WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Wildlife and Natural Environment (Scotland) Bill (introduced in the Scottish Parliament on 9 June 2010) as amended at Stage 2. Text has been added or deleted as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – BACKGROUND AND OVERVIEW

4. 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.

5. The following expressions are used throughout these Notes:
   “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 – Defined expressions

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

Part 2 – Wildlife under the 1981 Act

7. Part 2 of the Bill makes amendments to Part 1 of the Wildlife and Countryside Act 1981. 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.

8. 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, replace the regime for controlling invasive species, amend and enable the delegation of, licensing functions under the Act and make consequential changes to the powers of wildlife inspectors.

Part 3 – Deer

9. Part 3 of the Bill amends the Deer (Scotland) Act 1996. 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.

10. 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 these Notes.

11. 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 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.

12. Section 27 of the Bill amends the Protection of Badgers Act 1992. 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.

13. Section 28 of the Bill amends the Hill Farming Act 1946. 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

14. Part 5 of the Bill amends the 2004 Act to make provision for the combination and denotification of sites of special scientific interest (“SSSIs”), operations which affect SSSIs and alternative procedure for securing reparation to SSSIs following illegal damage.

Part 6 – General

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

Schedule

16. The schedule contains repeals. These include the repeals of the 18th and 19th 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.

THE BILL – SECTION BY SECTION

PART 1 – DEFINITIONS

17. Part 1 consists of section 1, which contains defined expressions used throughout the Bill.

PART 2 – WILDLIFE UNDER THE 1981 ACT

Section 2 – Application of the 1981 Act to game birds

18. This section amends definitions in section 27(1) of the 1981 Act. Paragraph (b) amends the definition of “wild bird” to remove the exception in relation to game birds. This means that
game birds (pheasants, partridges, red and black grouse and ptarmigan) will be covered by the offences in the 1981 Act which relate to wild birds. The amendment should be read with section 21 and the schedule, which repeal the older legislation which restricts the killing, taking and sale of game birds. Paragraph (a) is consequential on the other amendments to the 1981 Act. It repeals the definition of “game bird”, a term which is not used in the amended provisions in relation to wild birds.

Section 3 – Protection of game birds etc. and prevention of poaching

19. This section amends sections 1 and 2 of and Schedule 2 to the 1981 Act. Section 1 of the 1981 Act creates offences of killing, taking and injuring any wild bird. Section 2 of that Act creates exceptions to those offences, which allow certain species (those listed in Schedule 2) to be taken and killed outside close seasons.

20. The amendment to section 1 ensures that the offences under that section will apply to partridges, pheasants, mallards and red grouse which are bred in captivity and released for shooting.

21. The amendments to section 2 and to Schedule 2 extend the exceptions to cover the game birds which are brought within the 1981 Act by virtue of the amendment to the definition of “wild bird” under section 2. The amendments set close seasons for those game birds. They also amend the exceptions so that these may only be relied on by people with a legal right (at common law or otherwise) to kill or take the birds. These amended exceptions replace the poaching offences in older legislation which relates to game birds and which is repealed by section 21 and the schedule.

22. Subsection (2) amends the italic heading of sections 1 to 8 of the 1981 Act (which relate to birds) to add a reference to poaching. The new heading takes account of the inclusion of poaching offences in the 1981 Act.

23. Subsection (3) amends section 1(6) of the 1981 Act. Section 1(6) of that Act excludes birds bred in captivity from the definition of “wild bird”. The amendment qualifies section 1(6) in two respects. First, to ensure that birds bred in captivity and lawfully released for conservation purposes are protected as wild birds after release. Second, to ensure that a captive bred mallard, grey or red-legged partridge, common pheasant or red grouse will be treated as a wild bird if it is no longer in captivity and not in a place in which it was reared. This subsection ensures that the birds that are most often bred in captivity for sporting purposes are covered by the offences under section 1 and the exceptions under section 2 of the 1981 Act when they are released.

24. Subsection (4)(a) to (c) amends section 2 of the 1981 Act, which creates exceptions to section 1 of the 1981 Act. The effect in the amendments is to provide that it is not an offence for a person to kill or take a bird listed on Part 1 of Schedule 2 to that Act outside the close season for that bird, provided that the person had the legal right to kill or take the bird, or had permission to do so. A legal right to kill or take wild birds may arise automatically under the common law (e.g. as a consequence of landownership), under a lease or another contract or under statute. Whether a person with a legal right to kill or take the bird has the authority to
grant permission to someone else will depend on the nature of their legal right. The Bill does not alter legal rights to kill or take birds or confer new powers to grant permission to others. It remains an offence to take or kill any other wild bird which is not listed in Part 1 of Schedule 2, unless otherwise authorised by means of a licence issued under section 16 of the 1981 Act.

25. Subsections (4)(d) and (6) inserts a new Part 1A into Schedule 2 to the 1981 Act which lists the birds which are not to be killed or taken on Sundays or Christmas Day. The restriction in relation to Sundays and Christmas Day does not apply to game birds (pheasants, partridges, red and black grouse and ptarmigan).

26. Subsection (4)(e) inserts new subsections (3A) to (3C) into section 2 of the 1981 Act. Subsections (3A) and (3B) provide that it is not an offence to take live mallard, partridge, pheasant, black grouse or red grouse (all listed in Part I of Schedule 2 to the 1981 Act), or the eggs of those birds for breeding purposes during a period of 2 weeks after the start of the close season for those birds, provided that the person taking the birds or eggs has the legal right or permission to do so. This process is sometimes referred to as “catching up”. As with subsection (4)(a), the amendment does not alter legal rights to take birds or confer power to grant permission to others.

27. Subsection (3C) provides that catching up of mallards or mallards’ eggs is not permitted on the foreshore, below the high-water mark of ordinary spring tides.

28. Subsection (4)(f) amends section 2(4) of the 1981 Act to create close seasons for pheasant, grey and red-legged partridge, black grouse, red grouse and ptarmigan. The provision should be read with section 21 and the schedule, which repeals the close seasons set for those species under the Game (Scotland) Act 1772.

29. Subsection (4A) is a consequential amendment of the provision in section 5(5) of the 1981 Act which authorises the use of a cage trap or net to catch a ‘game bird’ for the purpose of breeding. It substitutes a reference to grouse, mallard, partridge or pheasant included in Part I of Schedule 2 to the 1981 Act.

30. Subsection (4B) amends the procedure for an order which removes black grouse, common pheasant, grey partridge, ptarmigan, red grouse or red-legged partridge from Part I of Schedule 2 to the 1981 Act. It makes any order made under section 22(1)(a) of the 1981 Act for that purpose subject to affirmative procedure.

31. Subsection (5) amends Part 1 of Schedule 2 of the 1981 Act to add the game bird species (black grouse, red grouse, grey partridge, red-legged partridge, common pheasant, and ptarmigan) to the list of birds which may be killed or taken outside the close season.

Section 4 – Areas of special protection for wild birds

32. Section 4 of the Bill repeals section 3 of the 1981 Act, which enabled the Scottish Ministers to declare areas of special protection for wild birds, their nests, and their young. Eight Scottish areas of special protection created by order under the Protection of Birds Act 1954
This document relates to the Wildlife and Natural Environment (Scotland) Bill as amended at Stage 2 (SP Bill 52A)

(where they are described as “bird sanctuaries”), which was repealed and re-enacted by the 1981 Act, will be abolished as a consequence of that repeal.

Section 5 – Sale of live or dead wild birds, their eggs etc.

33. This section amends sections 2 and 6 of and Schedule 3 to the 1981 Act. Section 6 creates offences in relation to the sale of birds and their eggs. These offences are subject to exceptions which apply to certain species of bird which are listed in Schedule 3 to the Act.

