish Ministers must consult on and publish a sale order in the same way as for a no-release order, and may also cause a public inquiry to be held.

*Reason for taking power*

59. At present, the enabling powers in section 14A(1) and (3) of the 1981 Act may be used to ban the sale or marketing of an animal not ordinarily resident in Great Britain, or a plant not ordinarily grown in Great Britain, or an animal or plant listed on Schedule 9 to that Act.

60. The Bill makes changes to section 14A that are consequential on the release provisions. The new power relates to invasive animals or invasive plants. The reason for taking the power is broadly the same as the reason for taking the keeping power. Regulating the sale or marketing of invasive species will help prevent their introduction into or spread in the wild.

*Choice of procedure*

61. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

62. Negative resolution procedure is considered appropriate, given that a power to ban the sale of animals or plants is relatively limited in scope, requires to be exercised in a flexible and responsive manner, is subject to consultation (except in the case of an emergency), is in general consistent with the level of scrutiny in Part 1 of the 1981 Act, and is in particular the same level of scrutiny as the power being replaced.

**Section 14(5) – Power to specify invasive animals and plants outwith their native range which specified persons must provide notification of**

*New section 14B(1) of the 1981 Act*

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

*Provision*

63. Inserted section 14B(1) to (3) of the 1981 Act makes provision for the Scottish Ministers to require the notification by a specified person to a specified person of the presence of a specified invasive animal or invasive plant at a place outwith the native range of the plant or animal. It is an offence to fail without reasonable excuse to notify the presence of a specified plant or animal. In response to a recommendation of the Subordinate Legislation Committee, the Government proposed an amendment at Stage 2 to restrict the order to a person or type of person considered to have, or should have, knowledge of (or is likely to encounter) the relevant invasive animal or plant. This amendment was agreed by the Rural Affairs and Environment Committee.

*Reason for taking power*

64. There are some invasive non-native species which pose a high-risk to biodiversity, the wider environment, and social and economic interests. In most cases early action to control or eradicate such species is the most effective way to ensure that they do not spread in the wild. Ensuring that their presence must be notified by specified persons means that early detection is more probable, and therefore successful control action a more likely prospect.

*Choice of procedure*

65. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

66. Negative resolution procedure is considered appropriate, given that a power to require the notification of animals or plants is relatively limited in scope, requires to be exercised in a flexible and responsive manner, and is in general consistent with the level of scrutiny in Part 1 of the 1981 Act.

## **Section 15 – Non-native species code**

### *New section 14C of the Wildlife and Countryside Act 1981*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Scottish Ministers  
**Parliamentary procedure:** Affirmative resolution for the first and any replacement code and negative resolution for any revision or revocation

#### *Provision*

67. Inserted section 14C of the 1981 Act confers on the Scottish Ministers a power to issue a code of practice to provide practical guidance in respect of the release, keeping, sale and notification offences in the 1981 Act, and after amendment at Stage 2 in respect of species control agreements and species control orders (and relevant offences), and related matters.

68. A code may only be issued following consultation with SNH and any other person who appears to the Scottish Ministers to have an interest in the code. The first and any replacement code is subject to affirmative resolution. A revision or revocation of the code (where it is not being replaced) is subject to negative procedure.

69. Failure to comply with a provision of a code does not, of itself, give rise to proceedings. It can however be taken into account in determining any question in any proceedings, and in a criminal prosecution for a relevant offence the court may have regard to compliance with the code when deciding whether or not the accused is liable for the offence.

#### *Reason for taking power*

70. The issuing of a code of practice will help the public to understand the nature of the duties imposed on them by the 1981 Act, and frame their behaviour accordingly. It will also assist the courts in interpreting and applying the relevant law. For example, the Scottish Ministers could give guidance on how far a non-native ferret released temporarily for the purposes of pest control can be considered as being under the control of any person.

71. A code of practice will also be able to go into more detail than the legislation, and illustrate the intended effect of the legislation with case studies.

#### *Choice of procedure*

72. The code requires to be user-friendly and in an accessible format, and is expected to require regular revision and updating. It is persuasive rather than binding. Following recommendations in the Subordinate Legislation Committee and Rural Affairs and Environment Committee Stage 1 Reports a Government amendment was proposed at Stage 2 to make the code subject to Parliamentary scrutiny. This makes provision for the code to be subject to affirmative procedure for the first version and replacement versions and negative procedure for any revisions or revocation. This amendment was agreed by the Rural Affairs and Environment Committee.

