

Citizen Participation and Public Petitions Committee

1st Meeting, 2023 (Session 6), Wednesday 18
January 2023

PE1859: Retain falconers' rights to practice upland falconry in Scotland

Lodged on 24 March 2021

Petitioner Barry Blyther

**Petition
summary** Calling on the Scottish Parliament to urge the Scottish Government to amend the Animals and Wildlife Act 2020 to allow mountain hares to be hunted for the purposes of falconry.

Webpage <https://petitions.parliament.scot/petitions/PE1859>

Introduction

1. The Committee took evidence from the petitioner on [7 December 2022](#) and from the Minister for Environment and Land Reform and NatureScot on [21 December 2022](#).
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received a written submission from the petitioner which can be found at **Annexe C**.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.
6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).

Key issues highlighted in evidence

7. Issues highlighted by the petitioner in the evidence session include:
 - Falconers' concern about the risk of prosecution if mountain hare are taken unintentionally.
 - Lack of consultation with falconers before the passage of the amendment to the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 (The Act)
 - Animal welfare concerns, particularly regarding the ability of falconers to fly larger captive birds, such as eagles, in the uplands in order for them to exhibit their natural behaviour.

8. Issues highlighted by the Minister for Environment and Land Reform and NatureScot in the evidence session include:
 - The unfavourable conservation status of mountain hare and their status as a priority species for conservation under the United Kingdom biodiversity action plan – as with any protected species, it is not permitted to take mountain hares for sporting purposes, be that shooting or falconry.
 - Prosecution risk where a person intentionally or recklessly kills, injures or takes a wild animal - accidental behaviour would not constitute unlawful behaviour.
 - Existing risk management currently undertaken by falconers operating in areas with other protected species and lack of prosecution of falconers for taking a protected species to date.
 - Prior to the Act falconers had to contend with open and closed seasons for mountain hare as well as protections for other species which birds of prey may accidentally take.
 - Requirement to take a proportionate and consistent approach to decision making and application in this area, in the context of the nature emergency.

9. Outstanding issues and points of clarification include:
 - Existing licensing purposes and options,
 - Circumstances which would constitute an offence and where a person could be charged and prosecuted,
 - How the welfare of birds of prey – particularly larger birds like eagles– can be ensured in the context of the new arrangements for the protection of mountain hare, and
 - Potential unintended consequences of any legislative change.

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe A

PE1859: Retain falconers' rights to practice upland falconry in Scotland

Petitioner

Barry Blyther

Date lodged

24 March 2021

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to amend the Animals and Wildlife Act 2020 to allow mountain hares to be hunted for the purposes of falconry.

Previous action

I have written to MSPs Murdo Fraser, Andy Wightman and Alison Johnstone.

Background information

The heritage art of falconry has been practised around the world for at least 4000 years and is recognised by UNESCO as an intangible cultural heritage of humanity. The wider concept of falconry has many disciplines within its scope, and these are in many ways controlled by both the species of bird of prey being flown, and the land that you have permission to fly it over.

For example, the spectacular Golden Eagle, one of only two species of eagle native to Scotland, needs extraordinarily vast, wide open spaces to be allowed to express itself and its flying style in a natural way.

To be conducive to the very high soaring flight in strong winds and among its natural home of the mountains, vast mountainous regions are where this bird can be flown at its very best. Bouncing backwards and forwards in field is really not what this species has evolved for millions of years to do.

Eagles are apex predators, and the result of flying them in these areas is that they will hunt their natural quarry. In the Scottish mountains, that quarry base is the mountain hare (*Lepus Timidus*), that has evolved side by side with eagles for millions of years. The predator will be successful in its attempt at hunting hares just frequently enough to survive, and the hare almost always evades the predator, assuring its survival and the proliferation of the species.

People and falconers travel to Scotland from around the country and the world to witness this age-old wild dynamic play out in front of them.

A captive bred Golden Eagle, enjoying the safety net of Veterinary care when illness or injury arises (that would likely lead to the death of its wild counterpart) can live to 50 years old. Many, if not most, in this country are bred, kept and trained with the ultimate aim to be flown over those high mountains each winter, and perhaps catch a mountain hare. In doing so, it fully expresses its nature and purpose and helps to keep the eagle stimulated, balanced, and ensures that it is a better contributor to captive breeding projects – It fully understands that it is an eagle and not an ornament.

New legislation comes in to force on March the 1st (with no mechanism for licensing), that makes it illegal for these birds with their falconers to continue to exhibit their natural instincts and behaviour within the reasonable framework of the law and principles of sustainable hunting as they have through time immemorial. The sustainable use of wild species is a key and proven strategy upheld by the International Union for the Conservation of Nature (IUCN) in order to promote the preservation and restoration of endangered species.

The purpose of the legislation was to prevent mass culls of tens of thousands of hares in Scotland each year on organised shoots. This petition is NOT aimed at this, rather its aim is to allow the continued practice of falconry in Scotland and her mountainous places, without risk of prosecution.

It seems unfair and unjustifiable that a piece of legislation brought into law to address a totally different issue, has the side effect of making the sustainable and legitimate branch of falconry illegal.

Unaddressed, this legislation will condemn hundreds upon hundreds of trained birds of prey to enclosed aviaries for the rest of their long lives, and therefore, I believe, presents an intolerable animal welfare issue of itself which the government does not appear to have anticipated.

It will end the dreams of hundreds of falconers and rob us of our heritage and right to properly fly our birds.

Business too will suffer. Substantial fees are paid by falconers to rent ranges to fly over, cottages to stay in, restaurants to eat in etc.

Film and production companies come to Scotland to film this wild behaviour (using trained birds of prey so wild eagles are not disturbed) for movies, documentaries and science.