34. The amendments to section 6 and Schedule 3 extend the exceptions to cover the sale of dead game birds (grouse, partridge, pheasant and ptarmigan) which are killed legally outside the close season. These provisions should be read with section 21 and the schedule, which repeal older restrictions on the sale of game birds. The amendments to section 2(6) are consequential on these changes.

35. The amendments to section 6 and Schedule 3 also extend the exceptions in section 6 to permit the sale of live birds and eggs of species which are taken or collected in accordance with the “catching up” provisions in section 2(3A) to (3C), as inserted by section 3.

36. The amendments to Schedule 3 also remove the restrictions on selling certain birds between 28 February and 1 September by moving the species currently listed in Part III of Schedule 3 to a new Part of that Schedule.

37. Subsection (2) amends section 2(6) of the 1981 Act so that if the Scottish Ministers declare a period of special protection for a bird species, this period of special protection would be treated as part of the close season for the purposes of assessing whether it was an offence to sell a bird or egg of that species under section 6(5A) or (5B).

38. Subsections (3)(a) and (b) and (4)(a) deal with the sale of live birds and eggs. Subsection (3)(a) and (b) amends section 6(1) of the 1981 Act and inserts a new section 6(1A) and (1B), while subsection (4)(a) inserts a new Part IA into Schedule 3 of that Act. The effect is to allow birds and eggs of the species listed in the new Part of the Schedule (red grouse, grey partridge, red-legged partridge, common pheasant and mallard) to be sold alive if they are bred in and remain in captivity or if they taken legally outside close seasons or during the catching up period provided under section 2(3A) and (3B) (as inserted by section 3).

39. Subsection (3)(d) replaces section 6(5) of the 1981 Act with a new section 6(5) and (5A). The effect of the changes made by the subsection is that the offence in section 6(1) of that Act applies to birds bred in captivity and lawfully released for conservation purposes. Section 6(5A) re-enacts the enabling power in section 6(5) of the Act.

40. Subsections (3)(c) and (e) and (4)(b) and (c) amend provisions which deal with the sale of dead birds. They amend subsection (2) of section 6 of the 1981 Act, insert a new subsection (5B), insert a new Part IIA into Schedule 3 and repeal all the entries in Part III of that Schedule. The new Part IIA of Schedule 3 lists game species (grouse, partridge, pheasant and ptarmigan) as well as the species previously listed in Part III of the Schedule. The effect of the changes is to
allow birds of all species listed in Part IIA to be sold dead at any time provided that they are killed outside the close season by someone with the legal right to do so.

41. Subsection (3)(f) makes a consequential amendment to section 6 of the 1981 Act. It replaces subsection (6) of that section to remove a redundant reference to Part II of Schedule 3.

Section 6 – Protection of wild hares etc.

42. Section 6 inserts new sections 10A and 10B and Schedule 5A into the 1981 Act. These provisions set close seasons for wild mountain hares and brown hares and create related offences. The new sections are inserted by subsection (2) and the Schedule by subsection (5).

Inserted section 10A of the 1981 Act

43. Inserted section 10A of the 1981 Act sets close seasons and creates offences in relation to hares. Subsection (1) of that section specifies that it is an offence to intentionally or recklessly kill, injure or take any animal on Schedule 5A outside the close season. The species listed on Schedule 5A are the brown hare and the mountain hare.

44. Subsection (2) of new section 10A specifies separate close seasons for mountain hares and brown hares. The close seasons are 1 March to 31 July and 1 February to 30 September, respectively. Subsection (3) of new section 10A allows Scottish Ministers to vary these close seasons by order.

45. Subsections (4) to (7) of new section 10A allow periods of special protection to be set outside the close season for animals on Schedule 5A. The provisions are similar to the provisions for setting periods of special protection in respect of wild birds, under section 2(6) and (7) of the 1981 Act. Subsections (4) and (7) allow Ministers to set such periods by order for all or any part of Scotland, subject to compliance with the consultation requirements in subsection (5). Subsection (6) provides that a period of special protection has effect as if it was part of the close season. Section 6(3) of the Bill amends section 26(2) of the 1981 Act to provide that orders setting periods of special protection for animals under new section 10A(4) will not be subject to parliamentary procedure. Section 26(2) of the 1981 Act already makes similar provision for orders setting periods of special protection for wild birds.

46. Subsection (8) of new section 10A creates a presumption in relation to any offence under subsection (1) that the animal in question was a wild animal. Similar presumptions apply in relation to offences under section 9 of the 1981 Act and in new section 11E(2), as inserted by section 7 of the Bill.

Inserted section 10B of the 1981 Act

47. Inserted section 10B of the 1981 Act creates exceptions to the offences of killing, injuring or taking an animal during the close season under section 10A.

48. Subsection (1) of new section 10B provides a defence to the offence of killing an animal during its close season if the accused can show that the animal in question was too seriously
disabled to recover. That defence will only apply if the disability to the animal was not caused by an unlawful act of the accused.

49. Subsection (2) of new section 10B provides a defence to the offence of taking an animal during its close season if the accused is able to show that the animal had been disabled and was taken for the purpose of tending it and releasing it once it had recovered. The defence can only be relied on by someone who, apart from the close season, had a legal right or permission to take the animal and if the disability to the animal had not been caused by an unlawful act of the accused.

50. Subsections (3) to (6) of new section 10B provide a defence to the offence of killing or injuring an animal during its close season. The defence can only be relied on by an “authorised person”, which is defined in section 27 of the 1981 Act to include the owner or occupier of the land involved and persons authorised by the local authority. The defence allows an authorised person to kill or injure an animal listed on Schedule 5A, in cases where subsections (4) and (5) do not apply and if he shows that the action was necessary to prevent serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.

51. Subsection (4) prevents an authorised person from relying on the defence if it became apparent in advance that it would be necessary to kill or take the animal and either the person failed to apply for an appropriate licence under section 16 of the Act as soon as practicable or a licence application had already been determined. Subsection (5) prevents an authorised person from relying on the defence if he failed to inform the licensing authority (the “appropriate authority” under section 16(9) of the 1981 Act) as soon as practicable after the animal was killed or injured.

52. Subsection (7) ensures that any action taken in relation to wild hares as a result of a requirement of the Scottish Ministers under section 39 of the Agriculture (Scotland) Act 1948 or in pursuance to anything done under the Animal Health Act 1981 (whether by order or otherwise) is not an offence under section 10A. These provisions relate to the powers of Scottish Ministers to take measures to control animal disease (Animal Health Act 1981) or require action to be taken for the prevention of damage to crops, pasture, animal or human foodstuffs, livestock, trees, hedges, banks, any works on land (Agriculture (Scotland) Act 1948).

Section 7 – Prevention of poaching: wild hares, rabbits etc.

53. Section 7 inserts new sections 11E and 11F and Schedule 6A into the 1981 Act (sections 11A to 11DA being inserted into the 1981 Act by section 13 of the Bill, which relates to snaring). These provisions create offences in relation to killing and taking hares and rabbits without a legal right to do so. This type of offence is more commonly described as poaching. The provisions should be read with section 21 and the schedule, which repeals the older legislation which creates poaching offences in relation to hares and rabbits (which are referred to in that context as “ground game”).

54. Subsection 7(3) inserts a new section 11E into the 1981 Act. Section 11E(1) creates an offence of intentionally or recklessly killing injuring or taking a wild animal listed in Schedule
6A of the Act. Schedule 6A is inserted by subsection (4) and lists rabbits, mountain hares and brown hares. Section 11E(2) creates a presumption that the animal in question in relation to an offence under section 11E(1) was a wild animal. Similar presumptions apply in relation to offences under section 9 of the 1981 Act and section 10A(8), as inserted by section 6 of the Bill.

