

# **WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

### **THE ACT – COMMENTARY ON SECTIONS**

#### **Part 1 – Definitions**

21. Part 1 consists of section 1, which contains defined expressions used throughout the Act.

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

##### ***Section 2 – Application of the 1981 Act to game birds***

22. **Section 2** of the Act has the effect that a game bird as it was defined in the 1981 Act (a pheasant, partridge, red or black grouse, or ptarmigan) comes within the definition of “wild bird” in section 27(1) of that Act, and is therefore covered by the offences in the 1981 Act which relate to wild birds. The amendment should be read with section 25 and Part 2 of the schedule, which repeal the older enactments which restricts the killing, taking and sale of game birds.

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

23. **Section 3** of the Act amends sections 1, 2, 5 and 26 of, and Schedule 2 to, the 1981 Act.
24. 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. Section 5 of that Act prohibits certain methods of killing or taking wild birds. Section 26 of that Act provides for the making of regulations, orders and notices.

#### **Subsections (2) and (3)**

25. Subsections (2) and (3) amend section 1 of the 1981 Act, with the effect that the offences under that section will apply to any bird born in captivity and released for conservation purposes, and to any partridge, pheasant, mallard or red grouse born in captivity and fully released for any purpose (typically, for sporting purposes).

#### **Subsections (4), (7) and (8)**

26. Subsections (4), (7) and (8) amend section 2 of, and Schedule 2 to the 1981 Act, with the general effect that it is lawful to kill or take game birds outside the close seasons for such birds, provided that the person who kills or takes any bird covered by section 2 of that Act has a legal right to do so (or permission from a person with such a right).
27. Subsection (4), paragraphs (b) and (c), qualifies the exception in section 2(1) of the 1981 Act under which it is not an offence under section 1 of that Act for any person to kill or take a bird included in Part 1 of Schedule 2 to that Act outside the close season

for that bird, with the effect that the exception only applies where the person who kills or takes the bird has either a legal right to do so or permission from a person with such a right. The Act does not however confer or alter any legal right to kill or take a wild bird, or to give permission to do so. In broad terms, a legal right to kill or take a wild bird on or over land arises from ownership or lawful occupation of the land or of an interest in the land.

28. Subsection (4)(d) amends the qualification in section 2(3) of the 1981 Act which provides that the exception in section 2(1) of that Act (as discussed above) does not apply in Scotland on Sundays or on Christmas Day, so that the qualification only applies to birds listed in both Parts 1 and 1A of Schedule 2 to that Act. Subsection (8) inserts Part 1A into the 1981 Act. The effect is that it is not an offence to kill or take a grouse, partridge, common pheasant or ptarmigan on a Sunday or on Christmas Day.
29. Subsection (4), paragraph (e) inserts new subsections (3A) to (3C) into section 2 of the 1981 Act as follows:
  - subsections (3A) and (3B) have the effect that it is not an offence for person with a legal right or permission to do so (as discussed above) to take for the purposes of breeding grey or red-legged partridge or common pheasant, or the egg of such a bird, during a period of 28 days after the start of the close season for those birds (a process sometimes referred to as “catching up”), and
  - subsection (3C) has the effect that it is not an offence for a person with such a right or permission to take a red grouse for the purpose of preventing the spread of disease where it is intended to release the bird after no more than 12 hours.
30. Subsection (4), paragraph (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 25 and Part 2 of the schedule, which repeals the close seasons set for those species under the [Game \(Scotland\) Act 1772 \(c.54\)](#).
31. Subsection (4), paragraph (g), amends section 2(7) of the 1981 Act with the effect that the Scottish Ministers must consult such persons interested in the shooting of birds proposed to be protected by a special protection order under section 2(6) of that Act as they consider appropriate.
32. Subsection (7) amends Part 1 of Schedule 2 to the 1981 Act to add 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 for those birds.

### **Subsection (5)**

33. Subsection (5) amends section 5(5) of the 1981 Act as needed as a consequence of the repeal of the definition of “game bird” in that Act, with the effect that it is lawful to use a cage trap or net to catch for the purpose of breeding any grouse, mallard, partridge or pheasant included in Part I of Schedule 2 to that Act.

### **Subsection (6)**

34. Subsection (6) amends section 26 of the 1981 Act, with the effect that an order under section 22(1)(a) of that Act which removes black grouse, common pheasant, grey partridge, ptarmigan, red grouse or red-legged partridge from Part I of Schedule 2 to that Act (so that is an offence to kill or take such a bird outside the close season) is subject to affirmative procedure.

#### ***Section 4 – Areas of special protection for wild birds***

35. **Section 4** of the Act has the effect of repealing section 3 of the 1981 Act, which enabled the Scottish Ministers to declare by order areas of special protection for wild birds, their nests, and their young. Eight areas of special protection in Scotland created by order under the Protection of Birds Act 1954 (where they are described as “bird sanctuaries”), which was repealed and re-enacted by the 1981 Act, are accordingly abolished.

