

# Wildlife Management and Muirburn (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Wildlife Management and Muirburn (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 24–EN);
  - a Financial Memorandum (SP Bill 24–FM);
  - a Policy Memorandum (SP Bill 24–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 24—LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### Outline of Bill Provisions

4. The Bill is being introduced to address raptor persecution and ensure that the management of grouse moors and related activities are undertaken in an environmentally sustainable and welfare conscious manner. The Bill will do this by implementing the recommendations of the independent review of grouse moor management.
5. The Bill will also implement the recommendations of the Scottish Animal Welfare Commission: report on the use of rodent glue traps in Scotland.

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6. The Bill is in three parts:

- Part 1: Wildlife Management – prohibiting the use, purchase or possession of glue traps; regulation of certain wildlife traps; and licensing of land for taking and killing of certain birds.
- Part 2: Muirburn licensing.
- Part 3: Miscellaneous and general provisions, including: powers of entry; individual culpability; Crown application; ancillary provisions; and commencement.

## Rationale for Subordinate Legislation

7. The Bill contains a number of provisions conferring delegated powers. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:

- The need to allow detailed operational arrangements to be set out in secondary legislation, in line with the basic structures and principles set out in the primary legislation;
- The need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- The need to ensure proper use of parliamentary time;
- The possible frequency of amendment; and
- The need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

8. The relevant provisions are described in detail below. For each provision, this memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

9. Subordinate legislation is required to implement the Scottish Government's policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has carefully considered the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

## Delegated Powers

### Part 1: Wildlife Management

#### Section 4(2) Requirements for use of traps

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

#### Provision

10. Section 4(2) inserts section 12A (requirements for use of certain wildlife traps) into the Wildlife and Countryside Act 1981 (the “1981 Act”).

11. Section 12A(1) provides that a person must possess a wildlife trap licence to use a trap, to which section 12A of the 1981 Act applies, for the purpose of killing or taking a wild bird or wild animal. Section 12A(2) provides that the section applies to a trap for the purpose of taking wild birds or certain traps approved by an order made under section 50 of the Agriculture (Scotland) Act 1948.

12. Section 12A(8) permits the Scottish Ministers to make regulations to amend subsection (2) to add, modify or remove traps (or descriptions of traps) to which the section applies.

13. Section 12A(9) provides that before making any regulations under section 12A(8) the Scottish Ministers must consult Scottish Natural Heritage and such persons as they consider likely to be interested in or affected by wildlife trap licensing.

#### Reason for taking power

14. Taking this power gives the Scottish Government the flexibility to respond to the manner in which traps are used in the future, for example should evidence come to light that a trap or traps which do not currently fall within these provisions, are linked to raptor persecution. If such evidence does come to light, it would be possible for Ministers to amend section 12A(2) in order to provide that the use of such a trap will require a wildlife trap licence.

15. It will also allow the Scottish Government to respond timeously if new types of traps are developed or existing traps are modified or removed from the market.

#### Choice of procedure

16. As this provision enables amendment of a provision of primary legislation, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

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## Section 4(2): Further Provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

### Provision

17. Section 4(2) inserts section 12G (further provision) into the Wildlife and Countryside Act 1981 (the “1981 Act”).

18. Section 12G enables the Scottish Ministers to make provisions relating to: (a) the use of a wildlife trap to which section 12A applies; (b) displaying of licence numbers on tags or directly on the trap; and (c) approved training courses.

19. Section 12G(3) provides that before making any regulations under section 12G(1) the Scottish Ministers must consult Scottish Natural Heritage and such persons as they consider likely to be interested in or affected by wildlife trap licensing.

### Reason for taking power

20. This power is required to enable the Scottish Ministers to respond quickly to any changes relating to the use of wildlife traps.

21. This regulation power enables modification of the definition of relevant offence which will ensure that the provisions remain aligned with any new offences which may be created by future legislation as well as removal of offences if these are no longer required. The power will also enable Scottish Ministers to add current offences which are not included in the definition if there is evidence that these are linked to the use of wildlife traps. This will ensure that these offences are taken into account when granting, modifying, suspending or revoking a wildlife trap licence.

22. The power to make regulations relating to displaying licence numbers on trap directly or through a tag will ensure future proofing by enabling future regulations to take account of new methods of marking and identification.

### Choice of procedure

23. As this provision enables amendment of the Bill itself, so far as the provision enables amendment of the definition of “relevant offence” in section 12D(5), the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

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## Section 7(2): Licensing: land on which certain birds may be killed or taken

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

### Provision

24. Section 7(2) inserts Section 16AA into the 1981 Act to make provision for the establishment of a licensing scheme for land on which certain birds may be killed or taken. New Section 16AA(8) makes provision for circumstances in which a licence may be revoked, including where the licence holder or a person involved in managing the land to which the licence relates has committed a “relevant offence” (as defined by section 16AA(11)).