## **Section 18(3) and (4) – Delegation of a licence granting power to a local authority**

### *New section 16A(4)(b) of the 1981 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution

#### *Provision*

73. Section 18(2) of the Bill amends section 16 of the 1981 Act (which deals with licensing functions) and section 18(3) inserts a new section 16A into the Act. Inserted section 16A of the 1981 Act makes provision for the Scottish Ministers to delegate their species licensing functions under section 16 of that Act to SNH or a local authority. Section 16A(4)(b) provides that delegation to a local authority must be by order.

74. Section 26 of the 1981 Act (as amended by section 18(4) of the Bill) has the effect that the Scottish Ministers shall give any local authority or other person affected by an order an opportunity to submit representations or objections to the subject matter of the order, and may only make an order where they have consulted SNH.

#### *Reason for taking power*

75. To allow for species licensing to be as streamlined and efficient as possible, the power will give Scottish Ministers the opportunity to consider delegation (for example in relation to development where the local authority are currently considering species protection as part of planning controls) in particular circumstances.

#### *Choice of procedure*

76. Section 26(2) of the 1981 Act has the effect that orders made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

77. Negative resolution procedure is considered appropriate, given that a power to delegate the granting of licences is limited in scope, is subject to consultation requirements, and such procedure is in general consistent with the level of scrutiny in Part 1 of the 1981 Act.

## **Section 23 – Deer management code of practice**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Scottish Ministers  
**Parliamentary procedure:** Affirmative resolution for the first and any replacement code and negative resolution for any revision

#### *Provision*

78. Section 23 of the Bill inserts a new section 5A into the 1996 Act. Section 5A requires SNH to draw up a code of practice for the purpose of providing practical guidance in respect of deer management. SNH must consult any person appearing to have an interest in the code before

drawing up the code of practice. The code of practice will be submitted to Scottish Ministers who may approve or reject the code.

79. The code once approved is subject to affirmative procedure for the first, and any replacement, code and negative procedure for any revision.

80. Failure to comply with a provision of the code will not, of itself, give rise to any action in terms of the 1996 Act.

*Reason for taking power*

81. The code of practice will provide practical examples of deer management and set out detail which would not be appropriate for legislation.

*Choice of procedure*

82. The code is not binding (although SNH will have regard to it when exercising intervention powers and may direct public bodies and office holders to have regard to it in exercising their functions).

83. A non-Government amendment was agreed by the Rural Affairs and Environment Committee at Stage 2 to make the code subject to Parliamentary scrutiny. This makes provision for the code to be subject to affirmative procedure for the first version and replacement versions and negative procedure for any revisions.

**Section 26(4) – Power to introduce a competence requirement in deer stalking**

*Inserted section 17A(1) of the 1996 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

84. Section 26(4) of the Bill inserts a new section 17A into the 1996 Act. This enables the Scottish Ministers to make regulations which provide for the establishment and maintenance of a register of persons competent to shoot deer in Scotland. These regulations could prohibit anyone who was not named on the register, or not supervised by a named person, from shooting deer. They could provide that registration is sufficient to establish that a person—

- is fit and competent for the purpose of exercising occupiers rights under section 26(2)(d) of the 1996 Act to shoot deer in close season in order to protect crops;
- is authorised to shoot deer out of season to prevent damage to unenclosed woodland, or the natural heritage, or in the interests of public safety, under section 5(6) of the 1996 Act;
- is authorised to shoot deer out of season for scientific purposes under section 5(7) of the 1996 Act;

- is authorised to shoot deer at night under section 18(2) of the 1996 Act; or
- is authorised to drive deer with vehicles under section 19(2).

Regulations made under this power could also require cull returns to be submitted to SNH either by those registered as competent or by owners or occupiers of land.

85. The regulations may provide who will set up and maintain the competence register, and how applications to be named on the register will be decided, together with deciding the criteria for judging competence, arrangements for supervision and the procedure for handling an appeal. Provision may be made to charge a registration fee and to specify the form in which cull return must be made.

#### *Reason for taking power*

86. The shooting of deer by persons with a low standard of shooting competence creates a risk to deer welfare and impacts on public confidence. Concerns in that respect have been expressed to the Scottish Ministers by DCS, and it is therefore appropriate to enable Scottish Ministers to impose compulsory competence requirements on those intending to shoot deer.

87. Those requirements are not set out in the Bill because the deer sector may through self-regulation be able to demonstrate that shooting in Scotland is carried out by those that are competent to do so. Indeed the deer sector has signalled its commitment to ensure high standards of competence and best practice amongst all those who shoot deer, on a voluntary basis. While Scottish Ministers may exercise this power at any time, new section 17B of the 1996 Act requires SNH to conduct and publish a review of standards of competence in deer stalking if the power has not been exercised by April 2014.