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

36. **Section 5** of the Act amends sections 2 and 6 of, and Schedule 3, to the 1981 Act. Section 6 of the 1981 Act creates offences in particular in relation to the sale of live wild birds and their eggs. Those offences are subject to exceptions which apply to certain species of bird which are listed in Schedule 3 to the 1981 Act.
37. The amendments to section 6 and Schedule 3 of the 1981 Act have the effect of extending the exception relating to the sale of dead birds to game birds (red grouse, grey partridge, red-legged partridge, common pheasant and mallard) as listed in new Part IIA of that Schedule, which are lawfully killed outside the close season. These provisions should be read with section 25 and Part 2 of the schedule, which repeal older restrictions on the sale of game birds. The amendments to section 2(4) and (6) of the 1981 Act (which provide for close seasons) are consequential on these changes.
38. The amendments to section 6 and Schedule 3 of the 1981 Act also extend the exceptions in section 6 to permit the sale of live game birds and their eggs (red grouse, grey partridge, red-legged partridge, common pheasant and mallard) as listed in new Part 1A of that Schedule if lawfully taken or collected outside close seasons or in accordance with the “catching up” provisions in section 2(3A) to (3C) of that Act, as inserted by section 3 of the Act.
39. The amendments to Schedule 3 of the 1981 Act also remove the restrictions on selling certain birds between 28 February and 1 September by moving all the species currently listed in Part III of Schedule 3 to new Part IIA of that Schedule (birds killed outside close season by certain persons). Part III of the Schedule is not however revoked, and birds could in future be added to that Part by an order made under section 22 of the 1981 Act.
40. The amendments to section 2(4) and (6) of the 1981 Act (which provide for close seasons) are consequential on these changes.
41. Paragraph (d) of subsection (3) replaces subsection (5) of section 6 the 1981 Act with new subsections 6(5) and (5A). The effect of the changes made by that paragraph is that the offences 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.
42. Paragraph (f) of subsection (3) makes a minor change 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.***

43. **Section 6** of the Act inserts new sections 10A and 10B and Schedule 5A into the 1981 Act. These provisions provide in particular for close seasons for wild mountain hares and brown hares, for offences in that respect, and for exceptions and related matters.

#### **Subsection (2)**

44. Subsection (2) inserts new sections 10A and 10B into the 1981 Act. Protection of wild hares etc. - inserted section 10A of the 1981 Act

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45. Subsection (1) of section 10A of the 1981 Act provides for it to be an offence to kill, injure or take any wild animal listed in new Schedule 5A to that Act outside the close season for the animal. The penalties in section 21(1) of the 1981 Act apply in to any such offence. .
46. Subsection (2) of section 10A specifies 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 enables the Scottish Ministers to vary any close season by order.
47. Subsections (4) to (7) of section 10A enable the Scottish Ministers to specify by order a period of special protection of up to 14 days for any animal listed in Schedule 5A, to have effect as if the period were part of the close season for the animal. The provisions are similar to power to specify a period of special protection in respect of wild birds under section 2(6) and (7) of the 1981 Act.
48. Subsection (8) of section 10A creates a presumption in any proceedings for an offence under that section 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 Act.

**Exceptions to s.10A - inserted section 10B of the 1981 Act**

49. Subsection (1) of section 10B provides a defence to the offence of killing an animal during close season where 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.
50. Subsection (2) of section 10B provides a defence to the offence of taking a seriously disabled animal during close season where the accused can show that the animal was taken for the purpose of tending it and releasing it when no longer disabled. The defence can only be relied on by where the disability had not been caused by an unlawful act of the accused, and the accused had a legal right to take the animal or permission from a person with such a right. The Act does not however confer or alter any legal right to kill or take an animal, or to give permission to do so), In broad terms, a legal right to kill or take an animal on land arises from ownership or lawful occupation of the land or of an interest in the land.
51. Subsections (3) to (6) of section 10B provide for it to be a defence to the offence of killing or injuring an animal during close season for the accused to show 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. The defence can only be relied on by an “authorised person”, as 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.
52. Subsection (7) of section 10B provides that nothing in section 10A shall make unlawful anything done in pursuance of a requirement by the Scottish Ministers under section 39 of the Agriculture (Scotland) Act 1948 (damage to crops etc.), or under or in pursuance of an order under the Animal Health Act 1981 (control of animal disease).

**Subsection (3)**

53. Subsection (3) 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.

**Subsections (4) and (5)**

54. Subsection (5) inserts Schedule 5A into the 1981 Act, and subsection (4) makes a consequential change to the heading of Schedule 5 of that Act.

55. The species listed on Schedule 5A are the mountain hare and the brown hare. Section 10 of the Act amends section 22 of the 1981 Act with the effect that the Scottish Ministers may add any animal to, or remove any animal from, Schedule 5A.

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

56. **Section 7** of the Act inserts new sections 11G and 11H and Schedule 6A into the 1981 Act (sections 11A to 11DA being inserted into the 1981 Act by section 13 of the Act, which relates to snaring). These provisions provide in particular for it to be an offence to kill, injure or take hares and rabbits without a legal right to do so (or permission from a person with such a right), a type of offence more commonly described as poaching.
57. **Section 7** of the Act should be read with section 25 and Part 2 of 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”).

**Subsection (3)**

58. Subsection (3) inserts new sections 11G and 11H into the 1981 Act.  
Prevention of poaching: wild hares etc. - inserted section 11G of the 1981 Act

59. Subsection (1) of section 11G creates an offence of intentionally or recklessly killing or injuring or taking a wild animal listed in Schedule 6A of the Act. 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 Act.