25. Section 16AA(12) provides that Scottish Ministers may by regulation modify the definition of relevant offence in subsection (11).

### Reason for taking power

26. The ability to modify the definition of relevant offence is necessary to allow the government to respond if there is evidence to show that offences which are not included within the definition that relate to raptor persecution or grouse moor management ought to be included in the definition. This would ensure that these offences are taken into account when granting, modifying, suspending or revoking a section 16AA.

27. The delegated power also helps to future-proof the Bill by giving Scottish Ministers the power to amend to definition of relevant offence to reflect future legislation and new offences which may be created. Section 16AA licences currently only apply to land on which the killing or taking of red grouse occurs. This power enables the Scottish Ministers to add relevant offences should section 16AA licences be extended to other birds in the future.

### Choice of procedure

28. As this provision enables amendment of a provision of primary legislation, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

## Section 6(3): Killing and taking of certain birds permitted only on land with section 16AA licence

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

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## Provision

29. Section 6(3) of the Bill amends section 26(2) and 26(3) of the 1981 Act to provide that an order under section 22(1)(a) of the 1981 Act which adds any bird to, or removes any bird from, Part 1B of Schedule 2 must be laid by affirmative procedure rather than negative procedure. Reason for taking power

30. This power is required to enable the Scottish Government to add other species of birds to the list of birds which can only be taken under a section 16AA licence. For example, if evidence were to come to light that raptor persecution was being carried out in relation to another species of grouse; or that greater regulation of the taking of a bird listed in Part 1 of Schedule 2 was necessary for another reason.

## Choice of procedure

31. Section 26 of the 1981 Act provides these schedules can be amended by negative procedure, however, the Scottish Government believes that adding birds to the licence regime should be subject to the affirmative procedure due to the extra conditions that it places upon anyone taking such birds. This is also considered appropriate as the subordinate legislation would amend an Act.

## Section 8(1): Power to investigate certain wildlife offences

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

## Provision

32. Section 8(1) of the Bill provides that the Scottish Ministers may by regulation modify section 49(2)(a) of the Animal Health and Welfare (Scotland) Act 2006 (the “2006 Act”) in order to add powers that a person so appointed may exercise in relation to offences under Part 1 of this Bill and Part 1 of the Wildlife and Countryside Act 1981.

33. Section 49(2)(a) of the 2006 Act sets out that the Scottish Ministers may appoint inspectors to carry out investigations under relevant provisions in the 2006 Act.

## Reason for taking power

34. The 2006 Act makes provision for the welfare of “protected” animals. Animals which are protected are those which are under the control of man on a temporary or permanent basis or those not living in a wild state. Inspectors appointed under the 2006 Act have the power to investigate relevant offences against protected animals as set out in the 2006 Act.

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35. This regulation making power is required to enable the Scottish Ministers to extend the powers of inspectors authorised under the 2006 Act to investigate relevant offences relating to wild animals, as set out in section 8 of the Bill, should they deem it appropriate to do so. The power is therefore taken for the purpose of future-proofing.

### Choice of procedure

36. As this provision enables amendment of a provision of primary legislation, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

## Part 2: Muirburn licensing

### Section 10(5): Grant of muirburn licence

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

### Provision

37. Section 10 of the Bill relates to applications for a muirburn licence permitting muirburn to be made for one of the purposes specified in subsection (2). Subsection (2)(a) sets out the purposes which may apply where the land to which the application relates is not peatland, including managing the habitats of moorland game or wildlife.

38. Subsection (2)(b) sets out the purposes which may apply where the land to which the application relates is peatland, including restoring the natural environment and reducing the risk of wildfires causing damage to habitats.

39. Section 10(5) gives Scottish Ministers the power to amend section 10(2)(a) and 10(2)(b) of the Bill to modify, add or remove the purposes for which a licence may be granted to undertake muirburn on both land which is not peatland, and peatland.

40. Section 10(6) provides that before making any regulations under section 10(5) the Scottish Ministers must consult Scottish Natural Heritage and such persons as they consider likely to be interested in or affected by the licensing of muirburn.

### Reason for taking power

41. The restriction on the purposes for which muirburn can be undertaken is a precautionary measure based on the latest available scientific evidence and reflects the recommendations of the Climate Change Committee, an advisory body who advises the Scottish Government on climate matters. However, as set out in the policy note accompanying the Bill, the evidence of the harm and benefits of muirburn on peatland is contested.

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42. A delegated power is therefore necessary to enable the Scottish Ministers to adapt the approach to muirburn if new evidence emerges that a different approach is required. This power could be used to either relax or restrict further the purposes for which muirburn may lawfully be undertaken on peatland.

### Choice of procedure

43. As this provision enables amendment of the Bill itself, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

## Section 16(2): Muirburn season

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

### Provision

44. Section 16(1) of the Bill sets out the date of the muirburn season. Section 16(2) gives the Scottish Ministers the power to amend the dates set out in section 16(1).