The filming and broadcast of natural history documentaries showcasing the natural hunting behaviour of eagles and other birds of prey in Scotland is key to helping both a whole generation of youths and the public as a whole to value, cherish and understand nature. Additionally, such filming of eagles and other birds of prey hunting in their native habitat portrays some of Scotland's most unique and beautiful facets and thus contributes to the promotion of the truly unique ecological heritage of Scotland to a domestic and international audience. These film makers will now have to go elsewhere and thus promote other destinations.

Falconry based companies eke out an income during their lean winters by taking guests out to see this amazing spectacle. Those companies' futures are jeopardised by the sudden and unjustified loss of income and trade.

Finally, licences are to be made available to land owners to shoot the hares in a bid to protect habitat, crops and forestry. Currently, many estates do not shoot hares to ensure there is a realistic population to attract falconers trade to their doors. If falconry is to be lost as a legitimate pastime in the mountains, I believe, the hares will almost certainly be shot on many estates in far greater numbers than would be accounted for in falconry.

This petition requests an amendment to the legislation, exempting the taking of mountain hares in the practice of Falconry.

Annexe B

Extract from Official Report of last consideration of PE1859 on 21st December 2022

The Convener: Agenda item 2 is consideration of continued petitions. The first builds on the visit to Parliament of Stanley the golden eagle, which we enjoyed a fortnight ago. Therefore, we are discussing petition PE1859, which is entitled, “Retain falconers rights to practice upland falconry in Scotland”. The petition was lodged by Barry Blyther, and it calls on the Scottish Parliament “to urge the Scottish Government to amend the Animals and Wildlife Act 2020 to allow mountain hares to be hunted for the purposes of falconry.”

The committee will recall that we heard directly from Barry Blyther at the meeting on 7 December. Once again, I thank Barry, Stanley and—I think— Roxanne for their contributions and assistance.

This morning, we are joined by Màiri McAllan MSP, who is the Minister for Environment and Land Reform. Welcome. We are also joined by Hugh Dignon, who is the head of the wildlife management unit at the Scottish Government, and Stan Whitaker, who is a wildlife manager for NatureScot. Good morning, and thank you all for being here. We have a lot to get through today so we are making an early start. Members would like to explore a number of questions. Do you want to say anything before we move to questions?

The Minister for Environment and Land Reform (Màiri McAllan): I will make some opening remarks to set the scene, if that would be helpful.

I thank the committee for inviting me to give evidence on the petition. We have said previously, and I reiterate it today, that we absolutely recognise the cultural significance of falconry: indeed, I am taking the Hunting with Dogs (Scotland) Bill through Parliament and, at stage 2, I rejected amendments that I felt could unjustifiably impinge on legal activity.

However, it is very much our view that hunting with birds of prey must be undertaken within the law. Mountain hares are now a protected species, following the passing of the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act in June 2020, which, of course—as the committee will have heard—means that mountain hares have been protected from 1 March 2021. That means that they can no longer be taken for sporting or recreational purposes.

Mountain hares have been protected principally due to concern about their having unfavourable and inadequate conservation status, together with the very real concern of many stakeholders and the public about the number of mountain hares that were being killed each year. On conservation status, the mountain hare is a priority species for conservation under the United Kingdom biodiversity action plan and it is also on the Scottish biodiversity list. That means that mountain hares are of

principal concern and importance for biodiversity conservation. Of course, we are living in a climate and nature emergency.

However, I point out that birds of prey can still be used to take mountain hares for other purposes, where that is carried out under licence. That is dictated by section 16(3) of the Wildlife and Countryside Act 1981. I appreciate that a lot of the discussion has been about the risk of falconers taking non-target species, including mountain hares, when birds are being exercised and when they are hunting legitimate quarry, such as rabbits. Section 9 of the Wildlife and Countryside Act 1981 made it an offence for a person to “intentionally or recklessly” kill, injure or take a wild animal. Of course, we might get into some discussion about what constitutes an intentional or reckless act, but suffice it to say that accidental behaviour does not constitute unlawful behaviour, in that regard.

However, ultimately, as with any criminal offence, it is up to Police Scotland and the Crown Office and Procurator Fiscal Service to consider the evidence in the circumstances. I also point out that, prior to mountain hares being given year-round year-round protection on 1 March, they were included in schedule 5A to the Wildlife and Countryside Act 1981, which contains the list of animals that were protected in their close seasons. I point that out falconers have had to contend with open seasons and close seasons for many years, which gives me confidence that they are able to conduct their activities in a way that abides by different requirements at different times.

I know that the convener and committee members will have a lot of questions, so I will leave it there, but I stress that I recognise the cultural significance of falconry and the people who practise it. I am always open to views on the adequacy, implementation and impact of legislation, but I stress that the decision was taken on the basis of conservation concerns, so curtailment of sporting activity is justified in that context.

The Convener: At a previous evidence session, the petitioner clarified that the petition relates to upland falconry, and that there are different practices and different types of falconry. Upland falconry is what is relevant to the committee’s consideration of the petition. What is your understanding of upland falconry, and in what way do you understand it to differ from other falconry practices?

Màiri McAllan: I appreciate that the petition focuses on upland falconry, but for the purposes of making legislation and policy development, I have to take falconry as a practice in the round, because we have not made—I do not think that we would make—law for different types of falconry in different places. However, I understand that there is a dense population of mountain hares in the uplands, particularly on land that is managed as moorland, which means that such areas are where falconers have practised their activity. Obviously, the density of the mountain hare population in such areas means that there is a propensity for them to be the quarry that is pursued.

The type of falcon is another difference that can be found between practices in the uplands and other areas, but that—again—comes down to the quarry that is

pursued. You might find that smaller falcons are used in some parts of the country for smaller quarry. A small number of people use birds as large as eagles to take larger quarry, which previously included mountain hares.

