



OFFICIAL REPORT  
AITHISG OIFIGEIL

# Rural Affairs and Islands Committee

Wednesday 21 June 2023

Session 6



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**RURAL AFFAIRS AND ISLANDS COMMITTEE**

**19<sup>th</sup> Meeting 2023, Session 6**

**CONVENER**

\*Finlay Carson (Galloway and West Dumfries) (Con)

**DEPUTY CONVENER**

\*Beatrice Wishart (Shetland Islands) (LD)

**COMMITTEE MEMBERS**

\*Karen Adam (Banffshire and Buchan Coast) (SNP)  
\*Alasdair Allan (Na h-Eileanan an Iar) (SNP)  
\*Ariane Burgess (Highlands and Islands) (Green)  
\*Jim Fairlie (Perthshire South and Kinross-shire) (SNP)  
\*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)  
\*Rhoda Grant (Highlands and Islands) (Lab)  
\*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Ross Ewing (Scottish Land & Estates)  
Deputy Assistant Chief Officer Bruce Farquharson (Scottish Fire and Rescue Service)  
Dr Miranda Geelhoed (Scottish Crofting Federation)  
Dr Nick Hesford (Game and Wildlife Conservation Trust)  
Dr Emma Hinchliffe (International Union for Conservation of Nature)  
Robbie Kernahan (NatureScot)  
Dr Marnie Lovejoy (British Association for Shooting and Conservation)  
Detective Sergeant David Lynn (Police Scotland)  
Ross MacLeod (Game and Wildlife Conservation Trust)  
Ashley McCann (Scottish Land & Estates)  
Duncan Orr-Ewing (RSPB Scotland)  
Ian Thomson (RSPB Scotland)  
Jamie Whittle (Law Society of Scotland)  
Max Wiszniewski (Revive)

**CLERK TO THE COMMITTEE**

Emma Johnston

**LOCATION**

The Sir Alexander Fleming Room (CR3)



# Scottish Parliament

## Rural Affairs and Islands Committee

Wednesday 21 June 2023

*[The Convener opened the meeting in private at 08:49]*

09:12

*Meeting continued in public.*

### Wildlife Management and Muirburn (Scotland) Bill: Stage 1

**The Convener (Finlay Carson):** Good morning, and welcome to the 19th meeting in 2023 of the Rural Affairs and Islands Committee. Our first item of business is a round-table session on grouse moor licensing provision in the Wildlife Management and Muirburn (Scotland) Bill.

For the record, the committee visited a grouse moor on Monday to see the different practices with regard to trapping and muirburn, which was a huge help in our deliberations.

I welcome to the meeting our first panel of witnesses that will be discussing grouse moor licensing this morning: Robbie Kernahan, director of green economy for NatureScot; Dr Marnie Lovejoy, head of evidence and environmental law for the British Association for Shooting and Conservation; Detective Sergeant David Lynn, national wildlife crime co-ordinator for Police Scotland; Ross MacLeod, head of policy in Scotland for the Game and Wildlife Conservation Trust; Ashley McCann, legal advisor for Scottish Land & Estates; Duncan Orr-Ewing, RSPB Scotland; Max Wiszniewski, campaign manager for Revive; and joining us remotely, Jamie Whittle, member of the rural affairs sub-committee for the Law Society of Scotland.

I beg your pardon—it is Ian Thomson from RSPB Scotland. My apologies, Ian, and welcome to the meeting.

Jamie Whittle, if you wish to add to the conversation, please put an R in the chat box. Everyone else should raise their hand. Witnesses do not need to respond to every question. Given the time constraints, if someone says something that you agree with, just say that rather than going over the answer again.

I will kick off with the first questions, which most witnesses will want to answer. Do you agree that licensing is a proportionate response to the issues

that were identified by the Werritty review? Can it resolve concerns about raptor persecution and, if not, what are the alternatives?

09:15

**Ian Thomson (RSPB Scotland):** RSPB Scotland has been campaigning for licensing of the grouse shooting industry for at least a decade. We have a long history of involvement in assisting statutory agencies, particularly the police, in the investigation of wildlife crime cases. For the past 25 to 30 years, we have been the only body that has collated and published figures on raptor persecution on a United Kingdom-wide basis. Obviously, over the past 10 years, the Scottish Government has been publishing figures for Scotland.

The situation is very clear. Raptor persecution has been a persistent problem, and an overwhelming weight of scientific and witness evidence and the outcomes of police investigations link the majority of raptor persecution crimes with the grouse shooting industry. Successive Scottish Governments since devolution have taken various steps to try to bear down on the problem: vicarious liability, pesticide disposal schemes and the introduction of the facility for NatureScot to revoke general licences. Although those steps have all been welcome, raptor persecution continues, so, yes, we feel very strongly that licensing is a proportionate and necessary step.

**Dr Marnie Lovejoy (British Association for Shooting and Conservation):** The same body of evidence from the RSPB that Ian Thomson mentioned also shows that between 2007 and 2021, raptor persecution or illegal killing of raptors has decreased by nearly 75 per cent. That is massive progress. The illegal killing of raptors is fully covered by Scots law and by the Wildlife and Countryside Act 1981, and we therefore do not think that it is necessary to introduce further regulations or a licensing framework.

**Ashley McCann (Scottish Land & Estates):** I endorse what Dr Lovejoy said. I have a great deal of respect for the work that Ian Thomson and his team at the RSPB do, but the reality is that the successive measures that the Scottish Government has introduced to tackle that issue have done their job.

Putting the question of necessity to one side, the other part of your question, convener, relates to the proportionality of licensing. In assessing proportionality, the law requires there to be a rational connection between the content and design of the licensing scheme and its aim, which, as you alluded to in your question, is to tackle raptor persecution. The scheme that is proposed

in the bill fails on that rational connection test, because it goes much further than is needed to tackle raptor persecution. It would allow NatureScot to refuse licences and to take licences away for an unlimited time for conduct that has nothing to do with raptor crime, or even crime at all, because it would allow NatureScot to remove licences for conduct that is less than criminal.

Therefore, in plain terms, SLE's position is that the bill goes much further than is needed to tackle the problem of raptor persecution on grouse moors—to the extent that there is a problem. That makes it bad law, and bad law leads to unintended consequences, so it is incumbent upon the committee to consider narrowing the scope of the licensing regime to address that.

**The Convener:** Before I bring Ian Thomson back in, Ariane Burgess has a supplementary question.

**Ariane Burgess (Highlands and Islands) (Green):** I want to pick up on the numbers and the apparent decline in raptor killings. The figures that the committee has in its papers, which were provided by Police Scotland, show that there have been 88 offences over those five years. Ashley McCann, do you consider 88 offences to be a small number, or do you have other evidence to show that raptor persecution is really in decline? Eighty eight offences is 88 offences: that is 88 killed raptors.

**Ashley McCann:** Ariane, as I do not have the benefit of the statistics that you have in front of you, may I ask whether the evidence points to those offences all being committed on grouse moors?

What is lost in this debate is the fact that raptor crime—like every other crime—is not committed by one single class of people for one single motivation. For example, the latest official “Wildlife Crime in Scotland” annual report, shows that, in 2020-21, there were 12 raptor crime incidents—not prosecutions but recorded events that were investigated by the police—and that the majority of them related to incidents in Dumfries and Galloway, where there are no grouse moors. It is important to contextualise those numbers and not allocate all incidents to one land use—it would be wrong to do so.

**Ian Thomson:** It is easy to focus on absolute numbers of bodies found. What I would say is that the people who commit crimes against raptors do not want to be caught. Those crimes take place in some of the remotest areas of Scotland, where witnesses are few and far between and evidence is easily disposed of. For example, we have found satellite tags wrapped in metal and thrown into rivers, and bodies buried in the ground. As Professor Newton mentioned when he spoke to

you last week, the crimes that are being uncovered represent the tip of an iceberg. What is a much clearer indication of whether raptor persecution is truly declining are the populations of birds of prey on our grouse moors. Species such as hen harrier and peregrine continue to be largely absent and are certainly not continually breeding successfully. That is as clear evidence as anything else that raptor persecution continues unabated.

**Ross MacLeod (Game and Wildlife Conservation Trust):** I would like to comment on the conservation status of golden eagles. Since the latest framework report came out, a 2015 national survey indicated that they have achieved the threshold of good conservation status, as there are more than 500 pairs. It is the case that, in certain circumstances, golden eagle chicks are being translocated to the South of Scotland Golden Eagle Project, which could not happen if those populations were not robust enough to enable it.

I agree that there is patchy information about hen harrier figures, but I think that a framework report on hen harriers is coming out this year; we ought to be led by the evidence with regard to the situation for the hen harrier and other species.

Certainly, the Werritty report has galvanised interest in raptors and enabled an understanding that raptors are part of a functioning ecosystem. We have seen a considerable change in attitude, which might not yet be feeding through into official statistics.

**Dr Lovejoy:** I want to return to the point of proportionality. The fact that criminals are hiding their crimes is inherent to their being criminals. That is not unique to wildlife crime, and it is surely not unique to criminal offences that happen on managed grouse moors.

There has been a decrease of nearly 75 per cent in the illegal killing of raptors, which is a positive outcome. I do not think that there is any justification for bringing in a legal and licensing framework that is as far reaching and obtrusive as the one that is proposed in the bill—I am sure that we will come back to the point about the suspension of a licence based on the mere existence of an investigation. The proposal in the bill is so far reaching that it breaches the most fundamental procedural guarantees that a person should be able to enjoy in a democratic society. That cannot be proportionate and it cannot be right.

As Ashley McCann mentioned, if we look at the quality of law that is proposed and view it outside of the controversial debate about whether driven grouse shooting or shooting in general is something that we like, we must all agree that the

bill needs work. It is not yet at a stage at which it can be implemented into law.

**Ashley McCann:** I endorse those points.

**Jim Fairlie (Perthshire South and Kinross-shire) (SNP):** Last week, Professor Ian Newton said:

“As we understand it, the situation is that the persecution of birds of prey has not declined substantially in the years since the report was written. In fact, during the year with the most lockdown, which was 2020, the rate of killing or the number of cases reported to the RSPB was the highest so far this century. In other words, when there were fewer people in the countryside, the level of persecution almost certainly increased.”—[*Official Report, Rural Affairs and Islands Committee*, 14 June 2023; c 2.]

He gave some figures to back that up, which I will not go into.

My question is for Ashley McCann, Marnie Lovejoy and Ross MacLeod. Do you accept that there is a problem with the persecution of raptors in this country?

**Ashley McCann:** I accept that the crime of raptor persecution is being committed in Scotland. I do not accept that it is a problem that is exclusive to grouse moor management. Again, I come back to the point that I made in response to Ariane Burgess’s question, which is that the deterrent effect of the regulation that has already been brought in has reduced the instances of those crimes on grouse moors to a level that means that the Scottish Government has done its job.

There are several motivations for killing raptors. We can go only on the most authoritative statistics, which are those contained in Scotland’s wildlife crime reports. As I said, the recent statistics suggest that it is not, in fact, happening on grouse moors to any great extent.

With respect to Ian Thomson, a lot of what he is saying is grounded in suspicion. The sector is, in effect, being asked to prove the absence of crime. How do we go about that?

**Jim Fairlie:** If you accept the evidence that we are hearing that there is a dearth of breeding pairs of peregrines, hen harriers and so on in the vicinity of grouse moors, could anything other than persecution be the cause of that? Could you give me an example?

**Ashley McCann:** I will stay in my lane. I am not a scientist. However, I understand, for example, that some birds of prey are very territorial, and so, in areas where golden eagles are doing very well, you may not see as many other birds of prey. However, there are people who are better equipped than me to answer that question.

It comes back to the question of whether this scheme goes further than it needs to go in order to address the issue of raptor persecution on grouse

moors—if you are right in saying that there is an issue. The answer to that question is yes, it goes much further than it needs to go, which means that the measure, as proposed in the bill, is disproportionate. That is the key point.

**The Convener:** I will bring in David Lynn.

**Detective Sergeant David Lynn (Police Scotland):** Police Scotland is impartial. However, we want to reduce crime across the board, and wildlife crime is no different. We therefore support the licensing scheme in general terms.

I can provide some clarity to the committee around some recent statistics and figures. Since the publication of the Werritty report in 2019, 11 crimes against birds of prey have been reported as having happened on, or very near to, grouse shooting estates. Those offences can be broken down into four poisoning cases, six shootings and one muirburn that resulted in a nest disturbance. Those crimes have been recorded.

Over and above those recorded crimes, there have been 20 suspicious cases where there has been insufficient evidence to conclude that a crime has definitely occurred. I appreciate that “suspicion” is a subjective term, but we have been very fair in how we classify a suspicious incident. Those incidents include the sudden stop—or, as we call it, “no malfunction”—of satellite tags. Ian Thomson will have far more expertise in that area of business than me but, based on my knowledge of satellite tags, they have a general decline in battery life and usually show signs of malfunction prior to ceasing to transmit. We are therefore talking about incidents where a satellite tag has simply stopped transmitting, which we consider to be suspicious.

There can also be incidents where bird of prey carcasses are found by a member of the public but have been removed by the time that police officers arrive on the scene, which could suggest that someone is potentially covering up their tracks. Again, that is about suspicion as opposed to the recording of a crime. There are also cases where the carcasses of birds of prey have been found, but we are still waiting to hear back about forensic results, such as post-mortems, toxicology and things like that.

Police Scotland is of the belief that raptor persecution is an on-going issue. Arguments can be made about the extent of that and whether rates are increasing or decreasing, but it is on-going, and that is key here. Wildlife crime is very different to any other criminality. I appreciate Dr Lovejoy’s point about how all criminals try to cover up their tracks and so on, but wildlife crime is very different in the sense that we generally cannot use conventional policing methods—such as going door to door, CCTV inquiries and witnesses—to

address it. Wildlife crime happens in very rural areas and it is very hard to detect.

I appreciate that a minority of estates are potentially involved in such incidents, but those people who are involved have a vast knowledge of their land and where they can potentially do things that will be out of the view of the public, which is another key point to remember. Wildlife crime is incredibly difficult to detect. It is widely accepted that the figures that we have could be an underrepresentation of what is actually going on.

09:30

**Dr Lovejoy:** I will respond to that directly. All crimes that happen in a rural setting involve those problems. They can include crimes committed by farmers related to the use of pesticides, as well as poaching or hare coursing. All crimes in this setting are difficult to investigate and prosecute. It is not limited to what happens on a managed grouse moor.

The fact that the criminal offence is difficult to investigate—that law enforcement is difficult—does not give the state the right to infringe on the fundamental procedural guarantees that an individual must be able to enjoy in a democratic society. We have the presumption of innocence, and a suspicion is not the same as a criminal offence prosecuted, with the person found guilty. We have to be very careful with that.

If we take it out of context, there would be a public outcry if we had the provisions before us for any other criminal offence. What if we were to suggest that we take someone's driving licence away based on a suspicion? It might not even be a suspicion: even if the relevant authority is not satisfied that a criminal offence has been committed, it can suspend a licence. Imagine if we were to suspend someone's driving licence even though we were not satisfied that the driver had committed a criminal offence. That is unthinkable.

There is another problem. David Lynn might highlight, rightly, how difficult it is to investigate rural crimes with all the investigatory power of the police, but imagine how difficult it is for an individual with none of those investigatory powers to disprove such a crime. That is the crux of the problem. As Ashley McCann mentioned, the bill is bad law and it is not drafted in a sensible way. It is disproportionate and it infringes on rights. We need to take it out of the context and out of the political discourse. We can all see that it must be worked on.

**The Convener:** We are still on question 1, so I will try to bring this discussion to a close. I will bring in Ross MacLeod and Max Wiszniewski, and Rachael Hamilton has a supplementary question. We will then move on to the next question.

**Ross MacLeod:** The GWCT is a research and education charity, so we are not experts on raptor crime as such. However, we want there to be sensible recording. One of the downstream effects of the Werritty report relates to the need to understand the conservation status of three key species of raptors in or in the vicinity of managed moorland. For us, that meant trying to establish a basis on which that could be measured. Putting a line around an area of moorland is quite challenging, but we have done it.

NatureScot's special heritage zones are quite large areas, which cover more than just managed moorland, and we need to be a bit more refined about that. The GWCT has established a series of area transects in different parts of managed moorlands in Scotland. The effect of that is twofold. First, it has concentrated minds on understanding what is out there—it is performing a useful purpose in that regard, and we understand a little bit more. Secondly, it has engaged the keepers in understanding exactly what we are recording. In the longer term, we are looking to ensure that the data is shared in a safe space with other parties who are interested in collaborating on the conservation status of raptors. A positive aspect has come out of Werritty already, and that is what we are focused on.

**The Convener:** I will bring in Max Wiszniewski and then Robbie Kernahan, as we have not heard from him yet.

**Max Wiszniewski (Revive):** On the questions whether the bill is proportional and whether it will work, I will start on whether the bill will work. We certainly hope so. There has been a wide body of evidence over many years, and the pattern of behaviour would suggest that there is, indeed, a link between raptor persecution and grouse moor management. As the Government official said in the first evidence session on the bill, steps have been taken that may have had an impact, but they have certainly not stopped the issue from arising. We certainly hope that the measures will work. Many years after our first First Minister, Donald Dewar, called the situation a "national disgrace", we are still discussing the issue, so we hope that the bill works.

As to the question of whether the bill is proportionate, we are talking about huge proportions of Scotland's land, which are managed in many separate ways. The central issue is the maximising of grouse numbers. Revive is a unique coalition of environmental, animal welfare and social justice organisations that have come together to consider grouse moor management, because the issue—which embraces issues of animal welfare, environmentalism and social justice—is one that unites us. Large tracts of land

are managed simply so that a few people can shoot some grouse.

The situation that we find ourselves in is one in which wild animals are trapped and hundreds of thousands of animals are killed so that more grouse can be shot for sport. Large tracts of land are being burned so that more grouse can be shot for sport. That is at the heart of the issue here. Therefore, it is wholly proportionate for the Government to regulate those huge tracts of land. The very fact that they have not been regulated in any significant way up to this point indicates that we need a substantial amount of change.

As to whether the bill will work, from where the Revive coalition stands, it looks good from the point of view of bringing in the next stage of reform. We certainly hope that it does its intended job of ending raptor persecution.

**Robbie Kernahan (NatureScot):** I will make a couple of observations. My main point is that we absolutely support the primary purpose of the bill, which is to address the blight that is raptor persecution in Scotland. Raptor persecution has no place in modern-day Scotland. I think that we would all support that goal.