55. New section 11F of the 1981 Act creates defences to the offence of taking, killing or injuring an animal listed in Schedule 6A. Section 11F(1) allows a person with a legal right or permission to kill or take the animal. A legal right to kill or take wild animals may arise automatically under the common law (e.g. as a consequence of landownership), under a lease or another contract or under statute. Whether a person with a legal right to kill or take the bird has the authority to grant permission to someone else will depend on the nature of their legal right. The Bill does not alter legal rights to kill or take animals or confer new powers to grant permission to others.

56. Section 11F(2) provides that it is not an offence to kill an animal listed in Schedule 6A if the accused shows that the animal in question was so seriously disabled that there was no reasonable chance of its recovering and that the animal was not disabled by any unlawful act of the accused.

57. Section 11F(3) ensures that anyone who takes or kills a wild hare or rabbit as a result of a requirement of the Scottish Ministers under section 39 of the Agriculture (Scotland) Act 1948 or in pursuance to anything done under the Animal Health Act 1981 (whether by order or otherwise) is not guilty of an offence under section 11E. These provisions relate to the powers of Scottish Ministers to take measures to control animal disease (Animal Health Act 1981) or require action to be taken for the prevention of damage to crops, pasture, animal or human foodstuffs, livestock, trees, hedges, banks, any works on land (Agriculture (Scotland) Act 1948).

Section 8 – Sale, possession etc. of wild hares, rabbits etc. killed or taken unlawfully

58. Subsection 8 inserts a new section 11G into the 1981 Act. Section 11G(1) makes it an offence to possess, control, sell or offer to sell, possess or transport for the purpose of selling any wild animal or part of a wild animal which has been killed or taken in contravention of section 10A or 11E.

59. Section 11F(2) provides a defence if the accused shows he had a reasonable excuse.

60. Section 11F(3) creates a presumption that the animal in question in relation to an offence under section 11F(1) was a wild animal. Similar presumptions apply in relation to offences under section 9 of the 1981 Act and sections 10A(8) and 11E(2), as inserted by sections 6 and 7 of the Bill.

Section 9 – Wild hares, rabbits etc.: licences

61. Section 9 makes consequential amendments to section 16(3) of the 1981 Act which allow the activities covered by the offences at new sections 10A(1) (killing of animals listed on Schedule 5A in the close season) and 11E(1) (poaching of hares, rabbits etc.) to be licensed under that section.
Section 10 – Wild hares, rabbits etc.: power to vary Schedules to the 1981 Act and prescribe close season

62. This section extends the enabling power in section 22 of the 1981 Act to allow the Scottish Ministers to add to or remove animals from the lists in new Schedules 5A and 6A by order. It also allows such orders to set close seasons for any animal added to Schedule 5A by order.

Section 11 – Wild hares and rabbits: miscellaneous

63. Section 10 replaces section 12 of the 1981 Act with section 12YA and amends the title of Schedule 12 to clarify the content of Schedule 12. Schedule 12 concerns the protection from the noise of shooting hares and rabbits animals at night.

Section 12 – Single witness evidence in certain proceedings under the 1981 Act

64. Section 12 amends section 19A of the 1981 Act to extend the admissibility of single witness evidence to cover offences in relation to the unlawful taking, killing or injuring of game birds (grouse, partridge, pheasant,) and wild hares and rabbits. The provision reflects the position under the Game Acts, which are repealed in the Schedule but which permitted conviction on the evidence of a single witness for offences in relation to game birds and ground game.

Section 13 – Snares

65. Section 13 deals with the use of snares. Subsection (2) amends section 11 of the 1981 Act to insert a new subsection (1A). Subsection (3) inserts new sections 11A to 11D into that Act. As well as setting new requirements in relation to snaring, the amendments replace provisions in the Snares (Scotland) Order 2010 (S.S.I 2010/8), which set requirements about snare stops and anchors and checks of whether snares are free-running. The amendments also reorganise some existing provisions from section 11 into new sections 11B and 11C. These relate to inspecting snares and obtaining authorisation from landowners.

Snares calculated to cause unnecessary suffering

66. Inserted section 11(1A) of the 1981 Act sets out circumstances in which a snare is to be considered to be of a nature or set in a way calculated to cause unnecessary suffering for the purpose of the offence in section 11(1)(aa). It requires snares to be fitted with stops (subsection (1A)(a) and (b)), attached to the ground or an object to prevent them being dragged (subsection (1A)(d)) and not set in a place which is likely to cause an animal to become suspended or drown (subsection (1A)(e)). These provisions replace those in the Snares (Scotland) Order 2010.

Training, identification numbers and tags

67. Inserted section 11A of the 1981 Act requires people who set snares to be trained and to label their snares. It does so by requiring anyone who sets a snare to have an identification number (section 11A(1)). Failure to do so is an offence (section 11A(5)). Such numbers must be obtained from the police (section 11A(3) and (4)) and can only be issued to persons who have been trained to set snares (section 11A(4)(b)).
68. Identification numbers must be shown on tags which must be attached to snares (section 11A(2)). Tags must also indicate whether a snare is intended to catch brown hares or rabbits, or foxes. It is an offence to set or use a snare without a compliant tag (section 11A(6)). Section 11A(8) enables the Scottish Ministers to specify training requirements and other elements of the identification number and tagging regime by order.

69. Inserted section 11B of the 1981 Act requires a person who sets a snare to ensure that it is inspected at least every 24 hours to see whether there is an animal caught in the snare and whether the snare is free-running (as defined in section 11B(4)). If an animal is found to be caught then it must be released or removed. If the snare is found not to be free-running then it must be removed or mended to make it free-running. It is an offence to fail to comply with these requirements. The requirements in relation to whether the snare is free-running are new. The Bill moves the requirements in relation to animals caught in snares from section 11(3), (3A) and (3B) of the 1981 Act but does not alter their effect.

70. Inserted section 11C of the 1981 Act provides that it is an offence for a person to set, or have in their possession, a snare without permission of the owner of the land which the person is on. The Bill moves this provision from section 11(3D) of the 1981 Act but does not alter its effect.

71. Inserted section 11D of the 1981 Act creates a presumption that the identification number appearing on a tag fitted to a snare is that of the person who set the snare. This applies to all snaring offences under the 1981 Act.

72. Inserted section 11DA of the 1981 Act requires Scottish Ministers to carry out (or secure the carrying out of) a review of the operation and effect of the snaring provisions in and under sections 11 to 11D of the 1981 Act. The review must be carried out by 31 December 2016 with a report of the review being laid before Parliament as soon as practicable after this date. Scottish Ministers (or any person carrying out the review) must consider whether further legislation is required, and consult those persons and organisations with an interest.

Section 14 – Non-native species etc.

73. Section 14 amends sections 14 and 14A of the 1981 Act and inserts new sections 14ZC and 14B of that Act.

Introduction of new species etc.

74. Subsection (2) inserts section 14(1) to 14(2B) of the 1981 Act.

75. It is an offence under inserted section 14(1)(a)(i) to release or allow to escape from captivity any animal to a place outwith its native range. This replaces the former offence which relates to the release or escape into the wild of an animal which is of a kind not ordinarily resident in and is not a regular visitor to Great Britain in a wild state. Section 14P(2) and (3) of the 1981 Act, as inserted by section 15 of the Bill, provides for the meaning of the native range of animals and plants.
76. It is an offence under inserted section 14(1)(a)(ii) to release or allow to escape from captivity any other animal specified in an order made by the Scottish Ministers under that section and inserted section 14(2C). This replaces the former offence which relates to an animal of a kind listed in Schedule 9 to the 1981 Act. The new power relates to release of an animal within its native range. For example, it might enable Ministers to control the release of a raptor within its native range to prevent harm to the wild population from increased competition for food.