I do not know whether Hugh Dignon can add to that.

Hugh Dignon (Scottish Government): A key aspect of what defines upland falconry is the prey species that are available in the uplands. As the minister said, mountain hares are a key prey species in some parts of Scotland and are found in high numbers in limited parts of Scotland. Another species that is routinely hunted by falconers in the uplands is grouse, which is an upland species that can be hunted without a licence with the permission of the landowner during the grouse open season. The type of prey that is available dictates to a large extent the sort of falconry that goes on in the uplands.

The Convener: So the basis of your understanding is entirely restricted to the quarry that you believe the birds are trying to hunt and does not include the natural landscape that allows them to fly.

Màiri McAllan: Obviously, the landscape has a bearing, but we would say that the—

The Convener: The birds cannot take off without that landscape.

Màiri McAllan: I am not sure that that is the case. I think that they can take off in other areas of the country. Obviously, a trained falconer would know a great deal more about that than I or we do, but we say that the quarry that is being pursued is the principal factor that differentiates upland falconry from other types, although there are other variables. Stan, do you want to come in?

Stan Whitaker (NatureScot): Golden eagles live in relatively low habitats on the west coast and on our islands, and peregrines and other species that are used for upland falconry have happily taken up residence in many of our towns and cities and will happily fly and hunt in lowland areas.

Fergus Ewing (Inverness and Nairn) (SNP): Does the Scottish Government value falconry?

Màiri McAllan: Yes. I value falconry in the same way as I value other cultural heritage, including sporting and recreational parts of Scottish culture. I accept that it is important to the people who practise it, and that there are economic advantages to its practice in the countryside.

Fergus Ewing: An amendment to the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 that dealt with the ban on shooting of mountain hares was passed at stage 3. Is it correct to say that the Scottish Government did not consider any evidence whatsoever from falconers in relation to that measure?

Màiri McAllan: Mr Ewing, I understand that you were the cabinet secretary at the time—

Fergus Ewing: No, I was not the cabinet secretary who was responsible for that bill.

Màiri McAllan: Well, the minister who took the legislation forward was a junior minister under both you and Ms Cunningham.

You are quite right that the amendment that dealt with the issue was lodged at stage 3 of that bill, so the Scottish Government was not able to undertake a business and regulatory impact assessment, for example, as we normally would. However, as I said in my opening remarks, as the minister who is now responsible I am always open to monitoring the impact of legislation and, equally, to hearing concerns about its effect.

Fergus Ewing: It is factually correct to say that falconry was not mentioned in that process. There was no evidence about falconry. Nobody mentioned falconry at all at stage 3, no evidence was submitted and nobody from the falconry world had the opportunity to be heard. Is that right?

Màiri McAllan: Again, owing to the speed with which stage 3, when the amendment was lodged, happened, we were not able to do the normal statutory assessments of the amendment before the legislation was passed. However, NatureScot worked closely with a range of stakeholders in the aftermath of the bill's passage to design the licensing scheme that went alongside protected status for the mountain hare. They included—I think—the Scottish Hawk Board and others.

Fergus Ewing: If you do not mind, minister, I want to press you in order that we get clarity about the point, because I think that it is factually incontrovertible that the falconry world had no opportunity to be heard. It was not consulted, it was not mentioned and no evidence whatsoever about falconry in relation to mountain hares was presented, submitted, discussed or mentioned by anybody during the passage of the bill. Is that factually correct?

Màiri McAllan: I accept that the normal assessment could not be undertaken because of time. I accept that point. I do not accept that the falconry community could not have been heard because—as you know—when you take legislation through as a minister, you have an open door.

Fergus Ewing: Did anyone consult the falconry community or reach out to it? Mr Dignon, did you say to the falconers, “Excuse me, but this amendment has come forward and we think you might be affected by it”? Did that happen?

Hugh Dignon: I do not recall specifically speaking to folk—

Fergus Ewing: You could maybe check that out.

I will move on, minister. You said that falconry could be carried out in other parts the country. We have heard from the petitioner—who has looked into the matter—that the only part of the country where they would be able to practise their sport without risking prosecution is Harthill service station. You have said that they can carry out their sport in other parts of the country. In which other parts of the country can they carry out their sport legitimately and without fear of prosecution, should their birds take mountain hares?

Màiri McAllan: The last part of your question really sets the context, because we are talking about mountain hares, which are the one quarry that is now protected owing to the change in the law. The rest of the spectrum of quarry that falconers can take is still available to them. I point out that, even despite the protected status of the mountain hare, hares can still be taken for licensable purposes. There are two examples to mention: falconers can still take mountain hare under licence, and they can take other quarry.

On that, I will pass over to Stan Whitaker from NatureScot, because I understand that some licences have been issued since the 1 March implementation date. He might give us a bit of insight into where the practice continues in Scotland.

Stan Whitaker: We have issued 21 licences for control of mountain hares to prevent serious damage to young trees and natural habitats. Most of the control is done by shooting, but at least one land manager has approval to use falconry. Admittedly, most of that will be done in areas where there are recently planted trees, and some of those areas might not be very large, but a proportion will be suitable for hunting over.

The Convener: Is that a serious answer to the question—that something like a golden eagle will be flying through trees? Is that really the proposition that you are presenting to us? Stan Whitaker: We are talking about trees that are less than 2 feet high.

Màiri McAllan: The point is that, when the trees are young and vulnerable—

The Convener: Is not it the case that the licence is afforded as a method of pest control and is completely unworkable for large birds such as eagles because of the risk of serious injury to the birds?

