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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers provisions in the Wildlife Management and Muirburn (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 2 May and 13 June 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Wildlife Management and Muirburn \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

Overview of the Bill

3. This Government Bill was introduced by the former Cabinet Secretary for Net Zero, Energy and Transport, Michael Matheson MSP, on 21 March 2023. The lead committee is the Rural Affairs and Islands Committee.
4. The Bill takes forward most of the recommendations made by the Grouse Moor Management Group Report (often referred to as the “Werrity Report”). According to the [Policy Memorandum](#), the Bill is being introduced to “address raptor persecution and ensure that the management of grouse moors and related activities are undertaken in an environmentally sustainable and welfare conscious manner.” In addition, the Bill bans the use, possession, and purchase of glue traps, in response to ongoing concern over the animal welfare implications of their use.
5. The Bill seeks to achieve this by:
 - banning the use, purchase, and possession of glue traps;
 - introducing licensing and training requirements for certain types of wildlife traps;
 - introducing a licensing regime for land used for the shooting of red grouse;
 - extending the licensing regime for all muirburn (the controlled burning of heather), regardless of the time of year it is undertaken; and
 - providing constables and authorised inspectors with updated powers of entry, search, and seizure in relation to the investigation of offences under the Bill.
6. The Bill comprises 28 sections arranged in three parts: wildlife management, muirburn and general provision.
7. The Bill confers ten powers to make subordinate legislation on the Scottish Ministers.
8. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.
9. The Committee wrote to the Scottish Government to raise questions in relation to the following delegated powers: -
 - section 10(5) - power to modify the purposes for which muirburn can be made.
 - section 18 - power to change the definition of “peat” and “peatland”.
10. The Committee’s questions and the response received from the Scottish Government are set out in the **Annex**.
11. The Committee’s views on these, and the eight other delegated powers, are set out below.

Review of relevant powers

Section 4(2) - Requirements for use of traps

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

12. Section 4(2) (regulation of certain wildlife traps) inserts sections 12A to 12G into the Wildlife and Countryside Act 1981, which creates a licensing regime for the use of certain traps used for the taking of wild birds and killing wild animals. It will be an offence for a person to use a trap to which the section applies without having a wildlife trap licence.
13. Inserted section 12A(8) gives Scottish Ministers the power to add, modify, or remove traps (or descriptions of traps) to which the section applies. The power is subject to the affirmative procedure.

Committee Consideration

14. The Scottish Government explains that this power will allow Scottish Ministers to respond in the event that new traps are developed or existing traps are modified or removed from the market. As the power permits changes to primary legislation, it is subject to the affirmative procedure.

15. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 4(2): Further Provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

16. As noted above, section 4(2) (regulation of certain wildlife traps) inserts sections 12A to 12G into the Wildlife and Countryside Act 1981 which creates a licensing regime for the use of certain traps used for the taking of wild birds and killing wild animals. New section 12D sets out the circumstances in which a licence may be suspended or revoked, including where the licence holder has committed a “relevant offence”.
17. Inserted section 12G(3) gives Scottish Ministers power to make further provision in relation to wildlife traps subject to the licensing regime, how a licence number is to

be displayed on a trap, the approved training courses, and the definition of “relevant offence”. The Scottish Ministers are required, before making such regulations, to consult Scottish Natural Heritage and such other persons who may be interested in, or affected by, wildlife trap licensing.

Committee consideration

18. The Scottish Government explains that this power is required to ensure that the list of relevant offences can be kept up to date. This requires a degree of flexibility. The Scottish Government also explains that the power is subject to the affirmative procedure because its exercise will involve the amendment of primary legislation.

19. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 7(2): Licensing: land on which certain birds may be killed or taken

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

20. This section amends the Wildlife and Countryside Act 1981 Act to create a licensing scheme for land on which the killing or taking of grouse is to occur. Within that new regime, provision is made for the circumstances in which a licence may be revoked, including where the licence holder has committed a “relevant offence”. New section 16AA(12) gives Scottish Ministers the power to modify the definition of “relevant offence”.