Exceptions to s.11G - inserted section 11H of the 1981 Act

60. Subsection (1) of section 11H provides that it is not an offence to take or kill an animal where a person has a legal right to do so, or permission from the person with such a right. The Act does however not confer or alter any legal right to kill or take an animal, or to give permission to do so. In broad terms, however, a legal right to kill or take an animal on land arises from ownership or lawful occupation of the land or of an interest in the land.
61. Subsection (2) of section 11H provides a defence to the offence of killing an animal listed in Schedule 6A where 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.
62. Subsection (3) of section 11H provides that nothing in section 11G shall make unlawful anything done in pursuance of a requirement by the Scottish Ministers under section 39 of the Agriculture (Scotland) Act 1948 (damage to crops etc.), or under or in pursuance of an order under the Animal Health Act 1981 (control of animal disease).

**Subsection (4)**

63. Subsection (4) inserts Schedule 6A into the 1981 Act. The species listed on Schedule 6A are the mountain hare, brown hare and rabbit. Section 10 of the Act amends section 22 of the 1981 Act with the effect that the Scottish Ministers may add any animal to, or remove any animal from, Schedule 6A.

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

64. **Section 8** of the Act inserts a new section 11I into the 1981 Act.

**Sale etc. of wild hares etc. - inserted section 11I of the 1981 Act**

65. Subsection (1) of section 11I 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 sections 10A or 11G of the 1981 Act.

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66. Subsection (2) of section 11I provides for a defence to that offence where the accused shows he had a reasonable excuse.
67. Subsection (3) of section 11I 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 11G(2), as inserted by sections 6 and 7 of the Act.

***Section 9 – Wild hares, rabbits etc.: licences***

68. **Section 9** of the Act makes consequential amendments to section 16(3) and (4) of the 1981 Act, with the effect that a licence under the 1981 Act can authorise an activity that would be an offence under new sections 10A(1) (killing of animals in the close season), 11G(1) (poaching of hares, rabbits etc.) and 11I (sale etc. of animals killed or taken unlawfully) of that Act.

***Section 10 – Wild hares, rabbits etc.: power to vary Schedules to the 1981 Act and prescribe close season***

69. **Section 10** of the Act makes consequential amendments to the enabling power in section 22 of the 1981 Act, with the effect that the Scottish Ministers may by order add to or remove animals from the lists in new Schedules 5A and 6A of that Act, or set a close season for any animal added to Schedule 5A.

***Section 11 – Wild hares and rabbits: miscellaneous***

70. **Section 11** of the Act makes minor amendments to the 1981 Act in order to clarify the purpose of the provisions in Schedule 7 to that Act as amended by earlier enactments. Subsection (2) inserts a new section 12YA into to give continuing effect to Schedule 7 to that Act, subsection (3) repeals section 12 of the 1981 Act (which previously gave effect to that Schedule), and subsection (4) amends the name of that Schedule.

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

71. **Section 12** of the Act amends section 19A of the 1981 Act to extend the admissibility of single witness evidence to cover the offences inserted by the Act in relation to the unlawful taking, killing or injuring of game birds (grouse, partridge, pheasant and ptarmigan), hares and rabbits.
72. The effect is to preserve the comparable measures in the game Acts as repealed by Part 2 of the Schedule, which permitted conviction on the evidence of a single witness for offences in relation to game birds and ground game (hares and rabbits).

***Section 13 – Snares***

73. **Section 13** deals with the use of snares.
74. As well as setting new requirements in relation to snaring, the amendments replace provisions in the [Snares \(Scotland\) Order 2010 \(S.S.I 2010/8\)](#) (the “Snares Order”), which set requirements about snare stops and anchors and checks of whether snares are free-running. The amendments also re-enact some existing provisions from section 11 into new sections 11B and 11C without changing their effect. These relate to inspecting snares and obtaining authorisation from landowners.

**Subsection (2)**

75. Subsection (2) amends section 11 of the 1981 Act to insert a new subsection (1A).
76. 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) of that Act. It requires snares to be



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fitted with stops (subsection (1A)(a) and (b)), attached to the ground or an object to prevent them being dragged (subsection (1A)(c)) and not set in a place which is likely to cause an animal to become suspended or drown (subsection (1A)(d)).

77. Section 11(1A) of the 1981 Act re-enacts with modifications articles 4 to 6 of the Snares Order. In particular, the requirement in the Snares Order to fit stops on snares intended to catch foxes and hares is extended to all animals.
78. Subsection (2) also repeals section 11(3) to (3B) and (3D) of the 1981 Act. Those provisions are re-enacted by new sections 11B and 11C of that Act as inserted by the Act.

**Subsection (3)**

79. Subsection (3) inserts new sections 11A to 11F into that Act.  
Snares: training, identification numbers, tags etc. - inserted section 11A of the 1981 Act
80. Section 11A of the 1981 Act provides for persons using a snare to have an identification number, to be trained in the setting and use of snares, and to attach identification tags to snares.
81. Subsections (1) and (5) provides for any person who sets a snare to have an identification number, and for failure to do so is an offence. Such numbers must be obtained from the police (subsections (3) and (4)), and can only be issued to persons who have been trained to set snares and on the circumstances in which the setting of snares is an appropriate method of predator control (subsection (4)(b)).
82. Subsections (2)(a) and (b) and (7)(a) provide for identification numbers to be shown on tags, which must be attached to snare. Tags must also indicate whether a snare is intended to catch brown hares or rabbits, or foxes (subsection (2)(c)).
83. Subsection (6) provides that it is an offence to set or use a snare without a compliant tag.
84. Subsection (8) enables the Scottish Ministers to specify training requirements and other elements of the identification number and tagging regime by order subject to annulment by the Scottish Parliament (see section 26(2) of the 1981 Act.  
Snares: duty to inspect etc. - inserted section 11B of the 1981 Act
85. Section 11B of the 1981 Act moves the requirements in relation to animals caught in snares from section 11(3) to (3B) of the 1981 Act but does not alter their effect.
86. Subsection (1) 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 subsection (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.
87. Subsection (3) provides that it is an offence to fail to comply with these requirements.
88. The requirements in relation to whether the snare is free-running re-enact with modifications article 2 of the Snares Order.  
Snares: authorisation from landowners etc. - inserted section 11C of the 1981 Act .
89. Section 11C of the 1981 Act provides that it is an offence for a person to set a snare, or have a snare in their possession, on land without permission of the owner or occupier of the land. The Act moves this provision from section 11(3D) of the 1981 Act but does not alter its effect.  
Snares: presumption arising from identification number - inserted section 11D of the 1981 Act

