

Citizen Participation and Public Petitions Committee  
Wednesday 25 September 2024  
14th Meeting, 2024 (Session 6)

## **PE2100: Ministerial guidance to clarify the criteria for assessing licence applications under section 16 of the Wildlife and Countryside Act 1981**

### **Introduction**

**Petitioner** Gary Wall

**Petition summary** Calling on the Scottish Parliament to urge the Scottish Government to produce guidance under Section 54 of the Nature Conservation (Scotland) Act 2004 to clarify the criteria for consideration of “no other satisfactory solution” in relation to licensing and to include the sustainable cultural use of natural resources under Section 16 of the Wildlife and Countryside Act 1981.

**Webpage** <https://petitions.parliament.scot/petitions/PE2100>

1. This is a new petition that was lodged on 14 May 2024.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee’s consideration of the petition and can be found at **Annexe B**.
4. Every petition collects signatures while it remains under consideration. At the time of writing, 16 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered.
6. The Committee has received submissions from the Scottish Government and the Petitioner which are set out in **Annexe C** of this paper.

### **Action**

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

**Clerks to the Committee**  
**September 2024**

## **Annexe A: Summary of petition**

### **PE2100: Ministerial guidance to clarify the criteria for assessing licence applications under section 16 of the Wildlife and Countryside Act 1981**

#### **Petitioner**

Gary Wall

#### **Date Lodged**

14 May 2024

#### **Petition summary**

Calling on the Scottish Parliament to urge the Scottish Government to produce guidance under Section 54 of the Nature Conservation (Scotland) Act 2004 to clarify the criteria for consideration of “no other satisfactory solution” in relation to licensing and to include the sustainable cultural use of natural resources under Section 16 of the Wildlife and Countryside Act 1981.

#### **Previous action**

I've spent 15 years researching this subject and annually, for the last 12 years, provide more and more evidence to NatureScot on how case law, government policy and responsibilities to international convention support my applications for sustainable cultural use of a natural resource. NatureScot don't address my evidence in their license refusals, which appears to ignore their balancing duties, but focus solely on what they believe to be "no other satisfactory solution". They appear reluctant to discuss the evidence I submit with me and have lately refused my requests for meetings. I've had two of my MSPs involved in trying to bring about a solution, which hasn't improved the situation. NatureScot cut off communications under their unacceptable behaviour policy when I persist in getting issues addressed when they have a statutory duty to address issues related to their functions under the Natural Heritage (Scotland) Act 1991.

#### **Background information**

For 12 years I've applied for licenses that support sustainable cultural use of natural resources which also benefits conservation and yet NatureScot's refusals direct me to use non-native species, which they believe is another "satisfactory solution". I don't understand how their decisions are proportional or how they apply consideration of "no other satisfactory solution". Their actions contradict their published guidance but they ignore my requests for clarification.

When the Government Minister informed the Scottish Natural Heritage CEO of their new code of practice in 2015 he stated the code "requires regulators to take a risk-based enabling approach, communicate clearly and effectively, and understand who they regulate." This is not my experience and I feel there are hidden agendas. This has left me, part of a cultural minority, feeling discriminated against to the point of

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persecution. The present situation is also contrary to judgement of the European Court of Justice (C-339/87) on transposition of EU Directives into national law.

## Annexe B: SPICe briefing on PE2100



The petitioner is calling on the Scottish Parliament to urge the Scottish Government to:

- Produce guidance under Section 54 of the Nature Conservation (Scotland) Act 2004 to clarify the criteria for consideration of “no other satisfactory solution” in relation to licensing, and to
- Include the sustainable cultural use of natural resources under Section 16 of the Wildlife and Countryside Act 1981.

### Background – NatureScot’s licensing functions

The petition relates to how NatureScot, Scotland’s statutory nature conservation agency, carries out its species licensing functions. NatureScot can license, for certain purposes, actions that would otherwise constitute an offence against a protected species. NatureScot is responsible for almost all species licensing in Scotland except for some aspects in the marine environment.

Scottish wildlife is protected under three main pieces of legislation. This legislation also provides for the circumstances in which certain activities may be licensed:

- [The Wildlife and Countryside Act 1981](#) (as amended)
- [The Conservation \(Natural Habitats &c.\) Regulations 1994](#) (as amended), and;
- [The Protection of Badgers Act 1992](#) (as amended)

The purposes for which licences may be granted, and the statutory licensing ‘tests’ vary according to the legislation in question but generally include an assessment:

- Of whether the applicant’s proposal is covered by the purposes for which a licence can be granted (the ‘licensable purposes’),
- That there is no other satisfactory solution or alternative for achieving that licensable purpose which doesn’t require a licence, and
- Of what the impacts of the proposal will be on the conservation status of the species involved.