77. It is an offence under inserted section 14(1)(b) of the 1981 Act to cause any animal outwith the control of any person to be at place outwith its native range. The offence applies where an animal that is not in captivity for the purposes of inserted section 14(1) is enabled by some act or omission to move to a new place outwith its native range.

78. Inserted section 14(2A) has the effect that an offence is not committed under inserted section 14(1) if the common pheasant or red-legged partridge are released or allowed to escape from captivity for the purpose of being subsequently killed by shooting. A release of any other non-native bird or for any other purpose is unlawful, unless authorised by an order made by the Scottish Ministers under inserted section 14(2B), or by a licence granted under section 16 of the 1981 Act.

79. It is an offence under new section 14(2) of the 1981 Act to plant or otherwise cause to grow any plant in the wild outwith its native range. This replaces the former offence which relates to a plant of a kind listed in Schedule 9 to the 1981 Act.

80. Inserted section 14(2B) and (2C) of the 1981 Act enables the Scottish Ministers to specify a plant or animal to which the offences in inserted section 14(1) and (2) do not apply. The power can be used to make lawful the release of animals outwith their native range. For example, an order might make possible the re-introduction into any part of Scotland of a formerly native animal such as the European beaver. Inserted section 14(2BA) enables the Scottish Ministers to specify a person or conduct (that conduct being undertaken for the purposes of any enactment or authorised by any such enactment) to which the offences in inserted section 14(1) and (2) do not apply.

81. Subsection (2)(b) amends the defence in section 14(3) of the 1981 Act to make it consistent with the other statutory defences in Part 1 of the 1981 Act. The accused must show that he took all reasonable steps and exercised all due diligence to avoid committing the offences in inserted sections 14(1) and (2).

82. Subsection (2)(c) repeals the provisions enabling the Scottish Ministers to authorise persons to enter any land to ascertain whether an offence in section 14 of the 1981 Act is being, or has been, committed. A wildlife inspector appointed by Ministers under section 19ZC of the 1981 Act has the same power, so the repeal removes an unnecessary duplication.

Prohibition on keeping etc. of invasive animals or plants

83. Subsection (3) of the Bill inserts new section 14ZC into the 1981 Act, which enables the Scottish Ministers to prohibit the keeping of invasive animals or plants. Inserted section 14P(4) provides for the meaning of invasive. It is an offence to keep a prohibited animal, and a defence
for the accused to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence. An order can 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. Keeping, and release, measures have been taken under the Destructive Imported Animals Act 1932 and the Import of Live Fish (Scotland) Act 1978, both repealed by the Schedule.

Prohibition on sale etc. of certain animals or plants etc

84. Subsection (4) changes the powers of the Scottish Ministers in section 14A of the 1981 Act to prohibit the sale and marketing of certain animals and plants. The amended power is exercisable in respect of an invasive animal or plant and not as before in respect of the release of the animal or plant that is prohibited under section 14 of that Act.

Notification of presence of non-native animals or plants etc.

85. Subsection (5) revokes the existing section 14B (guidance: non-native species) of the 1981 Act and inserts a new section 14B into that Act. Inserted section 14B enables the Scottish Ministers to require notification of the presence of an 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 plant or animal as required under the inserted section. Notification can only be required where the Scottish Ministers consider that the person or type of person to be subject to the requirement has, or should have, knowledge of, or is likely to encounter, the specified invasive animal or plant.

Section 15 – Non-native species etc.: code of practice

86. Section 15 inserts new section 14C into the 1981 Act. Section 14C enables the Scottish Ministers to issue codes of practice for the purpose of providing practical guidance in respect of the release, keeping, sale and notification offences in the 1981 Act, and in respect of species control agreements and species control orders (and related offences), and related matters. For example, a code could offer guidance on how far an animal temporarily released by any person (such as a raptor in a falconry display) remains under the control of that person for the purposes of the release offence. The Code may also provide guidance on how SNH, Scottish Environment Protection Agency, the Forestry Commissioners and the Scottish Ministers should co-ordinate they way they deal with non-native animals and plants. In addition the code will provide for best practice on a variety of issues.

87. The Scottish Ministers must consult with Scottish Natural Heritage and any other persons appearing to them to have an interest before making, replacing or revising a code. The first code of practice and any replacement code is subject to affirmative procedure. Revisions to the code of practice are subject to negative procedure.

88. Guidance in a code of practice issue under section 14C is not binding. 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.
Section 16 – Species control orders etc.

89. Section 16 inserts new sections 14D to 14P of the 1981 Act. Sections 14D to 14O of the 1981 Act provide for species control orders and section 14P provides for the interpretation of terms used in sections 14 to 14O of that Act.

Power to make species control orders

90. Inserted section 14D of the 1981 Act enables any of the Scottish Ministers, Scottish Natural Heritage, the Scottish Environment Protection Agency or the Forestry Commissions (each of which is a ‘relevant body’ as defined in inserted section 14P(6)) to make a species control order for premises when the relevant body is satisfied of the presence on the premises of an invasive animal or plant at a place outwith its natural range.

91. The relevant body must give any owner or occupier it has identified at least 42 days in which to enter into a voluntary agreement before it can make a species control order. If such an agreement is entered into then an order can only be made on default. Section 14D also provides for a statutory notice where an owner or occupier cannot be identified.

Emergency species control orders

92. Inserted section 14E enables a relevant body to make a species control order without agreement or notice under section 14D where the body is satisfied that the making of the order is urgently necessary. Any such emergency order expires 49 days after it is made.

Content of species control orders

93. Inserted section 14F provides for the contents of species control orders. It enables a relevant body to specify what must be done by whom and by when in order to control or eradicate an invasive species, such as the removal of Japanese knotweed. It enables the body to specify preventative measures (an ‘excluded operation’), such as a ban on strimming knotweed that might be needed due to a high risk that such an operation would cause the plant to spread. Lastly, it enables the relevant body to provide for who is to pay for control and eradication measures, which might include the owner or occupier of the premises subject to the order.

Notice of species control orders

94. Inserted section 14G provides for notice of the making of a species control order to be given to the owner and any occupier of premises, and if appropriate by a relevant body to the Scottish Ministers. The notice must give reasons for the making of the species control order, and set out where applicable that the order is an emergency order.

Appeals in connection with species control orders

95. Inserted section 14H enables an owner or occupier whose premises are subject to a species control order to appeal to the sheriff within 28 days of being given notice of the making of the order. The sheriff must consider the merits of the order, may suspend any effect of an emergency order, and will dispose of the appeal as he or she thinks fit. Further appeal from the decision of the sheriff is on a point of law only.
Effect of species control orders

96. Inserted section 14I provides that an emergency species control order has effect on the giving of notice under section 14G, and any other order has effect either on the expiry of the 28 day period for appeal under section 14H or where an appeal is made or the withdrawal or determination of the appeal.

Review of species control orders

97. Inserted section 14J enables a relevant body to review a species control order made by the body, and if appropriate revoke the order. An order might be revoked because it has been complied with before it would otherwise expire, or because an operation or excluded operation will for any reason no longer deliver the intended outcome (in which case it might be replaced by a subsequent order).

Offences in relation to species control orders

98. Inserted section 14K makes it an offence to fail without reasonable excuse to carry out an operation required under a species control order, to carry out an excluded operation, or to intentionally obstruct any person carrying out an operation required to be carried out under an order. Section 17(3)(d) of the Bill inserts new section 21(4ZA) of the 1981 Act which provides for penalties on conviction for such an offence.