With regard to the issue of understanding the statistics, we know that raptor persecution is still occurring and that it is still related to the management of moors for grouse. Although the official crime statistics might not reflect that accurately, we know that there are still territories in and around grouse moors that are unoccupied by some of our best raptors. There is ecological data that has helped to inform the bill that does not seem to be getting much airtime.

In the context of existing licensing frameworks, we have—based on intelligence from the police—five general licence restrictions in place at the moment, all of which are in and around grouse moors and are to do with trapping offences, shooting and poisoning. Such practice is still pervasive in Scotland, and I do not want to underplay the significance of that.

In relation to the ambition of the bill, it is a mistake to look at the bill only through the lens of raptor persecution. We are in a nature and climate crisis. With the bill's provisions, we can up the standards of everybody who is involved in managing Scotland's uplands for nature and climate. I am sure that we will come on to that as the discussion continues.

As a licensing authority and a regulator, we have been an advocate of better regulation ever since we took on licensing functions from the Scottish Government. We can be proportionate and targeted; we are trying to increase accountability here.

My final point is that, in this space, we are talking about civil burdens of proof rather than criminal burdens of proof. We have lots of experience of situations in which we have lost trust and confidence in those who have been operating under licences. In such situations, we can act accordingly.

**The Convener:** I will bring in Jamie Whittle, who will be the final person to respond to the opening question.

**Jamie Whittle (Law Society of Scotland):** I have a couple of comments. In its consultation responses at the end of last year and in May, the Law Society of Scotland made the point that a licensing scheme, in and of itself, might not be the ultimate deterrent and that it is important to couple it with enforcement and information sharing.

My second point picks up on one that Robbie Kernahan made a moment ago. The context is one in which we face climate and biodiversity emergencies. There is further land reform potentially coming through, on which there has been consultation. One of the proposals is about looking at wider management plans for larger land holdings. This issue might come up later in the discussion, but I make the point that, when it comes to drafting law, whenever law can be made clear and—[Inaudible.]—and one of the real challenges with wildlife law in Scotland is that it is very fragmented, which can lead to complexity in understanding. The more those elements can be dovetailed together, the better it will be.

**Alasdair Allan (Na h-Eileanan an Iar) (SNP):** I will address this question initially to the police and the Law Society, but anyone else can chip in. It is about the list of relevant offences that are set out in the bill for which a section 16AA licence might be revoked or suspended. What do the witnesses think about that list of offences? Is it too short or too long? What should be in it? Is it workable?

As David Lynn is sitting next to me, I will start with him.

**Detective Sergeant Lynn:** Police Scotland does not have a massive opinion on the list of relevant offences. It is important that anything that is included in it relates to good grouse moor management.

I believe that, in the list of relevant offences, there are links to legislation that could tie in with grouse moor management. I am not an expert in those links—excuse me, I will refer to something quickly.

They include the likes of the Protection of Badgers Act 1992. There is some indication that badgers and European protected species could pose a risk to young grouse as they are being raised and released. I think that that is part of the

thinking behind that. However, Police Scotland was not involved in including those offences.

It is important that the offences relate to grouse moor management. Police Scotland does not have a massive opinion on that.

**Alasdair Allan:** I appreciate that there is not much that you can comment on, but, looking at the proposal as a police officer, what is your opinion on its workability?

**Detective Sergeant Lynn:** We will investigate the offences regardless, ultimately. The only difference would be that we would investigate them and notify NatureScot of our investigation as it progresses so that a decision can be made about whether it is proportionate to restrict a licence.

The list will not affect Police Scotland as such because, if one of the relevant offences is reported to the police, we will carry out thorough investigations regardless. The only difference would be that we would notify NatureScot, which would then consider whether it was proportionate to restrict the licence. It comes down to whether the bill is intended to protect wider wildlife and grouse moor management or, specifically, address raptor persecution.

**The Convener:** Rachael Hamilton has a supplementary question.

**Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con):** Mr Lynn, you made an interesting point about badgers. What evidence does Police Scotland have to suggest that anyone who operates a grouse moor is culpable of the persecution of badgers? Is that included in the raptor persecution data?

**Detective Sergeant Lynn:** I certainly do not have that to hand at the moment. As I said, Police Scotland was not involved in including the relevant offences.

**Rachael Hamilton:** Do you not agree that it is related?

**Detective Sergeant Lynn:** There could be certain links. For example, there is the Wild Mammals (Protection) Act 1996. I do not know this for a fact, but I have heard that there are ticks that can be found on mammals that can pass to grouse and pass on disease.

**Rachael Hamilton:** Yes, I know all that, having worked in the countryside and campaigned to protect against ticks to stop the spread of Lyme disease. The key point for the committee to understand is the evidential basis. You are implying that there is a link between badger persecution and grouse moors. Is that correct?

**Detective Sergeant Lynn:** Not that I can evidence right now in statistics and figures.

**Rachael Hamilton:** Why did you say that there was?

**Detective Sergeant Lynn:** It has obviously been included for a reason. As I said, Police Scotland was not involved in including the relevant offences in the bill. I do not know who did include it, but they might be better placed to discuss why it has been included and the proportionality of it.

As I said, it will not impact Police Scotland. Clearly, there is a link or it would not be included. I do not think that the Government would pull the legislation out of nowhere and include it in the bill.

**Rachael Hamilton:** Perhaps somebody else around the table can comment.

09:45

**Dr Lovejoy:** I am in the privileged position of working at the interface between law and ecological science, so I have some statistics that might help here.

Badgers do not tend to live on grouse moors; it is not their preferred habitat. Badgers live on arable land, grassland and woodland, but they do not live on bog and heath. The Scottish badger distribution survey from 2006 showed that, of the eight habitat types that were surveyed, heath and bog were the least preferred by badgers. In terms of figures, badger setts covered 0.019 per cent per square kilometre. They are simply not there.

There is, ecologically, no link between crimes against badgers and managed grouse moors. Grouse are not released, by the way—I think that there is a little bit of confusion between reared and wild game birds.

That shows us that parts of the bill are based on stigma rather than reality. The same applies to hunting with dogs—there are no fox hunts on grouse moors.

**The Convener:** Thank you. I will bring in Ariane Burgess.

**Ariane Burgess:** Let us go back to Alasdair Allan's initial question, which was about the list of relevant offences. I will address my question to RSPB Scotland.

RSPB Scotland recommended in written evidence that the list of relevant offences that could result in licensing being suspended should also include offences under the Animal Health and Welfare (Scotland) Act 2006. I am interested in hearing why you take that view and whether you have examples that would help us to understand it.

**Ian Thomson:** Basically, raptor persecution is quite often a symptom of a wider pattern of offending that occurs in some of these intensively

managed areas. We agree with the inclusion of the relevant offences, and we have suggested that animal welfare should also feature. For example, the use of crow traps on intensively managed grouse moors is widespread, and we have substantial evidence, which we have passed to NatureScot and police in the past, that shows that a significant number of those traps are misused or abused—in other words, contrary to the terms and conditions in the general licence. Those offences often include the suffering of animals, hence the need for animal welfare provisions.

Grouse moor management entails a significant amount of predator control. Most of that, as I think we acknowledge, is legal; whether the scale of that predator control is suitable during a biodiversity crisis is perhaps not for the scope of this bill. Inevitably, unfortunately, there is also misuse of traps and snares as part of that.

Having as wide a range of offences as possible to tackle the pattern of offences, which is not simply restricted to raptor persecution, is entirely appropriate.

**Robbie Kernahan:** I will give Mr Allan a response from my perspective.

Thinking about how land management takes place in reality, grouse moors do not operate in isolation; they operate as part of an estate that will have integrated uses for farming, forestry and agriculture. Quite a lot of wildlife management is undertaken by the same staff, so, while farmers might not be a significant issue on grouse moors in themselves, quite a lot of the management activity will be around integrated land use.

From NatureScot's perspective as a regulator, if we have lost trust that people can comply with the Protection of Badgers Act 1992, the Wildlife and Countryside Act 1981 and the habitats regulations, we have to ask ourselves whether those are the kind of people to whom we want to issue licences for all those purposes. It is important that we look at the context of what is happening in the round, not just through the lens of raptor persecution.

**Ashley McCann:** The wide scope of relevant offences in the bill effectively says that grouse moor operators are being held to a much higher standard in law than any other type of land manager. It has discriminatory effects. If you are going to interfere with rights that have huge economic value and support jobs and are essential to operating a business, you need to have a good, evidence-led reason for that interference.

There is absolutely no evidence that the wide range of offences that do not cause harm to raptors that are included in the bill are occurring at any higher rate on grouse moors than in any other land management context. The desirability for an

additional deterrent for those crimes is not enough to interfere with rights—it needs to be evidence based. Such crimes are already covered by the law; they are already covered by punitive criminal sanctions as well as the ability to remove general licences, as Robbie Kernahan alluded.

The effect of the bill would be to say that, if someone commits a crime under the conservation legislation on a farm, they will be able to continue to operate their farm and will suffer a penalty only if their guilt has been proved beyond reasonable doubt. However, two miles down the road, on a grouse moor, it will be a completely different story: there, a person can have their licence taken away without any proof of their guilt to any standard.

Robbie Kernahan talked about the civil standard of proof being what underpins the bill, but that is patently not the case. The bill says that licences can be suspended for an unlimited time where the regulator is not “satisfied”, which means where there is no proof whatsoever. That is draconian.

**Jamie Whittle:** If the focus of the bill is much more on raptor persecution, in the interests of fairness, it is important to ensure that the relevant offences are focused on that point. However, if, as I mentioned in my previous set of comments, there is a wider aim in the context of broad legislation that considers biodiversity issues more generally across the countryside, I can see how that wider set of relevant offences and pieces of legislation can fit into that context more easily. There is a danger that the bill will be unfair if a different level of treatment is applied to grouse moors compared to the wider countryside. That needs to be taken into consideration.

**Rachael Hamilton:** Can I ask a quick supplementary question, convener?

**The Convener:** If it is on this point.

**Rachael Hamilton:** Jamie Whittle, in your opinion, would lowering the standard of proof violate any articles under the European convention on human rights?

**Jamie Whittle:** I have not considered the human rights aspect specifically, so I would need to consult Law Society colleagues on that. I would be happy to respond to the committee separately on that.

The way in which we have read the bill is that the civil standard of proof—that is, the proof is on the balance of probabilities—would apply to the powers given to NatureScot when it considers the various options of a warning, a temporary suspension or revocation. That would be analogous with other licensing regimes in which the civil standard of proof is applied. I understand that it is the same for other wildlife licensing instances.

Aside from a revocation or a warning by NatureScot, the situation may escalate into a different layer of enforcement in which Police Scotland and the Crown Office are brought in. There would then be a separate exercise in the context of the Wildlife and Countryside Act 1981, in which the criminal standard would be brought in. It does fit.

**The Convener:** We will come on to the ECHR a bit later.

**Dr Lovejoy:** I have two very brief comments. First, whether we are in the realm of civil or criminal law will be assessed autonomously in the European Court of Human Rights. Just because we call something a civil sanction does not mean that it is a civil sanction under human rights law. The European Court of Human Rights will examine, for example, the intrusiveness of the sanction that is imposed. That brings me to my second point. We have to be very careful to compare this licensing framework with other licensing frameworks in the same sphere, such as the general licensing framework to control pest birds. To control pest birds is not as important as getting a licence to take grouse, which is a licence that effectively determines whether a person can go on with their profession and business. It is a completely different sphere and we are looking at completely different legal interests. That partially answers the question regarding ECHR. I understand that we will come back to that.

**Ashley McCann:** I just want to clarify Jamie Whittle's point, for the record. For the avoidance of doubt, we are not talking about the civil standard when we talk about suspension in relation to new sections 16AA and 16AC to the 1981 act, but are talking about no standard of proof—it is lower than the civil standard. We are talking about the regulator applying punishment where it is not "satisfied".

**The Convener:** Okay. Thank you.

**Alasdair Allan:** Ashley McCann, on that point about the standard used and the penalty, which you described as "draconian", do you have a view on the evidence to the committee given by Professor Werritty, who said that he could not see a way to deal with raptor persecution other than through a licensing scheme?

**Ashley McCann:** It could be a licensing scheme predicated on the civil standard of proof, but that is not what we are talking about. The Scottish Government consulted the public on a licensing scheme that would allow penalties to be imposed where NatureScot, as the regulator, is satisfied, on the balance of probabilities, that the crime has occurred. That is one proposition, but it is not what is in the bill.

Having listened to the evidence sessions so far, and having read the business and regulatory impact assessment and the policy memorandum, I am concerned that there is a real disconnect between what the Scottish Government says that the bill does and the black-letter law. The bill as drafted would allow licences to be removed where there has been no proof to any standard, including the civil standard.

It is fine that we are to have a licensing regime, but let us ensure that it is improved so that it is workable and we do not lose those benefits to Scotland that Professor Newton talked about last week in relation to biodiversity, investment, wildfire mitigation and so on. We need procedural safeguards. That is what I am hoping will come out of today's discussion. How can we improve the bill? If licensing is happening, how do we make it workable?

**Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP):** I would like clarification from NatureScot. You said that a licence would be suspended if a crime had been committed. Would you use the term 'crime', or would you just say that it was a breach of the terms of the licence? It is important to distinguish between civil and criminal.

**Robbie Kernahan:** The key principle underlying all of that is the balance of probabilities.

**Christine Grahame:** I know all about that. I am asking whether, if there has been a breach of the terms of the licence, you would use the term 'crime', which would seem to me to move the matter into the area of criminal responsibility, where it must be beyond reasonable doubt and so on.

**The Convener:** Can I stop you there, Christine? That point will be covered in Karen Adam's question.

**Christine Grahame:** I beg your pardon.

**Karen Adam (Banffshire and Buchan Coast) (SNP):** That is okay, Christine.

I want to dig a bit more into the suspension of licences and what is behind that. We have heard that that may happen where there is a suspicion, but I understood that it happened only when an official investigation had started and not where it was just a suspicion. I should point out that the Driver and Vehicle Licensing Agency can revoke or suspend a driver's licence when an official investigation is under way.

When would NatureScot regard an official investigation as being under way and consider it appropriate to suspend a licence?

**Robbie Kernahan:** I will try to reassure members about how I envisage that working in

practice, given our experience to date and as proponents of better regulation. We will make interventions based on the best information that we have in front of us. That information needs to be robust otherwise we will be challenged. I cannot envisage a situation in which we would suspend a licence based on no evidence.

In constructing a framework to make the scheme work in practice—as we did for general licence restrictions—we will work with stakeholders to set out the type of evidence that we will consider and the circumstances in which we would consider suspension, revocation or modification. We will not construct a licensing framework that we are not comfortable would withstand scrutiny. When we constructed the framework for general licences, we were taken to judicial review. However, we had put in place a process involving robust evidence, an appeals mechanism, the right for people to be heard and a right to respond, based on our assessment of the evidence, and that all withstood scrutiny. I cannot envisage a situation in which we would not try to replicate that in the current bill.

**Karen Adam:** Thank you. Detective Sergeant Lynn, can you clarify what you deem to be an official investigation?

10:00

**Detective Sergeant Lynn:** I have heard different points made about whether an official investigation is under way at the point at which someone contacts the police. I suppose that that entirely depends on the incident and how it unfolds. You could very quickly identify that there was no crime, and therefore, technically, there would be no investigation. You could even potentially identify that on the basis of the text or a call from a member of the public. You could receive the incident, review it and think, “There doesn’t appear to be any criminality here,” and then go out and very quickly establish that to be the case.

It is difficult to give an answer about a hypothetical situation, because every situation is different. However, it often happens that it is discovered very early on that there has been no criminality. In that case, a full-blown investigation does not really commence, whereas, in another case, that point when someone contacts the police could be when an investigation commences, and it will go from there.

**Karen Adam:** I want to clarify that: there would have to be evidence of criminality before an official investigation was launched.

**Detective Sergeant Lynn:** No, not entirely. You can carry out an investigation, during which criminality can come to light, or at some point you

could realise that there has been no criminality. It might not happen at that immediate point in time; it could happen initially when the call comes in or after a few hours or a few days. It would depend entirely on the circumstances. Again, we are speaking hypothetically, so it is very difficult to answer the question, considering the wide range of calls that we deal with. You could establish criminality at any point, and that is the purpose of an investigation: to establish whether there has been criminality and, if there has, to deal with it thereafter.

**The Convener:** Is there such a thing as an unofficial investigation?

**Detective Sergeant Lynn:** No, not really, because everything is recorded on the system. As soon as someone contacts the police, an incident is created, which needs to be updated and disposed of accordingly. Incidents need to be disposed of—we work under the Scottish crime recording standards—so, basically, we need to write off incidents after someone contacts the police to report something. That might be that a crime report is raised and it is established whether there has been criminality or, for example, in child protection matters, it might be the case that social work will take the case forward, so incidents can be written off in different ways. Therefore, technically, there is no such thing as an unofficial investigation, because, once someone contacts the police, there is a paper trail that needs to be finalised.

**The Convener:** Therefore, immediately upon someone contacting the police with a complaint that involves an allegation of some sort of criminality, there is an official investigation.

**Detective Sergeant Lynn:** Technically, yes, because it needs to be resolved in one way or another. As I said, it could very quickly be established that there has been no criminality, in which case, it would be an incredibly short investigation.

**The Convener:** There are no timescales for an official investigation. You are suggesting that, whether it is very quick or very long—

**Detective Sergeant Lynn:** No, as I said, it could happen very quickly or it could take time to establish whether there has been criminality.

**The Convener:** —it is still an official investigation. Thank you.

**Dr Lovejoy:** That discussion highlights exactly what is wrong with the bill. The letter of the law clearly says that a licence can be suspended for an unlimited time, even though the relevant authority is not satisfied that a criminal offence has been committed, if there is an official investigation. We heard that, in some cases, an official

investigation starts because of as little as a phone call to the police. That is exactly the problem with the bill.

With all due respect, for people who are affected, it is simply not enough to get an informal reassurance from NatureScot that says, “Well, yeah, but we won’t apply it in that way. We will be much more pragmatic.” You might be much more pragmatic, but the certainty in law that we require must reflect that. That is how laws should work in a democratic society. That is why that needs to be worked on.

The problem with an official investigation is that we are operating in a highly politicised sphere, and there are incidences in which people who are opposed to driven grouse shooting are meddling with traps or snares and staging evidence to show that there might have been a criminal offence when there has not been one.