45. Section 16(3) sets out the Scottish Ministers can use this power to change the dates of the muirburn seasons in relation to climate change, for the purpose of conserving, restoring, enhancing or managing the natural environment, or for the purpose of preventing, or reducing risk of, wildfires causing harm to people or damage to property.

46. Section 16(5) provides that the Scottish Ministers must consult Scottish Natural Heritage and such others as they consider likely to be interested in or affected by the making of muirburn, before making such regulations.

### Reason for taking power

47. The Bill sets out that except under exceptional circumstances, muirburn is permitted only during the statutory muirburn season (the “open season”), which runs from 1st October to 15th April inclusive.

48. The reason for the close season for muirburn is to reduce the risk of wildfire occurring during the hottest and driest part of the year, and to protect vulnerable wildlife, such as ground nesting birds and mammals, during their main breeding season.

49. It is expected that environmental pressures such as the twin impacts of the climate change and biodiversity crises may bring about changes to weather patterns, the breeding season of wild animals and the growth cycle of plants and crops.

50. The regulation making power in section 16(2) of the Bill is therefore necessary to ensure that the Scottish Ministers can react quickly by amending the dates of the

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muirburn season in order to mitigate the impact of such changes, ensuring that dates for the open season continue to align with weather patterns and wild animal breeding cycles.

## Choice of procedure

51. As this provision enables amendment of the Bill itself, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

## Section 18: Interpretation of Part

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

## Provision

52. Section 18(1) defines “peat” and “peatland” for the purposes of Part 2 of the Bill. “Peat” is defined as “soil which has an organic content (that is, content consisting of living and dead plant and animal material) of more than 60%”. “Peatland” is defined as “land where the soil has a layer of peat with a thickness of more than 40 centimetres”. The definition of “peat” and “peatland” is relevant as muirburn can only take place on peatland for certain purposes specified in the Bill.

53. Section 18(2) and (4) provides that the Scottish Ministers may amend the definitions of peat and peatland by regulations subject to the affirmative procedure.

54. Section 18(3) provides that before making any regulations under section 18(2) the Scottish Ministers must consult Scottish Natural Heritage and such persons as they consider likely to be interested in or affected by the making of muirburn.

## Reason for taking power

55. As set out in the policy memorandum accompanying the Bill, some of the science around muirburn is contested, and there is a divergence of opinion on the thickness of peat that should be used to define peat for the purposes of muirburn. The definition used in the Bill was set at 40 cm in-line with the precautionary principle adopted in developing the policy for the Bill and was considered appropriate in order to protect areas of peatland associated with shallower peat.

56. However, given that science is still evolving an enabling power is necessary to allow the government to amend the definition if new evidence emerges that supports a change to the way peatland should be measured for the purposes of muirburn.

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## Choice of procedure

57. As this provision enables amendment of a provision of primary legislation, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure.

## Part 3: Miscellaneous and general provisions

### Section 26: Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if amending primary legislation, otherwise negative procedure

#### Provision

58. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of or in connection with the Bill, or for giving full effect to it. The regulations may make different provision for different purposes and modify any enactment.

#### Reason for taking power

59. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. The power is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provisions in the Bill. Such provision is common in Bills to provide flexibility to make any adjustments that may arise in light of experience in relation to the operation of the Act as timeously as possible.

60. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues with the operation of the new legislation. Without the power, it may be necessary to make further primary legislation to deal with a technical, operational or implementation matter which is clearly within the scope and policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Scottish Parliament or the Scottish Government.

61. The Scottish Government recognises the potentially broad application of this power, which includes the power to modify primary legislation, and to alter the provisions of the Bill. However, it is limited to the extent that it can only be exercised by the Scottish Ministers for the purposes of, in connection with, or for giving full effect to any provisions of the Bill.

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## Choice of procedure

62. Section 26(3) requires regulations made under section 26(1) to be subject to affirmative procedure if they contain a provision which adds to, replaces or omits any part of an Act. Any other regulations made under this section are subject to negative procedure. These procedures are typical for ancillary powers.

## Section 27: Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure (in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010)

## Provision

63. This provision allows the Scottish Ministers to commence provisions in this Bill (other than sections 27 (commencement), and 28 (short title) which come into force on the day after Royal Assent) on such day as they may appoint by regulations. The regulations may include transitional, transitory or saving provision and may make different provision for different purposes

## Reason for taking power

64. It is standard practice for the Scottish Ministers to have control over the commencement of a Bill so that it can be brought into force at a suitable time. For example, it will be necessary to ensure that the appropriate forms and guidance for applicants in relation to the licences to be granted under the Bill are in place before those provisions are brought into force.

## Choice of procedure

65. As is usual for commencement regulations, the default laying requirement applies (as provided for by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.

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