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The Information Centre  
An t-Ionad Fiosrachaidh

## Citizen Participation and Public Petitions Committee

16th Meeting, 2023 (Session 6), Wednesday  
8 November 2023

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

#### Introduction

On 18 January 2023, the Committee agreed to write to Police Scotland, COPFS, NatureScot and the Scottish Government with follow-up questions. The Committee has also received several additional submissions from the petitioner responding to points made.

The following sections summarise the issues raised, and replies received, in the context of the evidence to date.

#### Legislative position

The legislative position in relation to falconry mountain hares is as follows:

- The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 inserted mountain hares into **Schedule 5 of the Wildlife and Countryside Act 1981** ('the 1981 Act').
- In doing so, a general offence in relation to intentionally or recklessly killing, injuring or taking a protected species listed in Schedule 5 applies to mountain hares (set out in Section 9(1)).
- General defences to the offence in Section 9 are provided for in Section 10 (more on this below).
- Section 16(3) provides that the offences in Section 9 do not apply if done under and in accordance with the terms of a licence granted by the appropriate authority. Licences may be granted for specific purposes set out

in the legislation (more on this below). The existing licensable purposes are not specific to species but apply to all of Schedule 5.

- There is no power to amend the licensable purposes by secondary legislation.
- The 1981 Act does not exempt any recreational activities from protections for wild birds and animals. However, there is a power in 16(1) to grant licences for the purposes of falconry or aviculture (among other things). This applies in relation to offences regarding wild birds in Sections 1 (the protection of wild birds, their nests and eggs), 5 (prohibition on certain methods of killing or taking wild birds), 6(3) (showing live wild birds for competition), 7 (failing to register captive birds, or keeping certain captive birds if convicted of an offence), and 8 (confining a bird in an inappropriately-sized cage).
- There are limits to issuing licences for falconry and aviculture under Section 16(1). Section 16(1A) states that the appropriate authority shall not grant a licence for any purpose mentioned in Section 16(1) unless it is satisfied that there is no other satisfactory solution in relation to that purpose. In addition, the authority shall not grant a licence for any purpose mentioned in paragraphs (e) to (h) (this includes the purpose for falconry) otherwise than on a selective basis and in respect of a small number of birds.

## Purpose

The Committee wrote to the Scottish Government and public bodies to discuss distinctions between the purposes for which a bird of prey could be flown.

The petitioner [stated in the evidence session on 7 December 2022](#) that upland falconry can include circumstances where the trainer and bird of prey are ‘actively hunting’ as well as situations where they are ‘exercising the eagle’. The petitioner stated:

“If we are actively hunting, our job on the ground will be to drop off the side of the hill, move through the countryside or heather moorland and see if a hare has been flushed. However, if we are just exercising the eagle, we will stay on the ridge, where there may not be game, and move backwards and forwards. Because the eagle is being trained, it has been led to believe that all the good things in life happen with, near or around us, so the bird, while it is at altitude, will track our position from the sky.”

The Committee further investigated whether a distinction is made between activities which would constitute active hunting of mountain hare (e.g. where beating or flushing takes place) and upland flight for the purposes of exercise and wellbeing of the bird, flight displays, or other business purposes.

Considering the possible distinction between activities, the Committee also sought to clarify what circumstances would constitute an offence under the Act and in what circumstances a person could be charged and prosecuted. For example, would accidentally taking a mountain hare where no flushing or other hunting activities were taking place constitute an offence?

The Scottish Government and public agencies emphasized that different circumstances would have different merits, but that the relevant determination would be whether killing a mountain hare was intentional or reckless.

Then Minister for Environment and Land Reform, Mairi McAllan MSP stated in her response that

“I appreciate that there could be a risk that falconers’ birds take non-target species, such as mountain hares, when being exercised and when hunting legitimate species such as brown hares or rabbits. Section 9 of the Wildlife and Countryside Act 1981 makes it an offence for a person to intentionally or recklessly kill, injure or take any wild animal included in schedule 5 which includes mountain hares...Generally, to act recklessly a person requires to display gross negligence mere carelessness or accidental conduct is insufficient.”

However, she noted,

“the legislation does not distinguish between recklessly taking a mountain hare whether by active hunting or during exercise. Ultimately, as with any criminal offence, it will depend on the individual facts and circumstances at play as to whether or not an offence has been committed.”