I want to highlight one figure: in 2014, the Scottish Government commissioned BASC to conduct a study of the number of recorded incidences of meddling with traps and snares and vandalism. In only one year, there were 193 recorded incidences of traps and snares being meddled with. Therefore, the idea that someone who opposes grouse shooting can call the police and start an official investigation is a reality, not a hypothesis.

**The Convener:** Okay. Thank you. Rachael Hamilton has a supplementary on that.

**Rachael Hamilton:** My question has just been covered, but I would like to press David Lynn on the definition of an official investigation. If—as has happened, because we heard about it on Monday—a gamekeeper walks into a police station with a dead raptor, what happens? Does that become an official investigation?

**Detective Sergeant Lynn:** Yes—

**Rachael Hamilton:** Well—

**Detective Sergeant Lynn:** Apologies—carry on.

**Rachael Hamilton:** What is the process? In that particular case, the police deemed at that point that there had been no criminal activity, and there was no official investigation. Is your approach inconsistent?

**Detective Sergeant Lynn:** Suspicion would not necessarily fall on the gamekeeper in that case. However—

**Rachael Hamilton:** But there was no toxicology test.

**Detective Sergeant Lynn:** I was about to come to that. Again, it is difficult to speak about such situations without any experience of the events

themselves, because decisions could have been made behind the scenes that I am unaware of. There could have been reasons for not going down that route, but I would expect there to be a post-mortem or a toxicology test if a raptor were found with no obvious indication of the reason for death.

**Rachael Hamilton:** Well, in that particular case, there was not.

**The Convener:** I think that we have established that an investigation is an investigation, whether official or not.

I want to move on. I will bring in Ashley McCann and then Christine Grahame for a very short supplementary. I should perhaps indicate that we are more than two thirds through the time for the session and we still have another 10 questions to ask, so we need to keep questions and answers as succinct as possible.

**Ashley McCann:** I will be brief. One point that I do not think has been stressed enough is that suspension is not, as the bill team confirmed in evidence, a short-term penalty. There is nothing in the bill—the black letter of the law—that limits suspension to, say, a period of weeks. What we have heard over and over again—and, indeed, prior to the introduction of the bill—is that police investigations into wildlife crime such as raptor persecution are very difficult, can become protracted and can take a long time to complete. As a result, the damage caused by suspension in the interim will be permanent. It is all well and good to say that NatureScot as a regulator will be even-handed in its approach, but the reality is that the ease with which licences can be suspended will mean that the bill will have disproportionate effects and will make long-term investment in grouse moor management no longer an attractive proposition.

I also have to say, as someone who works in courts, that appeal rights are of very little comfort in that respect. There is no obligation on NatureScot to share any information with the licence holder in advance of the imposition of suspension, nor is there any obligation to notify the licence holder that it is considering suspension. How, in that case, are you supposed to challenge such a decision in the courts? I think that that would be very difficult on a practical level, and I do not think that the provision really provides access to justice. As we heard last week from Professor Colin Reid, this is a very big step to take, and it is a trigger for suspension, which, in his words, he imagined NatureScot would use

“very rarely, if at all.”—[*Official Report, Rural Affairs and Islands Committee*, 14 June 2023; c 10.]

My respectful suggestion to the committee is that the balance weighs in favour of not including

that provision in the bill. The proposed scheme already materially adds to NatureScot's toolbox by providing it with the civil standard of proof for suspension and revocation of a licence—the investigation trigger goes too far.

**Christine Grahame:** I am completely muddled about the levels of proof. We are using the term “criminal” when we are referring to licensing, which is a civil matter with civil remedies and breaches.

Let me put to you a proposition, so that I can understand what will happen. The licensing scheme is in place, and the police receive a report of an incident and check it out. Let us assume that there is absolutely sufficient evidence that a crime has been committed that meets the standard of proof in the criminal courts, with the onus on the prosecution. Would the police simply bypass NatureScot and go to criminal prosecution? Please do not answer now, Mr Lynn—that is just my first proposition.

In my second proposition, the police get a phone call and carry out an investigation, but do not think that there is sufficient evidence to take it to the procurator fiscal. Do you then take the matter to NatureScot, which will look at what you have and decide whether, on the civil balance of probability, the licence should be suspended?

That is what I am trying to get into my head. The word “crime” is being used in the context of both NatureScot and Police Scotland, and what I need to know and what landowners would also need to know is: how does that work?

There you go—that was quite short.

**The Convener:** Would Robbie Kernahan like to come in on that?

**Robbie Kernahan:** Yes. I appreciate the complexity and the interplay of all this. To an extent, each case must be considered on its merits.

When an investigation starts, NatureScot is in fairly regular contact with Police Scotland about the nature of any potential offences. We would also look at the context in which an offence takes place. We will not act in isolation; we will have intelligence and the background and history, which will give us an understanding of whether or not the most recent investigation continues to remove our trust and confidence that an operator is acting within the intention and spirit of how we issue licences. If we have lost trust, and in that context another investigation means that we do not have confidence in an operator, we may well suspend their licence.

We already have discretion, in all our licensing functions, to carry out such steps, so it is not new territory. It has not been prescribed in law in the way that it is in this bill, but NatureScot, as a

licensing authority, already has discretion to think about how we might ratchet up the sanctions or conditions, or the expectations about how people behave under licence. That is a civil, not a criminal, issue.

**Christine Grahame:** I understand the difference. However, would Police Scotland bypass NatureScot if it thought, “Well—it's right in front of us here”?

**Detective Sergeant Lynn:** No, we would not.

**Christine Grahame:** So, you would go to NatureScot, but I take it that the prosecution would take priority over anything else.

**Detective Sergeant Lynn:** We would do both. All that we would do is notify NatureScot of the investigation and whether or not the action met the threshold for charging and reporting someone, because the thresholds are different, and the criminal threshold obviously exceeds the civil threshold that NatureScot will be working under.

In both examples that you gave, Police Scotland would be engaging with NatureScot. Obviously the thresholds are different, and it would be up to NatureScot as to whether it felt that there was enough there to impose any licence restrictions.

**Christine Grahame:** So, it would be a dual process: Police Scotland would go straight to prosecution, and in the meantime NatureScot would have suspended the licence, I take it.

**Robbie Kernahan:** Possibly.

**Christine Grahame:** Possibly. Thank you—I think that I understand it now.

**The Convener:** I will bring in Ashley McCann, and then we will move on to the next question.

**Ashley McCann:** I will be brief. To compare general licensing with grouse licensing is to compare apples with oranges. The legal tests and the legal checks and balances that are required in this context are fundamentally different. When NatureScot is exercising its general licensing functions, it is saying, “You can do something that would otherwise be illegal”—it is what we call a derogation from the law. If your general licence is restricted, it effectively means that you are no longer entitled to light-touch regulation in that respect, so you would apply for a specific licence.

Grouse shoot licence suspension or revocation is fundamentally different. It involves depriving a person of their property rights, which has a huge impact in terms of value—it underpins jobs and has a ripple effect on rural communities, both economically and ecologically. The gravity of those consequences means that the two licensing regimes cannot be compared. We need procedural safeguards, and we need decisions

that amount to penalties to be underpinned by evidence, at least to the civil standard.

To go back to Christine Grahame's point, the criminal law and the civil law sanctions will dovetail, so it is a double whammy. That can be distinguished from situations involving the likes of the Scottish Environment Protection Agency, which I am guessing is why you are asking the question.

**The Convener:** I will bring in Jim Fairlie.

**Jim Fairlie:** I come back to Robbie Kernahan with an observation on the point that Ashley McCann just made in speaking about the "gravity" of the consequences. To my mind, the gravity of the consequences of raptor persecution and any other wildlife crime that falls within the bill is such that it would absolutely deter anyone from carrying out the crime in the first place. To me, that is the important part.

Ashley McCann says that the example of a general licence restriction is not comparable with the ability to limit the licence of a grouse moor manager. Robbie, are you confident that there are sufficient safeguards in NatureScot's system that would allow you to make an informed decision, given the gravity of the consequences, based on your current system or how the bill is going to work?

**Robbie Kernahan:** That is a useful way of framing it. We will not develop a framework for imposing these suspensions, modifications or restrictions unless we do so in consultation with stakeholders. We will build a framework that will, we would hope, provide reassurance that we are acting in a way that is proportionate, targeted and evidence based. I have no doubt at all that, the first time that we decide to suspend or revoke a licence, we will be challenged, and I suspect that we will go through legal scrutiny to ensure that we have a framework that is robust and defensible. That is exactly what happened with the general licence restrictions.

I hear Ashley McCann's point about apples and oranges. Some of the principles in the bill are very similar in that we can ratchet up the conditions that are associated with our licensing based on the severity of the offences or breaches that are in front of us. That is all about proportionality and those are the issues that will follow in terms of ECHR if we roll out and apply a framework and that is challenged legally.

10:15

**Jim Fairlie:** Can I seek some clarification on that point, please?

**The Convener:** Very briefly.

**Jim Fairlie:** Ashley McCann and Dr Lovejoy have talked about vexatious actions by other people. When you talk about ratcheting up conditions, does NatureScot have enough experience and understanding so that, when you get a report from Police Scotland to say that there has been a raptor persecution incident on a particular estate, you need to look at it only from the licensing point of view? Do you have enough of a relationship and an understanding of those situations to be able to say that you believe that the action is vexatious and that you will not therefore revoke a licence on that basis at that time?

**Robbie Kernahan:** Dr Lovejoy referred to the BASC study of 2014. We have also carried out an awful lot of work on understanding the potential issues with existing provisions and interfering with trapping and snaring. Vexatious actions have been occurring for a long time, and we are working within a framework that means that we can explore that, give it sufficient airtime and allow estates to make their own representation to us before we make any decision. Indeed, we have been encouraging the reporting of trap tampering, because we can use all that intelligence to help us to make a decision on a case-by-case basis.

**Jim Fairlie:** A licence will therefore not be revoked on the basis of a phone call to say that something has happened. A process that will be gone through and you will not just suddenly suspend a licence.

**Robbie Kernahan:** Absolutely not. Again, I assure the committee that we would never do that. Developing a framework that helps people to understand the way in which we would licence is crucial to all of us.

**Dr Lovejoy:** I just want to use one sentence to boil this down. With all due respect, the problem is that the imposition of a sanction that infringes people's property rights and the most fundamental procedural guarantees of individuals and which is based on the trust and confidence of NatureScot is plainly unlawful. We need to focus on the facts on the ground, not on the trust and confidence of NatureScot. I do not mean that in an offensive way; it is just a matter of fact, is it not?

**Ashley McCann:** I just want to paint a picture for the committee using a real-life example. In spring last year, a gamekeeper in Perthshire found a dead golden eagle and reported it to the police, then handed the bird over. A police investigation was instigated, as we would expect, and in its message on Facebook and every other social media platform calling for people to come forward with evidence, the police said that raptor persecution could have been a cause. During those months, under the proposed legislation in the bill, it would have been well within

NatureScot's rights to suspend the licence, but, in that case, no criminality whatsoever was involved. Had the proposed scheme been in place, permanent damage would have been done to that estate with no right of redress and no proper appeal right, because how do you prove a negative?

That is the kind of situation that we are talking about here. That kind of sanction should be imposed only when the regulator is satisfied that there is guilt to the civil standard.

**The Convener:** We will move on to the code of practice.

**Jim Fairlie:** What is your view on the need for a code of practice for grouse moor management, and what would you like to see included in such a code? Does the bill provide enough clarity on that or is it about leaving some flexibility in the system for adaptive management? Robbie Kernahan, I will start with you on this one.

**Robbie Kernahan:** To take away from some of the specifics on the hard choices about licensing, there is no doubt that the bill provides an opportunity for us to continue to drive up standards. I am sure that that is something that we all support, and a code of practice will allow us to do it. We can set out a framework to help practitioners to understand what they must do because it is a legal requirement, what they should do and what they could do as best practice.

We have quite a lot of experience of these types of codes in other sectors. We have, for example, the deer code, which does exactly the same thing, the outdoor access code and the muirburn code. All of these codes under statute can help to drive up standards.

Some work is already under way on thinking about the framework, and we are using moorland forum colleagues to help populate it. I think that it will be a useful addition and will drive up standards.

**Ian Thomson:** I agree with Robbie Kernahan. Basically, as the code will be essential in ensuring that grouse moors are managed in an environmentally sustainable and legal fashion, its content will need to be comprehensive and address, for example, predator control, mountain hare management, under-licence muirburn—obviously cross-referencing part 2 of the bill in that respect—the use of medication and the creation of hill tracks. We have suggested that the code be developed by NatureScot—that is clearly happening—and signed off by its scientific advisory committee. It needs to be founded in evidence.

It also needs to be robust. A number of the current codes have only voluntary provisions, and

we certainly feel that this code should have provisions that must be followed, in order to ensure compliance.

**The Convener:** Beatrice Wishart will now ask some broader questions about the code, and then I will bring in those who have indicated that they want to speak.

**Beatrice Wishart (Shetland Islands) (LD):** My questions follow on from what Ian Thomson has just said. How does the requirement for a code of practice for grouse moor management fit into the bigger picture of the climate and ecological crises and the wider context of upland management? Is the Scottish Government being joined up in how it is looking at upland management, including in relation to the coherence of the requirements being put on land managers?

**Ashley McCann:** Scottish Land & Estates is not opposed at all to the development of a code of practice, but it is really important for it to be developed in consultation with the stakeholders who actually practise land management, not those who are opposed to it.

Our other issue with the code of practice is its role in the licensing scheme. The one that has been described in the papers that underpin the bill is really broad ranging and covers land management activities that are not exclusive to grouse moors. Penalties already exist under self-contained regulation for the type of conduct that Ian Thomson is talking about. For example, if you breach the law on muirburn, you will suffer penalties set out in the Hill Farming Act 1946. We cannot have inconsistency in the application of the law, as that will have discriminatory effects.

I also think that this speaks to the overall theme that we have been hearing about of the bill's proportionality and of ensuring proportionality of punishment under it. As the bill is drafted, the code of practice forms the basis for refusing and taking away a licence, and such a step takes us far away from raptor crime.

**Max Wiszniewski:** I note that the text of the code of practice will cover

"how land ... should be managed to reduce disturbance of and harm to any wild animal, wild bird and wild plant, including how the taking or killing of any wild birds should be carried out and how predators should be controlled."

Revive, as a coalition, would like to ask why such activities are happening in the first place. We welcome the fact that the legislation on trapping will put it into a national framework—in other words, all these traps will be legislated for on a national basis, which is very good. However, what if, hypothetically speaking, one were to apply for a licence for reasons to do with killing wildlife, whether on a grouse moor or otherwise? There might well be legitimate reasons for doing so, such

as the protection of livestock as well as reasons to do with ecology and conservation, but should a licence be given for the purpose of increasing grouse numbers for sport shooting? Revive, as a coalition, does not think so, and we are bringing that question to the table.

That said, from our point of view, it is certainly important for the code of practice to be part of a legal framework, to ensure that it can be enforced and linked legally to the licence.

**Ashley McCann:** With respect, I quickly point out to Max Wiszniewski that this debate is not about whether grouse shooting should continue in Scotland but about whether the bill is a proportionate response to the perceived issue of raptor persecution on grouse moors and whether it will be an effective and proportionate deterrent.

**The Convener:** We will move on to the issue of annual licences, with a question from Alasdair Allan.

**Alasdair Allan:** I hope that my question, which is about the period of section 16AA licences, will be reasonably quick. The bill sets out that licences must be for a period that does not exceed one year. Is that the right period?

**Ashley McCann:** The annual licence framework is problematic. Without delivering any evident public benefit, all that it will do is add to the scheme's cost and to the administrative burden on NatureScot, which already has a full plate. The policy memorandum gives an irrational justification—it says that licences will be granted annually because grouse shooting is a seasonal activity. However, the significant financial investment that goes into grouse moor management is long term, as are the employment of gamekeepers and the capital investment, which requires a long-term outlook. Likewise, the concerns about raptors that underpin the scheme are long term—that problem is not seasonal.

The period is illogical. The licence provisions should be amended to provide for licences to be granted indefinitely. Nothing would be lost by doing that; a long-term licence could still be removed or suspended, and some form of reporting requirement could be imposed, if that were possible. Annual licences would cause problems and deliver no benefit.

**Alasdair Allan:** Do you really mean indefinite licences?

**Ashley McCann:** Why not? Let us think about premises licensing. What would be lost by taking such an approach? Another example is that trap licensing uses a 10-year period. Clarity and certainty are needed for businesses so that they can continue to invest in moorland management. If

such investment is disincentivised, Scotland's rural economies and its rural environment will suffer.

**The Convener:** I will bring in Robbie Kernahan to respond on why NatureScot thinks that an annual licence is appropriate.

**Robbie Kernahan:** To be honest, we would probably prefer a bit more flexibility in the bill than the prescriptive approach that it takes now, for a variety of reasons, of which administrative efficiency is just one.

**The Convener:** If licences were granted indefinitely, I presume that the bill would provide the ability for licence conditions to change without people having to make an application, if secondary legislation changed the licence requirements. Is that right?

**Robbie Kernahan:** All that I am saying is that I would prefer an opportunity for us to think about a sensible timescale on which a duration of licence would work, without necessarily being tied to an annual prescription.

**The Convener:** I call Jim Fairlie.

**Jim Fairlie:** Thank you, convener—*[Interruption.]* Does Christine Grahame want to ask a question first?

**The Convener:** Jim, will you ask your question, please? Thank you.

**Christine Grahame:** Robbie Kernahan did not say what he would suggest as something different.

**Jim Fairlie:** I will come back to you.

**The Convener:** I ask Christine Grahame to go through the chair, please.

**Jim Fairlie:** The question goes back to the severity of the crime and the potential repercussions for the person who holds the licence. I held a licence for raven control, which I had to apply for every year. It got to the point where it was a case of putting in the form and having that returned. I get that that might cause administrative issues for Robbie Kernahan's organisation, but that process clarified in my mind that not having a licence would be breaking the law and that people had a duty to make sure that their licence was in place before they started to control something that was causing them a severe problem. I get that that might be slightly more onerous for NatureScot, but do the witnesses accept that annual licensing keeps people's minds firmly on that fact?

**Ashley McCann:** I do not think that anyone who operates a grouse moor forgets the fact that they may lose their ability to do so as a result of restrictions. I come back to the point that, if you have a licence, it can be taken away if you commit an offence—or, under the bill, if you are alleged to

have committed or are suspected of committing an offence. That is irrespective of whether a licence operates for 10 years, 20 years or one year.