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90. 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.

Snares: record keeping. - inserted section 11E of the 1981 Act

91. Section 11E of the 1981 Act provides for a person with an identification number (see inserted section 11A) to keep a record their snaring activities, to produce that record to a constable if asked, and for offences in those respects.

Snaring: review etc. - inserted section 11F of the 1981 Act

92. Section 11F of the 1981 Act provides for a review of snaring enactments.

93. Subsections (1), (3) and (4) 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 11E of the 1981 Act. 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.

94. Subsections (2) and (5) have the effect that the first review must be carried out by 31 December 2016, with subsequent reviews every 5 years, and subject to the requirement that a report of a review must be laid before Parliament as soon as practicable after the review is carried out.

#### **Subsection (4)**

95. Subsection (4) makes a consequential amendment to section 16(3) of the 1981 Act, with the effect that a licence under the 1981 Act can authorise an activity that would be an offence under new section 11C of that Act (authorisation by owner or occupier of land).

#### **Subsection (5)**

96. Subsection (5) makes a consequential amendment to section 17 of the 1981 Act, with the effect that it is an offence under that Act to make a false statement for the purpose of obtaining identification number (see inserted section 11A).

#### **Section 14 – Non-native species etc.**

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

#### **Subsection (2)**

98. Subsection (2) substitutes section 14(1) to 14(2D) of the 1981 Act.

99. 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 Act, provides for the meaning of the native range of animals and plants.

100. 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(2D). 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.

101. 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



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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.

102. 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.
103. 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.
104. Inserted section 14(2B) and (2D) 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.
105. Inserted section 14(2C) and (2D) of the 1981 Act 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. For example, an order might take out of the scope of the offence approved non-native planting in managed woodland.
106. 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 (and not as before 'prove') that he took all reasonable steps and exercised all due diligence to avoid committing the offences in inserted sections 14(1) and (2).
107. 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.
108. See also section 17(6) of the Act which modifies the conditions which must be satisfied before an order under section 14 of the 1981 Act can be made.

### **Subsection (3)**

109. Subsection (3) of the Act inserts new section 14ZC into the 1981 Act.  
Prohibition on keeping etc. - inserted section 14ZC of the 1981 Act
110. Section 14ZC of the 1981 Act enables the Scottish Ministers to prohibit the keeping of invasive animals or plants, by specifying the type of animal or plant in an order subject to negative procedure.
111. Subsection (1) provides that it is an offence to keep a prohibited animal, and subsections (3) and (4) provide for it to be a defence for the accused to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence. Subsection (5) enables the Scottish Ministers to provide by order for the payment of compensation to people who can no longer keep an animal or plant as a result of the making of a prohibition order.
112. Orders made under section 14ZC are subject to negative procedure, for which see section 26 of the 1981 Act as modified by section 17(6) of the Act.
113. 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 Part 2 of the Schedule.

#### **Subsection (4)**

114. 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.

#### **Subsection (5)**

115. Subsection (5) substitutes a new section 14B of the 1981 Act, with the effect that the section formerly providing for guidance on non-native species is repealed (but see section 15 of the Act).

#### **Notification of presence of invasive animals etc. - inserted section 14B of the 1981 Act**

116. Section 14B of the 1981 Act enables the Scottish Ministers to require by order certain persons to notify the presence of an invasive animal or invasive plant at a place outwith the native range of the plant or animal. 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.
117. Subsection (5) provides for it to be an offence under the 1981 Act (see section 21 of that Act for penalties) to fail without reasonable excuse to notify the presence of a plant or animal as required under the inserted section.
118. Orders made under section 14B are subject to negative procedure, for which see section 26 of the 1981 Act as modified by section 17(6) of the Act.

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

119. Section 15 of the Act inserts new section 14C into the 1981 Act.

#### **Non-native species: code of practice etc. - inserted section 14C of the 1981 Act**

120. 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 the way they deal with non-native animals and plants. In addition the code will provide for best practice on a variety of issues.
121. 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 are subject to affirmative procedure. Revisions to the code of practice are subject to negative procedure.
122. Guidance in a code of practice issued 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.**

123. Section 16 of the Act 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- inserted section 14D of the 1981 Act**

124. Section 14D of the 1981 Act enables any of the Scottish Ministers, Scottish Natural Heritage, the Scottish Environment Protection Agency or the Forestry Commissioners (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.
125. 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- inserted section 14E of the 1981 Act**

126. Section 14E of the 1981 Act 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, to allow sufficient time for the making of a non-emergency order if appropriate.