Committee consideration

21. It is commonplace to take such powers so that Government can respond to the creation, modification, and removal of offences from the statute book. The criminal statute book is not static and what constitutes an offence changes over time. Furthermore, which offences are “relevant” when it comes to grouse moor licensing, may also change over time. As the Committee expects, this power is subject to the affirmative procedure because it enables the amendment of primary legislation.

22. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 6(3): Killing and taking of certain birds permitted only on land with section 16AA licence

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

23. Section 6(5) inserts Part 1B into Schedule 2 of the Wildlife and Countryside Act 1981. This covers the birds which may only be taken or killed on land with a licence. At present, new Part 1B only includes red grouse. Scottish Ministers currently have the power to vary any of the Schedules to the 1981 Act by regulations. This means they could make other species of birds (in addition to grouse) the subject of a licensing regime. That power is currently subject to the negative procedure. Section 6(3) amends the 1981 Act to make the exercise of this power subject to the affirmative procedure.

Committee consideration

24. The Scottish Government considers that adding birds to the licensing regime should be subject to the higher level of procedure because (a) it will impose a burden upon persons subject to the licensing requirements and (b) the exercise of the power involves amending primary legislation.

25. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 8(1): Power to investigate certain wildlife offences

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

26. The Animal Health and Welfare (Scotland) Act 2006 confers powers on inspectors appointed under that Act. Such powers relate to the investigation of animal welfare offences. Section 8 of the Bill allows Scottish Ministers to modify the 2006 Act to give inspectors further powers to investigate offences under Part 1 of the Bill (glue traps) and Part 1 of the 1981 Act (wild animals).

Committee consideration

27. The Committee considers that this power extends no further than is appropriate because the offences in respect of which inspectors' powers may be extended are circumscribed by the terms of both Part 1 of this Bill and Part 1 of the 1981 Act. As the power enables the amendment of primary legislation and involves powers to investigate offences, the Committee agrees that the affirmative procedure is appropriate.

28. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 10(5): Grant of muirburn licence**Power conferred on: The Scottish Ministers****Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Affirmative***Provision*

29. Section 10 sets out the requirements for applying for a muirburn licence. Amongst other things, an application must specify the purpose for which the applicant wishes to make muirburn, which must be one of the purposes listed in subsection (2). Subsection (2) sets out different lists of permissible purposes depending on whether the land in question is “peatland”. Subsection (5) gives the Scottish Ministers a power to modify by regulations the lists of permissible purposes for which muirburn can be made.

Committee consideration

30. At its meeting on 2 May 2023, the Committee observed that the purposes for which muirburn can be made are central to the operation of Part 2 of the Bill, which extends the muirburn licensing regime. It also observed that the science on muirburn on peatland is contested. Given that the exercise of this power has the potential to significantly alter the effect of the legislation, the Committee queried whether it was appropriate for this aspect of the Bill to be open to amendment by subordinate legislation. The Committee therefore asked the Scottish Government for further explanation as to why it considers it appropriate for Ministers to be able to change this aspect of the Bill by regulation.

31. In its response, the Scottish Government explains that: -

- in light of the lack of scientific consensus regarding the effects of muirburn on peatland, the Scottish Government commissioned a report on the matter;
- that report identified that there are two competing arguments regarding muirburn on peatland. On one account, burning heather on peatland presents a risk to biodiversity and carbon stores. On the other account, refraining from burning heather on peatland may allow fuel loads to build up, risking wildfire;
- the approach taken in the Bill, which is to allow a muirburn licence to be granted for limited purposes, is intended to strike a balance between these two positions;
- whilst the Government believes that the current provisions reflect the best approach, further findings from research, some of which is already under way means it might be considered necessary to amend these provisions to prevent sub-optimal or even harmful land management practices or to enhance carbon management or biodiversity outcomes;
- any proposed changes to the muirburn licensing scheme would be developed in consultation with relevant stakeholders before any amending regulations are brought to the Scottish Parliament for consideration and approval.