NFU Scotland backs us up—it said:

“Applying for and gaining a licence on a yearly basis is an extremely short timeframe and we would strongly suggest making this period longer. The licensing regime should not be overly complex, onerous, or burdensome for a land manager, who will already have multiple competing priorities to contend with.”

That organisation, which does not even have a grouse shooting interest, is telling you that businesses need certainty. That comes back to the principles of better regulation. The regulator should enable people to carry out their activities lawfully; that is lost in the context of an annual licensing scheme.

10:30

**Jamie Whittle:** In many ways, I echo some of the points that have already been made. The Law Society has commented that, if the process of renewal is not straightforward, the scheme could be unduly burdensome, not just on NatureScot and Police Scotland but on estates. We suggested in our response that a timescale of three to five years might be more appropriate, bearing in mind that other licensing regimes, such as civic licensing, often have a three-year timescale.

On the point about certainty, many grouse moor operations will be taking advance bookings before a year-long period has ended, and they want the certainty of being able to plan, as do their guests, who will be deciding whether to come to Scotland or to shoot elsewhere.

**Dr Lovejoy:** I fully endorse what Ashley McCann said about annual licences. I add that we are looking at not only business investment but investment in nature conservation. Many of the investments that are undertaken by landowners are long term and privately funded. The uncertainty of an annual licence will risk undermining those long-term conservation projects.

I can offer a comparative view: in England, we have an annual licence to release game birds in and around protected sites and, this year, the licence was changed at very short notice, which led to significant economic, environmental and legal impacts. The uncertainty of an annual licence is a real problem.

**Max Wiszniewski:** It is important to mention that, for the public interest, regardless of whether the licence needs to be renewed every year or a bit less frequently, full cost recovery will be important so that there is no burden on the public purse in the scheme. The regularity of accruing

the fees for the licence might also be an important consideration in the debate.

**The Convener:** I think that we will come to that issue later.

**Ross MacLeod:** There have been a couple of mentions of better regulation, and I am relieved to hear that NatureScot will be working to that. In the conditions of better regulation laid down in the “Scottish Regulators’ Strategic Code of Practice”, there are things such as adopting

“a positive enabling approach in pursuing outcomes that contribute to sustainable economic growth”,

and using

“evidence based protocols which help target action where it’s needed”.

The code also says that regulators should

“Help those they regulate to design simple and cost-effective compliance solutions to improve confidence and day to day management control.”

It is important to underline that, in our work so far, we aim to support that objective of better regulation.

**The Convener:** Robbie Kernahan suggested that there should be more flexibility in the licensing. How would that look? Would it be an annual rolling licence or a five-year or 10-year licence? What are your thoughts on that?

**Robbie Kernahan:** I agree with most of the points that have been made. We need to ensure that a balance is struck between providing certainty for investment decisions and, at the same time, ensuring that we have sufficient flexibility to review what is happening annually. We would expect annual returns to be a condition of any licence. We want that intelligence so that we can be better informed about what is happening under licence. A licence duration of between three and five years sounds about right and sits more comfortably with other civil licensing schemes that we know work well.

**Alasdair Allan:** Professor Werritty recommended that NatureScot should have the power to impose fines. Can NatureScot clarify whether we are now talking about that and, if not, should we be?

**Robbie Kernahan:** During Professor Werritty’s considerations, NatureScot was very conscious that a range of civil sanctions could come into play to continue to tackle the inherent problem of raptor persecution. Civil penalties were absolutely part of that discussion. Our thinking has not sufficiently moved on as to whether those, as a tool in the toolkit, will aid with that particular issue.

**Alasdair Allan:** Would you have the power to impose fines?

**Robbie Kernahan:** Do you mean in the bill?

**Alasdair Allan:** Yes, in the bill.

**Robbie Kernahan:** No.

**Alasdair Allan:** Do you feel that you need that power to have an effective range of sanctions?

**Robbie Kernahan:** I think that, of the civil sanctions that we have talked about so far, the most likely to be successful is the removal of a licence. That is probably the one that we are putting our faith in as a backstop power.

**The Convener:** We move to questions about cost recovery, which has already been touched on. I call Karen Adam.

**Karen Adam:** We have, indeed, touched on the question of whether there should be a fee for a licence. Do the witnesses agree with the bill's approach to fees? How do you feel about the way in which the licensing scheme is to be resourced?

**Ashley McCann:** From the bill's final BRIA and financial memorandum, it appears that ministers have failed to make any real assessment of the costs that might be borne by owners and occupiers of land if the regime is introduced. The bill's financial memorandum simply states:

"Individuals and businesses may apply for a licence if they meet the specified criteria, to continue to be able to take grouse, use wildlife traps and make muirburn without cost."

That is patently wrong, because the cost of regulation extends well beyond the fees charged by the regulator, and it is deeply regrettable that the BRIA fails to identify and analyse those cost impacts.

This is a vital point for the committee. Robust BRIAs underpinned by reliable data help you to make laws that do not have unintended consequences and allow you to strike the right balance in regulation and to identify and mitigate such unintended impacts.

I am conscious of the constraints on time, but I want to draw the committee's attention to some of the main deficiencies with the BRIA. First, the Scottish Government's own BRIA toolkit—that is, its guidance on how such assessments should be conducted—says that it should engage in face-to-face discussions with six to 12 businesses on the impact of proposed legislation. Despite that, not a single business or individual who will be affected by the bill was interviewed, and that is exactly the kind of failure of process that leads to bad law.

The simplistic justification given was that

"the proposed changes will minimally affect businesses that respect wild animal welfare and the associated legislation."

How can you arrive at that conclusion if you have not interviewed a single business? The

complacency of that approach is hugely disappointing, especially given the Werritty group's emphasis on the need to better understand the socioeconomic sphere in which we are operating.

The BRIA also does not help us to understand the role of grouse moors in the rural economy, the breadth of jobs and businesses that might be affected or, on the specifics of the proposed scheme, the impact of the one-year licences and the ease with which they can be suspended, which we have just discussed. Those are all cost impacts, and it is vital that they are all looked at in this discussion.

These are real-world impacts, which is why I am being so expansive. We are talking about people's lives, jobs and tied accommodation being put at risk.

**Karen Adam:** I was just asking about the specific issue of whether the licensing fee is proportionate. It might be appropriate to bring in Max Wiszniewski, as he touched on the issue earlier.

**Ashley McCann:** Perhaps I could just respond to that question. I think that there are two issues at play here. There is a commitment in the Bute house agreement to full cost recovery, but that does not form part of the bill. What is said in the bill—

**Karen Adam:** It is about the system of licensing. It is not unreasonable to ask people to pay for a licence—after all, that is what generally happens with licences.

**Ashley McCann:** I do not think that Scottish Land & Estates would oppose there being a licence fee per se, but the point is that the overall cost has not been assessed as part of the bill. I should also say that we are also opposed to full cost recovery but, again, it is probably a bit premature to say so, given that it does not form part of the bill.

**Max Wiszniewski:** I agree with Karen Adam that it is not unreasonable to expect to pay for a licence, and I welcome SLE's agreement on that.

**The Convener:** Are there any further comments?

**Ian Thomson:** All that I would add is that, as we know, budgets are constrained, and that applies to NatureScot as much as anything else. NatureScot's remit also covers nature protection and recovery and, in our view, it is absolutely imperative that resources are targeted at those objectives and are not diverted to the administration of a licensing scheme. We therefore absolutely agree that the scheme should be cost neutral, at least, to the public purse.

**The Convener:** Robbie Kernahan, what are you reviewing with regard to your options for cost recovery?

**Robbie Kernahan:** Currently, we do not charge for any of our licensing functions, and you should be aware that we issue 5,000 species licences per annum. As some are quite clearly in the public interest, it might not be appropriate to charge for them.

However, as Ian Thomson said, we are increasingly having to look afresh at opportunities to ensure that our licensing burden does not mean that we are putting all our resources into administering things when there is arguably a strong rationale for full cost recovery through charging.

**The Convener:** We will move to our final topic—

**Rachael Hamilton:** Convener, could I briefly go back to the code of practice? You did not notice that I had indicated to come back in.

**The Convener:** Okay.

**Rachael Hamilton:** Does any of the stakeholders have a comment on whether a licence could be revoked or suspended if any part of the code of practice was not followed? RSPB might have a comment on that.

**Ian Thomson:** In our view, the code of practice has to have statutory provisions. If one of the criteria in the assessment of a licence application is whether an applicant is adhering to the code of practice then, yes, if they are not, they could potentially lose their licence or be refused a licence in the first place. That is entirely reasonable.

**Rachael Hamilton:** Is that NatureScot's position?

**Robbie Kernahan:** Again, the reality is that it would depend on the circumstances. However, when it comes to compliance with the code of practice, if there is any breach of the code, that would be part of our considerations as to whether a revocation, suspension or modification was necessary. We would want to take the code into account when considering the matter, but it would depend on the nature of the breach.

**Rachael Hamilton:** The code of practice will be developed with stakeholders, but how do they know what that code of practice looks like?

**Robbie Kernahan:** It does not exist yet, so—

**Rachael Hamilton:** How can we scrutinise it if we do not know what it looks like?

**Robbie Kernahan:** I do not think that the code will benefit from parliamentary scrutiny.

**Rachael Hamilton:** But if a licence is to be revoked or suspended, surely it is up to our committee to scrutinise what the code looks like. That is just a point.

**Dr Lovejoy:** I agree with Rachael Hamilton. We do not know what the code of practice looks like, so how can anybody in this room make an informed decision as to whether the bill is proportionate? We need to know its full extent. That goes back to the point about the clarity of law. We need to have certainty and, at the moment, the bill is lacking in that.

**The Convener:** Very briefly, I will bring in Alasdair Allan.

**Alasdair Allan:** On that point, to be fair, that is true of every piece of legislation that has subsidiary legislation or regulations or dependent licensing based on it. We have been through many bills in this Parliament and we have had this discussion. There is an issue of carts and horses here. Yes, we can scrutinise licences, but we cannot scrutinise them until we have legislation to empower organisations to have licences.

**Dr Lovejoy:** Very briefly, the problem is that the sanctions can be so far reaching that it is a very important point in this case. I appreciate what Dr Allan said, but the intrusiveness of the bill means that it requires more clarity.

**The Convener:** Before we move on to the final topic, Jim Fairlie has some questions to tidy up the ECHR question.

**Jim Fairlie:** This question is specifically aimed at James Whittle.

**The Convener:** It is Jamie.

**Jim Fairlie:** My apologies—Jamie Whittle.

We have heard views from various stakeholders who believe that the bill may not be compliant with the European convention on human rights. What is your view on concerns raised by stakeholders that the provisions of the bill in relation to licensing may not be compliant—for example, due to potential disproportionate interference with property rights?

**Jamie Whittle:** As I mentioned earlier, the Law Society of Scotland has a sub-committee on human rights, and it has not specifically considered the bill from that angle. I can go back and seek a written response for the Parliament on that in particular.

I note that property rights across Scotland lie on various different levels and that ownership, leases or rights of access can be affected by legislation in different ways. I see it all fitting into a matrix of different laws, at different levels. By default, whenever any legislation is created, it has the

potential to limit people's rights. That is part and parcel of the way in which the law works.

**Jim Fairlie:** Will you write to the committee after the meeting to provide a view on that?

**Jamie Whittle:** Yes, I will feed that back to the Law Society of Scotland and ask for a written response.

10:45

**Dr Lovejoy:** Property rights under article 1 of protocol 1 of the European Convention on Human Rights are, indeed, not absolute rights, as Jamie Whittle mentioned, and they can be infringed by state interference. However, the infringement by state interference must follow three conditions: first, it must be implemented in law, which would be the case here, because we would have a statutory instrument; secondly, it would need to be in the public interest, which is debatable here because there are two very different opinions; and, thirdly and fundamentally, it must be proportionate.

In order to assess the proportionality of an infringement of property rights, procedural safeguards are one fundamental element. Let us look at the provision that we discussed earlier under which a licence could be suspended for an unlimited time based on no wrongdoing whatsoever but simply on a phone call to the police, which triggers an official investigation. I have no doubt in my mind that that would be considered disproportionate and would lead to court cases.

**Christine Grahame:** We have not touched on appellant procedure. That would deal with the ECHR. Depending on circumstances, how quickly might an appeal be made against revocation or suspension of a licence or a variation of the terms of a licence? It is very important that, when a judgment has been made, a person has a right to appeal on cause shown.

**Robbie Kernahan:** For any potential suspension, on receipt of information—that could be from a variety of sources—our first port of call would be the licence holder; we would contact the licence holder in order to understand what might be going on before we took any decision to suspend a licence. To address Dr Lovejoy's point, procedurally and in fairness, there is a right to respond to any suggestion that we might revoke a licence. In that way we, as a public body, safeguard ourselves with regard to being proportionate in discharging our regulatory functions. That is built into the frameworks that we already have for general licensing, and it would need to be built into any future framework.

**Dr Lovejoy:** It is not in the law, though.

**Robbie Kernahan:** It is not in the law.

**Ashley McCann:** Thank you, Christine Grahame, for that really important point. I welcome Robbie Kernahan's commitment on that, but the internal appeals process—the internal notification that he talks about and the right to be heard—is not enshrined in primary legislation. The bill needs to be amended to reflect that.

I have a second—very short, I promise—point on appeals. The bill does not allow the sheriff the discretion to provide, on an interim basis, that the suspension or revocation imposed by NatureScot is of no effect pending determination of the appeal. As a litigator, I know that appeals take a very long time. You could be waiting well over a year for a determination, during which time, if the business is unable to operate, the damage would be permanent—there would be no reparation.

**Ian Thomson:** We have a concern that the appeals process is quite one-sided. Proceedings appear to be limited to consideration of decisions to suspend or revoke the licence, and in the interests of justice, even-handedness and compliance with the Aarhus convention, a person should be able to appeal the granting of a licence, a failure to attach a condition or a failure to modify, suspend or revoke a licence.

**Ashley McCann:** It would be extremely unusual to have a third-party right of appeal in a statutory appeal structure in that context. It would be open to aggrieved parties to judicially review decisions, which is a much more appropriate forum for that kind of dispute.

**Robbie Kernahan:** Again, I will rehearse some of our existing controls when we restrict general licences. There is an appeals process internally in NatureScot, and there is no suspension of a licence while an appeal is being undertaken. That safeguard exists in our processes already and, again, to provide some reassurance, we fully expect that that would be the case in any future licensing scheme.

**Rachael Hamilton:** Can I just ask Robbie Kernahan a question?

**The Convener:** It will have to be very brief.

**Rachael Hamilton:** It is a very significant question on any financial implications. Robbie Kernahan, given that you have those powers currently, if there were financial implications, would that mean that article 6 of the ECHR could be violated? It might be the Law Society that should answer this, but do you take the financial implications into consideration, and do you have due regard to any violation of article 6?

**Robbie Kernahan:** The specifics of the ECHR is perhaps not a question for me. Our founding legislation, the Natural Heritage (Scotland) Act

1991, requires us to apply our balancing duties in considering—

**Rachael Hamilton:** But how do you do that?

**Robbie Kernahan:** In behaviours and frameworks. I have talked today about what we consider to be a proportionate way of responding to all those issues.

**Rachael Hamilton:** Do you believe that the frameworks are proportionate?

**Robbie Kernahan:** The ones that we operate to date? Absolutely.

**Rachael Hamilton:** Today?

**Robbie Kernahan:** To date.

**Rachael Hamilton:** To date? Do you mean the frameworks in the bill?

**Robbie Kernahan:** I mean those within our existing licensing functions. We fully expect to apply similar principles under any future legislation and licensing regime.

**The Convener:** We will move on to our final topic, on the powers of the Scottish Society for the Prevention of Cruelty to Animals. Unfortunately, we have very little time for it, so we will keep the questions and answers succinct.

**Ariane Burgess:** The committee is interested in hearing what the key considerations are regarding whether the Scottish SPCA should have additional powers to investigate wildlife crime. I am interested in hearing from people who were not represented on the previous panel, because we asked that question last week. I will start with Jamie Whittle. Did you catch my question?

**Jamie Whittle:** In the Law Society's response, we suggested that criminal investigations should remain confined to the police and the Crown Office and Procurator Fiscal Service rather than extended to the SSPCA. With the SSPCA being a registered charity, there was a question around whether it would be appropriate for that scope of investigation to fall on its behest.

**Ariane Burgess:** Perhaps I could hear from the RSPB and Revive, as they were not here the last time.

**Ian Thomson:** We support an extension of SSPCA powers. The SSPCA already has powers to investigate some wildlife crime on the basis that an animal is suffering. To give a very brief example, a few years ago a member of the public was walking across a grouse moor and found a gull floundering in an illegally set spring trap and bleeding heavily, and because there was an immediate welfare implication, the Scottish SPCA was called. An inspector attended within an hour and euthanised the gull. However, his powers did

not allow him to search for similar traps, and only a week later the police went on to the ground using their powers under section 19 of the 1981 act and found that a line of 10 traps had been set across that hillside. Had the SSPCA been given powers to search land under the Wildlife and Countryside Act 1981, that evidence could have been uncovered much quicker and other animals could have been spared suffering.

**Ariane Burgess:** Were there animals in those other traps?

**Ian Thomson:** No; there were not. The traps were not found—that is the thing. What was found was where they had been set.

**Max Wiszniewski:** Just to say briefly, I agree with Ian Thomson on that. Any measures that can be taken to increase the capacity for improved animal welfare across our lands is to be welcomed.

**Ashley McCann:** As Ariane Burgess alluded, SLE had an opportunity to air its concerns on that issue last week. I echo the sentiment of the Law Society, and I endorse Police Scotland's response on the issue, which is that it is simply not appropriate for a charity that has at its core an animal welfare concern to be investigating wildlife crime. It creates a huge amount of scope for bias and conflict of interest.

**Detective Sergeant Lynn:** This discussion has been going on for a number of years, and Police Scotland has maintained a consistent approach to the issue. We have several concerns. We believe that we should remain the lead enforcement agency on wildlife crime. We are concerned about confusion among members of public about who they should report incidents to. If members of the public were to report incidents directly to the SSPCA, and it was to commence investigations to a greater extent than it can now, we have concerns that when an investigation progressed and police became involved, we would be at a disadvantage because things that we would have done early in the investigation might not have been done.

We have discussed impartiality in relation to an animal welfare charity having increased powers. The SSPCA has publicly opposed snaring, for example, which is a legal practice if done properly and appropriately. Another issue is the capacity through training and resourcing to accommodate additional powers.