Màiri McAllan: The licence is about control and protecting young timber and agricultural land. It is about conserving natural habitats. That brings me back to the point that I made at the beginning, which is that, owing to the conservation status of the mountain hare, it has been viewed by Parliament and the public as not appropriate—

The Convener: Minister—

Màiri McAllan: Please let me finish the point. It is not appropriate to be taking mountain hares for sporting purposes.

The Convener: You have made the point, minister. We have limited time and I do not need to you repeat points.

Màiri McAllan: If you repeat questions, I will repeat points.

The Convener: I did not repeat the question. You indicated that the licence was an adequate method of control, but it clearly is not.

The petitioner made the point that, if everybody with a bird of prey—a falcon—let it loose every day during the open season, and every day it took a hare, it would take

50 years for those birds of prey to take as many hares as are shot in one year. Are birds of prey seriously a threat to conservation of the mountain hare?

Màiri McAllan: I will turn to my colleague Hugh Dignon in a second. The correction that I will make to that point is to say that not all falcons could or would take a mountain hare. Only an eagle would.

The Convener: Yes, but you commented a moment ago that the birds could legitimately hunt other prey, just not mountain hare. Is the eagle supposed to have some sort of education about which of the animals on the ground it is allowed to hunt?

Màiri McAllan: No, that is the responsibility of the falconer.

The Convener: Is that really practical in the context of upland falconry with a golden eagle?

Màiri McAllan: I understand that it will be a new challenge for falconers—

The Convener: It is a challenge that you really did not give any consideration to during the passage of the legislation because you did not give any thought whatsoever to taking evidence from people who would have been able to give an opinion.

Màiri McAllan: As I said, the late stage of the stage 3 amendments—

The Convener: That is not an excuse for poor legislation.

Màiri McAllan: It is the reality, convener—

The Convener: Mr Dignon, is there something that you want to say?

Hugh Dignon: On the separate but related question that you asked about where people could fly the birds, the risk of a golden eagle taking a mountain hare is clearly high if it is flown over areas of high mountain hare population density. That is the case really only where we have managed grouse moors. In the rest of upland Scotland, which is by far the majority of upland Scotland, where eagles live and fly in the wild, mountain hare numbers are very low. If a falconer decided to fly their bird in a part of upland Scotland other than a grouse moor, the chances of it taking a mountain hare accidentally are low, and taking a mountain hare there would not be considered by most people to constitute intentional or reckless conduct.

There are plenty of other prey species in the wild that eagles can take, and there is no reason why someone should not fly the birds in areas of Scotland where mountain hares do not exist in such high densities as they do on managed grouse moors.

Fergus Ewing: From the point of view of a falconer, if a falconer lets his bird of prey go and it takes a hare, the population of hares will be okay if the activity is concentrated on grouse moors where the land is properly managed, but there are other populations of hares.

The problem for falconers is that practising their sport exposes them to prosecution. Is that factually correct, or do you dispute that?

Hugh Dignon: It does, in the same way as does the risk of their golden eagle taking any other protected species. For example, golden eagles are known to take—

Fergus Ewing: Moving on from that—

Hugh Dignon: Can I finish the point? Golden eagles are known—

Fergus Ewing: You have answered the question, so I would rather move on. What happened here was that, without any opportunity to be heard, a group of people within Scottish society were made into potential criminals; a criminal offence was created without their having any opportunity to give evidence in their own Parliament before they became subject to potential prosecution. The petitioner is therefore asking for the law to be amended to allow mountain hares to be hunted for the purposes of falconry.

Finally, I want to pursue the point raised by the convener, which is that the evidence that we have heard shows that the practice of falconry in Scotland is fairly restricted. It is not a huge sport: relatively small numbers of people and of birds of prey are involved. The number of hares actually taken as a result of falconry is infinitesimal. Therefore, the Scottish Government should surely agree with the petitioners and should grant the petition because the impact on the hare population is negligible.

Màiri McAllan: Convener, you have previously stopped me from talking when I have tried to answer the question that has been posed, so I will not address the first part of Mr Ewing's question again, but I can say that I am always open to considering the impact of legislation.

Secondly, the decision to protect the mountain hare is based on evidence of a risk to their conservation status. I can hear Mr Ewing asking himself what impact falconry has on that conservation status and would respond to that by saying that lawmakers must make decisions that are consistent across the piece. This is a question for us all: why would it be justifiable to make an exception to species protection for sporting purposes if we were to have a different treatment for those who need to control a species on a grouse moor or a similar place? I must respond to threats to conservation status during a nature emergency but I must also be mindful to take decisions that are consistent across the piece for all those who seek to hunt in the countryside.

Fergus Ewing: If that argument applies, falconry cannot be carried out because it might take a few mountain hares. You have not answered the factual question about the impact of falconry on hares, but the evidence that we have heard—and that you have seen—is that the impact is negligible, infinitesimal, nugatory and irrelevant. You have not disputed that evidence. If you have, or if Mr Dignon has, further factual evidence, I would be very grateful if you could supply the committee with that after the meeting.

The point I want to put to you is this: you are saying that falconry is finished. Falconry cannot be practised because those who practice it face the risk of carrying

out a criminal activity and therefore cannot practice their sport in Scotland. You are saying that that is correct and justified because of a law that was passed in respect of which those people had no opportunity whatsoever to be heard. Is that not a preposterous proposition?

Màiri McAllan: My colleague Hugh Dignon answered that point thoroughly in his previous response, which was about all the ways in which falconry can continue in Scotland, despite the change to the law.

The Convener: You talked about a distinction that you said we cannot make. The petitioners' argument is that there are natural behavioural characteristics. There is clearly a difference in behaviour between someone who shoots hares with a gun and a bird that is displaying the natural characteristics that it has exhibited here in Scotland for an estimated 5,000 years, but that have now been made illegal.