32. The DPM also explains the Scottish Government’s view that the delegated power is necessary because of the precautionary approach taken in the Bill. The Bill restricts the purposes for which muirburn can be undertaken, based on the latest available scientific evidence. The Scottish Government acknowledges that the scientific evidence is not settled, and the evidence of the harm and benefits of muirburn on peatland is contested. It argues that taking this delegated power will enable the Scottish Ministers to adapt the approach to muirburn if new evidence emerges which suggests that a different approach is required.

33. The Committee notes that the purposes for which muirburn can be made are central to the operation of Part 2 of the Bill. While the Committee recognises the need to respond to new scientific evidence, it considers that any changes to this provision may merit greater parliamentary scrutiny. It therefore highlights this provision to the lead committee.

Section 16(2): Muirburn season

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

34. A muirburn licence only allows muirburn to be made for certain purposes during the muirburn season. Section 16 defines the muirburn season as “the period of time from 1 October in any year to 15 April in the following year.” The reason for the closed season for muirburn is to reduce the risk of wildfire occurring during the hottest and driest time of the year, and to protect vulnerable wildlife, such as ground nesting birds and mammals, during their main breeding season.

35. Section 16(2) empowers the Scottish Ministers to modify what constitutes the muirburn season by regulations.

Committee consideration

36. The Scottish Government explains that this power is necessary to ensure that the dates of the open season continue to align with weather patterns and wild animal breeding cycles. The Committee notes that this power is circumscribed in that it only allows the Scottish Ministers to amend the dates of the muirburn season if they consider it necessary or expedient to do so in relation to climate change, for the purposes of conserving, restoring, enhancing, or managing the natural environment or for the purpose of public safety. The Committee considers that this restriction ensures the power extends no further than is necessary. As the Committee would expect, its exercise is subject to the affirmative procedure because it permits the amendment of the Bill as enacted.

37. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 18: Interpretation of Part

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

38. Section 18 defines various terms used elsewhere in Part 2 of the Bill. Section 18(2) empowers the Scottish Ministers to change the definition of “peat” and “peatland” for the purposes of Part 2, by regulations.

Committee consideration

39. At its meeting on 2 May, the Committee observed that the definition of peatland is central to the system of muirburn licensing which is being extended by the Bill. It also observed that the science on muirburn on peatland is contested. Since this power could be exercised to make the definition more or less restrictive, thereby changing the amount of land subject to the stricter controls, the Committee queried whether it was appropriate for this aspect of the Bill to be open to amendment by subordinate legislation. The Committee therefore asked the Scottish Government for further explanation as to why it considers it appropriate for this power to be delegated.
40. In its response, the Scottish Government explains that: -
- there is no single, settled, definition of “peat” or “peatland”;
 - in response to the independent review of grouse moor management, the Scottish Government considered whether the current definition peatland should be revised;
 - various options were considered, but the outcome was that a “stricter” definition (i.e., based on a shallower depth of peat) should be adopted, as this was in accordance with the “precautionary approach” taken in the Bill;
 - given the lack of consensus on definition of peatlands, this regulation-making power will allow Scottish Ministers to amend the definition should new evidence emerge;
 - Scottish Ministers must consult NatureScot, and other such persons as may be interested or affected before making regulations under this power.
41. The Scottish Government also states that the definitions of “peat” and “peatland” are based on the best currently available evidence. However, this comprises both data that is contested, and data that is incomplete. This means that, whilst the Scottish Government believes the current provisions represent the best approach, further findings from research, some of which is already under way, means it might be considered necessary to amend these provisions to prevent sub-optimal or even harmful land management practices or to enhance carbon management or biodiversity outcomes.
42. The Government argues that taking this delegated power will enable the Scottish

Ministers to adapt their approach if new evidence emerges.