Enforcement of operations under species control orders

99. Inserted section 14L enables a relevant body on default to carry out an operation required by a species control order. The body is not required to make any payment that would otherwise be required under the order, and may recover such payments and any additional costs incurred by the body in enforcing the order.

Species control orders: powers of entry

100. Inserted section 14M enables persons authorised by a relevant body to enter premises, giving notice where required, for the purposes of determining whether to enter into a species control order, whether to make or revoke an order, to serve any required notice, to ascertain whether an offence is being or has been committed, and to carry out operations required in connection with the order.

101. Inserted section 14P(5) defines premises for the purposes of sections 14 to 14O, with the effect that the powers of entry do not include power to enter a dwelling.

Species control orders: entry by warrant etc.

102. Inserted section 14N sets out when a sheriff must grant a warrant to an authorised person to use a power of entry that is otherwise authorised under section 14I, and the effect of such a warrant.

Species control orders: powers of entry: supplemental

103. Inserted section 14O sets out who may accompany an authorised person taking entry under a warrant granted under section 14N, and what that person may take on to the premises. It
also provides for compensation to be paid for damage caused when entry is taken, unless the damage is attributable to the person who sustained it.

*Interpretation of sections 14 to 14O of the 1981 Act*

104. Inserted section 14P provides for the meanings of native range, invasive, premises and relevant body. It also makes further provision for the meanings of animal and plant.

*Section 17 – Non-native species etc.: further provision*

105. Section 17 amends the 1981 Act in connection with the changes made to that Act by section 15 of the Bill.

106. Subsection (2) has the effect the keeping measures in inserted section 14ZC do not apply to anything done under and in accordance with a licence granted by the Scottish Ministers under section 16 of the 1981 Act.

107. Subsection (3) amends section 21 of the Act to provide for penalties on conviction for a keeping, notification or species control order offence, and for forfeiture of any animal or plant which is of the same kind as that in respect of which a ‘species’ offence is committed. It provides expressly that the maximum period of imprisonment on summary conviction of an offence under sections 14, 14A and 14ZC is 12 months. That maximum was increased from 6 months to 12 months in respect of sections 14 and 14A by virtue of the ‘gloss’ in section 45 of Criminal Proceedings Etc. (Reform) (Scotland) Act 2007.

108. Subsections (4) and (8) repeal references to Schedule 9 to the 1981 Act and that Schedule respectively.

109. Subsection (5) enables Scottish Natural Heritage to advise any other relevant body carrying out operations under a species control order, or a person authorised to enter premises in connection with an order.

110. Subsection (6) has the effect that the making of a release, keeping, sale or notification order by the Scottish Ministers can be annulled by the Scottish Parliament. Ministers must consult with Scottish Natural Heritage and other persons before making a release, keeping or sale order.

111. Subsection (7) makes further provision for notice preparatory to, or the making of, a species control order. It has the effect that a notice of a species control order under section 14G cannot be served by electronic means, and that the general rule in the 1981 Act for service of notices on persons who cannot be identified do not apply to notice of a species control order under section 14D.

*Section 18 – Licences under the 1981 Act*

112. Section 18 amends section 16 of the 1981 Act, which allows the licensing of activities prohibited under Part 1 of that Act.
113. Subsection (2)(a) and (b) amends section 16(3) and inserts a new section 16(3A) into the 1981 Act. The effect of this is to allow the licensing authority to grant a licence to carry out activities which would otherwise be prohibited in relation to animals and plants protected by Part 1 of the 1981 Act. The licence must be for a social, economic or environmental purpose. Inserted section 16(3A) also requires the licensing authority to be satisfied that the conduct authorised will give rise to or contribute towards social, economic or environmental benefit and that there is no other satisfactory solution.

114. Subsection (2)(c) to (e) amends section 16 of the 1981 Act to provide that the Scottish Ministers are the licensing authority (“the appropriate authority”) for all types of licence under section 16, except where they delegate licensing functions to SNH or a local authority as set out below.

115. Subsection (3) inserts a new section 16A into the 1981 Act. This enables Scottish Ministers to delegate licensing functions to SNH by direction or to local authorities by order. It also sets consultation requirements and makes other technical provisions in relation to such delegations. Subsection (4) makes consequential modifications to section 26 of the 1981 Act in relation to the new power to delegate by order in section 16A.

Section 19 – Amendment of Schedule 6 to the 1981 Act

116. Section 19 amends Schedule 6 of the 1981 Act to remove duplication in relation to species which are also protected by the Conservation (Natural Habitats &c.) Regulations 1994 (S.I.1994/2716).

Section 20 – Wildlife inspectors etc.

117. Section 20 amends the 1981 Act so that a wildlife inspector appointed by the Scottish Ministers under section 19ZC of the 1981 Act is authorised to take enforcement action in respect of the keeping, notification and species control order offences created by the Bill.

118. Subsections (2) and (3) repeal the provisions in sections 6 (sale etc. of live or dead wild birds, eggs etc.) and 7 (registration etc. of certain captive birds) of the 1981 Act that enable the Scottish Ministers to authorise persons to enter any land to ascertain whether an offence under those sections is being, or has been, committed. A wildlife inspector appointed by Ministers under section 19ZC of the 1981 Act has the same power, so the repeal removes unnecessary duplication.

119. Subsection (4) enables a wildlife inspector to enter and inspect any premises to ascertain whether or not an offence in respect of the sale etc. of wild hares or rabbits (inserted section 11G of the 1981 Act), the keeping or notification of an invasive plant or animal (inserted sections 14ZC and 14B), or a species control order (inserted section 14K), (the “new offences” in paragraph (a)) is being or has been committed. It enables a wildlife inspector to require in connection with the new offences that a specimen is made available for examination by the inspector. It enables a wildlife inspector to enter premises to check for compliance with a condition of a registration or licence granted under Part 1 of the 1981 Act as amended by the
Bill, as well as before to in connection with verifying statements made in connection with an application for or the holding of a licence or registration.

120. Subsection (5) enables a wildlife inspector to require the taking of a sample of blood or tissue from a specimen found when taking entry under section 19ZC in respect of the new offences, or any connected specimen, in order to determine the origin, identity or ancestry of the first specimen. It also provides a new definition of “tissue” in section 19ZD (power to take samples: Scotland) of the 1981 Act.

121. Subsection (6) repeals the function of a GB conservation body under the 1981 Act to advice or assist a person not being a wildlife inspector authorised to enter premises in connection with an offence under sections 6, 7 and 14 of that Act.

Section 20A – Offences by Scottish partnerships etc.

122. Section 20A inserts a new section 69A into the 1981 Act. Section 69A provides for partners to be prosecuted for the offences of a partnership, and managers to be prosecuted for the offences of an unincorporated association they are managing.

Section 20B – Liability in relation to certain offences by others

123. Section 20B inserts two new sections into the 1981 Act.

124. Inserted section 18A provides for the criminal vicarious liability of a person (person B) with right to take or kill a wild bird, or who manages such rights, for a relevant offence under the 1981 Act as specified in subsection (6). Person B will also be guilty of an offence where their employee or agent commits one of the specified offences.

125. Inserted section 18B provides for person B to be also guilty of an offence where a relevant offence is committed by a person who provides relevant services as specified in subsection (5) to person B. A person is providing “relevant services” for B if they are managing or controlling shooting on or over that land, habitat of birds on that land, presence of predators of those birds on that land or releasing birds from captivity for the purpose of shooting on or over that land.

126. It will be a defence under both sections 18A and 18B for person B to show that they did not know that an offence was being committed by the employee, agent or person providing relevant services and that they took all reasonable steps and exercised all due diligence to avoid the offence being committed.