David Torrance (Kirkcaldy) (SNP): As Mr Whitaker mentioned, we are talking about golden eagles and buzzards that fly on the west coast and the islands, where there is little obstruction. Those birds need to fly on the uplands. Their natural instinct on seeing, for example, a mountain hare, is to take it.

I will ask about legislation on animal welfare. Some captive birds of prey will never fly again because of the threat of prosecution to the owners. Does the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 override the Animal Health and Welfare (Scotland) Act 2006?

Màiri McAllan: I have a couple of points to make in response to that. I do not accept that falcons can no longer be used because of the 2020 act. That goes back to Hugh Dignon's description of the multitude of activities that can continue in Scotland with falcons. We have pointed to their being used for a whole range of quarry. We are talking only about mountain hares here, but they are used to take other species. Equally, in the case of mountain hares, they can still be used for purposes that are licensed.

That point is frequently put to me when it comes to legislation on wildlife management in the countryside. For example, I am asked what the impact is on dogs in relation to the hunting with dogs legislation and what the impact is on the falcon in relation to this legislation. I take that all into account.

You are right to point to the 2006 act. Under that legislation, the keeper of any animal has a responsibility to ensure that they do not cause it any unnecessary pain or suffering, and that they look after its welfare. That is still the case, regardless of other changes to the law.

David Torrance: If some golden eagles cannot fly in their natural habitat because they might take a mountain hare, how can an owner of such a bird allow it to fly, given the threat of prosecution?

Màiri McAllan: Hugh has indicated to me that he wishes to come in.

Hugh Dignon: I make the point that the risk of prosecution for an eagle taking a mountain hare is no different from the risk of prosecution that has existed for many

years for an eagle taking any number of other protected prey species that form part of its natural diet. For example, golden plovers, curlews, red squirrels, adders and baby pine martins are all protected species and are all known to be part of the diet of golden eagles.

For many years, falconers have been working with that risk and managing it. They do not direct the birds on to such species. They can do the same with mountain hares. I do not accept that this is a new unmanageable risk that means that falconers must keep their birds at home. That is simply not the case. There are plenty of other protected species that have posed a similar prosecution risk. As far as I am aware, there has never been a prosecution for a falconer accidentally taking a protected species.

Màiri McAllan: I will add to that by reiterating Hugh's earlier comments about the best way to manage the situation is about understanding the density of the protected species and operating in areas where you are least likely to encounter them.

Fergus Ewing: Would one solution to the petitioner's request be for the Scottish Government to invite the Crown Office and Procurator Fiscal Service or the Lord Advocate to issue guidance indicating that no prosecutions will be taken with regard to falconers practising their sport?

Màiri McAllan: No.

Fergus Ewing: In that case, they are open to prosecution, so we are back to square 1, minister, with a group of people in Scotland—

Màiri McAllan: I do not think that there is—

Fergus Ewing: —being criminalised without the opportunity of having been heard.

Màiri McAllan: I think that it would be a highly unusual activity for any law officer in Scotland to issue guidance saying that a criminal offence was not going to be prosecuted.

The Convener: It strikes me that Mr Dignon's explanation might explain why no evidence was taken at the time of the legislation. It is clear that Mr Dignon did not think that it necessary to take any evidence, because he had already determined that no issue was involved. The evidence would have been pointless. From the exposition that you have just given, it is quite clear that you did not think that there was any merit in taking any evidence. As far as you were concerned, the issue was clear-cut.

Hugh Dignon: To be absolutely clear, I was not actually present. I was away at the time that it happened.

The primary focus of the consideration was on the conservation status of the mountain hare and whether it was necessary to protect it. There were a number of people who we knew were not at all keen on the mountain hare being given protected status, not least people such as Scottish gamekeepers and recreational shooters of mountain hares. Falconers would have been a subset of those people.

The counterargument to protection was certainly considered, but, on whether the specific needs of falconry were considered, I could not say because I was not here. Given the speed of events at the time, I understand that it would have been quite difficult to do that.

The point that I am making is that, as it turns out, the position on mountain hares and falconers is no different from that on falconers in relation to other protected species, of which the uplands are full. All wild birds are protected; wild birds such as waders and grouse form a significant part of a golden eagle's diet, and falconers manage that risk in the same way that they are perfectly capable of managing the risk with mountain hares.

The Convener: Yet Stanley, who we met a fortnight ago, has not flown for two years. Hugh Dignon: I am sorry—I cannot explain that. The Convener: He has not flown for two years because of the risk of prosecution should he do so.

Hugh Dignon: I would find it very surprising if a falconer could not find a place in upland Scotland where there was sufficiently low density of mountain hare for the falconer to fly their eagle with no particular concern about it taking a mountain hare rather than any other protected species that might be present.

The Convener: Mr Whitaker, what is NatureScot's view of the impact of falconry on mountain hare populations in Scotland?

Stan Whitaker: We do not have accurate figures for how many mountain hares were previously taken by falconers. If it was, say, 1,000 that were caught, as one of the other witnesses who gave evidence suggested—

The Convener: I think that the witness suggested that, if a falcon went out every day and hunted one mountain hare only, we would get to the figure of 1,000. However, on the law of probabilities, that is not very high. We have just had all your colleagues here say to us that it would be very unlikely that there would be a prosecution, because an accidental hare being hunted would be such a rare event.

Stan Whitaker: Well, other falconers who we have spoken to when consulting about the issue have said that they can go out and take six a day if they are specifically going after mountain hares. Hunting over a six-week period, for example, one falconer could take 60 to 100 hares.

The Convener: But you would accept that 1,000 hares, in the scenario that we have described, compared with the 26,000 to 38,000 that would be shot, is a small number.