43. **The Committee notes that the definition of “peat” and “peatland” are central to the operation of Part 2 of the Bill. While the Committee recognises the need to respond to new scientific evidence, it considers that any changes to this provision may merit greater parliamentary scrutiny. It therefore highlights this provision to the lead committee.**

Section 26: Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if amending primary legislation, otherwise negative procedure

Provision

44. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory, or saving provision as they consider appropriate for the purposes of or in connection with the Bill, or for giving full effect to it. The regulations may make different provision for different purposes and modify any enactment.

Committee consideration

45. The Committee notes that this is a standard ancillary power.

46. **The Committee finds the power acceptable in principle and is content with the choice of procedure.**

Section 27: Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure (in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010)

Provision

47. Section 27 is a standard commencement provision, which allows the Scottish Ministers bring the Bill into force on such day as they appoint. In accordance with normal practice, the commencement regulations will be laid before the Parliament, but will not be subject to any further procedure.

Committee consideration

48. The Committee notes that this is a standard commencement power.

49. **The Committee finds the power acceptable in principle and is content that it will not be subject to any parliamentary procedure.**

Annex

Letter to the Scottish Government, 4 May 2023

The Delegated Powers and Law Reform Committee considered this Bill at its meeting on Tuesday, 2 May 2023 and agreed to write to you in relation to the following delegated powers:

- Section 10(5): power to amend the purposes for which a muirburn licence may be granted
- Section 18(2): power to amend the definitions of “peat” and “peatland”.

The Bill introduces a new requirement to obtain a licence to undertake muirburn on peatland. Such a licence can only be granted for limited “permitted purposes” which are listed in section 10(2)(b). Furthermore, a licence will only be granted if the licensing authority is satisfied that the making of muirburn is both necessary for the specified purpose and no other method of vegetation control is available. It follows that peatland is subject to stricter muirburn controls than other land.

Section 10(5)

Section 10(5) gives Scottish Ministers the power to amend the purposes for which a licence may be granted to undertake muirburn on peatland. As acknowledged in paragraph 42 of the DPM, “this power could be used to either relax or restrict further the purposes for which muirburn may lawfully be made on peatland”.

Section 18(2)

Section 18 defines peatland as “land where the soil has a layer of peat with a thickness of more than 40 centimetres” and section 18(2) gives Scottish Ministers the power to amend this definition. It would be open to Scottish Ministers to make the definition more or less restrictive, thereby changing the amount of land subject to the stricter controls.

Given that (i) the definition of peatland is central to the system of muirburn licensing being introduced by the Bill, (ii) the restrictions on muirburn on peatland take a “precautionary approach”, (iii) the science on muirburn on peatland is contested, and (iv) exercise of these powers has the potential to significantly alter the effect of the legislation, the Committee: -

- **requests further explanation from the Scottish Government as to why it considers it appropriate for Ministers to be able to change these aspects of the Bill by regulation, either to further restrict or relax muirburn on peatland, after the Bill is passed by Parliament.**

It would be appreciated if you could email your response to the Delegated Powers and Law Reform Committee e-mail address above by Monday 15 May.

Response from the Scottish Government, 12 May 2023

Thank you for your letter of 4 May 2023 relating to the Delegated Powers within the above Bill following the Committee’s consideration of this Bill on 2 May. In your letter, you sought clarification on two specific provisions within the Bill – at Section 10 and Section 18. I have

provided further background on the rationale for these provisions and have addressed your question (in bold) below.

Section 10 – Power to amend the purposes for which a muirburn licence may be granted.

As you set out in your letter, section 10 of the Bill provides that Scottish Ministers may, by regulations, amend the purposes for which a licence may be granted to undertake muirburn on peatland. You requested further explanation why it was considered appropriate to allow Scottish Ministers to amend these purposes by regulation.

As you note, paragraph 42 of the DPM advises that, “this power could be used to either relax or restrict further the purposes for which muirburn may lawfully be made on peatland”.