127. The penalties relating to inserted sections 18A and 18B are the same as those that apply to the relevant offences.
Section 21 – Modifications and repeals relating to Part 2 and game licensing

128. This section repeals part, or all, of the various Acts in the Schedule. These mainly relate to game laws. The repeals of the Game Licences Act 1860 and the Game Act 1831, together with consequential repeals of related legislation, have the effect of abolishing the game licensing regime.

PART 3 – DEER

Section 22 – Deer management etc.

129. Section 22 amends SNH’s general functions and duties in relation to deer management under sections 1, 3 and 4 of the Deer (Scotland) Act 1996. Subsection (2) amends section 1 of the 1996 Act to require SNH to take into account the interests of public safety and the need to manage the deer population in urban and per-urban areas when exercising its functions. This adds to the current factors that must be taken into account (size and density of the deer population and its impact on natural heritage, the needs of agriculture and forestry and the interests of owners and occupiers of land).

130. Subsection (3)(a) amends section 3(1) of the 1996 Act to confer power on SNH to assist any person or organisation in reaching agreements with third parties. This adds to the powers currently set out in section 3 of the 1996 Act.

131. Subsection (3)(b) inserts a new section 3(3) into the 1996 Act. This imposes a duty on public bodies and office holders to have regard in exercising their functions to any guidance or advice issued by SNH relating to the conservation, control or sustainable management of deer or to any other aspect of the SNH’s deer functions.

132. Subsection (4) amends section 4(1) of the 1996 Act to remove a limit on the number of members of a panel appointed under that section.

133. Subsection (5) adds public safety as a ground for obtaining authorisation for the taking or killing deer at night and also changes the threshold in the existing ground for such authorisation being given from ‘serious damage’ to crops, pasture, human or animal foodstuffs or to woodland to ‘damage’ to crops, pasture, human or animal foodstuffs or to woodland.

Section 23 – Deer management code of practice

134. Section 23 inserts a new section 5A into the 1996 Act. This imposes a duty on SNH to draw up a Code of Practice for the purpose of providing practical guidance in respect of deer management. Section 5A(1) and (2) sets out the purpose and general content of the code. Section 5A(3) to (8) sets procedural requirements for the preparation and entry into force of the code as well as its replacement or revision. These include requirements for public consultation, approval by Scottish Ministers and parliamentary procedure. A first, and any replacement, code of practice will be subject to affirmative procedure, with any revision to a code being subject to negative procedure. Section 5A(9) requires SNH to monitor compliance with the code and to have regard to it in carrying out its own functions.
Section 24 – Control agreements and control schemes etc.

135. Section 24 amends sections 7, 8, 10 and 11 of the 1996 Act. Section 7 of that Act allows SNH to initiate control agreements where deer are causing certain kinds of damage. These agreements relate to “measures” to manage deer. Section 8 allows SNH to make control schemes where control agreements have failed. Schedule 2 of the 1996 Act sets out the procedure for Ministers to confirm control schemes. Sections 10 and 11 confer powers to take emergency action where deer are causing serious damage and control agreements or schemes are not an option.

136. Subsection (2) amends section 7 of the 1996 Act, which relates to control agreements. The effect of the amendments is to require SNH to have regard to the code of practice when deciding whether to exercise its functions. The amendments also expand the types of damage which can be relied on as a basis for SNH seeking a control agreement, the purposes of such agreements and the types of measures they can cover. The amended section 7 will cover damage as a result of steps taken or not taken for the purposes of deer management as well as damage by deer themselves. It will also cover damage to deer welfare or to public interests of a social, economic or environmental nature. It will allow SNH to seek a control agreement for the purpose of remedying existing damage (as well as preventing further damage in future). The amendments will also allow control agreements to provide for a wider range of measures than those to reduce deer numbers. The amended section will also state that control agreements may set out steps to be taken in each 12 month period within any control agreement. SNH will be required to review compliance with control agreements on an annual basis.

137. Subsection (3) amends section 8 of the 1996 Act, which relates to control schemes. The effect of the amendments is to ensure that, with one exception, the tests which allow SNH to make a control scheme are the same as those which would allow it to seek a control agreement. The exception is that SNH cannot make a control scheme in relation to a control agreement which was concluded for the purpose of altering or enhancing the natural heritage. The amendments also set deadlines for concluding that control agreements have failed. SNH will be required to review compliance with control schemes.

138. Subsections (4) and (5) amend sections 10 and 11 of the 1996 Act, which relate to emergency measures to control deer. The amendments will allow emergency measures to be taken in relation to any damage, including damage to deer welfare.

139. Subsection (6) relates to the procedure for control schemes made under section 8 of the 1996 Act. This replaces the current procedure specified in Schedule 2. This allows owners or occupiers aggrieved by a control scheme to object to the Scottish Ministers who must consider these objections and decide whether or not to confirm the control scheme. Owners or occupiers may subsequently appeal the decision of the Scottish Ministers or the terms and conditions of a control scheme to the Scottish Land Court.

Section 25 – Deer: close seasons etc.

140. Section 25 amends sections 5, 26 and 37 of the 1996 Act. Under section 26, occupiers will retain the right to take or kill deer where there is for the purpose of preventing damage (previously this was serious damage) but will require an authorisation under section 5 if they
wish to do so during the close seasons. SNH will be able to grant authorisations under section 5 for the purposes of preventing damage to crops, pasture, human or animal foodstuffs or enclosed woodland. It will be possible to issue general authorisations to classes of people (e.g. occupiers) or in respect of types of land (e.g. arable land). The requirement to consider fitness and competence under section 37 will continue to apply except when considering authorisations to occupiers for the purposes of preventing damage to crops, pasture, human or animal foodstuffs or enclosed woodland.

Section 26 – Register of persons competent to shoot deer etc.

141. Section 26 inserts new sections 17A and 17B into the 1996 Act. Section 17A (inserted by subsection (4)) contains an enabling power which permits Ministers to introduce a requirement that any person shooting deer, or supervising the shooting of deer, must be named on a register as competent to do so. Section 17A(3) creates an offence of shooting deer in contravention of requirements set under the enabling power. This is subject to an exception (in section 17A(4)) which allows the killing of a deer which is injured or diseased or killing dependant young which has been, or is about to be, deprived of its mother.

142. Regulations made under the enabling power may also provide that persons who are registered as competent can be considered “fit and competent” for the purposes of authorisations to shoot deer at night, or during close seasons (section 17A(1)(c)).

143. In the event that a competence requirement is introduced, regulations may also require those persons named on the competence register to submit a regular cull return (section 17A(1)(d)). “Cull return” is defined in section 17A(6) as a return showing the number of deer of each species and of each sex which have been killed. Section 17A(5) creates an offence of failing to submit a cull return in accordance with regulations or submitting a return which is materially false or misleading. This offence would replace the offence under section 40(4) of the 1996 Act.

144. Section 17A(2) allows regulations to include supplementary, incidental or consequential provision and lists examples of the type of provision this might include.

145. Subsection (9) of section 26 sets maximum penalties for the new offences in section 17A(3) and (5). Subsections (2), (3) and (5) to (8) make further amendments to the 1996 Act in consequence of the new section 17A.

146. Section 17B (inserted by subsection (4)) requires SNH to conduct and publish a review of competence in deer stalking and its effect on deer welfare if the enabling power in section 17A has not been exercised by 1 April 2014.