I have anecdotal evidence of a fairly recent incident—in the past couple of years—when the police and the SSPCA were working on an operation together and a member of the public was resistant to being told what to do and controlled by the SSPCA under its powers. He said that he was more than happy to engage with

the police, but he was reluctant to engage with the SSPCA, which is ultimately an animal welfare charity. That raised issues. I spoke to an officer who said that it was clear that there could be resistance from the public.

**The Convener:** What is Ian Thomson's response to stakeholders such as David Lynn who are concerned about the SSPCA undertaking further official duties, given its charitable and funding model?

**Ian Thomson:** The SSPCA is a reporting agency—it can already report directly to the Crown Office and Procurator Fiscal Service. It is the lead body in animal welfare cases, for example.

**The Convener:** We are talking about criminality and the investigation of crimes, not about animal welfare.

**Ian Thomson:** The SSPCA investigates crimes—it has a special investigations unit that investigates crimes that relate to puppy farming, for example. Our experience is that the SSPCA works very much in partnership with the police. The two bodies complement each other.

**Jim Fairlie:** I have a quick question for David Lynn. You currently work with the SSPCA—how does that operate? You have probably answered this already, but do you have concerns about extending the SSPCA's powers under the bill?

**Detective Sergeant Lynn:** We work well with the SSPCA. We are in contact and work together regularly. We appreciate the hard work that it does and the contribution that it makes.

In general, the SSPCA's current powers relate primarily to non-wild animals, and it is looking to take on the broad section 19 powers. In police terms, those powers are excellent and strong. I outlined our concerns about extending those powers to the SSPCA.

**The Convener:** I think that Jim Fairlie has asked the last question, unless anyone has more comments on the SSPCA.

**Rachael Hamilton:** Can I ask a question?

**The Convener:** Yes, if it is on the SSPCA.

**Rachael Hamilton:** It is. I do not know whether my question is for Ian Thomson or David Lynn. Police Scotland said in its submission that giving the SSPCA more powers could hinder some of the stuff that the police do in inquiries into organised crime. I want clarity on the difference of opinion about that. The aim is to ensure that criminal investigations are more successful, so they need to be robust. Why does the RSPB's opinion differ from Police Scotland's?

**Detective Sergeant Lynn:** The key point to think about is whether extending the powers could

hinder police involvement. Hypothetically, the SSPCA could commence an investigation and start working towards its ultimate objective, then we could become involved down the line, when some investigative opportunities might not be there any more, because the SSPCA does not have the same access to systems as we have.

Financial inquiries are now a big part of dealing with wildlife crime; I recently read a report that wildlife crime is the fourth-highest generator of illicit funds internationally. The SSPCA has the ability to do phone downloads but, from memory, I do not believe that its power extends far beyond that. For example, it would not be able to access systems such as public-space closed-circuit television—that would be unlikely to be relevant to wildlife crime, but it could come into play. The point is about general access to systems.

I know that the SSPCA has its own intelligence database, but obviously we have the Scottish intelligence database, which is a network of intelligence that shows links to nominals, areas, vehicles and so on. Potentially, that would allow us to put a picture together fairly quickly of links to serious and organised crime and other individuals, which might lead to a small investigation branching into something much wider. There is just a bit of concern about the lack of access to the systems and resources that we have, which might ultimately hinder any investigation, if we come into play at a later time.

**Rachael Hamilton:** Okay.

11:00

**Ian Thomson:** I do not know the extent of the powers that are being discussed. Indeed, one of our concerns is that it is quite vague what extra powers the SSPCA will get. I absolutely agree that section 19 of the 1981 act is huge in this respect. As far as I am aware, though, what the organisation is looking for is limited provisions to access land, not the power to search vehicles and so on.

From our perspective, and from dealing with cases on the ground, we know that what the SSPCA can do is provide that very early initial capacity. When you find an animal dangling by its broken legs from a trap, you will often find it very difficult to get a police officer to attend, particularly in rural areas. That is no criticism of Police Scotland; it is about resource. The Scottish SPCA has 60-odd uniformed inspectors whose sole function is to deal with animal welfare issues, and in many circumstances they are able to respond more quickly than Police Scotland officers.

I hope that, whatever happens down the line, there is the sort of very good partnership working that there is now. I do not see that being

compromised by any extra powers that the SSPCA would get.

**Rachael Hamilton:** Just for the record, Ian, what kind of trap was it you were talking about, and when did the incident happen? On our visit to the grouse moor on Monday, we were told that if a trap had been tampered with, the sort of incident that you have described with the gull could happen. That could happen with some older traps, such as Fenn traps, but it cannot happen any more. All the gamekeepers were licensed to work the traps; they showed us how they worked, and it was clear that a non-target species would not be able to enter such a trap.

**Ian Thomson:** The bottom line is that the traps in question had been set illegally. It was a line of Fenn traps that had been baited and set next to rabbits across a hillside.

**Rachael Hamilton:** And are Fenn traps still used?

**Ian Thomson:** Yes, they are. They are permitted for catching weasels.

The traps in question were not set legally. Prior to the change in law a couple of years ago, Fenn traps still had to be set under cover to target mustelids and rats. These were set in the open next to a bait and covered with a thin layer of moss to ensure that they were not visible. What happened was that the gull went down to feed on the dead rabbit and got its legs smashed in the trap.

**Rachael Hamilton:** Just for the purposes of the *Official Report*, when was that?

**Ian Thomson:** Forgive me—I think that it was in 2016.

**The Convener:** Okay. I will take a very, very brief supplementary from Christine Grahame, but I must point out that we are now half an hour over time.

**Christine Grahame:** I declare an interest as a member of the SSPCA. I absolutely appreciate the commonality and good will that exist between the SSPCA and the police. Why and in what circumstance would the SSPCA be seeking more powers?

**Detective Sergeant Lynn:** Presumably in the sort of circumstances that Ian Thomson has referred to, in which an animal is trapped or in need of assistance. That would be the primary purpose.

**Christine Grahame:** Obviously you do not want to compromise the evidence that might be available for a prosecution. Do you therefore accept that those might be the very circumstances in which it would be useful to extend the powers, with limitations? The Government will probably not

forgive me for saying this, but the fact is that there are not enough wildlife crime police officers, and the SSPCA will be able to do the early bit and secure the scene until you can take over—in certain circumstances.

**Detective Sergeant Lynn:** In theory, we would not be against the SSPCA having very limited powers to deal with such occasions, but I do not know whether there is the ability to do that. Once you give the SSPCA the power to enter on to land under section 19 of the 1981 act, you open up a broad range of possibilities.

**Christine Grahame:** We can find out. It is always available to us to find something more specific for stage 2.

**Detective Sergeant Lynn:** If it was purely for the purpose of entering on to land to protect or retrieve an injured animal, and if it was done through co-working with the police, that would be something that we could discuss.

**The Convener:** That brings the evidence session to an end. I thank the witnesses very much for their patience and the additional time that they have spent with us.

I will suspend the meeting until 11:15. I ask people to leave the room as quickly as possible to allow for a changeover of witnesses.

11:04

*Meeting suspended.*

11:15

*On resuming—*

**The Convener:** I reconvene the meeting and welcome the participants in our second round-table discussion, which is on muirburn. Ross Ewing is director of moorland at Scottish Land & Estates; Bruce Farquharson is deputy assistant chief officer at the Scottish Fire and Rescue Service; Dr Miranda Geelhoed is policy co-ordinator at the Scottish Crofting Federation; Dr Nick Hesford is Scottish adviser at the Game and Wildlife Conservation Trust; and Dr Emma Hinchliffe is director of the International Union for Conservation of Nature UK Peatland Programme. We are again joined by Robbie Kernahan—he is a glutton for punishment—director of green economy at NatureScot. Finally, Duncan Orr-Ewing is head of species and land management at RSPB Scotland.

Anybody who would like to contribute to the discussion should raise a hand. I also ask that all questions and responses be directed through the chair. We have a very tight 90 minutes, unfortunately, because a further committee meeting is taking place after this one, so I would

appreciate it if questions and responses could be as brief as possible.

Once again, I will kick off with a very broad question. What is your understanding of the pattern of muirburn across Scotland? We were fortunate enough to be invited to a grouse moor on Monday, and we got an idea of the situation, but could you tell us what, typically, would be burned on an annual basis, how long the rotations typically are and how the burning practices for grouse moor management differ from those that are used on farms or crofts?

I will start with Ross Ewing.

**Ross Ewing (Scottish Land & Estates):** Good morning, and thank you for having us here today.

It is important to give the committee a flavour of what the national overview of the muirburn footprint looks like. I would argue that the best source for that comes from the Scottish Government's stage 2 research into the socioeconomic and biodiversity impacts of driven grouse moors and, in particular, the paper by Keith Matthews and others in 2020. They mapped grouse butts on to rough grazing in Scotland, which covered 491 landholdings in all and spanned a total of 1 million hectares. Of those 1 million hectares, about 858,000 hectares were classified as rough grazing, of which 163,000 hectares, or 19 per cent, were subject to muirburn.

If we look at the picture in more granular detail and go within 2km of the grouse butts, we find that the total area of rough grazing falling within those 2km was 584,000 hectares, of which some 146,000 hectares, or 25 per cent, were subject to muirburn. If we are looking at the extent of muirburn across Scotland, it probably applies to about 163,000 hectares, certainly in relation to driven grouse moor management.

On the rotations that the convener mentioned, those are usually between 10 and 25 years, although between 10 and 15 years is probably more commonplace for grouse moor management. The size of the muirburn strips can vary. Obviously, we do not have a practitioner who does muirburn on the ground here today to give us an insight into this, but we have consulted widely, and fires are generally kept to between about 10 and 15m wide. They also generally get smaller over the years, because the fuel load is managed over that time.

I would also argue that there is much crossover with agricultural interests. Clearly, those land uses are integrated. For example, you often have sheep farming operations co-existing with grouse moor management operations. As a result, some of the muirburn for moorland game and wildlife tends to benefit livestock and vice versa.

**Dr Nick Hesford (Game and Wildlife Conservation Trust):** I echo a lot of what Ross Ewing said. It is important to understand that muirburn size and rotation periods vary significantly depending on the spatial, the temporal and even the environmental context. For example, drier areas might be burned more frequently than wetter areas, where vegetation regrowth would be slower. However, as Ross mentioned, a typical rotation might be anywhere between 10 and 25 years, and even beyond that, depending on the vegetation.

When managing for red grouse, the aim is to produce a habitat mosaic of small, interconnected burns so that we have a diversity of heather ages. The GWCT would not advise fires being any larger than a 30m width, but the fires are typically much smaller than that.

The GWCT holds data for about 25 upland estates across Scotland on which driven grouse shooting is a primary management objective on how many fires there are, the size of those fires and the peat depth at the ignition point of those fires. I have not analysed that data and cannot share it with the committee today, but we could potentially look at that in the future.

**Duncan Orr-Ewing (RSPB Scotland):** Every year, we are contacted about breaches of the muirburn code. That could be damage to bird nests—

**The Convener:** I am sorry, could we—

**Duncan Orr-Ewing:** I am coming to the stats.

**The Convener:** We are just looking at the pattern of muirburn at the moment. We have about 20 questions, which will look into—

**Duncan Orr-Ewing:** On the pattern of muirburn, we have conducted a citizen science project in recent years, whereby people can use a muirburn app to report incidents. For the purposes of this discussion, in the 2022-23 burning season, 17 per cent of the burns were on peatland deeper than 50cm. That is 28 out of 162 incidents.

Another important point for this discussion is the fact that science conducted by one of our people, David Douglas, shows that, particularly on grouse moors, muirburn intensity has been increasing in the past 20 years. That is one of the reasons why we are having this conversation.

**Dr Emma Hinchliffe (International Union for Conservation of Nature):** It is really difficult to say what the extent of burning on peatland is. Duncan Orr-Ewing has just provided us with some stats, but we are lacking a common definition of peatland, which provides some challenges.

**The Convener:** I will stop you there, because we will be coming on to that. We simply want to

know what the pattern of muirburn is across Scotland at the moment.

**Dr Hinchliffe:** Okay.

**Dr Miranda Geelhoed (Scottish Crofting Federation):** One of the key concerns for us is about the definition of muirburn. A lot of the statistics that we are hearing about muirburn are about large-scale heather burning, which is what we generally perceive muirburn to be, but it is our understanding that the bill would apply to any use of fire to control vegetation, which would be much broader and might not be adequately captured by the statistics. The requirements would apply even to the small-scale burning of gorse, for example. The breadth of the requirements could be much wider than what the statistics suggest.

**Alasdair Allan:** On the point about the pattern of muirburn and how it differs across different sectors, one of the things that is different about crofting is that it sometimes takes place on common grazings, so it involves multiple crofters, which makes it a different kind of activity. Dr Geelhoed, do you want to comment on that?

**Dr Geelhoed:** I agree with that, but I have nothing else to add.

**Ross Ewing:** Duncan Orr-Ewing talked about the intensity of muirburn increasing. I have to say that that is contested. The paper by Matthews and others as part of the stage 2 research said that there were instances of muirburn increasing and decreasing. I just wanted to put that on the record.

**The Convener:** Jim Fairlie is next.

**Jim Fairlie:** Robbie Kernahan wants to come in on the pattern for crofters.

**Robbie Kernahan:** Precise current and historical information about the extent of muirburn is limited. NatureScot has developed a semi-automated protocol to map the extent of burning using Sentinel-2 satellites. For context, in the past three years, there has been about 10,000 hectares of burning, but we have not been able to break that down into specific muirburn prescription versus fires that have got out of control. Our ability to monitor burning is improving all the time as technology improves. One of the benefits of a licensing scheme is that it would give us that type of data and we could have a bit more confidence in it.

**Jim Fairlie:** Robbie Kernahan has answered part of the question I was going to ask about what the monitoring is and how muirburn would be monitored. Will the muirburn provisions help to achieve a more complete understanding of how the burn is used in Scotland? Hindsight is a wonderful thing, but it would have been great to have some of the people who were handling the fires that were burning up north last week here

today to talk about what that actually means. One of the benefits of the licence is the fact that we will get better data as time goes on.

**Robbie Kernahan:** Our expectation is that, through the licensing scheme, we will know what is being burned, where and for what purpose, and we will be reassured that the appropriate standards are in place.

**Jim Fairlie:** Okay. Do you mind if I go to Bruce Farquharson now, convener?

**The Convener:** I think that Bruce would like to come in on that, as a practitioner.

**Deputy Assistant Chief Officer Bruce Farquharson (Scottish Fire and Rescue Service):** Just to be clear, I am not a muirburn practitioner. However, I have experience with fires. On a point of clarity, the fires that happened last week have nothing to do with muirburn. The muirburn season is completely finished. We are now into a different season. It is inaccurate to conflate fires that are started from mid-April onwards with muirburn.

**Jim Fairlie:** I was talking from the point of view of how we manage to control fires if they get out of hand and whether the licensing scheme will help with that.

**Deputy Assistant Chief Officer Farquharson:** Absolutely. The skills that are brought to bear by those who are practitioners in muirburn, and the equipment, experience and knowledge that they hold, are invaluable for the fire service.

**Jim Fairlie:** Okay.

**Rhoda Grant (Highlands and Islands) (Lab):** I have a small supplementary on Robbie Kernahan's answer about tracking muirburn. You said that you could not tell whether it was muirburn fires or wildfires. Are you perhaps able to track that by making reference to the fire service? It would be aware of what was a wildfire and would not be involved in a managed muirburn.

**Robbie Kernahan:** We can certainly drill down to get better detail on the specifics of what prompted those fire incidents and whether it was muirburn, something intentional or, indeed, arson. We can drill down to provide a better understanding of what has happened within those 10,000 hectares annually. However, the benefits of the licensing scheme suggest that we should not need to do that, because the data will be coming in to give us that intelligence, which we currently do not have.

**Rhoda Grant:** So, you are not able to provide that at the moment.

**Robbie Kernahan:** Not without doing some further work.

**Dr Hesford:** As I have alluded to previously, the GWCT in Scotland is already working with landowners and land managers on ways in which they can collect data on their muirburn. Between 20 and 30 estates—big upland grouse moors—are currently collecting data on the dates on which they are burning, the peat depth at the ignition point, some vegetation measures—those are not always collected, but they often are—and the size of the burn. Those data are currently being collected and they are being held centrally by the GWCT, although they are owned by the estates. That is why I have not been able to share that information today.

**The Convener:** Thank you. Rachael, did you have a supplementary?

**Rachael Hamilton:** No.

**Rhoda Grant:** Will the new licensing scheme that is proposed in the bill strengthen the role of the muirburn code, and will that mean that best practice is more prevalent?

**Robbie Kernahan:** We have a muirburn code already, but it has no statutory basis. The bill will, in effect, allow us to put in place a muirburn code that provides that statute, which we would certainly hold practitioners to account for under any licences that were issued. Again, we are hugely supportive of the need to underpin existing practice with greater strength, which is what the bill will allow us to do.

**Deputy Assistant Chief Officer Farquharson:** I echo Robbie Kernahan's comment that the underpinning of the existing code by a licensing scheme would be hugely beneficial. There is perhaps some scope for the code to be amended to reflect practice. As Miranda Geelhoed said earlier, a broad range of activities are captured under muirburn that are very different from one another, but the licensing scheme would absolutely be of benefit.

**Dr Hesford:** Again, the GWCT would agree on that position. We think that the muirburn code should be reviewed and updated to reflect emerging research. Without that type of framework, the regulation that is proposed in the bill is unlikely to prove effective.

**Duncan Orr-Ewing:** The problem with the current muirburn code is that it is largely treated as voluntary. We could provide lots of examples, even from the report that we have produced, of breaches of the muirburn code. Burning out of bird nests was mentioned earlier. In the previous evidence, for example, an incident was mentioned of muirburn close to a golden eagle nest this year. There is also burning out of tree regeneration and burning on steep slopes and scree. Actually, in the current muirburn code, burning on peatland is not

allowed, but we know that a lot of burning still happens on peatland soils.

11:30

**Ross Ewing:** The vast majority of grouse moor managers already adhere to the muirburn code and there has been a concerted effort in the past year to undertake the Lantra-approved voluntary training that has been developed by Bright Spark Burning Techniques, NatureScot and the Scottish Fire and Rescue Service. I put that on the record.

I was struck by Professor Newton's sentiments last week. He said:

"The management of fires in general, at least on grouse moors, has improved enormously over my lifetime."—*[Official Report, Rural Affairs and Islands Committee, 14 June 2023; c 25.]*

I endorse that and can support it by saying that the development of new equipment, from fogging units to leaf blowers, enables muirburn to be professionally conducted.

