



Law Society
of Scotland

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Consultation Response

Scottish Natural Heritage 2019 - General Licensing
consultation

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Licensing law sub-committee welcomes the opportunity to consider and respond to the *Scottish Natural Heritage's 2019 General Licensing consultation*¹ (the consultation). The Licensing law sub-committee is made up of solicitors who represent those responsible for licensing matters from the Local Authorities as well as counsel and solicitors representing clients involved in the licensing trade.

General Comments

We understand that the basis of this consultation lies in the legal challenge that was made to the general licensing system in England which meant that those using these types of licences may not have been acting lawfully. As a result, Natural England withdrew three of the General Licences for controlling wild birds from 25 April 2019.

The system under which these General Licences are issued has been operating for some time, allowing people to carry out activities which would otherwise be illegal. The system involving the issue of General Licences needs to be robust and proportionate, balancing the interests of the wildlife which they affect and people.

We would seek to respond only to Question 12 as the other questions depend on specific operational knowledge and scientific information.

¹ <https://www.smartsurvey.co.uk/s/2019GL/>

Question 12: Do you have any comments/ further comment to make on General Licensing in Scotland?

We are aware of the judicial review against Natural England² which culminated in Natural England revoking three of their General Licences. Though no judgment was issued, as the case was not determined in court, Natural England following legal advice, revoked these General Licences. We understand that their concession was made as they considered that there was merit in the challenge that had been brought. From the reporting of their decision, the circumstances in which that concession was made would seem to be equally applicable to Scotland as the legislative structure for granting of these General Licences is the same as for England. Under section 16(1A) (a) of the Wildlife and Countryside Act 1981, it states:

“(1A) The appropriate authority— (a) shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution;...”

Two issues were raised in the Natural England judicial review in that:

- It failed to make its own assessment whether there were no other satisfactory solutions for bird control, and
- It unlawfully delegated responsibility for deciding that matter to the Authorised Persons being those granted and using the General Licence.

That case does not apply to Scotland though it does have potential implications for the granting of General Licences in Scotland where it is understood that similar powers to those of Natural England in granting licences are exercised by Scottish Natural Heritage.³

Following the arguments made and the concession in the English case, it seems that any General Licences which are issued in Scotland may be equally legally problematic. Given that background, it would have been advantageous for the consultation to outline how the circumstances in Scotland regarding the issue of General Licences differ from England so that the concerns arising from the judicial review do not apply.

On the basis that the same problems do apply in Scotland, it would appear that maintaining the current approach would fall foul of the general principle of administrative law that where power is conferred on a

² <https://www.gov.uk/government/publications/wild-bird-general-licences-legal-summary-on-decision-to-withdraw-licences-gl04-gl05-and-gl06-and-assessments-to-support-new-ones/natural-england-general-licensing-legal-summary#the-legal-challenge>

³ Section 16A of the Wildlife and Countryside Act 1981

decision-maker, it must, in the absence of any sub-delegation, be exercised by that decision maker. There seems nothing in the legislation which provides a basis for that sub-delegation of power.

Any Scottish General Licence which could be construed as having been issued on that basis could be likely to be open to a comparable legal challenge.

Other Observations

Scottish Natural Heritage would be best placed, rather than a licence holder, to have the evidence on which to make a decision about the need, if any, for lethal control and to ensure that the decision is taken on an objective scientific viewpoint untrammelled by irrelevant considerations which might otherwise influence a licence holder's decision.

Such considerations might include, but are not limited to, a natural bias in favour of lethal control as a traditional method. Scottish Natural Heritage would also have access to in-house legal advice which would be robust in the event of challenge and would have been properly considered.

The need to explore alternatives to killing is based on the EU Birds Directive.⁴ That imports a test of proportionality and the need for an evidenced and reasoned basis for the issue of any licence.

This is a strict test given that the lives of other species are at stake. Where there is room for doubt, such doubt must be resolved in favour of the birds. Where an evidential threshold is reached which might suggest the need for control, it does not follow that the killing is the automatic outcome. Alternatives must be explored to demonstrate that the decision to proceed with lethal control has only been arrived at after the rational elimination of alternatives. Failure to do so will render any issue of a General Licence open to legal challenge.

We would suggest that Scottish Natural Heritage consider whether in line with most, if not all the Council of Europe, that instead of General Licences those who seek to control the bird population whether through management, conservation or hunting should be made to apply for a specific licence. This would permit specific consideration of the estate or land in question and provide more focus, given the greater specificity

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0147>

involved, of consideration of the need for a licence and the fitness of any applicant. Such a system could attract a realistic fee which, in turn, could provide for properly resourced enforcement of such a system. This would be consistent with other forms of licensing law in Scotland.

For further information, please contact:

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