### **Content of species control orders - inserted section 14F of the 1981 Act**

127. Section 14F of the 1981 Act 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 where there is 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 - inserted section 14G of the 1981 Act**

128. Section 14G of the 1981 Act 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-- inserted section 14H of the 1981 Act**

129. Section 14H of the 1981 Act 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.

### **Coming into effect of species control orders - inserted section 14I of the 1981 Act**

130. Section 14I of the 1981 Act 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 - inserted section 14J of the 1981 Act**

131. Section 14J of the 1981 Act 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 - inserted section 14K of the 1981 Act**

132. Section 14K of the 1981 Act makes it an offence under that Act 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)(c) of the Act 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 - inserted section 14G of the 1981 Act**

133. Section 14L of the 1981 Act 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 - inserted section 14M of the 1981 Act**

134. Section 14M of the 1981 Act 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.
135. Inserted section 14P(5) of the 1981 Act 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. - inserted section 14N of the 1981 Act**

136. Section 14N of the 1981 Act sets out when a sheriff may grant a warrant to an authorised person to use a power of entry that is otherwise unauthorised under section 14M, and the effect of such a warrant.

### **Species control orders: powers of entry: supplemental - inserted section 14O of the 1981 Act**

137. Section 14O of the 1981 Act sets out who may accompany an authorised person taking entry under a warrant granted under section 14N of that Act, 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 - inserted section 14P of the 1981 Act**

138. Section 14P of the 1981 Act 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***

139. **Section 17** of the Act amends the 1981 Act in connection with the changes made to that Act by sections 15 and 16 of the Act.

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140. Subsection (2) has the effect that the keeping measures in inserted section 14ZC of the 1981 Act do not apply to anything done under and in accordance with a licence granted by the Scottish Ministers under section 16 of that Act.
141. Subsection (3) amends section 21 of the 1981 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.
142. Subsections (4) and (8) repeal references to Schedule 9 to the 1981 Act and that Schedule respectively.
143. Subsection (5) enables Scottish Natural Heritage to advise or assist any other relevant body carrying out operations under a species control order, or a person authorised to enter premises in connection with an order.
144. 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.
145. 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**

146. **Section 18** of the Act amends section 16 of the 1981 Act, which allows the licensing of activities prohibited under Part 1 of that Act.

**Subsection (2)**

147. 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.
148. 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.

**Subsection (3)**

149. Subsection (3) inserts a new section 16A into the 1981 Act.  
Delegation of licence-granting power - inserted section 16A of the 1981 Act
150. Section 16A of the 1981 Act enables Scottish Ministers to delegate any of their licensing function under that section to SNH by direction, or to delegate such a function so far as relating to development or demolition to local authorities, by order subject to negative procedure (see section 26(2) of the 1981 Act).

#### **Subsection (4)**

151. Subsection (4) amends section 26 of the 1981 Act to set consultation requirements and makes other technical provisions in relation to delegations to a local authority under inserted section 16A of the 1981 Act.

#### ***Section 19 – Amendment of Schedule 6 to the 1981 Act***

152. 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 – Annual report on wildlife crime***

153. Section 20 of the Act inserts a new section 26B into the 1981 Act., which provides for the Scottish Ministers to be required to lay a report before the Scottish Parliament after the end of each calendar year on offences relating to wildlife, and related matters.

#### ***Section 21 – offence of knowingly causing or permitting certain offences under the 1981 Act***

154. Section 21 of the Act amends sections 6, 7 and 15A of 1981 Act.
155. The effect in each case is to create new offences in those sections for any person to knowingly cause or permit to be done an act which is unlawful under the specified provisions of those sections. The penalties relating to inserted sections 18A and 18B are the same as those that apply to the relevant offences ( see section 21(1) of the 1981 Act).

#### ***Section 22 – Wildlife inspectors etc.***

156. Section 21 of the Act 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 Act.
157. 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.
158. 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 Act, 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.
159. 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.



160. Subsection (6) repeals the function of a GB conservation body under the 1981 Act to advise 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 23 – Offences by Scottish partnerships etc.***

161. Section 23 of the Act 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 24 – Liability in relation to certain offences by others***

162. Section 24 of the Act inserts sections 18A and 18B into the 1981 Act.

**Vicarious liability for certain offences by employee etc, – inserted section 18A of the 1981 Act**

163. Section 18A of the 1981 Act has the effect that where the employee or agent of a person with a right to take or kill a wild bird on or over land, or of a person who manages or controls such a rights (see subsection 5), is guilty of relevant offences (see subsection 6) on or in relation to that land, then such a person is also guilty of an offence.
164. Subsection (3) provides for it to be defence for the person who has (or controls or manages) the relevant right to show that they did not know that an offence was being committed by the employee or agent, and that they took all reasonable steps and exercised all due diligence to avoid the offence being committed (a “due diligence” defence).
165. Subsection (4) has the effect that proceedings for an offence can be taken against the person who has (or controls or manages) the relevant right, or the employee or agent, or all such persons.
166. The penalties relating to offences under section 18A of the 1981 Act are the same as those that apply to the relevant offences (for which see section 21 of the 1981 Act).

**Liability where securing services through another – inserted section 18B of the 1981 Act**

167. Section 18B of the 1981 Act supplements inserted section 18A of that Act.
168. Section 18B has the effect that where a person providing relevant services to a person who has (or controls or manages) the relevant right is guilty of a relevant offence (see subsection 6) on or in relation to that land, then the person who has (or controls or manages) the relevant right is also guilty of an offence.
169. Subsection (4) has the effect that proceedings for an offence can be taken against the person who has (or controls or manages) the relevant right, the person who provides relevant services, or all such persons.
170. Subsection (5) has the effect that a person is providing “relevant services” 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.
171. A ‘due diligence’ defence is also available under section 18B, and the penalties are again those that apply to the relevant offences.