Stan Whitaker: We are talking about slightly less than 1 per cent of the population, but the population fluctuates quite considerably. On the overall mortality of mountain hares, the survival rate for mountain hares, year to year, is perhaps 50 per cent, at best. Therefore, that number of mountain hares might be insignificant at population level, but that does not mean that it would not have an impact at local level.

The Convener: Okay. If it is 1 per cent, that is 1,000, perhaps, taken by birds of prey each year, and 26,000 to 38,000—at the absolute maximum, 50,000—are shot each

year. Is the legislation proportionate in terms of the impact that it has had on those who fly birds of prey?

Stan Whitaker: I do not know whether we have a view on how proportionate the legislation is.

Màiri McAllan: That is a policy question, to be fair. We act on the basis of advice that NatureScot gives us on the conservation status of and risk to animals, but it is for us to make the decisions. I absolutely accept that there is a marked difference in the numbers that are taken by shooting mountain hare and those that are taken through falconry. However, I come back to the core point, which is that our statutory advisers, NatureScot, are telling us, in a nature emergency, that there is a conservation risk to mountain hare. We have to be prepared to take action in the face of that. That action has to be proportionate but, equally, consistent.

Again, I acknowledge the concerns of the petitioner, and everything that the committee has said, but, equally, I ask how we could justify action that restricted people's ability to take an animal for recreational purposes by shooting but did not apply similar conditions on those who would take it by other means. It is about consistency.

As I have said, for example, throughout the current consideration of the Hunting With Dogs (Scotland) Bill, we are grappling with those questions of consistency in all the ways that people seek to hunt with dogs in the countryside. We have to have a consistent approach.

David Torrance: Minister, you said that NatureScot is advising you. Stan Whitaker admitted earlier that NatureScot has no idea how many mountain hares are taken by golden eagles or buzzards. How could the Government take such advice, if NatureScot has no idea about what is happening?

Màiri McAllan: I do not think that Mr Whitaker said that NatureScot has "no idea". What he said, I think, was that such figures are not collected.

David Torrance: Basically, that means having no information.

Màiri McAllan: It does not mean that. NatureScot has officers who are integrated into their communities and who understand a great deal about what is happening in those communities. The point is that the advice that we took from NatureScot was about the conservation status as a whole, and we had to respond to that.

Paul Sweeney (Glasgow) (Lab): Thank you, minister, for your points so far. You made a point about balancing and being consistent about legislation. I note a point that was made by our witness Barry Blyther at his recent session with us. He said: "When we look at the Wildlife and Countryside Act 1981, we note that, for the very same reason, there is an exemption from the legislation that protects birds 'for the purposes of falconry'."

It explicitly mentions falconry. Mr Blyther continued: NatureScot has suggested that it does not understand why the same derogation has not been applied in the legislation that is relevant to mammals, and, indeed, it does not support such an omission. All

that is required to correct that is a small amendment to the legislation to bring mammal and bird legislation into line. Such an amendment would be far less complicated than that which has already been imposed, and it would not require any change to primary legislation.”

The art of falconry is 4,000 years old. It is protected by the United Nations Educational, Scientific and Cultural Organization as an intangible cultural practice. It has been carried out in Scotland since at least the Norman conquest and the emergence of medieval society in Scotland.

To balance the cultural practices, the minimal risk in practice and reality, and the fact that there is a precedent with regard to birds of prey feeding on other birds—as opposed to mammals—is there the potential to make a minor amendment that would give comfort to falconers that they can carry out a protected cultural practice that has existed in Scotland for a thousand years or so? That would give a decent balance and allow the issue to be resolved amicably. On the balance of risks, it is probably a useful way to proceed.

Màiri McAllan: I thank Mr Sweeney for his point, and I understand that that is the premise of the petition. As I have said, I will consider all suggestions and all the ways in which the legislation that we pass impacts on the people who are affected by it. However, my contention today is that the interference in the ability of falconers to take mountain hare—which I understand is an interference, albeit that, as Hugh Dignon has pointed out, that activity can still take place elsewhere, and falconers are still able to take other species—remains justified on the backdrop of the conservation concern for the mountain hare. Of course, I am very open to considering concerns.

Alexander Stewart (Mid Scotland and Fife) (Con): This has been an eye-opening session, minister, and I am staggered at some of the responses so far—at the complete lack of understanding of the situation and circumstances that we have heard.

On the licensing system, the Scottish Government says: “The Scottish Government believes that the licensing scheme for the control of mountain hares ... does not impact on the ability of falconers to enable their birds to exhibit normal behaviour patterns.” We have heard that the licensing scheme is completely and utterly unworkable, so do you believe that statement? It is not the position of the profession, which is able to understand what is taking place, but the Scottish Government fundamentally believes that it is the case. Do you still believe that it is?

Màiri McAllan: Will you repeat the statement?

Alexander Stewart: It is: “The Scottish Government believes that the licensing scheme for the control of mountain hares ... does not impact on the ability of falconers to enable their birds to exhibit normal behaviour patterns.”

Màiri McAllan: It is about the protection of the mountain hare, not the licensing scheme itself. The licensing scheme is an example of how, despite the ban, falconers who operate with golden eagles still have the opportunity to take mountain hares.

Alexander Stewart: The profession says that the licensing scheme is unworkable in the situation. It has indicated that it is completely unworkable because the birds are not able to “exhibit normal behaviour patterns.” You indicated that 21 licences have been issued, which is a small number.

Màiri McAllan: I will pass over to NatureScot to answer on whether that is small number of licenses, given that the legislation has been in force for only a short period.

Stan Whitaker: I clarify that the 21 licences were mostly to protect young forestry plantations and some natural regeneration schemes. Before the change in the legislation, we issued a similar number of licences to protect—

The Convener: Is that for birds of prey or shooting?