Section 26A – Action intended to prevent suffering

147. Section 26A amends section 25 of the 1996 Act. Section 25 provides an exception to the offences in the 1996 Act where the action taken is to prevent suffering. Section 26A adds starvation (where there is no reasonable chance of recovery) to the existing provision which relates to injury or disease.
Section 26B – Offence by bodies corporate, Scottish partnerships etc. under the 1996 Act

148. Section 26B applies to all of the offences in the 1996 Act. It ensures that where bodies corporate are managed by members those members will be treated as if they were directors of that body and it allows partners to be prosecuted for the offences of a partnership, and managers to be prosecuted for the offences of an unincorporated association they are managing.

PART 4 – OTHER WILDLIFE ETC.

Section 27 – Protection of badgers


Offences

150. The 1992 Act provides for five separate offences in relation to badgers: taking, injuring or killing (section 1); cruelty (section 2); interfering with badger setts (section 3); selling and possession of live badgers (section 4) and marking and ringing (section 5).

151. It is already an offence to knowingly cause or permit interference with a badger sett (section 3(2) of the 1992 Act). Section 27(2) to (5) creates new offences of knowingly causing or permitting any of the other offences in the 1992 Act, except the offence of wilfully remaining on land or refusing to give a full name or address under section 1(5) of the 1992 Act.

Licences

152. Under the 1992 Act as originally enacted, licensing functions were split between SNH and Scottish Ministers based on the reason for granting the licence. Subsection (6) amends section 10 of the 1992 Act to provide that the Scottish Ministers are the licensing authority (“the appropriate authority”) with power to grant a licence for any of the listed reasons, except where they delegate licensing functions to SNH or a local authority as set out below. Before granting a licence, the Scottish Ministers are required to consult SNH.

153. Subsection (7) inserts a new section 10A into the 1992 Act. This section allows Scottish Ministers to delegate their licensing functions to SNH by written direction, or to a local authority by order following consultation with the local authority, SNH and anyone else affected by the making of the order. If a local authority has been delegated licensing functions, they must consult SNH before granting or modifying a licence.

Attempts to kill, injure or take badgers

154. Subsection (8) amends section 11A(3) of the 1992 Act. This section creates a presumption that a person was attempting to do kill injure or take a badger where there is evidence from which it can be reasonably concluded that this is what they were attempting to do. The amendment applies the presumption to the new offence of knowingly causing or permitting the killing, injuring or taking of a badger.
Penalties

155. Under section 12(1A) of the 1992 Act, certain offences can be prosecuted either on indictment or summarily. These offences are primarily those related to badger digging and baiting and include the offences of causing a dog to enter a sett and selling a live badger. These offences are “relevant offences” within the meaning of sections 45(6) and 47(6) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which means that the maximum penalties on summary conviction are a 12 month sentence of imprisonment and/or a fine of the statutory maximum (which is set under section 225(8) of the Criminal Procedure (Scotland) Act 1995 and is currently £10,000). The maximum penalty for conviction on indictment is a 3 year sentence of imprisonment and/or an unlimited fine. Offences covered by section 12(1) of the 1992 Act can only be prosecuted summarily. The maximum penalties for these offences range from a fine of level 3 on the standard scale (for offences under section 1(5) of the 1992 Act) to a level 5 fine (currently set at £5,000 by section 225(2) of the Criminal Procedure (Scotland) Act 1995) and/or a six month sentence of imprisonment (for the offence of killing a badger as well as for most other offences under the 1992 Act).

156. Subsection (9) amends section 12 of the 1992 Act to extend the list of offences which can be prosecuted either on indictment or summarily. The effect is to allow the offences of illegally killing, injuring or taking a badger, possessing all or part of a dead badger, knowingly permitting or causing these offences, knowingly permitting or causing cruelty to a badger and knowingly permitting or causing the sale or possession of a live badger to be prosecuted summarily or on indictment.

157. Subsection (9) also amends section 12 of the 1992 Act to state that the maximum penalties for summary conviction for offences which can be tried either summarily or on indictment are a 12 month sentence of imprisonment and/or a fine of the statutory maximum. The effect is to ensure that the new offences which can be tried either way will be subject to the same penalties as the existing either way offences under the 1992 Act.

Time limits

158. Subsection (10) extends the application of the time limits prescribed in the 1992 Act for bringing summary proceedings to cover all of the offences in the 1992 Act. The effect is that summary proceedings for any offence under the 1992 Act must be brought within 6 months of the date on which the prosecutor has sufficient evidence to initiate proceedings. In addition summary proceedings cannot be brought more than 3 years after the commission of the offence or, where the offence is an ongoing one, more than 3 years after the last date on which the offence was committed.

Powers of court where dog used or present at commission of offence

159. Subsection (11) makes a consequential amendment to section 13 of the 1992 Act to include the new offence of knowingly causing or permitting someone to unlawfully kill, injure or take a badger. This means that a court can disqualify a person found guilty of this offence from having custody of a dog.
**Section 28 – Muirburn**

*Muirburn season*

160. Section 28 amends the Hill Farming Act 1946. Sections 23 to 27 of the 1946 Act regulate the practice of muirburn in Scotland.

161. Subsection (2) replaces section 23 of the 1946 Act which deals with the permitted times for making muirburn. The substituted section 23 establishes a positive muirburn season, consisting of a “standard muirburn season” (1 October until 15 April) and “extended muirburn season” (16 April until 30 April) (see section 23(2) to (4)). Muirburn may only be made during the extended muirburn season with the proprietor’s permission (section 23(5)).

162. The new section 23 removes the ability to make muirburn between 1 and 15 May on land situated more than 450 metres above sea level which had previously been possible with the proprietor’s permission. Under the new section 23, the last date of the “extended muirburn season” at all altitudes is 30 April.

163. The new section 23 also removes a power for Scottish Ministers to make limited extensions to the muirburn season in the spring by direction. This is replaced by an extension to the order making power in section 23A of the 1946 Act.

164. Subsection (3) amends section 23A of the 1946 Act, which was inserted by section 58 of the Climate Change (Scotland) Act 2009. Subsection (3)(b) and (c) extends the purposes for which the muirburn season may be varied (to include conserving, restoring, enhancing or managing the natural environment, or for public safety) and allows the dates to be varied on a geographical or phased basis. Subsection (3)(a) and (d) make changes to section 23A in consequence of the changes to section 23 of the 1946 Act, which sets the dates of the muirburn season.

165. Subsection (4) inserts new section 23AA into the 1946 Act. This allows Scottish Ministers to make further regulation by order, where they have extended the muirburn season on section 23A(1). In particular such further regulation might include provision on notification requirements or the making of objections or requiring approval for burning in an extended season, attaching conditions. Relevant offences can also be created. Orders made under section 23AA would be subject to negative procedure in the Scottish Parliament.

*Muirburn licences*

166. Subsection (4) inserts a new section 23B into the 1946 Act. This allows Scottish Ministers to license out of season muirburn for the purposes of conserving, restoring, enhancing or managing the natural environment, for research or for public safety. Muirburn licences may be granted subject to conditions. Scottish Ministers may delegate this licensing power to SNH. Inserted section 23B(11) enables Scottish Ministers to make further provision in regulations about muirburn licences. Such regulations are subject to negative procedure in the Scottish Parliament.
Notice by tenant

167. Subsection (4A) provides for tenants giving notice to proprietors of land. A tenant may give the notice of their intention to make muirburn required under subsection (2) of the 1946 Act to a person authorised by a proprietor of land to receive such notice and the notice (whoever given to) must be in writing.

Muirburn offences

168. Subsection (5)(a) amends section 25 of the 1946 Act to create an offence of making muirburn outwith the muirburn season and otherwise than in accordance with a muirburn licence. This replaces the offence under the previous version of section 23(4) of the 1946 Act and is consequential on the changes to section 23 and the insertion of section 23B.