88. Section 47 of the 1996 Act has the effect that regulations made under this power would be subject to annulment in pursuance of a resolution of the Scottish Parliament.

#### *Choice of procedure*

89. Any regulations would set out the administrative and technical requirements relating to competence levels, application process and maintenance of registers. Regulations of this sort are considered to be appropriate for negative procedure.

### **Section 27(7) – Protection of Badgers**

#### *New section 10A(4)(b) of the 1992 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution

#### *Provision*

90. Section 27(7) of the Bill inserts a new section 10A into the 1992 Act. This makes provision for the Scottish Ministers to delegate their species licensing functions under that Act to

SNH or a local authority. Section 10A(4)(b) and (8) provide that delegation to a local authority must be by order made by statutory instrument.

91. Before making an order, section 10A(9) requires the Scottish Ministers to consult the local authority to which functions are to be delegated, SNH and any other persons they consider are affected by the order.

*Reason for taking power*

92. To allow for licensing in relation to badgers to be as streamlined and efficient as possible, the power will give Scottish Ministers the opportunity to consider delegation in particular circumstances (for example in relation to development where the local authority are currently considering badger protection as part of planning controls).

*Choice of procedure*

93. Inserted section 10A(8) of the 1992 Act provides that orders under section 10A(4) will be subject to annulment in pursuance of a resolution of the Scottish Parliament.

94. Negative resolution procedure is considered appropriate, given that a power to delegate the granting of licences is limited in scope.

**Section 28(3) – Variation of the permitted times for making muirburn**

*Amended section 23A of the 1946 Act*

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Affirmative resolution**

*Provision*

95. Section 28(3) of the Bill amends section 23A of the 1946 Act. Section 23A was inserted by the Climate Change (Scotland) Act 2009 (“the 2009 Act”), and allows Scottish Ministers to vary by order the permitted dates for making muirburn in any year, where necessary or expedient in relation to climate change. A technical change to section 23A(1) was proposed by Government amendment at Stage 2, and agreed by the Rural Affairs and Environment Committee, so that the section refers only to extending or reducing the standard muirburn season, and not varying. This does not alter the legal effect of the Bill as introduced.

96. Section 28(3)(b) inserts a new subsection (1A) into section 23A, allowing an order to make different provision for different purposes and, in particular, for different lands and different years. Subsection (3)(c) specifies new purposes (conserving, restoring, enhancing or managing the natural environment and public safety) for which the muirburn season may be varied, in addition to adaptation to climate change. Under Section 23A, Scottish Ministers may not reduce the total number of burning days when varying the muirburn season. Subsection (3)(d) alters the minimum number of burning days which must be maintained in order to reflect the removal of the May extension to the muirburn season.

*Reason for taking power*

97. The permitted times for making muirburn in Scotland have not changed since the 1946 Act came into force.

98. The 2009 Act introduced an order-making power allowing Scottish Ministers to vary the permitted muirburn dates in order to allow adaptation to climate change, in case climatic changes continue to impact on the ability to successfully undertake muirburn. That power has not yet been exercised.

99. It is considered appropriate to be able to vary the dates of the muirburn season for reasons not related to climate change, or where a link to climate change cannot be clearly demonstrated. The muirburn season currently extends from 1 October until 15th April (subject to conditional extensions). Land managers 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. Before using the power in this way, it will be necessary to assess the likely environmental impacts of September burning on soils and biodiversity.

*Choice of procedure*

100. Subsection (5) of section 23A of the 1946 Act provides that an order made under subsection (1) of that section is subject to approval by resolution of the Scottish Parliament. Section 28(3) of the Bill does not change the procedure required when making an order under section 23A. It simply broadens the purposes for which the muirburn season may be varied, and allows an order to make different provisions for different lands and for different years. It is therefore appropriate for the amended power to be subject to the same level of scrutiny as the original power.

**Section 28(4) – Further regulation of extension to muirburn season**

***Inserted section 23AA(1) of the 1946 Act***

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order made by statutory instrument**  
**Parliamentary procedure: Negative resolution**

*Provision*

101. Inserted section 23AA(1) of the 1946 Act allows Scottish Ministers to make provision for regulation of the extended muirburn season (where this has been extended by an order under section 23A(1) of the 1946 Act). Any order made under this section would prescribe additional measures, and does not alter the existing regulation and notification requirements contained in the 1946 Act.

102. Any order made under section 23AA(1) may provide for notification requirements, the making of objections, requirement for approval, the imposition of conditions and associated offences.