## Scottish Ministers' power to issue guidance to NatureScot

Scottish Ministers have delegated powers under [section 54 \(1\)\(a\) of the Nature Conservation \(Scotland\) Act 2004](#) to issue guidance containing recommendations, advice and information for the assistance of public bodies in complying with their duty (under section 1(1) of the same Act) to further the conservation of biodiversity.

## Licensable purposes under the Wildlife and Countryside Act 1981

The petitioner argues that “the sustainable cultural use of natural resources” should be added to section 16 of the Wildlife and Countryside Act 1981 (‘the 1981 Act’), which sets out the list of purposes for which NatureScot can issue certain licences under that Act.

The petitioner is a falconer and [has previously argued that taking peregrine falcons from the wild in Scotland](#) could provide “British falconers with a native source of birds that would reconnect with their cultural heritage, hopefully giving many of the new generations coming into falconry a better understanding of how important healthy populations of wild raptors are to falconry”.

All wild birds in Scotland are given protection under the [Wildlife and Countryside Act 1981 \(as amended\)](#). A key requirement of this Act is set out in section 1, which makes it an offence to kill, injure or take any wild bird, subject to other provisions in that Act. Other requirements relate to prohibited methods of taking or killing birds, registration, ringing and other requirements for captive birds.

Section 16 sets out the conditions under which actions which would otherwise be an offence, including under section 1, may be licensed, including setting out what are “licensable purposes”.

Those purposes are:

- (a) for scientific, research or educational purposes;
- (b) for the purpose of ringing or marking, or examining any ring or mark on, wild birds;
- (c) for the purpose of conserving wild birds;
- (ca) for the purposes of the re-population of an area with, or the re-introduction into an area of, wild birds, including any breeding necessary for those purposes;
- (cb) for the purpose of conserving flora or fauna;
- (d) for the purpose of protecting any collection of wild birds;
- (e) for the purposes of falconry or aviculture;
- (f) for the purposes of any public exhibition or competition;
- (g) for the purposes of taxidermy;

- (h) for the purpose of photography;
- (i) for the purposes of preserving public health or public or air safety;
- (j) for the purpose of preventing the spread of disease; or
- (k) for the purposes of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters,

NatureScot (the ‘appropriate authority’) cannot grant a licence for any of the above purposes unless it is satisfied that, as regards that purpose, there is “**no other satisfactory solution**”. It also cannot grant a licence for any purpose mentioned in paragraphs (e) to (h) above “otherwise than on a selective basis and in respect of a small number of birds”.

## **Species licensing review**

The Scottish Government has commissioned a review of NatureScot’s species licensing functions. This review will set out to:

- Ensure that the law is being applied correctly and lethal control is only licensed where the conditions are demonstrably being met (this section of the review will be undertaken by Law Firm Harper Macleod).
- Assess the potential to apply the principle of full cost recovery to licensing
- Assess the potential to introduce a public register of licenses to improve transparency.

The review will be carried out in the context of the Better Regulation principles and the Scottish Regulators Code of Practice. More information [can be found on the NatureScot website](#). The aim is for a report to be provided “for external review” by October 2024.

**Alexa Morrison, Senior Researcher**

15 August 2024

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at [spice@parliament.scot](mailto:spice@parliament.scot)

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

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## **Annexe C: Written submissions**

### **Scottish Government written submission of 16 August 2024**

#### **PE2100/A: Ministerial guidance to clarify the criteria for assessing licence applications under section 16 of the Wildlife and Countryside Act 1981**

Thank you for your email requesting the Scottish Government's views on the action called for in the petition PE2100.

The petition asks “the Scottish Parliament to urge the Scottish Government to produce guidance under Section 54 of the Nature Conservation (Scotland) Act 2004 to clarify the criteria for consideration of “no other satisfactory solution” in relation to licensing and to include the sustainable cultural use of natural resources under Section 16 of the Wildlife and Countryside Act 1981.”

We want to ensure that legislation is as accessible and understandable as possible for applicants, or anyone else with an interest. That is why NatureScot provides detailed licensing guidance which includes specific guidance on the interpretation of no satisfactory alternative/no other satisfactory solution test. This is available on the NatureScot web page: <https://www.nature.scot/doc/guidance-licensing-test-2-no-satisfactory-alternative-licence-relation-european-protected-species>

This guidance takes into consideration European Court of Justice case law on protected species.

The suggested approach is to ask:

- What is the problem or specific situation that needs to be addressed?
- Are there any other solutions?
- If so, will these resolve the problem or specific situation for which the derogation is sought?

This methodology is also referred to in other European Commission guidance on sustainable hunting under the Birds Directive, which concludes that ‘where another solution exists, any argument that is it not “satisfactory” will need to be strong and robust’.