Police Scotland expressed a similar view to the Minister. They noted that

“Falconers can legally exercise their birds, with the authorisation of the land owner on which they choose to do so. If this is an area where Mountain Hare are densely populated then there is the obvious risk of the bird of prey taking a mountain hare or non-target species, and could be considered reckless.

“If the falconers had carried out due diligence with the land owner and NatureScot regarding the presence of Mountain hare in the area and it was thought that there was not a high density of Mountain Hare, and therefore the probability of a hare being taken was low, and thereafter a Mountain Hare was taken by a bird of prey, then this could be considered accidental. Police should be notified of the circumstances and this area should not be used for exercise purposes again.

“If thereafter this area were to be used again and a further Mountain Hare was taken, then this could be considered reckless. If the falconer takes all reasonable precautions and avoids flying their eagle in areas with a high abundance of mountain hares, they can mount a defence that they could not reasonably have foreseen that the eagle would catch a mountain hare.”

Police Scotland also stated that all cases are considered on their own merit – this was also highlighted by COPFS. They noted that in areas with a high population of mountain hare, flying a bird of prey may be considered reckless. However, there are areas where the population is low, and the risk would be minimised. They note that “guidance as to the most appropriate areas to carry out the exercise of the birds could be provided by NatureScot, and should be utilised for falconry exercise purposes.” Police Scotland expressed a view, like NatureScot and the Minister, that

“Mountain Hare is a protected species and therefore should not be targeted for sporting or recreational purposes.”

In relation to accidental killing of a mountain hare, NatureScot and COPFS both highlighted the defences set out in legislation. [Section 10\(3\)\(c\) of the Wildlife and Countryside Act 1981](#) (‘the 1981 Act’) provides that a person shall not be guilty of an offence – in this case, of killing a mountain hare – if:

- the killing was the incidental result of a lawful operation or other activity,
- the person who carried out the lawful operation or activity took reasonable precautions for the purpose of avoiding killing a mountain hare or did not foresee, or could not reasonably have foreseen, that killing a mountain hare would be an incidental result of the lawful operation or other activity, **and**
- the person who killed a mountain hare immediately took steps that were reasonably practicable to minimise the damage or disturbance.

All of these conditions need to be met in order for this to be considered a defence. NatureScot explained what meeting these conditions might look like:

1. “That eagle taking the hare was the incidental result of a lawful operation or other activity –
 

“Provided the handler has permission to fly the eagle over the land and is not actively hunting illegal quarry there is a lawful purpose for flying the eagle.
2. “The handler took reasonable precautions to avoid the eagle catching a mountain hare
 

“Reasonable precautions would include avoiding areas known to support a high population density of mountain hares. Evidence of reasonable precautions might include correspondence with estate staff confirming that that they rarely or never see mountain hares on the land. Nighttime surveys with either a lamp or thermal imaging equipment can provide a good indication of mountain hare abundance.
3. “The handler did not foresee, and could not reasonably have foreseen, that the eagle would catch a mountain hare.
 

“The likelihood of an eagle catching a mountain hare in area with a low population density of mountain hares is very small. If the handler takes reasonable precautions and avoids flying their eagle in areas likely to support a high abundance of mountain hares, they can mount a defence that they could not reasonably have foreseen that the eagle would catch a mountain hare.
4. “The handler took such steps as were reasonably practicable to minimise the damage.

“Once the eagle spots a mountain hare there is no practicable action that the handler can take to recall their bird. However, the handler should attempt to recapture the eagle as soon as is reasonably practicable.”

NatureScot further highlighted areas where mountain hare is not typically abundant. They noted that the likelihood of catching a mountain hare is “very low or non-existent” in certain areas, including on some islands, most lowland habitats, and certain hill and mountain ranges in southern, central and Highland Scotland, and notes that:

“This area includes more than half of the upland habitats in Scotland”.

In relation to areas where mountain hare may be more abundant, they note:

“The likelihood of a golden eagle catching a mountain hare is higher on moorland in eastern Scotland. Upland areas known to support a higher abundance of mountain hares include the Eastern Grampians, Moray, Cairngorms, Monadhliath, Angus Glens, Perthshire and Lammermuir Hills. However, mountain hare abundance is patchy and some mountains and moorlands in eastern Scotland do have lower population densities.”

Responding to these suggestions, the petitioner felt that these options were unfeasible because some of the upland areas are inaccessible, far away from his home and not in the areas where he already has agreement with the land manager.