To go back to Rhoda Grant's question, analysis of the Rural Affairs and Island Committee's call for views noted that 46.5 per cent of respondents—which was the biggest proportion—were against the proposed licensing system for muirburn. Two of the most commonly cited reasons were that it was "unreasonable" and "disproportionate", which gives you a flavour of the views being expressed beyond this room.

**Dr Geelhoed:** We support more effective implementation of the code and are looking at how to achieve that—for example, through mandatory training—but we question whether licensing is the right way to go. There are questions about accessibility and about how well it suits small-scale landholdings. Our written response cites research conducted in other countries where licensing has been introduced but has not resulted in better compliance, for example because people do not obtain a licence and then are too afraid to raise the alarm when things get out of control because they have breached the conditions. That has to be taken into consideration when looking at whether this is the right route to more effective implementation of the muirburn code.

**Jim Fairlie:** I have a quick observation. When we discuss muirburn, we keep talking about grouse moor management, but grouse moor managers are not the only people who manage muirburn. Farmers often do that, although my sheep farming friends may not thank me for raising this. What is the balance between fires that get out of control on grouse moors and fires that get out of control on sheep farms?

**Deputy Assistant Chief Officer Farquharson:** The statistical analysis that we have carried out

shows that muirburn is not a significant factor in wildfires and that only about 5 per cent of such fires are caused by muirburn on driven grouse moors. If we look at muirburn more broadly, including what is done by farmers and crofters, we see that the figure increases, but it is still not a significant factor in the incidence of wildfires.

**Jim Fairlie:** Are wildfires generally accidental and caused by things such as cigarettes?

**Deputy Assistant Chief Officer Farquharson:** Wildfires in this country are always caused by human behaviour. We do not yet have natural phenomena that cause wildfires in Scotland—I use the word “yet” with the caveat of climate change. Human behaviour is the predominant reason for wildfires, and they are usually accidental.

**Jim Fairlie:** Okay. Robbie Kernahan, if the licences will be for grouse moor management, how will the system pick up on farmers and crofters who do not have grouse moors on their property but who still want to burn heather in order to improve grazing habitats?

**Robbie Kernahan:** That is a good question, and it allows me to drive home the point that muirburn does not happen only on grouse moors; it is a fairly widespread practice. A number of burns happen up in the north-west, where there are no grouse moors. They are done for the purpose of agriculture or for game or deer management. Burning can provide an early first bite for livestock or game.

When we consider the bill, we must ensure that we think about muirburn in the round. It is about more than grouse moor management; it is about how burning is managed and the standards associated with that in the crofting and agricultural worlds, and how we can continue to reduce the risk of inappropriate burn and the very real risk of those fires getting out of control.

**The Convener:** We will move on to deal with the issue of wildfires in a little more detail. I have a question for Bruce Farquharson. Should the muirburn code include obligations for landowners to control the fuel load where there is an increased risk of wildfires? Countries such as Portugal have strict laws to ensure that landowners carry out some sort of muirburn—it is probably not called that in Portugal—to reduce the risk of incidents such as the one in Inverness last week.

**Deputy Assistant Chief Officer Farquharson:** The Scottish Wildfire Forum, which I chair, issues wildfire danger assessments when the threat of wildfires becomes very high or extreme. The recommendation that comes along with them—it is just a recommendation—is that people who are carrying out muirburn should take cognisance of those alerts and should either not burn or burn in a

much smaller and managed way than perhaps they had been planning.

However, the practice of muirburn is instrumental in reducing the risk of wildfire because it manages the fuel load, and it is the fuel load that is the real problem when it comes to the intensity of fire that we are seeing. Climate change is not having an impact on the number of fires that we are having, but it is having an impact on the fire behaviour that we are seeing and the intensity of fires. That, combined with an increased fuel load or an unmanaged fuel load, will result in a perfect storm for wildfires.

**The Convener:** In that case, should the muirburn code also cover those who are not burning for biodiversity, grouse moor or agricultural purposes, but are doing so basically to reduce fuel load?

**Deputy Assistant Chief Officer Farquharson:** The short answer is yes. However, the muirburn code should have differentiations between different types of burning. There is muirburn for driven grouse, muirburn for farmers and muirburn for crofters. All of those types of burning are different, but they are all being captured under one set of obligations. If we were to subdivide muirburn into those categories, the muirburn code would be a hugely powerful tool, but it should be within the code that the risk of wildfire has to be a consideration before a flame is applied to vegetation.

**The Convener:** We will now move to the topic of burning on peatland and on non-peatland.

**Rachael Hamilton:** Can the panel members give us their views on the distinction that is made between land that is peatland and land that is not peatland for the purpose of muirburn licensing?

**Dr Hesford:** There is no consensus in the scientific literature that supports the definitions that are laid out in the bill. There is no consensus that burning is damaging to peatland. If anything, the most robust science—I am happy to take questions on what I mean by robust—suggests that there are positive impacts of burning on peatland for a range of ecosystem services. That view is supported by “NatureScot Research Report 1302”, which noted that there is a lack of evidence to determine the impacts of muirburn on different peat depths. Therefore, I would say that there is no evidence to support the recalibration of peatland to 40cm as outlined in the bill.

Further, peat depths vary considerably within just a few metres across Scottish hillsides, and there is currently no spatial data at any reasonable resolution for peatlands at 40cm. That makes it absolutely impossible for practitioners to be sure that they would be in compliance, even if a peat depth survey were to be carried out in advance—

the resolution of peat depth surveys is part of the issue.

Our concern is that those definitions might either disincentivise muirburn, because of the confusion, or lead to licences being revoked if people are found to be carrying out actions against the code as set out in the bill. On the definition of peatlands, it is important that we can ensure that an adaptive management approach is taken, given the uncertainty around what we define as peatland, so that we can continue to contribute to that evidence in a real way.

I should say that the peatland definition should really be moved towards a focus on ecosystem functioning as opposed to arbitrary depths of peat.

**Duncan Orr-Ewing:** Many bodies have looked at that issue, including the Climate Change Committee, which has advised the Scottish Government on land use and meeting net zero targets. There is a consensus across those bodies that there should be no burning on peatland soils. We support that view. We recognise that the bill provides for burning on peatland soils for control of wildfire, and we can broadly accept that, but that needs to be done in extremis, rather than as normal. We would say that provision needs to be made in the bill to stop that becoming routine, because, essentially, that would bypass the intention of the bill.

The original Scottish Government response to the Werritty report indicated that there would be a statutory ban on burning on peatland, and we support that. That would be the easiest position to enforce, as well, rather than having a system that involves peatland depths. Now, however, we seem to be moving away from that statutory ban on burning on peat.

For us, a peatland depth of 40cm is unsubstantiated. We believe that, if we are going to use a peatland depth, 30cm could be substantiated because that is now used by the peatland code, it is referenced in the UK peatland strategy, and it is supported by the international approach. Richard Lindsay's "The Wetland Book" also supports a 30cm peat depth definition.

**The Convener:** I understand that the CCC is reviewing its position on peatland. At the moment, there has not been a definite yes or no from the CCC. However, given that muirburn, which is carried out under the muirburn code, burns only the vegetation and not the peat, why are you suggesting that a depth of 30cm or 40cm is important? We heard from the Scottish Fire and Rescue Service, I think, or it might have been Robbie Kernahan, that only 5 per cent of wildfires are on grouse moors. It is the wildfires that potentially burn peat.

**Duncan Orr-Ewing:** I will defer to Emma Hinchliffe on that, because the IUCN has produced some useful guidance on it. Essentially, however, we are concerned about what goes on below the ground in peatlands. The surface is just one indication of what is going on. We are concerned about the drying out of the peat below the surface. However, I defer to Emma.

**Dr Hinchliffe:** In response to your comment about cool burns, I note that logic tells us that putting a match to anything brings risk, but there is a special risk when our peatlands are largely in a degraded state through drainage, agricultural management and periodic prescribed burning, all of which changes the peatland vegetation towards a drier state. Even when a cool burn is attempted, there is a risk that, when you put a match to the vegetation, you will be unable to control it. Because of the drier nature of the degraded peat, there is a risk that the burn will go out of control and burn the peat. I would like the committee to reflect on that.

**The Convener:** Okay. Ross Ewing wants to comment. I will then bring in Bruce Farquharson.

**Ross Ewing:** I appreciated your point about the Climate Change Committee, convener. In its 2023 report to the Parliament, it said that it is reviewing its previous recommendations on the practice of rotational burning, so I thank you for that clarity.

Just to be clear, I note that the bill will, in effect, create two licensing schemes. We will have a licensing scheme for peatland, the definition of which is currently where the peat is deeper than 40cm, and a licensing scheme for non-peatland, which is—patently—everywhere else. However, in the public consultation that preceded the bill's introduction, a majority of people opposed that definition of peatland, so it is not something that is unanimously supported.

I return to a point that you made, convener. It strikes me as very illogical to regulate an above-ground activity using a below-ground metric, because those two things are separate. We only need to look to England to see what the implications of following that course of action could be. For everyone's awareness, I note that, in England, the heather and grass burning regulations that were brought in in 2021 basically license muirburn on protected sites where the peat is deeper than 40cm. England therefore has a similar scheme, although it is not as wide as what is being proposed here.

In England, the regulator has received 1,600 reports of illegal peatland burning, primarily on the back of a campaign headed by the RSPB. Those reports resulted in one warning letter, which was due to a technical breach, and one court case, which was due to a misunderstanding of the

regulations. That is an attrition rate of 0.0625 per cent.

The important thing to note here is that, if we are going to have these continued campaigns by several environmental non-governmental organisations—it is their right to run them—about “peatland burning”, which is an inaccurate characterisation, we are going to see vast sums of money expended through the regulator to investigate what are, frankly, nonsense incidents that have no bearing whatsoever as to the peat depth.

I put on the record what Professor Colin Reid said last week in responding to a question from Jim Fairlie. He described the measuring of peat as “a problem”. Those were his words. It is really important that we try to ensure that the licensing scheme, when it is developed, does not become weaponised, because, frankly, that is what has happened in England. The committee needs to be aware of that.

**The Convener:** I will bring in Emma Hinchcliffe on that specific point before I come to Bruce Farquharson.

**Dr Hinchliffe:** I would like to reflect on the fact that Ross Ewing claims that peatland identification is an issue. Under recent planting guidelines, the forestry sector is able to undertake survey and definition and assessment of peat down to 10cm. If the whole of the forestry sector in Scotland and, indeed, UK-wide can achieve that due to the adoption of new guidance, I would push back—

**Ross Ewing:** You understand the difference, obviously, between muirburn, which is an above-ground activity, and forestry, which involves planting below the ground. That is where I struggle to draw the difference.

**Dr Hinchliffe:** Both are looking to protect both habitats and peat soils through the activity, so I push back again. It is a consideration of peatland as an ecosystem with above-ground vegetation and the peat soil supporting that ecosystem.

11:45

**Deputy Assistant Chief Officer Farquharson:** A lot of the comments that have been made around the table reflect my own views, but from my perspective the differentiation in peat depth is irrelevant. There is perhaps not entirely empirical but very practical evidence that managed cool burn, as it has been called—that is, muirburn across the surface—penetrates no more than a centimetre below the surface of peatland. My concern is that, if we restrict where muirburn can be carried out by specifying the depth, we will allow a larger proportion of the fuel loading to be unmanaged, and the very thing that we are trying

to prevent, which is damage to the peatlands, will in fact be at higher risk. After all, a wildfire will absolutely damage the peatland. I acknowledge that muirburn carries some risk—there is never zero risk when fire is applied to vegetation—but that risk is smaller, because the fire is managed, controlled and, as the current phrase has it, cool, as opposed to a very hot and uncontrolled wildfire.

**The Convener:** I will bring in Robbie Kernahan before I go to Alasdair Allan.

**Robbie Kernahan:** Again, we have to be honest with ourselves: the evidence base for the benefits or disbenefits of burning on peatlands is, through both a carbon lens and a nature lens, complicated.

However, I am going to take a step back and just remind us that, in a nature and climate crisis in which 50 per cent of our emissions come from land use—and between 15 and 20 per cent of those come from peatlands—NatureScot’s existing position is that burning on peatlands is not a good idea. It is already not recommended in the peatland code, and the bill provides additional safeguards to ensure that, if we are going to burn on peatland—which has to remain a tool in the toolbox—it must happen for very specific purposes and in very specific places, primarily to address the issue of wildfires getting out of hand and to protect some of our important carbon and biodiversity assets. For me, that is sound from a policy perspective, and it is based on the precautionary principle in light of the climate crisis.

**The Convener:** Both Nick Hesford and Ross Ewing have indicated that they want to come in on the back of that contribution.

**Dr Hesford:** We absolutely acknowledge that the science around muirburn is complex, to say the least, but where we see a distinction in some of the differences in the results in the science relates to the length of time over which studies have been conducted. Typically, where you see negative impacts on ecosystem services through muirburn on peatlands, those studies tend to have been conducted over a three-year period—or, at best, a five-year period—as that reflects the funding models for most UK academic institutions.

With longer-term studies that look at burning over a real-term burning cycle, you start to see ecosystem service benefits over time. With its separation of burning on peatland and on land that is not peatland, the bill as introduced contains no provision to allow burning on peatland to deliver those kinds of benefits, and I think that that will tie the Scottish Government’s hands on what it can do to deliver on biodiversity and climate change.

**Ross Ewing:** I completely support Dr Hesford’s analysis of the science and, certainly, the limitations of shorter-term studies. The studies that

use before-and-after control impact methodologies tend to be the ones that produce the most robust evidence.

I am a little bit taken aback by what I have just heard from NatureScot, and I need to set out very briefly—if I may, convener—what we stand to lose if we do not conduct muirburn properly and thereby manage the wildfire risk. Perhaps I can give you a very brief example.

In the Saddleworth Moor fire of 2018, 7cm of peat were lost. Apparently, it will take 200 years to restore that, and the fire released between 17,798 and 26,281 tonnes of carbon dioxide equivalent from the soil carbon losses. That does not take into account the emissions from the vegetation that burned, either. We just need to remind ourselves of the role that burning can play in reducing fuel load, because as far as I am concerned, it is fundamentally important.

**The Convener:** I will take a brief comment from Emma Hinchliffe.

**Dr Hinchliffe:** I want to talk mainly about the consensus in the science. Before I do so, I would point out that there are other ways of managing fuel load. For example, I would argue that, given the Scottish Government's commitment to tackling the nature and biodiversity crisis and supporting peatland restoration, rewetting peatland would be a major way of dealing with the fuel load issue. Once you rewet peatland, there will be a reduction in heather cover within five to 10 years, and that will, in turn, reduce fuel load.

We believe that there is consensus in the science and that misleading interpretations of the science have been repeatedly published that have fuelled the lack of consensus debate that we are hearing about. Much of the long-term research that has been referred to and that indicates that burning is beneficial has been found to be very lacking due to the lack of peer review in the academic community and the huge methodological inconsistencies in defining peatland.

Much of the research that has been produced to date inconsistently and inaccurately describes the peatland type, condition and past and present management regimes, and the generic terms that are used in that research—such as “moorland”, which encompass both peatland and non-peatland types—make interpretation of the science really difficult.

We all agree that our shared goal is to have healthy peatlands and to restore them to health, so we need some further scientific work to compare burning management and healthy peatlands rather than work that compares two degraded states.

**Duncan Orr-Ewing:** In reference to what Ross Ewing said, the NatureScot report that was published recently to look at muirburn and peatland said:

“There is a lack of evidence from”

Scottish or UK studies that a reduction

“in fuel loads resulting from muirburn influence the occurrence of wildfire in moorland.”

We are talking about a climate crisis. Eighty per cent of peatland resource in Scotland is damaged, and in 2019 it emitted 6.3 million tonnes of carbon dioxide, which is more than the energy supply and residential sectors. The Scottish Government is investing £250 million into restoring peatlands, and there is growing evidence—including from the fire on Saddleworth moor, in England, and the fire on our neighbouring reserve at Dove Stone—that restored habitats are more resilient to wildfire than non-restored habitats. We also found that in the flow country at Forsinard, and the University of the Highlands and Islands is about to publish some papers that will make that point.

**Dr Hesford:** To save the committee from the experience of two academics butting heads over this, the back-and-forth between me and Emma Hinchliffe illustrates quite clearly how complex the issue is, and it highlights the need for an adaptive management approach.

On the point that Emma made about alternatives to muirburn, they are untested. If you think that the science on muirburn and its environmental impact is complex and requires more study, there is even less science on rewetting and cutting. Rewetting has been suggested for increased flood risk through things such as saturated overland flow, which is essentially when there is saturated peatland because of heavy rain and there is increased risk of flooding. It poses an increased risk of methane emissions, and methane is 80 times more damaging to the climate than carbon is. Although we think that cutting and rewetting are important management tools, they should not be prioritised over muirburn; they should all be in one toolbox, and they should be reviewed in an adaptive management context.

**Ross Ewing:** In Duncan Orr-Ewing's characterisation of the NatureScot report, he missed out quite an important detail. The report said that there is a “plausible mechanism” through which the intensity of wildfire could be influenced as a result of controlled burning.

I also refer members to Professor Ian Newton's remarks last week. He said:

“all the big fires have happened in areas that have not been burned for several decades”.

He continued:

“a huge build-up of dry trash on the ground ... has got the fire going.”—[*Official Report, Rural Affairs and Islands Committee*, 14 June 2023, c.24]

I completely support rewetting as an endeavour and as a tool in the box for managing wildfire mitigation, but we need to be clear that, on its own, it will not cut it. The fact that we have seen wildfires engulfing places such as Forsinard and Dove Stone, which the RSPB manages, shows that rewetting on its own is perhaps not quite cutting it.

**Deputy Assistant Chief Officer Farquharson:**

My points have largely been made. Emma Hinchliffe is absolutely right that rewetting is a valuable tool in the box, but, as both Nick Hesford and Ross Ewing said, it is not the only tool in the box and it is perhaps not the most effective one. Wildfire will damage wetland; it can and it does every year. Cutting is a tool that can be used, but it creates a dry litter layer that the fire will spread through. Burning is the most effective, yet the riskiest, approach to full management.

**Rachael Hamilton:** I want to pose a question that goes beyond the one that I originally asked. Would there not be circumstances in which NatureScot could differentiate between non-peatland and peatland when issuing a licence, without there being two licensing systems?