***Section 25 – Modifications and repeals relating to Part 2 and game licensing***

172. Section 25 of the Act and Part 1 of the schedule make a consequential modification of section 39(2) of the Agriculture (Scotland) Act 1948 (see Part 1 of the Schedule), needed as a result of the repeal of game laws by the Act.

173. **Section 25** also repeals part, or all, of the various Acts in Part 2 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 26 – Deer management etc.***

174. **Section 26** of the Act 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 peri-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).
175. 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.
176. 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.
177. 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.
178. 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 27 – Deer management code of practice***

179. **Section 27** of the Act inserts a new section 5A into the 1996 Act.

#### **Code of practice on deer management – inserted section 5A of the 1996 Act**

180. Section 5A of the 1996 Act imposes a duty on SNH to draw up a Code of Practice for the purpose of providing practical guidance in respect of deer management. Subsections (1) and (2) sets out the purpose and general content of the code. Subsections (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. Subsection (12) requires SNH to monitor compliance with the code and to have regard to it in carrying out its own functions.

#### ***Section 28 – Control agreements and control schemes etc.***

181. **Section 28** of the Act amends sections 7, 8, 10, 11 and Schedule 2 of the 1996 Act.
182. Section 7 of the 1996 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 damage and control agreements or schemes are not an option.

183. 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 by owners or occupiers in each 12 month period within any control agreement. SNH will be required to review compliance with control agreements on an annual basis.
184. 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, unless the purpose of that control agreement was to remedy damage caused by deer or steps taken for the purpose of deer management. The amendments also set deadlines for concluding that control agreements have failed. SNH will be required to review compliance with control schemes on at least an annual basis.
185. 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.
186. 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 29 – Deer: close seasons etc.***

187. **Section 29** of the Act amends sections 5, 26 and 37 of the 1996 Act.
188. Under section 26 of the 1996 Act, 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 of that Act if they wish to do so during the close seasons. SNH will be able to grant authorisations under section 5 of that Act 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 of that Act 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 30 – Register of persons competent to shoot deer etc.***

189. **Section 30** of the Act inserts new sections 17A and 17B into the 1996 Act. Subsections (2), (3) and (5) to (8) of section 30 make further amendments to the 1996 Act in consequence of the new section 17A.

## **Register of persons competent to shoot deer – inserted section 17A of the 1996 Act**

190. Section 17A of the 1996 Act 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. Subsection (4) creates an offence of shooting deer in contravention of requirements set under the enabling power, subject to an exception in subsection (5) 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.
191. 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 (subsection (1)(c)).
192. 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 (subsection (1)(d)). “Cull return” is defined in subsection (7) as a return showing the number of deer of each species and of each sex which have been killed. Subsection (6) 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.
193. Subsection (2) allows regulations to include supplementary, incidental or consequential provision and lists examples of the type of provision this might include.
194. Subsection (9) of section 30 of the Act sets maximum penalties for the new offences in section 17A(4) and (6).

## **Review of competence etc. by SNH – inserted section 17B of the 1996 Act**

195. Section 17B of the 1996 Act 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 of that Act has not been exercised by 1 April 2014.

### ***Section 31 – Action intended to prevent suffering***

196. **Section 31** of the Act amends section 25 of the 1996 Act, which provides an exception to the offences in the 1996 Act where the action taken is to prevent suffering. Section 31 adds starvation (where there is no reasonable chance of recovery) to the existing exceptions which relates to injury or disease.

### ***Section 32 – Offence by bodies corporate, Scottish partnerships etc. under the 1996 Act***

197. **Section 32** 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 33 – Protection of badgers***

198. **Section 33** of the Act amends provisions of the Protection of Badgers Act 1992.
199. 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).

### **Subsections (3) to (5)**

200. It is already an offence to knowingly cause or permit interference with a badger sett (section 3(2) of the 1992 Act). Subsections (2) to (5) create 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 that Act.

### **Subsections (6) and (7)**

201. Under the 1992 Act as originally enacted, licensing functions were split between SNH and Scottish Ministers based on the reason for granting the licence.
202. 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.
203. Subsection (7) inserts a new section 10A into the 1992 Act.  
Delegation of licence-granting power – inserted section 10A of the 1992 Act
204. Section 10A of the 1992 Act allows Scottish Ministers to delegate any of their licensing functions to SNH by written direction, or certain development functions to a local authority by order subject to negative procedure (see subsections (8) and (9)) 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.

### **Subsection (8)**

205. 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.

### **Subsection (9)**

206. 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).
207. 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



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cruelty to a badger and knowingly permitting or causing the sale or possession of a live badger to be prosecuted summarily or on indictment.

208. 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.

**Subsection (10)**

209. 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.

**Subsection (11)**

210. 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 34 – Muirburn**

211. Section 34 of the Act amends the Hill Farming Act 1946. Sections 23 to 27 of the 1946 Act regulate the practice of muirburn in Scotland.