The petitioner questioned how the suggestions outlined above would work in practice, in relation to the advice that if a mountain hare was caught in an area, that area should be avoided in future. He asked:

“How would a falconer decide what is the ‘area’ a hare was killed by a bird of prey following its instinct and showing behaviour natural to the species? Grid reference, 1 yard circumference, 100 yard circumference, 1 mile circumference? This is unenforceable. An eagle at 2000’ of altitude will take game at anything up to perhaps 2 miles away. For this reason, upland falconers ‘rent’ tracts of land of enormous size, perhaps a minimum of 6000 acres. If hawk takes a hare on this estate, would this be it?”

The petitioner argues that it is counterintuitive to not permit falconry in areas where there are high densities of mountain hare, limiting the activity to areas where numbers are low. The Scottish Government’s position, on the other hand, is that, overall, mountain hare numbers are low and the species has unfavourable conservation status. As a result, killing hares is generally prohibited and in order to avoid the risk of doing so, falconry should not be practiced in areas with high numbers.

## Licensing

[Section 9 of the 1981 Act](#) establishes that it is an offence to intentionally or recklessly kill, injure or take a wild animal included in Schedule 5 of that Act;

mountain hares are included in Schedule 5. Section 16(3) provides that the offence in Section 9 does not apply to in relation to any activity done under the terms of a licence granted for a specific licensable purpose set out in the legislation. The Committee's questions explored whether there is a route through existing options that would allow falconers to carry out some of their business activities (e.g. educational displays, film and photography for documentary) in circumstances where the risk of disturbing or taking a mountain hare are higher.

There is a broad range of licensable purposes set out in section 16(3). Licences may be granted:

- for scientific, research or educational purposes;
- for the purpose of ringing or marking, or examining any ring or mark on, wild animals;
- for the purpose of conserving wild birds, wild animals or wild plants or introducing them to particular areas;
- for the purpose of conserving any area of natural habitat;
- for the purpose of protecting any zoological or botanical collection;
- for the purpose of photography;
- for the purpose of preserving public health or public safety;
- for the purpose of preventing the spread of disease;
- for the purpose of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries
- for any other social, economic or environmental purpose

NatureScot provided clarification in its response as to how some of these purposes may permit falconry to take mountain hare. NatureScot noted that there were existing licences issued to control mountain hares to prevent serious damage to trees or to conserve natural habitats which permit the use of birds of prey. They noted:

“Some of these licences cover large areas of open moorland where the aim is to encourage natural regeneration of native trees. These licences may include falconry as a method of killing. For example, one mountain hare licence for preventing serious damage to young trees covers several thousand hectares of open moorland surrounding distinct blocks of woodland. This licence already permits falconry as a method of killing hares.”

The petitioner responded to this suggestion saying that “fences around woodlands kill eagles” and noted that other protected species live in those areas. The petitioner said:

“Within these areas, schedule 5 protected species such as pine marten and red squirrels live. We could fly there legally to control ‘pest’ hares, but the bird takes a red squirrel. Following the Police advice, do I now have to report this to them and avoid flying there again?”

In relation to the possibility of flying birds of prey under licences issued to landowners to cull hares to protect crops or forests, the petitioner cited three practical issues:

“First, falconers don’t know who the licences are issued to and privacy laws prevent this information from being shared. Second, a short visit or stay on an estate to catch some hares will not satisfy the exercise and enrichment requirements for an eagle across a full winter season. Thirdly, an estate will not realistically requisition the services of a falconer to deal with a problem hare population.”

In relation to educational purposes or photography, NatureScot said that:

“before NatureScot can issue such a licence it must be satisfied that there is no other satisfactory solution. For example, the applicant would have to demonstrate that there was no other way of making a wildlife documentary, such as using existing footage of a golden eagle hunting a mountain hare or using in a location where there is already a control licence. Carrying out a falconry display or photography in a location where there is a low likelihood of the eagle catching a mountain hare would be a satisfactory solution.”

Finally, NatureScot noted that, in relation to “any other social, economic or environmental purpose” the proposals “must ‘give rise to, or contribute towards the achievement of, a significant social, economic or environmental benefit’”. NatureScot further explained that it has had conversations with the falconry community during the development of the new licensing system for mountain hares. They said that “One area discussed was whether falconry is of sufficient cultural significance to fit the any other social, economic or environmental purpose. NatureScot’s view is that hunting mountain hares with birds of prey is not widely practised enough in Scotland to satisfy this purpose.”