When developing the muirburn provisions in the Bill, we thought carefully about the purposes for which muirburn should be allowed on peatland. This drew on extensive data and reports, including the recommendations made by the independent review of grouse moor management. The review recognised the benefits of muirburn, however it also highlighted that there was strong evidence that muirburn can have a detrimental effect on biodiversity, hydrology and soil. The report stated: *“Muirburn can have both positive and negative effects on carbon storage, both directly, by affecting carbon contents of soil and vegetation, and indirectly, by affecting carbon storage potential through the changes in plant community composition after fire. There is often an assumed net loss of carbon under regular muirburn, but the evidence is not conclusive...”*

While there is currently no legislation for prohibiting muirburn on peatland, the existing Muirburn Code contains supplementary guidance that sets out some of the associated risks:

- Peatland can be damaged easily by incorrect management.
- Fires that ignite peat can be very damaging and difficult to extinguish.
- Inappropriate management can lead to impurities in the drinking water, which are expensive to remove.
- Bad burning practices can produce bare peat, which is easily eroded by wind and water, allowing it to enter watercourses.

In addition, in their 2020 report ‘Land use: Policies for a Net Zero UK’ the Committee for Climate Change recommended that there should be a ban on burning on peatlands: *“[muirburn] is highly damaging to the peat, and to the range of environmental benefits that well-functioning peat can deliver (e.g., water quality, biodiversity and carbon sequestration). A voluntary cessation of this activity by landowners has not produced the desired outcome so the practice should be banned across the UK with immediate effect.”*

In response to the lack of consensus in the scientific research, the Scottish Government commissioned a report to review the current evidence from the research conducted on muirburn and the impacts on carbon stores, implications for the wider environment and wildfires. The review reached the following conclusions:

- There is evidence that muirburn causes a proportion of wildfires that occur on moorland, however, there remains uncertainty regarding this proportion and the

purpose for which muirburn is being undertaken. Studies suggest that fire intensity in heather is controlled by fuel structure, windspeed and fuel moisture content.

- There is evidence of burning of above-ground biomass on peat during muirburn with potential impact on carbon sequestration. The impacts of burning on carbon balance may be transient over longer burning rotations. There is no consensus as to the net impacts of muirburn on carbon budgets, with evidence supporting gains, losses and no difference in carbon stores/fluxes following muirburn.
- Burning on peatlands can change surface vegetation species and structure and can have a negative impact on carbon storage.
- Fire has the potential to get into the peat. Depending on the nature and characteristics of the fire, this can pose a significant risk to carbon stores.

The report found that there was an absence of complete evidence and the risks associated with muirburn were identified as:

- the risks of carrying out muirburn on peat is that it changes the vegetation structure, lowers the water table and damages peatland processes which in turn results in net carbon emissions and/or reduces the capacity for peat to store carbon.
- The risk of using fire as a tool to manage moorland is that it can lead to an uncontrolled fire (wildfire) and if this is on peat it can have serious implications for carbon emissions.
- The risks of not carrying out muirburn are that fuel load builds up which can influence the risk around the level of intensity of wildfires, which if close to peat/peatlands could damage these habitats.

In light of the available evidence we have taken the view that a precautionary approach should be taken. In this instance this means taking into account any activity which potentially carries a risk to carbon storage. Whilst the evidence around the role of muirburn as a tool to reduce the risk of wildfires is weak, it is acknowledged that the impacts of a wildfire would be significant. In this context, the precautionary principle would indicate that the role of muirburn as a potential tool to manage this risk must be considered.

The provisions in the Bill that allow a muirburn licence to be granted on peatland for limited purposes are therefore intended to balance the two main conflicting arguments on this issue; that burning heather on peatland is a risk to biodiversity and carbon stores, versus not burning heather on peatland may allow fuel loads to build up, risking wildfire.

The Bill provides that the Scottish Ministers must consult NatureScot and such other persons they consider likely to be interested in or affected by the licensing of muirburn before making such regulations.

Section 18 – Power to amend the definition of “peatland” for the purposes of muirburn.