Notifications in relation to muirburn

169. Subsection (6) amends section 26 of the 1946 Act to set new notification requirements in relation to muirburn. Subsection (7) inserts a new section 26A regarding the permitted methods for giving muirburn notices. Subsection (5)(b) repeals the previous notification requirements set under section 25(c) of the 1946 Act.

170. Under the amended section 26 of the 1946 Act it is an offence to make muirburn without having provided the proprietor of the land, and the occupiers of land within 1 km of the proposed muirburn site, with written notification of the intention to burn during that muirburn season (see section 26(1), (2) and (10). Notice does not require to be given to those who have indicated in writing that they do not wish to be notified (section 26(3)).

171. Amended section 26(4) to (7) makes provision about timescales, content and permitted methods of notification. Notice of intention to burn must be given after the end of the previous muirburn season, and at least 7 days before burning (section 26(5)(a)). It must indicate the places where burning is planned and specify that further information about the intended dates, location and approximate extent of burns may be requested (section 26(5)(b) and (c)). When such a request is made, the person intending to make the muirburn must make reasonable efforts to comply with this request not later than the day before the muirburn is made (section 26(7)). Where there are 10 or more occupiers within 1km of the proposed muirburn site, notification may alternatively be made by placing a notice in a local newspaper (section 26(4)).

172. Inserted section 26A of the 1946 Act specifies the permitted methods for giving muirburn notices. In addition to delivering (section 26A(1)(a)), leaving or posting (section 26A(1)(b) and (c)) written messages, it permits the use of electronic communications (including email, text message and fax) where the person to be notified has agreed to be notified in that way (section 26A(1)(d)). Notices given by electronic communications are deemed to have been received 48 hours after they are sent (section 26A(3)). Where it is not possible to ascertain the identity of an occupier who requires to be notified, fixing a notice to a conspicuous object on their land is a permitted form of notification (section 26A(2)).
This document relates to the Wildlife and Natural Environment (Scotland) Bill as amended at Stage 2 (SP Bill 52A)

Section 28A – Offences by bodies corporate, Scottish partnerships etc. under the 1946 Act

173. Inserted section 34A applies to the offences in the 1946 Act. It allows partners to be prosecuted for the offences of a partnership, and managers to be prosecuted for the offences of an unincorporated association they are managing.

PART 5 – SITES OF SPECIAL SCIENTIFIC INTEREST

Section 29 – Combining sites of special scientific interest

174. Section 29 inserts new section 5A into the 2004 Act which provides for the combination of SSSIs. Subsections (1) to (4) provide procedure relating to the notification and advertisement of combined SSSIs and the revision of the management statement for the combined site. From the date of notification of the combined SSSI, the component SSSI notifications cease to have effect under subsection (3)(c). Subsection (5) clarifies that SNH may not include any land in the new combined site which was not already part of one of the component sites and may not add a new operation requiring consent as a result of this procedure.

Section 30 – Denotification of SSSIs: damage caused by authorised operations

175. Section 30 inserts provision into section 9 of the 2004 Act for the streamlining of denotification of SSSIs in certain circumstances, i.e. when all or any part of an SSSI is no longer of special interest due to damage to, or destruction of, a natural feature when that damage or destruction is a consequence of an authorised operation and when the public body or office holder has already consulted SNH before permitting the operation.

Section 31 – SSSIs: operations requiring consent

176. Section 31 amends sections 13 and 14 of the 2004 Act such that existing provision relating to operations carried out by public bodies is also applied to operations which are caused or permitted by public bodies (when such operations occur on land which is owned or occupied by the public body).

177. Subsections (3)(a)(i) and (4)(a)(i) amend sections 14 and 17 of the 2004 Act such that SNH consent is not required when an operation is in accordance with a control scheme made under section 8 of the Deer (Scotland) Act 1996. Subsections (3)(a)(iii) and 4(a)(iii) insert new paragraphs into section 14(1) and 17(1) such that SNH consent is not required for operations which are specified in an order made by the Scottish Ministers.

Section 32 – SSSI offences: civil enforcement

178. Section 32 provides for civil enforcement where SNH is satisfied that a person has committed an offence under section 19(1) or (3) of the 2004 Act.

179. Subsection (1) inserts a new section 20A into the 2004 Act which provides for the giving of restoration notices. Such notices may be given by SNH. The procedure has a preliminary step covered by subsections (1) and (3). Subsection (1) allows SNH to propose to give a restoration notice to the responsible person if it is satisfied that that person has committed an
This document relates to the Wildlife and Natural Environment (Scotland) Bill as amended at Stage 2 (SP Bill 52A)

offence under section 19(1) or 19(3) of the 2004 Act. Subsection (3) specifies how the proposal is to be made (i.e. it must explain why SNH proposes to give the restoration notice, be accompanied by a draft of the proposed restoration notice, explain that giving notice of intention to comply with the restoration notice within 28 days of it being given would discharge the responsible person from liability to conviction for the offence in question, explain that the responsible person has the right to make representations to SNH within 28 days from the date on which the proposal was made and specify the manner in which such representations are to be made).

180. Subsection (2) of inserted section 20A explains what is meant by the term “restoration notice”. Subsection (4) enables SNH to give a restoration notice after the period for making representations (28 days) has expired. Subsection (5) gives effect to a restoration notice only if the responsible person gives SNH notice of intention to comply with it within 28 days of the notice being given. Subsection (6) allows SNH to extend the period for operations to be carried under the notice or otherwise modify the notice as SNH considers appropriate. Subsection (7) clarifies that SNH may only modify the notice under (6)(b) where the responsible person has consented to such a modification. Subsection (8) allows SNH to withdraw a restoration notice should it become satisfied that the restoration notice should not have been given to the responsible person. Subsection (9) requires SNH to compensate the responsible person for any expenses reasonably incurred in complying with a notice which is withdrawn. Subsection (10) prevents proceedings being commenced or continued for an offence in relation to which a restoration notice has effect even if the notice is subsequently withdrawn.

181. Subsection (11) of inserted section 20A provides that failing to comply with a restoration notice will itself be an offence. In the event of the requirements of a restoration notice not being carried out, subsection (12) of that section allows SNH to carry out the operations and recover costs from the responsible person.

182. Subsection (1) also amends sections 14(1) and 17(1) of the 2004 Act such that SNH consent is not required for operations carried out by public bodies or owner occupiers when such operations are in accordance with the requirements of a restoration notice. Section 44(1) of the 2004 Act is amended so as to grant a new power of entry to SNH for the purposes of it ascertaining whether an operation as required by a restoration notice has been carried out in accordance with the notice.

183. Subsection (1A) is a consequential amendment of the Rehabilitation of Offenders Act 1974.

184. Subsection (2) makes consequential amendments of the Criminal Procedure (Scotland) Act 1995.
PART 6 – GENERAL

Section 33 – Crown application

185. Section 33(2) inserts a new section 27A into the 1946 Act. Inserted section 27A provides that sections 23 to 27 (muirburn) of the 1946 Act bind the Crown, and that the Crown cannot be held criminally liable for the offences within these sections.

186. Section 33(3) inserts a new section 66B into the 1981 Act. Inserted section 66B provides that Part 1 of the 1981 Act binds the Crown, provides for the powers in section 14M and 19ZC of the 1981 Act to be exercised in respect of Crown land only with the consent of the appropriate authority as defined in subsection (7), and provides that the Crown cannot be held criminally liable for the offences in Part 1.


188. Section 33(5) amends section 44 of the 1996 Act, which provides for Crown application. It confirms that the 1996 Act binds the Crown, provides for the powers in section 15 of that Act to be exercised in respect of Crown land only with the consent of the appropriate authority as defined in new section 44(7), and provides that the Crown cannot be held criminally liable for offences in the 1996 Act.