Stan Whitaker: They were for taking mountain hares, so they were mostly for shooting but they can be for taking with birds of prey if that is what the land manager wishes to do.

Alexander Stewart: You are indicating that the majority of the 21 licences are for shooting. Is that the case?

Stan Whitaker: Yes, all except one.

Alexander Stewart: So only one licence has been requested that would deal with birds of prey.

Màiri McAllan: If Stan Whitaker is telling us that that is the case, it is the case. Let us be realistic: that reflects—

Alexander Stewart: Do you not believe, minister, that that is a very small number of licences to have been issued for that whole profession?

Màiri McAllan: It depends on the context. The legislation has been in force only since March 2021 and the division of licences reflects the discussion that we had about the fact that mountain hares are far more frequently taken by shooting than by birds of prey. That is just a reflection of the state of play.

The Convener: It is a reflection of the fact that the birds have not flown for two years.

Fergus Ewing: The petition was lodged on 24 March 2021, minister, so the Scottish Government has had 18 or 19 months to consider it. Indeed, we got an initial reply about a year ago. Although I hear that you are willing to consider solutions, we have not heard any this morning. The impression that I get—I cannot speak for my colleagues—is that the Scottish Government has no intention of coming up with a solution, that NatureScot has done nothing to reach out to the falconry world, that the evidence that you have is scant or non-existent and that falconry might as well be finished under the Scottish Government’s approach.

If I am wrong—and I very much hope that I am, minister—I ask you to prove it. Come up with a solution that allows the sport of falconry to continue for centuries in the

future as it has in the past. That is what we are asking for. I have suggested one solution, which you dismissed out of hand. What are your solutions? We have heard that a group of Scottish society that is small but that, nonetheless, you say that your value is getting no support, consideration or sympathy from the Scottish Government. I, for one, feel that that is shocking.

Màiri McAllan: If the solution that Mr Ewing is referring to is that I instruct law officers to make a statement that a criminal offence will not be prosecuted, he is doing a disservice to the legal profession that he was once part of. It is just not a realistic solution.

I have in front of me the three written submissions that the Scottish Government has made to the committee. I am here today in good faith. I do not believe that the changes made to the protection of the status of one species undermine the practice of falconry in Scotland to the extent that Mr Ewing suggests. We have to bear in mind the fact that the golden eagle is probably the only species of falcon that would be large enough to take a mountain hare. Falconers use a range of other species and they pursue a range of quarry.

There is also a licensing scheme for the protection of young timber and agricultural land and the preservation of natural habits that allows for the taking of mountain hare. That would be an opportunity for those who have golden eagles to exercise and use their birds in that way.

I believe that all of that is justified on the basis of the advice from our statutory advisors, NatureScot.

The Convener: I appreciate the fact that you are here in good faith. It has been testy because we have become quite exercised across all parties in the consideration of the petition and the evidence that we have received.

You talk about the evidence from NatureScot but I am trying to understand the circumstances. This was a stage 3 amendment. You said earlier that none of the normal practices or procedures were carried out. From Mr Ewing's questions, we have established that there was no outreach, no evidence taken and no mention of falconry whatsoever before the amendment. In what circumstances did the amendment to the legislation at stage 3 arise? Did somebody pick up the phone or push open the door and say, "Heck! We have just realised that we forgot all about falconry in this legislation. We had better rush through a stage 3 amendment"? You talk about the advice from NatureScot, but it was not received at any point during the progress of the bill through Parliament. It was received as an afterthought so that you lodged a stage 3 amendment with no consultation, consideration or discussion.

Màiri McAllan: It is important that we reflect the situation accurately and that we use accurate language. You have just put it to me that I said earlier that none of the normal processes were followed, but that is simply not the case. What I said is that the business and regulatory impact assessment that we would normally have wanted to undertake was not possible because of the late stage of the amendment. You have asked about what happened in practice. An amendment was lodged by a party

that is not in Government and, as would normally happen, the Government considered how it would approach that amendment.

Of course, the amendment being lodged at stage 3 means that it did not form part of the substantive scrutiny and debate that had taken place up to that point. When an amendment is put in front of the Scottish Government, the Government then responds by doing the research that we need to do into how we will respond to that amendment, including speaking with our statutory advisors. The conservation concerns that NatureScot put to us, together with the significant concerns of the public, brought us to the view that the amendment was acceptable and we would work with the industry thereafter to formalise the licensing scheme.

The Convener: In his evidence to the committee, Mr Whitaker said that he was unable to tell us how many mountain hare had ever been taken by birds of prey in any given year. What then was the substantive underpinning of the evidence that you received from NatureScot?

Màiri McAllan: It was specifically to do with the threatened status of the mountain hare as a whole.

The Convener: I thought it was in response to a stage 3 amendment from a party that is not in Government that sought to include birds of prey and falconry in the amendment.

Hugh Dignon: The amendment was not specifically about falconry. It was about giving protected status to mountain hares and putting them on to schedule 5 to the Wildlife and Countryside Act 1981. That is the schedule under which the sporting and recreational taking of a species is prohibited.

The Convener: So when I asked a moment ago what the circumstances were that allowed for birds of prey to be included, there were not any.

Hugh Dignon: The law does not specifically pick out birds of prey. It says that the species is protected if it is on the schedule, and it can be taken only for specified purposes. Recreation or sport are not among those purposes. That is how birds of prey taking mountain hare comes into this. It was not specifically about birds of prey, it was about putting that species into schedule 5 to the WCA and making it a protected species.