**Robbie Kernahan:** On receipt of any application relating to a piece of land, we would expect an applicant to be clear about why they are burning, where they are burning and what controls are in place. That can include peatland and non-peatland habitats, but the purpose will be different because it is different in the legislation. We need to be really clear that, if someone will be burning on peatland, it will be under exceptional circumstances and it will quite clearly be for the purpose that is explained in the bill.

Coming back to the discussion about the importance of the peatland resource, I understand the debate about how the situation plays out in practice on grouse moors, but most of the peatland resource in Scotland is not in the Monadhliaths, the Cairngorms, the Angus glens and the southern uplands in south Perthshire, which is where most muirburn happens for grouse purposes. Most of the peatland resource is in the north and west.

The conflict between peatland as a resource and muirburn for grouse moors seems to be dominating this discussion, but, in fact, quite a lot of the peatland resource is in areas outwith grouse moors, where muirburn is still occurring and we need to make sure that we get adequate controls. I thought that point was worth making.

**Rachael Hamilton:** Can I make an apology, convener? Did I jump in on Alasdair Allan's line of questioning? I am sorry.

**Alasdair Allan:** Most of my areas have been covered.

**The Convener:** Ariane Burgess had a question but that has been covered as well, so I will move on to a question from Karen Adam, who will probably explore the issue a bit further.

**Karen Adam:** Yes, it will probably just take a little bit more exploration, because—excuse the puns—we have gone into quite a bit of depth here.

**Christine Grahame:** Was it 40cm?

**Karen Adam:** Digging a little more into the definition of peat and peatland, what are witnesses' thoughts on that for the purpose of muirburn licensing?

**Ross Ewing:** I again refer to last week's remarks from Professor Newton, which I thought were quite instructive on that point. He talked about one licensing scheme covering the lot, and I think that that is really important.

From our perspective, we do not think that the mechanisms for determining peat depth will provide sufficient certainty for land managers. Ultimately, the current provisions in the bill would technically make it an offence to make an erroneous submission. If you have not followed the methodology to the letter, there is a real risk of your being prosecuted or caught out by the legislation. The fact that we do not have a methodology to scrutinise is a big part of the problem.

On that basis, we would advocate for a licensing scheme that removes the peatland licensing scheme in toto, so that there is one licensing scheme with the broadest range of licensable purposes, but NatureScot can perhaps still apply its discretion in those areas where the peat is that little bit deeper, if that is its concern.

One of the principal motivations for that, which I must set out because it is really important, is that paragraph 202 of the policy memorandum acknowledges that

“national survey data for peat measured at 40 cm does not exist”.

That massively exacerbates the uncertainty for land managers. It is really important and quite instructive that, during the development of the Heather and Grass etc Burning (England) Regulations 2021, one of the foremost things that the then Secretary of State for Environment, Food and Rural Affairs did before he pushed the green button on those regulations was ensure that, on designated sites, there was peat mapping data at 40cm. That is absolutely fundamental.

If we will be pushing the narrative that we need to have a peatland licensing scheme that is based on some measure of peat depth, our strongest view is that, because the data exists at the 50cm threshold, the scheme should be based on a depth of 50cm. Last week, Professor Werritty said that

“the existing map is based on ... 50cm ... if you migrate away from that, you clearly have a challenge in how you determine peat depth”.

He went on to say that developing that new national data set at 40cm

“would be a major undertaking to effectively remap Scotland’s peat soils.”—[*Official Report, Rural Affairs and Islands Committee*, 14 June 2023; c 30.]

Finally, I would draw the attention of all committee members to the 40th report of the Delegated Powers and Law Reform Committee, which states, in relation to the ability of Scottish ministers to amend the definition of peat and peatland via the affirmative procedure, that

“it considers that any changes to this provision may merit greater parliamentary scrutiny”

than just the affirmative procedure.

**Dr Hinchliffe:** Just to reflect a bit on Ross Ewing’s point, I agree completely that the mapping data is very challenging and that you will never get a map that is perfect on the ground. It will always need to be ground-truthed and checked, which means that there will be a requirement for practitioners and landowners to go out and do that survey. There are several easy and accessible tools in the box, such as using Munsell colour charts, von Post soil texture analysis and vegetation indicators, peat-depth probes and so on.

On Karen Adam’s question about the depth definition, the classification of peat has led to shallow areas of degraded peat being completely excluded from policy and land management decisions, which is a major concern. I would certainly welcome a more holistic look at and a move away from an arbitrary depth definition in relation to peat. I welcomed Nick Hesford’s comments earlier about taking a more holistic approach that looks at the ecology and hydrology of the system rather than an arbitrary depth being applied to it.

**Dr Hesford:** I was going to reiterate that point, so I thank Emma Hinchliffe for that. We would agree with Ross Ewing on the points that, in the absence of better data, retaining a 50cm peat depth definition should be adequate for now and that remapping could easily happen through an adaptive management approach whereby land managers take measurements in the field similarly to what Emma was talking about. Those data could feed into redefining the depth. In fact, that is happening already on the Scottish uplands, and,

as I said before, those data are currently sitting with the GWCT.

12:00

**Duncan Orr-Ewing:** As a landowner and land manager that is already doing peatland code work—we are doing the kind of testing of peatland depths that Emma Hinchliffe has just described—we know that there is an easily and readily accessible method for doing it. There is also a development method that is used in relation to wind farms and so on. Like a lot of landowners, we are moving into developing peatland code applications and so on. Some consistency would help us. That is why we would advocate a 30cm depth, as the UK peatland strategy does. We would appreciate such consistency. Forestry and Land Scotland uses a 10cm peatland depth. We argue that we should go with where the consensus seems to lie across the peatland community.

**Beatrice Wishart:** This question is addressed to Robbie Kernahan. Could you describe what methodology might be used to determine whether a piece of land is peatland? How could stakeholders be supported with the practicalities of that?

**Robbie Kernahan:** It has been fascinating to hear the discussion so far, because we understand the need for prescription and detail. Part of the discussion at last week’s committee meeting was about the balance between the need for flexibility in the system and the use of highly prescribed targets.

As Emma Hinchliffe has suggested, a range of tools are available that will help to illustrate peat depth, the most simple of which is a peat probe. The use by practitioners of peat probes for restoration work is becoming much more common.

Going back to first principles, given that we are in a climate and nature crisis, when the peatland resource is so important, if someone proposed to burn an area of peatland, I would ask why they proposed to do that without really understanding what was going on under the surface. It is not unreasonable to expect an applicant to be able to demonstrate that they have knowledge of that. We do not have the data nationally, and it will always be really hard to get that data. Therefore, there will be an onus on an applicant to demonstrate that they have an understanding that the right safeguards are in place.

Again, going back to first principles, I note that we are in a climate crisis and we are expecting transformative land use. That is a change, and I accept that people will struggle with it, but, from our point of view, we will not get to net zero unless people start to change their behaviour. Tackling burning is part of that, as is protecting our

peatland resource. That is why the Scottish Government is putting £250 million into addressing some of the damage and modification that has led to peatlands being in poor condition. The last thing that we want to see is applications being made that risk greater damage than we already have.

**The Convener:** Do you believe that the bill is flexible enough to be adapted to new science and changing ground conditions?

**Robbie Kernahan:** I come back to the issue of better regulation. In applying a licensing regime, we will need to continue to refine our approach as our knowledge improves. There are gaps in our knowledge. We will secure a lot of data from the licensing returns. The data that comes in from that will help to plug those gaps. We are on an adaptive management journey, which involves thinking about how we best protect our natural assets.

**Ross Ewing:** To follow on from Robbie Kernahan's comments, I completely accept that we are in a climate and biodiversity emergency, but we are also going through a just transition. The onus is on us to ensure that land managers have at their disposal the tools to be able to do what Government is asking of them, and to do it properly. I think that a 50cm depth base would not be unreasonable, given that we have data on that available.

There has been a lot of talk about the use of peat probes, which I understand are very simple to use. However, last year's NatureScot review of muirburn noted:

"There is however a constraint with this method in terms of the time required to carry out a survey, which will depend on the scale involved and the level of detail required."

Clearly, in the context of our larger landholdings, that presents a significant challenge. We would massively welcome much more information about what methodology will be used for determining the peat depth, because that is clearly a vacant area in the bill at the moment.

However, I certainly echo the sentiments that have been expressed about the climate and nature emergencies and the importance of managing fuel load on peatland to protect it for years to come.

**Dr Hesford:** I will pick up on the point about peat probes. We acknowledge the methodological limitations of using peat probes, but they provide a quick and easy assessment of peat depth even though that is subject to some issues.

As Ross MacLeod said, the landholdings that we are talking about can be quite extensive, so a peat probe survey that is carried out across even a whole hillside in accordance with the bill would still leave large areas categorised as either peatland

or not, because probing is done at a simple resolution. We would therefore advocate for ignition point recording and adaptive management, so that data is collected over time and we can learn from that.

**The Convener:** We will move to the issue of wildfires, given that one of the purposes for which a licence can be sought is to manage the risk of wildfire, as we touched on earlier.

Robbie Kernahan, is NatureScot confident that you will be able to assess wildfire risk for the purpose of granting licences?

**Robbie Kernahan:** That is quite a difficult question to answer. Going back to first principles, we know that muirburn must remain absolutely integral to our ability to reduce the risk of wildfire. I make that point absolutely clear: muirburn must remain as a tool in our toolbox. The main reason for that, in peatland and other habitats, is the need to protect our assets. That means that there is a need for strategic planning of where and how best to burn to reduce the risk of wildfire.

The onus is on the applicant to be able to demonstrate that, in their view, they are using muirburn in the most sensible place on their property. Owner-occupiers know their ground better than we do, so the onus is on the applicant to demonstrate that, in any particular case, certain areas should be burned to protect the habitat and to deliver on the core purposes of the bill. That is very much a joint consideration. Our relationship with applicants is based on trust and confidence.

**The Convener:** We are currently talking about landowners actively seeking licences in order to reduce wildfire risk. We could turn that on its head and ask whether there is a need for legislation to force landowners to assess the risk of wildfire and then take the appropriate action, which might well be to muirburn to reduce the fuel load. I ask that question because there was a suggestion after the recent fire in Inverness that someone should be held to account for not managing a fuel load that would, at some point, lead to a wildfire.

**Robbie Kernahan:** To take a step back, we are operating in a context in which we expect to see a temperature increase of an extra 1°C in Scotland by 2050, which means that wildfire risk is heightened and will continue growing.

In the past few weeks, we have hosted European delegates from forestry and nature conservation agencies. In many of those countries, wildfire risk is the single biggest protection issue for forests and for peatland soils. I highlight that because it is increasingly important for land managers, both of forests and of peatlands, to think strategically about how best to protect those stocks. Fire is one tool, although not the only one by any stretch of the imagination.

In the light of the climate crisis, changing environmental conditions and the increased risk of fire, we are asking people to think differently about how to mitigate risks.

**The Convener:** Bruce Farquharson, as part of your role, you carry out risk assessments of buildings and activities. Do you think that you should be carrying out risk assessments on moorland or grassland, and should you have powers to make landowners take action to reduce the risk of wildfires?

**Deputy Assistant Chief Officer Farquharson:** It is the duty of the landowner, not the fire service, to carry out such risk assessments. The risk assessment for a building is the responsibility of the duty holder, who might be the owner or someone to whom the owner has delegated authority. Similarly, in the rural environment, there must be an assessment of risk, whether that is for new plantations or for established sporting estates, crofts or farms. The assessment should cover not only the here and now, but the lifespan of the plantation or the next 10, 20 or 30 years. That assessment should be revisited and should be aligned to any guidance about what the risk assessment should contain.

We currently have the power to assess risk assessments for buildings and to identify whether those are suitable, and in relation to that we are the enforcing agency. Similarly, in the wildfire context, we would be able to assess whether a risk assessment was suitable, but whether we should be the enforcing authority is a separate debate. In my view, the risk assessment should be the primary factor in deciding what land management activity is carried out, and when, rather than arbitrary figures such as the depth of peat. However, the key bit is the management of the fuel—that is, that which burns first and will possibly cause the peat to burn afterwards. The risk assessment is, in my opinion, a key part of that.

**Ross Ewing:** Scottish Land & Estates supports its members in the development of integrated wildfire management plans and in placing their resources, if they feel able to, on the community asset register, which allows them to be used by the Scottish Fire and Rescue Service in the event of a fire taking hold.

I draw the committee's attention to what we see as two key problems in the bill with regard to wildfire. The first is the presumption against muirburn on peatland. The bill states:

"Scottish ministers may grant a licence"

where it relates to peatland if

"they are satisfied that ... no other method of vegetation control is available."

We think that that will have catastrophic consequences, not least because it ultimately prioritises other methods of vegetation control, the most obvious of which is cutting. Incidentally, cutting with a flail mower is a land management technique that we know even less about than muirburn with regard to its impact on the peatland below, so I would strongly urge caution in prioritising that. In our view, that provision, which prioritises other methods of vegetation control over muirburn, needs to be removed from the bill.

Secondly, the bill is completely silent on the issue of back burning. For those who are unaware of it, it is, in essence, a type of muirburn employed during a wildfire incident, ultimately to get rid of the fuel load in front of the fire. The bill is, as I said, completely silent on it, but it has been commended in two parliamentary motions, one lodged by Fergus Ewing and the other lodged by Kate Forbes. Indeed, it was used quite extensively during the Cannich wildfire, in the past few weeks. I just want to set out that the bill appears to make no provision whatsoever for back burning.

**Dr Hesford:** On Ross Ewing's point about the alternatives to muirburn not being tested, we support SLE's suggestion that the provision be removed from the bill. If we look at, say, rewetting, it stands to reason that a wetter bog might stop a fire; indeed, the science suggests that, with prescribed burns, an area of wetter moorland could stop fire. However, those burns happen during the cooler periods, between October and April, whereas wildfires predominantly happen in the summer, when, even in the most ecologically intact and well-functioning bog, the water table can drop by up to 30cm. The fact that a bog has been rewetted does not mean that it is not at risk from wildfires.

**The Convener:** In the interests of time, I will bring in Rhoda Grant, who has another question on wildfire, after which I will bring in other stakeholders.

**Rhoda Grant:** My question is for Bruce Farquharson. You said that muirburn is one of the most effective—if the riskiest—ways of managing wildfire. From your experience, can you suggest any other tools that would be useful in this respect? Is the regulatory framework appropriately designed for that kind of activity?

**Deputy Assistant Chief Officer Farquharson:** There are definitely other tools for managing fuel; a few of them have been mentioned already. From what I have seen from going around the country and speaking to various people, muirburn is definitely the most effective, because it removes the fuel in its entirety.

Cutting is effective, up to a point, but in that respect the analogy that I use quite regularly is of

the difference between attending a fire at a hoarder's house and a fire at the house of a minimalist. Cutting leaves the dry layer that encourages the spread of fire. Cutting is used to control muirburn, but in that case the cut material is still wet. That is the key part. If that material is allowed to dry out, you will have the fine fuel underneath the top vegetation layers, and that is what propagates and encourages fire.

Rewetting is a long-term tool, but, as has been said a number of times, the science in that respect is conflicting, so a bit of work is required. Similarly, the variegated planting of species has a demonstrable impact on how fire spreads as opposed to having a continuity of similar fuels. However, muirburn is absolutely the most effective way of removing the fuel, because it manages the landscape and prevents wildfire.

The bill also has a critical omission: the requirement for training to be mandatory for anyone who is going to apply a flame to vegetation. We have mentioned a few times the risks involved in that activity, so that seems to be quite an omission in that it will leave people completely untrained, with there being no input with regard to how the activity can be carried out safely.

12:15

**Rhoda Grant:** Should there be a duty on people to manage the fuel load? You talked about people's duty to mitigate fire risk in public buildings. Should there be a duty on land managers to mitigate fire risk?

**Deputy Assistant Chief Officer Farquharson:** Yes is the short answer.

**Dr Geelhoed:** We have heard that key resources such as peat are in the crofting counties, and we have heard about the recent wildfires in the crofting counties, but when we look at how the bill has progressed and some of the reports that underpin it, we see that there is very little recognition of crofting—I do not think that it was mentioned once.

As a small organisation, we are trying to fill that gap, but a lot more needs to be done. We can facilitate that by engaging with people on the ground who are using fire so that there is better understanding of what the practices are and better engagement on the issue. Ultimately, how are they able to identify those areas? We have heard about fire management plans, but how applicable are those in a small context? How accessible would fire remain as a tool if measures that might be better suited to land managers with larger areas were introduced?

We are keen to better understand the alternatives. In our evidence, we have proposed that there be some kind of programme of support for exploring those alternatives, of which grazing is one. I want to place this debate in that wider context. For example, there is a lack of support for common grazings—which are so important when we discuss these issues—when it comes to making sure that we have livestock in those areas.

A month ago, we had a case in Lewis in which a fire got out of control. It was instigated in someone's garden, but it got into a field of rank vegetation and got out of control very quickly. It then hit a well-grazed common grazing and stopped. That is the exception to the rule in some areas. Common grazings are increasingly neglected—for example, there is no longer any support under environment schemes for bracken control, there is to be no use of chemicals in that regard and there is a lack of support for people to have livestock on the hill. This will be the next thing.

There is, to some degree, a responsibility on land managers to manage fuel loads, but we have to look at the tools that we have in the box—we are currently restricted in that regard for various reasons—and see how muirburn fits into that.

**Duncan Orr-Ewing:** There is another consideration. I recognise that all of us here want to prevent wildfire, but we might have different ways of going about that. If there was a duty on managing fuel load that required people to burn or remove excess fuel, that would build on the approach that we have taken over many years.

Many of our landscapes in the uplands, in particular, are damaged because of centuries of overburning and overgrazing, which has promoted fire-prone vegetation such as heather and molinia grasses. If we want to take a longer-term view and create more resilience to wildfire in our landscapes, we have to create more diverse upland landscapes that include native woodland and restored peat bogs, which are more resilient to wildfire. We have to build in the short term as well as think about the long term.

**Rachael Hamilton:** I have a question for the RSPB and Dr Hinchcliffe. There was mention of forestry and peat depth earlier. In relation to emissions, there has been a huge issue around forestry being planted on peatland. If we are talking about climate change and carbon sequestration in relation to regeneration of habitat and species recovery, there is much quicker recovery and more carbon sequestration from the use of muirburn than there ever will be from forestry. I speak with the Woodland Trust, which is concerned about the issue, and people in the south-west talk about emissions and the impacts

of planting forestry on peatland, whether it is to 30cm or another depth.