**Subsection (2)**

212. Subsection (2) replaces section 23 of the 1946 Act which deals with the permitted times for making muirburn.

Muirburn season – inserted section 23 of the 1946 Act

213. Section 23 of the 1946 Act 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) (subsections (2) to (4)). Muirburn may only be made during the extended muirburn season by the owner of the land, or with the owner’s permission (subsection (5)).
214. The new section 23 removes the ability to make muirburn between 1 May and 15 May on land situated more than 450 metres above sea level which had previously been lawful with the proprietor’s permission. Under the new section 23, the last date of the “extended muirburn season” at any altitude is 30 April.
215. 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 power is replaced by an extension to the order making power in section 23A of the 1946 Act.

**Subsection (3)**

216. Subsection (3) amends section 23A of the 1946 Act, which was inserted by section 58 of the Climate Change (Scotland) Act 2009.
217. Subsection (3)(b) and (c) extends the purposes for which the muirburn season may be varied under section 23A of the 1946 Act to include protecting the natural environment



and public safety. It also enables the dates to be varied on a geographical or phased basis.

218. Subsection (3)(a) and (d) make changes to section 23A in consequence of the changes to section 23 of the 1946 Act, with the effect that the Scottish Ministers may by order extend, reduce or vary the periods of the standard or extended seasons (but not so as to reduce the overall number of days on which it is lawful to make muirburn).

#### **Subsection (4)**

219. Subsection (4) inserts new section 23B and 23C into the 1946 Act.

Extension of muirburn season etc. – inserted section 23B of the 1946 Act

220. Section 23B of the 1946 Act enables the Scottish Ministers by order to further regulate the making of muirburn, where they have extended either muirburn season under section 23A(1) of that Act. Such further regulation might include provision on notification requirements, or on the making of objections or requiring approval for burning in an extended season, or as to the making of muirburn being subject to specified conditions. Relevant offences can also be created (subsection (3)(g) to (i)).

221. Orders made under section 23B are subject to negative procedure in the Scottish Parliament (subsections (6) and (7)).

Muirburn licences – inserted section 23C of the 1946 Act

222. Section 23C of the 1946 Act enables the Scottish Ministers to license out of season muirburn for the purposes of protecting the natural environment, for research, or for public safety. Muirburn licences may be granted subject to conditions.

223. Scottish Ministers may delegate their powers to grant, modify or revoke a muirburn licence to SNH (subsections (6) to (10)).

224. Scottish Ministers may by regulations make further provision for, or in connection with, muirburn licences (subsection 11). Such regulations are subject to negative procedure in the Scottish Parliament (subsections (12) and (13)).

#### **Subsection (5)**

225. Subsection (5) amends section 24 of the 1946 Act, which provides for the right of a tenant to make muirburn in certain circumstances notwithstanding the terms of the lease.

226. It inserts a new subsection (2A) into that section, which makes further provision in respect of the requirement in section 24(2) of the 1946 Act to give notice of intended muirburn under section 24(2). The effect is that a tenant may give the notice of their intention to make muirburn to a person purporting to be authorised by a proprietor of land to receive such notice, and the notice (whoever given to) must be in writing.

#### **Subsection (6)**

227. Subsection (6)(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 23C.

228. Subsection (6)(b) repeals the provision providing for it to be an offence to make muirburn without notice, and is consequential on the changes to section 26 of the 1946 Act made by subsection (7) (as considered next).

#### **Subsection (7)**

229. Subsection (7) in effect replaces section 26 of the 1946 Act, and sets new general notification requirements in relation to muirburn.

230. Subsections (1) to (3) of section 26 imposes a duty on any person who intends to make muirburn during season to give written notice to the owner of the land (if different), and to the occupiers of land within 1 km of the proposed muirburn site. Notice does not require to be given to those who have indicated in writing that they do not wish to be notified, Notice may be in a local newspaper where there are 10 or more occupiers within 1km of the proposed muirburn site.
231. Subsections (4) to (6) of section 26 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. 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. 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.
232. Subsection (7) of section 26 provides for it to be an offence to fail to comply with the requirements of section 26 of the 1946 Act (see section 27 of that Act for penalties).

### **Subsection (8)**

233. Subsection (8) inserts new section 26A of the 1946 Act. regarding the permitted methods for giving muirburn notices. Subsection (6)(b) repeals the previous notification requirements set under section 25(c) of the 1946 Act.

Giving of muirburn notices under [sections 24\(2\)](#) and [26](#) – inserted section 26A of the 1946 Act

234. Section 26A of the 1946 Act specifies the permitted methods for giving muirburn notices. It permits personal delivery, the leaving or posting of notice, and written messages.
235. It also 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. Notices given by electronic communications are deemed to have been received 48 hours after they are sent.
236. 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.

### **Subsection (9)**

237. Subsection (9) amends section 27 of the 1946 Act which provides for penalties on conviction of relevant offences, and is consequential on the changes made to that Act.

### ***Section 35 – Offences by bodies corporate, Scottish partnerships etc. under the 1946 Act***

238. [Section 35](#) of the Act inserts new section 34A into the 1946 Act, with the effect that partners may be prosecuted for the offences of a partnership, and managers may be prosecuted for the offences of an unincorporated association they are managing.

## **Part 5 – Biodiversity**

### ***Section 36 – Reports on compliance with biodiversity duty***

239. [Section 36](#) of the Act inserts new section 2A into the Nature Conservation (Scotland) Act 2004.

## **Reports on compliance with biodiversity duty – inserted section 2A of the 2004 Act**

240. Section 1 of the 2004 Act imposes a duty on every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions (the “biodiversity duty”).
241. Section 2A of the 2004 Act provides for each such body (but not each such office-holder) to publish a biodiversity report every 3 years, which is a report on the actions taken by the body in pursuance of the biodiversity duty during the period to which the report relates.