*Reason for taking power*

103. An extension to the muirburn season under section 23A(1), particularly if this was to include September, may have an effect on stock management practices of crofters and other tenant farmers. Inserted section 23AA(1) would allow any necessary additional requirements to be made (for example notification requirements or procedures) to address any concerns about the impact of the extension of the muirburn season.

*Choice of procedure*

104. Negative procedure is considered appropriate for a power that is ancillary to the power to extend the muirburn season (which is subject to affirmative procedure).

**Section 28(4) – Regulations relating to muirburn licences**

*Inserted section 23B(11) of the 1946 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution

*Provision*

105. Section 28(4) of the Bill inserts a new section 23B into the 1946 Act, allowing Scottish Ministers to issue licences permitting the making of muirburn outwith the muirburn season. Section 23B(11) and (12) enables the Scottish Ministers to make regulations by statutory instrument making further provision for, or in connection with, muirburn licences.

*Reason for taking power*

106. This power will allow Scottish Ministers to specify further details of the licensing system in regulations, such as procedures for notifying unsuccessful applicants, any appeals procedures, application timescales etc. Specification of such details in secondary legislation will allow the licensing system to operate more flexibly.

*Choice of procedure*

107. Section 23B(13) provides that regulations made under 23B(11) are subject to annulment in pursuance of a resolution of the Scottish Parliament. These regulations will specify technical details relating to the operation of the licensing system, as opposed to the permitted licensing purposes and licensing authority set out in the Bill. A negative resolution procedure is considered to offer an appropriate balance between flexibility and the need for scrutiny for a provision of this nature.

## **Section 31 – SSSIs: operations not requiring SNH consent**

### *Amended sections 14(1) and 17(1) of the 2004 Act*

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution

#### *Provision*

108. Section 31(3)(a)(iii) and (4)(a)(iii) amends sections 14(1) and 17(1) of the 2004 Act respectively. These amendments provide for extension of the lists of circumstances in which the consent of SNH is not required in relation to the carrying out of operations under section 13 (for public bodies) and section 16 (for non- public body-owner occupiers) of that Act. New paragraphs are added to each of section 14(1) and 17(1), specifying that an operation will not require consent if it is of a type described by order made by the Scottish Ministers.

#### *Reason for taking power*

109. The purpose of these amendments to the 2004 Act is 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 where 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 reason for taking the power in this manner is to provide flexibility for a possible range of situations where SNH consent will not be required (an example at the present time is the granting of certain types of rural development contract) and also to provide flexibility to accommodate operations which might be carried out under regimes created by future legislation.

#### *Choice of procedure*

110. Instruments will be subject to negative resolution procedure in terms of section 53(4) of the 2004 Act. Negative resolution procedure is considered appropriate in this case given the subject-matter of the provisions. No rights are affected and the provisions are concerned with administrative streamlining.

## **Section 34(1) – Ancillary provision**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative resolution of the Scottish Parliament, unless the order amends an Act, in which case affirmative resolution

#### *Provision*

111. Section 34(1) enables the Scottish Ministers, by order, to make incidental, supplemental, consequential, transitional, transitory or saving provision, if appropriate.

#### *Reason for taking power*

112. Any body of new law may give rise to a need for a range of ancillary provisions.

113. Without the power to make incidental, supplemental and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters which require to be dealt with to give full effect to the original Bill. That would not be an effective use of either the Parliament's or the Government's resources.

*Choice of procedure*

114. Where an order changes primary legislation it is submitted that the affirmative procedure is appropriate. In any other situation, the negative procedure is considered appropriate for these powers. The kind of provision that would attract negative procedure would be incidental or consequential in nature – the power to make such provision by order is considered desirable in case it proves necessary to make further minor and consequential tidying up provision e.g. further repeals.

**Section 35(1) – Commencement**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** no Parliamentary procedure

*Provision*

115. This section provides that all of the provisions of the Bill, except certain provisions containing definitions and order-making powers, shall come into force on a day set by the Scottish Ministers by order.

*Reason for taking power*

116. The decision on when and to what extent the Bill is commenced is an administrative issue for the Scottish Ministers.

*Choice of procedure*

117. As the decision on commencement is a matter for the Scottish Ministers, and as is usual, the Scottish Government considers that the commencement powers should not be subject to any Parliamentary procedure.



*This document relates to the Wildlife and Natural Environment (Scotland) Bill as amended at  
Stage 2 (SP Bill 52A)*

# **WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) BILL**

## **REVISED DELEGATED POWERS MEMORANDUM**