There is almost an argument going on here about climate change and biodiversity, but I think that both go hand in hand. From what I am hearing and from what I saw on Monday, it appears that muirburn is not only creating habitat but sequestering carbon, but that does not seem to be RSPB Scotland's position.

Secondly, on Bruce Farquharson's point, would the wildfire that was mentioned have had less of an impact had muirburn been practised in those areas?

**Duncan Orr-Ewing:** We are in a climate and nature emergency, and I very much agree with Robbie Kernahan that addressing that must be our priority. The best outcome for climate and biodiversity is having more heterogeneous habitats in our uplands, which would include more native woodland. Indeed, a very useful James Hutton Institute report sets out the role that native woodland regeneration can play in sequestering carbon in our uplands.

Some will dispute the figures, but people say that between 10 and 20 per cent of Scotland's land area is managed as grouse moor, and, in a lot of cases, land management activity is preventing the natural succession of woodland and other scrub vegetation that would take place in the absence of muirburn. Longer term—

**Rachael Hamilton:** But heather is regenerating for pollinators.

**Duncan Orr-Ewing:** It is widely recognised that we need more woodland in order to meet the carbon challenge, and some of that will have to be on grouse moors. In fact, new native woodlands are already being put in and around grouse moors.

**The Convener:** I think that we are drifting away from the topic.

**Rachael Hamilton:** Can I just get an answer on the fuel load question?

**The Convener:** I am conscious that the session should have finished 20 minutes ago, so—

**Rachael Hamilton:** Can I just get the answer to my question about fuel load from RSPB Scotland?

**The Convener:** Absolutely, but it has to be specifically on fuel load.

**Duncan Orr-Ewing:** We are managing our land in a way that creates more resilience in those habitats in order to mitigate the risk of wildfire. We have a lot of peat bogs on our land, many of which had been degraded before we acquired the sites. We are investing hugely in peatland restoration at other sites, and we are putting in or encouraging native woodland.

**Rachael Hamilton:** But in Spain, even with rewetting peatlands, it has been found that wildfires will still occur, because of drought.

**Duncan Orr-Ewing:** But Spain is very different from the UK. We have a completely different climate here.

**Rachael Hamilton:** But—

**The Convener:** I am going to move on. We are getting into the minutiae of the topic, and we need to be conscious of the time.

I will bring in Christine Grahame on the subject of wildfires.

**Christine Grahame:** The licensing provisions in the bill say that a licence will be granted when Scottish ministers

“are satisfied that ... muirburn is necessary ... and ... no other method of vegetation control is available.”

I would have preferred the word “appropriate” to “available”.

**Robbie Kernahan:** Or “practicable”.

**Christine Grahame:** “Appropriate” or “practicable”.

The issue of training has been mentioned, and I wonder whether one of the questions that should be asked as part of the licensing process is what training on the various methods has been undertaken on the estate in question. It is a very good point; you would not put it in primary legislation, but it might be a question that those providing the licence should ask to ensure that, in granting the licence, they know that the people who will exercise the terms of the licence know how to do these things appropriately.

**Robbie Kernahan:** Absolutely. One of the questions that we must pose is why burning is being used in the absence of alternatives. I do not think that it is unreasonable to ask the question, and I am sure that there will be lots of answers as to why burning is the most appropriate method.

**Christine Grahame:** “Appropriate” is a better word.

**Robbie Kernahan:** On standards of training, we are working quite hard to ensure that the people who undertake the activity are appropriately trained. That is in the bill, and it is incumbent on us, the Scottish Fire and Rescue Service and practitioners to ensure that we set the bar in the right place. Of course, we must ensure consistency and think about how we square the standards and skills that are appropriate to grouse moors, where the people involved are exemplary in their management of fire, with those in crofting communities and those of farmers, who do not have the same resources or skills. We would like standards to be raised and applied consistently so

that we can be assured that safeguards are in place.

**Christine Grahame:** Forgive me—I do not have the bill in front of me, but does it use the word “available” rather than “appropriate”?

**Robbie Kernahan:** I think that it says “available” just now.

**Christine Grahame:** I do not think that that is the right word.

**The Convener:** I will bring in Bruce Farquharson and Ross Ewing to bring this section to a close.

**Deputy Assistant Chief Officer Farquharson:** I will go back to the point that Rachael Hamilton made about whether the wildfire would have acted differently had the landscape been managed by muirburn. As Nick Hesford said, the interconnected mosaic of burning presents a fantastic opportunity for firefighters to put in a fire break or mount an attack from a portion of land that they know is safe from the fire. How a wildfire progresses across an area that has been managed by muirburn is very different. When the fuel has been managed in that way, it allows us a great opportunity to deal with the fire.

It was mentioned that our climate is very different from that of Spain. It absolutely is at the moment but, at the Scottish wildfire conference in Edinburgh in 2018, Marc Castellnou, who is recognised worldwide as an expert in wildfire and is based in Catalonia, stated that, from his research and in his opinion, the wildfire context in Scotland will be similar to that experienced in Portugal within the next 30 years.

The big context is that Portugal loses hundreds of people to wildfires every year. We need to identify what we can do now to prevent us from getting to that point. In Spain, the reintroduction of prescribed burning is part of the arsenal that is being used. We also see that in Australia and California—other places that have a significant wildfire problem. The management of the fuel is key to preventing us from getting to the position that Portugal finds itself in right now, where wildfires are uncontrollable and present a significant threat to life.

**Ross Ewing:** I wholly endorse what Bruce Farquharson just said. I will mention a concern that has been mentioned by some of our members who are undertaking peatland restoration, which we fully support—it is something that we need to do. There is concern among some members about the risk posed by an increased fuel load build-up as a result of the bill’s provisions, about the investment that they have put into peatland restoration and about the vast amounts of public money that have gone into it.

That is just a note to say that the bill will have implications for peatland restoration, in which a lot of people have invested money and on which a lot of the public purse has been used. It is important that the bill adequately provides resilience to protect our landscapes from wildfire risk.

**The Convener:** We will now consider the role of NatureScot, with a question from Alasdair Allan.

**Alasdair Allan:** I will ask about resources. We have heard a bit about the task that NatureScot would face in licensing muirburn. What are the resource implications for NatureScot? Is the organisation confident about being able to meet the requirement?

**Robbie Kernahan:** In the financial memorandum and in discussion with sponsor colleagues in the Scottish Government, we have tried to be clear on the transactional nature of the new licences. We have tried to quantify that as far as we are able, but quite a lot of the activity is unregulated just now, so it is very difficult to be absolutely specific about who will apply and how informed their applications will be.

That comes back to the point about trying to ensure that we are adequately resourced to deal with the demand. We are having that conversation with the Scottish Government so that, as the bill progresses, we have assurance that we will be able to deal with what will probably amount to between 500 and 800 new licence applications annually.

**Beatrice Wishart:** How will compliance with the new muirburn code and other licensing conditions be monitored?

**Robbie Kernahan:** Monitoring, enforcement and compliance will be fundamental. It comes back to resourcing. We know that compliance monitoring will be key to ensuring that we take the adaptive management approach and learn from experience.

We can draw some reassurance from the point that, as technology improves, we will be able to use efficient means of monitoring burning as part of our compliance condition. We are still operating on the basis of trust and confidence that we get returns and information about how well licences are complied with. However, we will need to secure enough resource for us to be able to go out and spot check from time to time and ground-truth that licences are being complied with. That will form part of the continuing drive for improvement as we move forward.

**Jim Fairlie:** Stakeholders have suggested that there is broad discretion for NatureScot in granting and making decisions on issuing, suspending or revoking licences. What does NatureScot see as

its role, and how will you ensure that you take a proportionate approach?

**Robbie Kernahan:** Proportionality has been a common theme through today's discussions. All that I can do is provide some reassurance to the committee that, in pursuing the licensing approach—which will be informed by a framework for how we expect applicants to make applications, how we monitor compliance and how any sanctions would apply in practice—we will work together.

We have given a commitment to develop the code, and we have previous experience in how frameworks work. I hope that that provides members with reassurance that we are accountable, that the safeguards are in place in legislation and that, if people are not happy, they have the opportunity to appeal decisions through us, as a public body. That is in the bill, and we would impose it anyway, because we desire to be exemplars of the better regulation agenda.

We are subject to Scottish Public Services Ombudsman complaints—and, ultimately, judicial review—if people are not happy with how we conduct our regulatory function. That is as much of a safeguard as I can provide the committee.

12:30

**Ross Ewing:** There is significant concern among land managers around the notion of ascertaining peat depth, which NatureScot will want to try to monitor. It is important that a provision is included that says that it would not be an offence to make a false declaration when applying for a licence for muirburn on peatland provided that the methodology was followed.

As we have just heard, peat depth can be hugely variable. How do we know that the bit of land that NatureScot probes when it does its assurance check will be the same bit of land that is probed when a land manager does their survey? There needs to be consistency and clarity.

I support—100 per cent—the point that Nick Hesford raised about ignition points being the points at which the measurement should be taken, because at least that would provide a little bit of clarity. If the point at which the fire starts is the point at which you measure, that will make it much easier for land managers to follow the provision.

**Karen Adam:** Stakeholders have suggested the need for adaptive management as new science becomes available. How will NatureScot ensure that that new information is reflected in decision making and in new guidance on licensing?

**Robbie Kernahan:** We fully appreciate that, because, as we have heard, there is so much uncertainty in the evidence base and around what

is a new, regulated framework, we need to learn by doing, although there will be some risks inherent in that—for practitioners and for us, as a regulator.

Going back to first principles, we have signed the shared best practice for wildlife management concordat, which is about working together, good communication, transparency in the evidence base and a desire to continue to improve. That is how we will work with the representative bodies that are around this virtual table and others, through the moorland forum.

**Ariane Burgess:** This question is for the RSPB, and it is about the fact that you have some concerns that the season will extend until April. Can you tell us about that?

**Duncan Orr-Ewing:** Our concern relates, in particular, to the spring end of the season, which is when birds start to breed. The current provisions in the bill set out an end of muirburn season date of 15 April, by which time many moorland birds are already breeding.

Climate change predictions say that bird breeding seasons come forward by one day every eight years as a result of climate change, so we can expect the trend of earlier breeding of moorland birds to increase. Ideally, we would suggest that an end of muirburn season date of 15 March would be more appropriate than 15 April. By 15 March, birds such as golden eagles have started breeding, and, by late March, many wading birds have started breeding as well—including red-listed species. There is a climate and nature crisis. The compromise might be 31 March, but 15 April is too late.

**Dr Hesford:** I would like to draw the committee's attention to the British Trust for Ornithology's report, which was published in 2021. It looked at breeding bird laying dates and confirmed what Duncan Orr-Ewing said about laying dates advancing. Despite that, it concluded that there is little overlap between the current burning season and the nesting attempts of most upland bird species. It also concluded that there is a very low overall risk from muirburn for populations of upland species.

For species for which there is greater overlap—for example, golden eagles—there are other provisions in the code that put a buffer around their breeding areas, while species such as lapwing and golden plover, which are potentially at risk from greater overlap, do not nest on rank heather anyway, so you would not expect to see any damage in that respect.

**The Convener:** I think that Duncan Orr-Ewing wants to come in on the back of that.

**Duncan Orr-Ewing:** I should say, as a final point, that we get reports every year from members of the public who are concerned about muirburn having burned out bird nests. It is a real issue.

**Ross Ewing:** I just want to make the quite obvious point that it does not serve the interests of a grouse moor manager to burn out nests, given that they are clearly trying to produce grouse, which are ground-nesting birds.

The far greater risk to ground-nesting birds comes from excessive fuel load build-up. We have seen the dreadful incident at Cannich—goodness knows the number of ground-nesting birds that perished in that wildfire. I just want to make the point that we have bigger problems than the muirburn season to worry about.

**Beatrice Wishart:** I have a final question for Emma Hinchliffe, which requires a yes or no answer. Is the IUCN involved in drawing up the draft statutory guidance on muirburn?

**Dr Hinchliffe:** No. I made a request to NatureScot just yesterday for a place at the table to help with the muirburn code. We have been involved in previous drafts of the code, and we would very much welcome the opportunity to feed in, because we would like the code to be drafted on the basis of sound scientific evidence and by a panel involving scientists and practitioners. It is really important to have that communication and partnership between the two elements.

**The Convener:** Thank you. That concludes today's evidence-taking sessions.

I suspend the meeting very briefly to allow the witnesses to leave. As we have further items to consider, I must ask committee members to stay in their places.

12:36

*Meeting suspended.*

12:37

*On resuming—*

## Subordinate Legislation

### Public Intervention and Private Storage Aid (Amendment and Suspension) (Scotland) Regulations 2023 (SSI 2023/150)

**The Convener:** Our next item of business is consideration of three negative Scottish statutory instruments. Do members wish to make any comments on the first instrument?

**Rachael Hamilton:** I just want to draw attention to the comments from the NFUS on this particular SSI. First of all, though, I want to confirm that we are talking about SSI 2023/150.

**The Convener:** Yes.

**Rachael Hamilton:** I note that, according to our papers,

“NFUS acknowledged the importance of having a framework for market support during crisis situations and expressed caution regarding the potential impact of the proposed changes on stability and confidence in various sectors.”

It also stated that

“the upcoming Agriculture Bill would provide adequate powers for Scottish Ministers to intervene when necessary.”

I am not minded to lodge a motion to annul, but, once again, we find ourselves in a situation in which a considerable body that represents quite a number of farmers is sharing its sense of caution with the committee. I seek your advice on the matter, convener.

**The Convener:** I echo Rachael Hamilton's views. It is concerning that the NFUS has itself raised concerns. However, it believes that the proposed agriculture bill will “offer ... adequate provision” in that respect. I have to say that I am not aware of any draft agriculture bill or any provisions in it, but it would appear that the NFUS has had sight of the proposed bill to give it that comfort. It concerns me that we are potentially making a decision without knowing whether a forthcoming bill will mitigate the NFUS's concerns.

Moreover, the policy note suggests that private intervention will cease to have effect in Scotland for a period of five years but no impact assessment has been made, because the provision is “for a temporary period”. I would have thought that five years is a fairly extended temporary period and that an impact assessment should have been carried out. Five years is a long time, and I am concerned that there is no more detail on that.

We could write to the Government today with those concerns. Are we otherwise content to agree to the instrument?

**Rhoda Grant:** My reading of the regulations is that, if something happens, the provision can be brought back into force, and the five-year period is to allow the agriculture bill to put in place something that will take over from it. Perhaps we can ask for confirmation of that. Moreover, we should make a note to look at this issue when we come to consider the agriculture bill, to ensure that it is doing what we have assumed to be the plan.

**The Convener:** Absolutely—particularly given that Scottish applicants could be left at a disadvantage if we did not

“mirror the rest of the UK”

in temporarily ceasing PI provisions. We certainly need to write in that respect.

The option that we have today is either to annul the instrument or to say that we are content but to write to the Scottish Government, seeking further clarity. Are we content?

**Rachael Hamilton:** Is it possible to seek clarity without moving a motion to annul? The policy note says that, if Scotland does not choose

“to mirror the rest of the UK”,

that will

“leave Scottish applicants at a disadvantage.”

Why is the NFUS not taking the same view?

**The Convener:** Just on the practicalities, I point out that the reporting deadline is 26 June, so today is our last opportunity to deal with the instrument.

**Rachael Hamilton:** Can we write?

**The Convener:** We can, but the instrument will come into force on 1 July.

**Rachael Hamilton:** Okay. How long have we had this instrument?

**The Convener:** We have had it for 40 days.

**Rachael Hamilton:** Sorry, but this is the first time that I have seen it.

**The Convener:** Are we content to write with our concerns in relation to the instrument?

**Alasdair Allan:** I am content with that approach, and I do not sense any movement to annul the instrument. I just want a clearer idea of what the letter to the Government will say and, roughly, its tone and content.

**The Convener:** Certainly. I think that we need clarity on why the NFUS has been given comfort that the forthcoming agriculture bill will “offer ... adequate provision” for the Scottish Government to intervene where necessary. I have not seen a

draft of the agriculture bill, so I cannot have any comfort that that is the case, but the NFUS appears to have had—

**Alasdair Allan:** It appears to have been given comfort on that point, which presumably is not the same as its having seen the bill.

**Christine Grahame:** There have been assurances, and I presume that they are something that the Government—or any Government—will not be able to renege on. There have obviously been discussions.

**Alasdair Allan:** But that is not the same as having been shown the bill.

**Christine Grahame:** I do not think that it has seen the bill.

**The Convener:** My point is that I have not had any comfort or assurance from anywhere that the agriculture bill will offer adequate provisions to give Scottish ministers these powers. I would find it difficult to make a decision on that, because I have had no reassurance that that will be the case. I am also concerned that there has been no risk assessment, because of the potential five-year period, which is slightly longer than I would consider to be temporary.

**Christine Grahame:** We can write to the Government, saying that it is our understanding that the NFUS has had comfort on this matter and asking the Government to confirm whether that is the case. I am sure that it is, otherwise the NFUS would not have said so.

**The Convener:** Absolutely. It will be along those lines.

**Christine Grahame:** That is sufficient, is it not, Alasdair? I am just asking because I have to go.

**Alasdair Allan:** It was an ideal moment to introduce controversy—we have all have to go. I am happy with the approach as long as we draw that distinction and make it clear that we are not trying to suggest that a bill has been shown to third parties.

**The Convener:** No. It is just that the policy note says that the NFUS

“stated that the forthcoming Agriculture Bill would offer ... adequate provision”.

If the NFUS has been given reassurances, it would be good for the committee to be given them, too.

**Alasdair Allan:** That is fine.

**The Convener:** Is the committee content to make no recommendation on the instrument?

**Members indicated agreement.**

**Seed (Fees) (Scotland) Amendment  
Regulations 2023 (SSI 2023/151)**

**The Convener:** If members have no comments to make, are we content to make no recommendation on the instrument?

**Members** *indicated agreement.*

**Feed Additives (Form of Provisional  
Authorisations) (Cobalt (II) Compounds)  
(Scotland) Regulations 2023 (SSI 2023/170)**

**The Convener:** Do members have any comments to make on the instrument? It has come before us because of a failure to apply for an appropriate licence within the specified time. I was concerned that, even though it was an animal health issue, it was a decision for the Minister for Public Health and Women's Health. However, I have been informed that such matters are dealt with by Food Standards Scotland, which sits within her portfolio.

Is everybody content to make no recommendation on the instrument?

**Members** *indicated agreement.*

**The Convener:** That concludes our meeting in public.

12:45

*Meeting continued in private until 12:48.*



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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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