In relation to the final point about cultural significance, the petitioner and other submissions have highlighted that falconry is recognised by UNESCO as “an intangible cultural heritage of humanity.” The UK is not a signatory to this convention, which means that there are no obligations in relation to conserving falconry as a cultural heritage. The petitioner argues, on the other hand, that it is a historical practice in Scotland.

## Consequences of legislative change

The petition specifically asks “to amend the Animals and Wildlife Act 2020 (‘the 2020 Act’) to allow mountain hares to be hunted for the purposes of falconry”. The Committee asked for further information on whether there are any potential wider, or

unintended, consequences of making legislative change in the way proposed by the petitioner.

The Minister clarified in her response that an amendment would need to be made to the Wildlife and Countryside Act 1981, rather than the 2020 Act. However, she noted that –

“as the mountain hare is a priority species for conservation action under the UK biodiversity action plan, and it is also on the Scottish biodiversity list, it is considered to be of principal importance for biodiversity conservation. Due to the unfavourable-inadequate conservation status of mountain hare we do not intend to remove the current protections in place.”

In relation to protected wild animals, there is no licensable purpose specifically for falconry, but falconry may be used as a method under licences for other purposes, as set out above.

Both the Minister and NatureScot highlighted that there are no existing licensable purposes for sporting or recreation and raise that creating a licensable purpose for falconry may set a precedent for requests to permit other recreational purposes. In its submission, NatureScot stated that there is “no route to apply for a licence for certain hobbies that took place in the past, such as collecting specimens of rare butterflies and moths or taking seed from rare plants to grow in gardens. Therefore, creating a licensable purpose of falconry could open the way for requests to allow animals and plants to be taken for a wide range of recreational purposes, not just sporting.”

NatureScot also raised that permitting falconry to take mountain hares would likely increase the pressure to permit shooting. They note that adding a species to Schedule 5 means that it “can no longer be killed for sporting or recreational purposes, such as shooting”. Were falconers to be permitted to take a protected species, NatureScot suggests that “This is likely to increase the pressure to permit shooting of mountain hares under licence, which would negate the effect of adding them to Schedule 5.”

Moreover, NatureScot highlighted that creating a licensable purpose for falconry could potentially create a ‘loophole’ allowing falconers to take other protected species. They highlight that the licensable purposes in Section 16(3) apply to all species in Schedules 5, 5A, 6, and 6A of the 1981 Act. This includes, for example, prohibitions on hunting brown hare during the closed season, pine marten and red squirrel. NatureScot notes that

“adding falconry to the list of licensable purposes, would allow individuals to apply for licence to hunt brown hares during the closed season and, perhaps other species of mammal, when they have previously been refused a licence for other purposes.”

They suggest that this may become a “loophole” which “could undermine the effectiveness of protection for these animals in certain situations.”



## Welfare

During its consideration of the petition, the Committee heard concerns from falconers that they may not be able to allow larger birds who are traditionally flown in the uplands to exhibit their natural behaviour in order to meet their welfare needs. The petitioner stated that one of his Golden Eagles has not flown since the legislation was passed in 2020.

The Scottish Government's submission initially suggested that birds of prey could be flown outwith the mountain hare range and provided a JNCC map of areas which showed the parts of Scotland which are outwith the distribution and range of mountain hares. This led to an understanding by the petitioner that they are only able to fly their birds in lowland areas.

However, the Scottish Government suggested in oral evidence on 21 December 2022 that it may be appropriate for an eagle to be flown in parts of the uplands where mountain hare populations are less dense. The Scottish Government stated that in those parts, "the chances of [the bird] taking a mountain hare accidentally are low, and taking a mountain hare there would not be considered by most people to be intentional or reckless conduct". As noted above, NatureScot has also highlighted a number of upland areas where it may be considered reasonable to fly a bird of prey and the steps to take to ensure that birds can be flown whilst minimizing the risk of taking a mountain hare.

The petitioner stated in his submissions that: "Falconry means, 'The hunting of wild prey, in its natural state, using a trained bird of prey'. Birds of prey are predators and obligate carnivores. Hunting is their instinct and their natural behaviour. All agencies contributing to the idea that we just have to go where there are no hares are losing sight of the imperative that we follow the 5 freedoms for captive animals including 'Opportunity to show behaviour natural to the species'." The petitioner has emphasised that an eagle is trained to trust and return to its owner when recalled, but when flying it will follow its instincts.

### **SPICe Research October 2023**

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