NatureScot believes using peregrine falcons and merlins that are not a pure-bred ‘native’ subspecies (i.e. commercially available captive bred birds) is a suitable alternative to taking birds from the wild to keep, breed and fly. So far, NatureScot have not been provided with a strong and robust argument that this is not the case.

The Scottish Government has no intention to bring forward legislation to include the sustainable cultural use of natural resources under Section 16 of the Wildlife and Countryside Act 1981.

**Environment and Forestry Directorate**

## Petitioner submission of 3 September 2024

### **PE2100/B: Ministerial guidance to clarify the criteria for assessing licence applications under section 16 of the Wildlife and Countryside Act 1981**

I think the response from the Scottish Government and the briefing from the SPICe is a good example of what I've had to endure for the last 16 years, people changing the focus of the issue away from my purpose but then I have to ask, how much influence has NatureScot had in these two responses?

My petition is clear, there is no mention of asking the Scottish Government to bring forward legislation to include the sustainable cultural use of natural resources under Section 16 of the Wildlife and Countryside Act 1981.", that is NOT its intention. Cultural use is already provided for on a discriminatory basis. The issue I'd like the Government guidance on is how "no other satisfactory solution" should be applied.

Section 16 is the implementation of Article 9 of the EU Birds Directive. Article 2 provides for cultural use on a proportional basis, proportionality is addressed in paragraph 6 of the Directives introduction and states -

"The measures to be taken must apply to the various factors which may affect the numbers of birds, namely the repercussions of man's activities and in particular the destruction and pollution of their habitats, capture and killing by man and the trade resulting from such practices; the stringency of such measures should be adapted to the particular situation of the various species within the framework of a conservation policy."

Article 13 states - "Application of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in Article 1."

NatureScot's alternative solution is to use non native species which is contrary to the Scottish Government's joint strategy on the use of non native species which promotes the use of native species by stakeholders.

NatureScot don't have a conservation policy which provides for sustainable cultural use and they don't explain how they have applied the principle of proportionality to any decision, even though the "balancing duties" policy states they do -

"In communicating our decisions and advice, we will highlight that we have considered other interests and taken them into account in reaching our conclusions. This will be the main way in which we document that we have applied our balancing duties." In my experience, this does not happen!

In 12 years and approximately 15 applications, they have never once explained the proportionality of any decision. What they explain is what they see as an alternative solution, applied as an overriding criteria, but also change the "purpose" of my applications to suit that alternative. This is contrary to the case law from the EU Court of Justice, C-339/87 which states -



"The transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific express legal provision, a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner. That may be the case where transposition is effected by a legislative provision serving as the basis for the adoption of administrative measures which are officially published, general in scope and capable of creating rights and obligations for individuals. In contrast, mere administrative practices, which by their nature may be changed at will by the authorities, do not constitute proper transposition." Without clarification on this issue, I believe the present position is unlawful.

In my experience NatureScot can change their "will" because they have no transparent conservation "objective" to apply when making a licensing decision on sustainable cultural use. Why does the Scottish Government not see clarification on licensing criteria important, when it creates rights and obligations for citizens? The Scottish Government have told me they support the UNESCO Convention on intangible cultural heritage. They also support the UN's Covenant of Social, Economic and Cultural Rights and have said they will introduce a Bill this year to implement it into law. Their own biodiversity strategy is based around the UN's Convention on Biodiversity, Article 10 supports cultural use and the Addis Ababa Principles and Guidelines on Sustainable Use of Biodiversity explains why it's positive to conservation.

NatureScot refuse to acknowledge whether or not their staff receive training on their Regulators Code, certainly in my experience I have seen nothing that would indicate they apply the code to their duties. The Committee have an opportunity to clarify the directive behind the implementation of the Regulators Code within NatureScot as it was Fergus Ewing MSP, the then Minister, who wrote to their CEO in 2015 explaining the code "requires regulators to take a risk-based enabling approach, communicate clearly and effectively, and understand who they regulate." This is certainly not my experience.

Sometimes I wish I hadn't started out on a project that required licensing by NatureScot because the experience has made me seriously question our democracy as without accountability I don't believe we have one. When someone like me, who has 50 years of experience related to a licensing issue and has done years of research to be able to go to authority with a mountain of supporting information, with much of it based in case law, is vilified like I feel I've been, something is seriously wrong!

I don't believe anyone with authority is holding NatureScot to account on any of their duties or compliance with their Regulators Code and its lack of focus on proportionality. I've been to the SPSO and I don't believe they have the competence to address the issues on proportionality.

Regarding the SPICe "briefing", paragraph 2 under "Licensable purposes under the Wildlife and Countryside Act 1981" doesn't provide the full story of what I've been trying to do and there's no mention of the importance of applying proportionality to licensing decisions.

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I don't feel it's fair if the Committee take NatureScot's word over mine without giving me the opportunity to respond. If possible, I would like to address the Committee in person to explain the issues in greater detail.