## **Part 6 – Sites of Special Scientific Interest**

### ***Section 37 – Combining sites of special scientific interest***

242. **Section 37** of the Act provides for Scottish Natural Heritage to combine two or more sites of special scientific interest (SSSIs) into a single SSSI, by giving notice to the persons who are interested parties in relation to the sites being combined.

### **Subsection (2)**

243. Subsection (2) inserts a new section 5A into the 2004 Act.  
Combining sites of scientific interest – inserted section 5A of the 2004 Act
244. Subsections (1) to (3) provide for SNH to give notice of the combination of the SSSIs, and for the combined site to be a single SSSI. Subsection (4) provides for SNH in addition to give notice to the general public of a notification under section 5A of the 2004 Act. 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.

### **Subsections (3) and (4)**

245. Subsections (3) and (4) make consequential amendments.
246. Subsection (3) has the effect that if SNH or the Scottish Ministers fail to give notice of a combined SSSI, then SNH or Ministers must both give such notice and take such action as it or they think fit in consequence of any representation received following notice.
247. Subsection (4) amends the definitions in section 58 of the 2004 Act.

### ***Section 38 – Denotification of SSSIs: damage caused by authorised operations***

248. **Section 38** of the Act amends section 9 of the 2004 Act, which as read with section 11 of and schedule 1 to that Act provides for SNH to denotify a SSSI to the extent that a site is no longer of special interest by reason of the natural feature specified in the notification of the site
249. **Section 9** as amended provides that section 11 of and paragraphs 3 to 15 of schedule 1 to the 2004 Act do not apply where a site is denotified by reason of damage to, or destruction of, a natural feature as a consequence of a certain operations permitted by a public body or office-holder. The effect is to streamline the process for denotification of a SSSI in such circumstances.

### ***Section 39 – SSSIs: operations requiring consent***

250. **Section 39** of the Act amends the 2004 Act with the effect 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).

251. 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 a negative procedure order made by the Scottish Ministers (see section 53 of the 2004 Act).

#### **Section 40 – SSSI offences: civil enforcement**

252. Section 40 of the Act 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.

#### **Subsection (1)**

253. Subsection (1)(a) inserts a new section 20A into the 2004 Act, which provides for the giving of restoration notices by SNH where it is satisfied that a person has intentionally or recklessly damaged any natural feature specified in an SSSI notification contrary to section 19(1) of that Act, or has without reasonable cause carried out an operation which has damaged a natural feature specified in an SSSI notification, or has failed to restore such a feature, contrary to section 19(3) of that Act.

#### **Restoration notices – inserted section 20A of the 2004 Act**

254. Subsections (1) and (3) enable SNH to propose to give a restoration notice to the responsible person if it is satisfied that that person has committed a relevant offence under the 2004 Act. SNH must in particular specify why the proposal is to be made, that representations may be made in respect of the proposed notice, and the effect of accepting a restoration notice if served i.e. that a person who is the subject of a restoration notice who gives notice of intention to comply with the notice within 28 days of it being given is discharged from liability to conviction for the relevant offence
255. Subsection (2) explains what is meant by the term “restoration notice”.
256. 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.
257. Subsection (11) 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.
258. Subsection (1)(b) and (c) of section 40 of the Act 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.
259. Subsection (1)(d) and (e) of section 40 of the Act amends section 44(1) of the 2004 Act so in respect of 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.

### **Subsections (2) and (3)**

260. Subsections (2) and (3) make consequential amendments needed following the introduction of the restoration notice procedure.
261. Subsection (2) amends section 8B(1) of the Rehabilitation of Offenders Act 1974, with the effect that the giving of a notice of intention to comply with a restoration notice is added to the list of alternatives to prosecution which are capable of being protected as spent alternatives under that Act.
262. Subsection (3) makes consequential amendments of the Criminal Procedure (Scotland) Act 1995, with the effect that the court may in certain circumstances (sentencing in particular) take into account the making and acceptance of a restoration notice.

## **Part 7 – General**

### ***Section 41 – Crown application***

263. **Section 41** of the Act provides for Crown application in respect of the 1946 Act, the 1981 Act, the 1992 Act, the 1996 Act and the 2004 Act.
264. Subsection (1) provides that modification of enactments made by the Act bind the Crown to the extent the enactments bind the Crown. Subsections (2) to (5) modify the Crown application of all the relevant enactments other than the 2004 Act.
265. Subsection (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.
266. Subsection (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.
267. Subsection (4) inserts a new section 13A into the 1992 Act. Inserted section 13A provides that the 1992 Act binds the Crown, and that the Crown cannot be held criminally liable for the offences in the 1992 Act.
268. Subsection (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.

### ***Section 42 – Ancillary provision***

269. **Section 42** of the Act enables the Scottish Ministers by order to make incidental or consequential provision in respect of any provision in the Act. An order will be subject to negative procedure, unless it adds to, replaces or omits the text of an Act.

### ***Section 43 – Commencement and short title***

270. **Section 43** of the Act provides for Ministers to commence by order the majority of the provisions in the Bill. Sections 1, 42 and 43 come into force upon Royal Assent. An order under this section is not subject to any procedure.

### ***Schedule – Ancillary provision***

271. The schedule provides for modifications and repeals relating to Part of the Act (wildlife under the 1981 Act), and to game licensing.