In your letter, you also sought information on why it was considered appropriate to allow Scottish Ministers to be able to change the definition of peatland for the purpose of making muirburn by regulations. Similar to the power at section 10, this power could be used to make the definition more or less restrictive, thereby changing the amount of land subject to the stricter controls.

While the Bill requires that “peat” and “peatland” are defined, as muirburn can only take place on peatland for certain purposes specified in the Bill, there is no single definition of peat or peatland. The current Muirburn Code, which provides guidance on how muirburn should be conducted, defines peat as “an organic soil, which contains more than 60 per cent of organic matter and exceeds 50 centimetres in thickness.”

However, as a response to the independent review of grouse moor management, the Scottish Government committed to review the current definition of peatland to determine whether this should be revised.

The benefit of using the Muirburn Code’s current definition of peat was considered and a potential benefit would be that it is in line with the Scottish soil definition. This would allow current digital survey maps, to be used to help provide a desk-based licence assessment and help to interpret field survey data. However, it would allow muirburn on peatlands that may be associated with shallower peat.

The use of surface vegetation was also considered as a possible way to define peatland for the purpose of muirburn as a number of broad habitat types are associated with undisturbed peatlands, each with their own characterised surface vegetation. There are, however, areas of peatland that show atypical vegetation due to past management and land drainage. A narrow definition of a vegetation indicator could lead to muirburn being considered appropriate on degraded peatlands or areas that could be suitable for restoration, whereas a wider definition may include areas that are not peatland or degraded peatland.

A definition based on the hydrological or morphological typology alone was also considered. Expert understanding of the relationship between peatland and water tables can be used to recognise structured patterns of peatland and other habitat types. However, this requires a high level of expertise, and the findings can be significantly impacted by the weather conditions surrounding the time of the survey as well as historic land management practices. It was felt that, while the understanding of the hydrological systems associated with peatlands could be used to identify areas which may be at higher risk or have a higher potential for restoration, including such a definition in the Bill would be impractical.

Having considered these alternatives, it was decided that, in line with the Bill’s wider muirburn provisions, the precautionary principle should be followed and a stricter definition should be imposed for the purpose of muirburn so that it may protect areas of peatland associated with shallower peat. Section 18 of the Bill therefore defines “Peat” as “soil which has an organic content (that is, content consisting of living and dead plant and animal material) of more than 60%”. “Peatland” is defined as “land where the soil has a layer of peat with a thickness of more than 40 centimetres”.

This definition is in line with The Heather and Grass etc. Burning (England) Regulations 2001 which provides that: “a person must not burn specified vegetation on a designated site on peat that is of a depth of more than 40 centimetres, except under (and in accordance with) a licence issued by the Secretary of State under regulation 4.”.

These considerations illustrated, similar to the lack of strong scientific consensus relating to muirburn on peatlands, that there is a lack of strong consensus on definition of peatlands. This is why it is considered appropriate for the Bill to contain a regulation making power to allow the Scottish Ministers to amend the definition of ‘peatland.’

The Bill provides that the Scottish Ministers must consult with NatureScot and such persons they consider likely to be interested in or affected by the making of muirburn.

The Committee requests further explanation from the Scottish Government as to why it considers it appropriate for Ministers to be able to change these aspects of the Bill by regulation, either to further restrict or relax muirburn on peatland, after the Bill is passed by Parliament.

The provisions relating to muirburn licensing, including muirburn on peatland, are based on the best currently available evidence. However, it can be seen from the extensive reviews and reports discussed above that this comprises both data that is contested, and data that is not yet available. This means that while we believe the current provisions are the best approach, further findings from research, some of which is already under way means it might be considered necessary to amend these provisions to prevent sub-optimal or even harmful land management practices or to enhance carbon management or biodiversity outcomes.

Any proposed changes to the muirburn licensing scheme would be developed in consultation with relevant stakeholders before any amending regulations are brought to the Scottish Parliament for consideration and approval, as required by the provisions in the Bill. These amending regulations would be subject to the affirmative procedure, so the Scottish Parliament will be able to scrutinise their appropriateness accordingly.

