

WILDLIFE AND NATURAL ENVIRONMENT (SCOTLAND) ACT 2011

EXPLANATORY NOTES

THE ACT – COMMENTARY ON SECTIONS

Part 4 – Other Wildlife Etc.

Section 33 – Protection of badgers

198. **Section 33** of the Act amends provisions of the Protection of Badgers Act 1992.
199. The 1992 Act provides for five separate offences in relation to badgers: taking, injuring or killing (section 1); cruelty (section 2); interfering with badger setts (section 3); selling and possession of live badgers (section 4) and marking and ringing (section 5).

Subsections (3) to (5)

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

Subsections (6) and (7)

201. Under the 1992 Act as originally enacted, licensing functions were split between SNH and Scottish Ministers based on the reason for granting the licence.
202. Subsection (6) amends section 10 of the 1992 Act to provide that the Scottish Ministers are the licensing authority (“the appropriate authority”) with power to grant a licence for any of the listed reasons, except where they delegate licensing functions to SNH or a local authority as set out below. Before granting a licence, the Scottish Ministers are required to consult SNH.
203. Subsection (7) inserts a new section 10A into the 1992 Act.
Delegation of licence-granting power – inserted section 10A of the 1992 Act
204. Section 10A of the 1992 Act allows Scottish Ministers to delegate any of their licensing functions to SNH by written direction, or certain development functions to a local authority by order subject to negative procedure (see subsections (8) and (9)) following consultation with the local authority, SNH and anyone else affected by the making of the order. If a local authority has been delegated licensing functions, they must consult SNH before granting or modifying a licence.

Subsection (8)

205. Subsection (8) amends section 11A(3) of the 1992 Act. This section creates a presumption that a person was attempting to do kill injure or take a badger where

there is evidence from which it can be reasonably concluded that this is what they were attempting to do. The amendment applies the presumption to the new offence of knowingly causing or permitting the killing, injuring or taking of a badger.

Subsection (9)

206. Under section 12(1A) of the 1992 Act, certain offences can be prosecuted either on indictment or summarily. These offences are primarily those related to badger digging and baiting and include the offences of causing a dog to enter a sett and selling a live badger. These offences are “relevant offences” within the meaning of sections 45(6) and 47(6) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, which means that the maximum penalties on summary conviction are a 12 month sentence of imprisonment and/or a fine of the statutory maximum (which is set under section 225(8) of the Criminal Procedure (Scotland) Act 1995 and is currently £10,000). The maximum penalty for conviction on indictment is a 3 year sentence of imprisonment and/or an unlimited fine. Offences covered by section 12(1) of the 1992 Act can only be prosecuted summarily. The maximum penalties for these offences range from a fine of level 3 on the standard scale (for offences under section 1(5) of the 1992 Act) to a level 5 fine (currently set at £5,000 by section 225(2) of the Criminal Procedure (Scotland) Act 1995) and/or a six month sentence of imprisonment (for the offence of killing a badger as well as for most other offences under the 1992 Act).
207. Subsection (9) amends section 12 of the 1992 Act to extend the list of offences which can be prosecuted either on indictment or summarily. The effect is to allow the offences of illegally killing, injuring or taking a badger, possessing all or part of a dead badger, knowingly permitting or causing these offences, knowingly permitting or causing cruelty to a badger and knowingly permitting or causing the sale or possession of a live badger to be prosecuted summarily or on indictment.
208. Subsection (9) also amends section 12 of the 1992 Act to state that the maximum penalties for summary conviction for offences which can be tried either summarily or on indictment are a 12 month sentence of imprisonment and/or a fine of the statutory maximum. The effect is to ensure that the new offences which can be tried either way will be subject to the same penalties as the existing either way offences under the 1992 Act.

Subsection (10)

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

Subsection (11)

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

Section 34 – Muirburn

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

Subsection (2)

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

Muirburn season – inserted section 23 of the 1946 Act

213. Section 23 of the 1946 Act establishes a positive muirburn season, consisting of a “standard muirburn season” (1 October until 15 April) and “extended muirburn season” (16 April until 30 April) (subsections (2) to (4)). Muirburn may only be made during the extended muirburn season by the owner of the land, or with the owner’s permission (subsection (5)).

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

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

Subsection (3)

216. Subsection (3) amends section 23A of the 1946 Act, which was inserted by section 58 of the Climate Change (Scotland) Act 2009.

217. Subsection (3)(b) and (c) extends the purposes for which the muirburn season may be varied under section 23A of the 1946 Act to include protecting the natural environment and public safety. It also enables the dates to be varied on a geographical or phased basis.

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

Subsection (4)

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

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

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

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

Muirburn licences – inserted section 23C of the 1946 Act

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

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

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

Subsection (5)

225. Subsection (5) amends section 24 of the 1946 Act, which provides for the right of a tenant to make muirburn in certain circumstances notwithstanding the terms of the lease.
226. It inserts a new subsection (2A) into that section, which makes further provision in respect of the requirement in section 24(2) of the 1946 Act to give notice of intended muirburn under section 24(2). The effect is that a tenant may give the notice of their intention to make muirburn to a person purporting to be authorised by a proprietor of land to receive such notice, and the notice (whoever given to) must be in writing.

Subsection (6)

227. Subsection (6)(a) amends section 25 of the 1946 Act to create an offence of making muirburn outwith the muirburn season and otherwise than in accordance with a muirburn licence. This replaces the offence under the previous version of section 23(4) of the 1946 Act, and is consequential on the changes to section 23 and the insertion of section 23C.
228. Subsection (6)(b) repeals the provision providing for it to be an offence to make muirburn without notice, and is consequential on the changes to section 26 of the 1946 Act made by subsection (7) (as considered next).

Subsection (7)

229. Subsection (7) in effect replaces section 26 of the 1946 Act, and sets new general notification requirements in relation to muirburn.
230. Subsections (1) to (3) of section 26 imposes a duty on any person who intends to make muirburn during season to give written notice to the owner of the land (if different), and to the occupiers of land within 1 km of the proposed muirburn site. Notice does not require to be given to those who have indicated in writing that they do not wish to be notified, Notice may be in a local newspaper where there are 10 or more occupiers within 1km of the proposed muirburn site.
231. Subsections (4) to (6) of section 26 makes provision about timescales, content and permitted methods of notification. Notice of intention to burn must be given after the end of the previous muirburn season, and at least 7 days before burning. It must indicate the places where burning is planned and specify that further information about the intended dates, location and approximate extent of burns may be requested. When such a request is made, the person intending to make the muirburn must make reasonable efforts to comply with this request not later than the day before the muirburn is made.
232. Subsection (7) of section 26 provides for it to be an offence to fail to comply with the requirements of section 26 of the 1946 Act (see section 27 of that Act for penalties).

Subsection (8)

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

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

234. Section 26A of the 1946 Act specifies the permitted methods for giving muirburn notices. It permits personal delivery, the leaving or posting of notice, and written messages.
235. It also permits the use of electronic communications (including email, text message and fax) where the person to be notified has agreed to be notified in that way. Notices

*These notes relate to the Wildlife and Natural Environment (Scotland)
Act 2011 (asp 6) which received Royal Assent on 7 April 2011*

given by electronic communications are deemed to have been received 48 hours after they are sent.

236. Where it is not possible to ascertain the identity of an occupier who requires to be notified, fixing a notice to a conspicuous object on their land is a permitted form of notification.

Subsection (9)

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

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

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