The Convener: Well, thank you. We will consider the evidence that we have heard this morning. I appreciate the contribution that you have made, minister. You can, however, see that the committee is quite exercised so we will have to consider whether we think that we have had answers to the questions that led us to invite you along this morning. I am grateful to you for the time that you have taken and for engaging as whole-heartedly as you have. Thank you all.

Annexe C

Petitioner submission of 5 January 2023

PE1859/EE: Retain falconers' rights to practise upland falconry in Scotland

Following the committee meeting of 21/12/2022 attended by Mairi McAllan & Hugh Dignon for the government and Stan Whitaker for NatureScot, I raise the following points.

It is insulting that the ministers still haven't done enough research to understand that an Eagle, Hawk or buzzard is not a falcon. Falcons are (by comparison to eagles) small, very fast raptors evolved largely to catch birds. They are not adept or evolved for taking ground game. Please disregard any comment made by ministers connecting falconry in the uplands with eagles and large hawk or buzzard type species with the taking of any bird species (Hugh Dignon) such as grouse, curlew, etc. This is utterly unrelated, and has no connection to upland falconry in winter with eagles and large hawks, which are naturally predators of mammalian prey. To suggest otherwise is at best demonstrative of the lack of understanding of the subject, and at worst obfuscation.

Ministers still fail to understand that an eagle flying in its natural style thousands of feet overhead cannot be 'Directed at suitable quarry'. It will follow instinct. It is not a gun pointed at something to chase. At this late stage, Mr Dignon's failure to understand this is exasperating.

NatureScot have a similar lack of understanding – I am not sure of the relevance of Stan Whitaker's comment about falcons hunting pigeons in cities. He may well have mentioned polar bears hunting on sea ice – it has the same amount of relevance.

Ministers suggest that they can't legislate for one quarry species but different types of falconry. They could if they chose to. The precedent is set in shooting where waterfowl legislation is different above and below the tide high watermark.

Ministers were at a loss to understand why Stanley, and eagles like him, have not flown for two years, and even suggested that we were saying they couldn't fly reinforcing the fact that they have not read the petition details or understand the subject. These eagles are trained for high soaring flight in gale force winds in the mountains. To take them to do that now risks prosecution if they catch a hare. Taken to low ground without the required orographic lift, they don't know what to do. You can't take a dressage horse to the grand national and expect it to deal with the fences. Different discipline, and eagles cannot be 'repurposed'. Additionally, this high flying is the natural behaviour for the species, and only high ground produces it.

Mr Dignon repeated several times that falconers should avoid hares in the same way that we avoid other protected species like pine martens and red squirrels. We already avoid woodlands where these other species live due to the unsuitable terrain for large birds like eagles, and the fatality risk brought by the fences that surround the woodlands. We fly on mountains where realistically, only mountain hares live. However, the minister goes on to insist that falconry actively hunting hares can continue under licence for pest control to protect trees. So they want to licence us to hunt hares in unsuitable locations where fences risk the lives of our birds, where the trees make it unsuitable for flying eagles, and put us in direct conflict with GENUINELY threatened species like red squirrels and pine martens - that they already tell us that we rightly avoid. The ministers are actually arguing AGAINST their own suggestions in how falconry with eagles can continue without risking threatened species.

Furthermore, Mr Dignon still does not understand the predator/prey dynamics between eagles and prey – which is mammalian, he suggests that to avoid risking catching a hare, we should fly on the low ground, ground occupied by curlew, lapwing, etc, threatened species that live in the very areas we want to avoid but he suggests we go. These bird species do NOT live in the brutal frozen uplands in deepest winter where and when we fly there. The lack of understanding and joined up thinking is frankly unbelievable.

Mr Whitaker (NatureScot) could not provide any information about hare populations, numbers taken by falconry or any measured impact of

falconry on hare numbers. He did at least manage to agree that where populations are strong - on managed land tracts that allow us the access to the high places that we need to fly large birds of prey in their natural style, that the impact of falconry was immeasurably small. He also went on to say that in areas where hare populations are small or poor, that the impact would be more relevant. It is obvious therefore that falconers responsible and ecologically sound practice of flying in parts of the Grampians and Cairngorms with hare populations that are very strong - the very regions to which licences are issued to cull hares, is responsible and sustainable. The minister's suggestion that to avoid the risk of prosecution, we should aim to fly our birds in areas where hare numbers are very low is an ecological disaster, I would even suggest ecological vandalism! To maintain their flawed legislation they want us to go and fly where the taking of a hares could have an impact on local population expansion and local prevalence just to avoid prosecution. This is the most blatant demonstration of both the government being directly at odds with their own statutory advisers (NatureScot) proving it likely that proper consultation was never made because it would have never supported the passing of the bill, and that despite the ministers comment to the contrary, that their **policy has absolutely nothing to do with conservation of the species**, but in fact is simply an act of digging in their heels to defend utterly unjustified objection to modifying legislation to allow falconry in the uplands to safely continue and assure the value and thus the conservation of mountain hares.

NatureScot appeared to accept that the less than 1% of hare population taken by falconry is negligible. The minister said that policy is shaped by NatureScot data and advice. These two facts alone prove that had consultation taken place, falconry would have been exempted from the legislation, and the fact that it wasn't proves that consultation was not made and any advice forthcoming was ignored. With no business & regulatory impact assessment having been completed (Mairi McAllan) and no advance stakeholder consultation before the passage of the amendment, it must be considered that the legislation is illegal?

In final conclusion to the ministers evidence, it is with dismay that I think you will agree, that had they appeared to give evidence the day BEFORE my petition was lodged, they would have delivered the same

statements, made the same arguments and reached the same summary because they still do not understand any part of the subject on any level and indeed, still confuse 2lb bird catching falcons with 12lb mammal hunting eagles. It is worrying for any activity connected to the countryside and could be devastating for future conservation legislation.