

NATURE CONSERVATION (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Protection of Wildlife Schedule 6

Protection of Wildlife

Protection of birds: offences

353. [Paragraph 2](#), changes the law relating to the protection of wild birds by means of amendments to section 1 of the 1981 Act. The key changes include:

- new offences of recklessly carrying out acts prohibited by section 1, including damage to nests and the reckless disturbance of Schedule 1 species;
- a new offence of interfering with the nest of a wild bird;
- a new offence of taking, damaging, destroying or otherwise interfering with any nest habitually used by any wild bird listed on a new Schedule A1. The new Schedule is established by paragraph 24 and entries can be added into it to by order under section 22;
- a new offence of obstructing or preventing any wild bird from using its nest;
- the existing statutory defence to a charge of possessing wild birds, their eggs or specimens derived from wild birds is amended and in particular is changed to differentiate between specimens which originated in Scotland and those which originated outwith Scotland. A person in possession of a bird, egg or other thing must be able to show that, if the specimen originated in Scotland, it was acquired without contravening the Protection of Birds Acts 1954 to 1967 or the Wildlife and Countryside Act 1981. If the specimen originated outwith Scotland the person must show that the manner in which it was killed, taken or otherwise acquired would not have breached the law of Scotland had the act occurred in Scotland. A special exception is made in relation to specimens which have been legally imported into Scotland in compliance with the Convention on International Trade in Endangered Species (“CITES”) as transposed into European law;
- a new offence of intentionally or recklessly disturbing any Schedule 1 bird which is engaged in a lekking display. The term “lekking” refers to the pre-breeding courtship and sexual display, typical of capercaillie, black grouse and ruff, in which male birds congregate, usually on a traditionally used lek site, for the purpose of competitive courtship display and in order to attract female birds for mating. This provision is primarily designed to improve protection for capercaillie, although ruff will also benefit. These are currently (June 2004) the only species listed on Schedule 1 which lek. The provision would however apply to any species which

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2004 (asp 6) which received Royal Assent on 11 June 2004*

might be added to Schedule 1 in the future, provided the species engages in lekking behaviour;

- a new offence of intentionally or recklessly harassing any wild bird included on new Schedule 1A. The distinction to be drawn between this new schedule and new Schedule A1 should be noted. Once again entries can be added into it by order under section 22; and
- the principle that it is an offence to “knowingly cause or permit” unlawful acts (which is already found at various locations in the 1981 Act) is extended to encompass offences under section 1.

354. [Paragraph 3](#) amends section 2 of the 1981 Act. These are minor changes which delete redundant references to Part II of Schedule 2. This Part of Schedule 2 formerly listed “pest” species (primarily members of the corvid family) which could be controlled by land managers. All of those species were however removed from Part II of Schedule 2 in 1992 by [S.I. 1992/3010](#) and the effect of Schedule 2 Part II has been replaced by licences issued by the Scottish Ministers under section 16 of the 1981 Act. Since Part II of Schedule 2 no longer has any effect, the opportunity has been taken to remove redundant references to it from the 1981 Act.
355. [Paragraph 4](#) amends section 3(1)(a) of the 1981 Act to extend the existing offence which, relates to *intentional* acts of disturbance, destruction or damage (in relation to areas of special protection), by inserting a new offence of recklessly carrying out the actions specified in the provision. As a result of the change made by this paragraph, section 3(1)(a) of the 1981 Act is extended to cover reckless as well as intentional acts of disturbance, destruction or damage. Paragraph 4 also removes a further redundant reference to Part II of Schedule 2. Paragraph 5 amends section 4 of the 1981 Act and adjusts the circumstances in which the existing “incidental result” defence may be used in cases where the provisions of sections 1 and 3 have been contravened. The defence can now only be deployed where each of the conditions set out in the new subsection (3A) are met.
356. In particular it must be shown firstly that the unlawful act (for example, the killing of bird or the destruction of a nest) was an incidental result of an otherwise lawful activity or operation (such as, for example, construction work, farming operations or a recreational activity such as rock climbing). Secondly, the person who committed the unlawful act must have taken reasonable precautions in order to avoid committing the act or, alternatively, the person must show that he or she did not foresee and could not reasonably have been expected to foresee that the action would result in an offence being committed. Finally, it must be shown that steps were taken to minimise any damage or disturbance (including, for example, disturbance to a nest site) once it became apparent that a contravention of the provisions of the 1981 Act had occurred.
357. Sub-paragraphs (4), (5) and (6) of paragraph 5 make a number of consequential changes to the text of section 4.
358. [Paragraph 6](#) amends the offence in subsection 5(1)(a) of the 1981 Act, relating to the prohibited use of certain methods of killing or taking wild birds. It is currently an offence to use or set in position the articles and devices listed where these are *calculated* to cause injury to wild birds. The meaning of the word “calculated” is potentially open to dispute and might be taken, on the one hand to suggest that use of a device which is calculated, in the sense of being designed, to cause injury is illegal. Alternatively, it might be argued that “calculated” is intended to be indicative of the intention of the person setting the device in position. Any lack of clarity is removed by substituting the word “likely” for “calculated”. It will in future be an offence to use or set in position a device which is likely to cause injury – that is any device which poses a physical threat to wild birds.

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359. In addition, paragraph 6 removes an exemption which permitted the use of duck decoys (i.e. large traps consisting of nets, into which ducks are enticed or driven) if those decoys can be shown to have been in use prior to 1954. Continuing legitimate uses for duck decoys (including in particular their use for scientific and research work) could be permitted by SNH or the Scottish Executive under licence, by virtue of section 16 of the 1981 Act.
360. [Paragraph 6](#) also removes a further redundant reference to Part II of Schedule 2.
361. [Paragraph 7](#) builds on changes effected by the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#), which dealt with a ban on certain activities (including dealing in dead birds and keeping or possessing certain species of bird listed on Schedule 4 of the 1981 Act) following conviction for a range of relevant offences. These offences include prohibited acts (under any enactment) which involve the ill treatment of birds or other animals, as well as specified offences under the 1981 Act.
362. [Paragraph 7\(b\)](#) adds to this by providing for the 5 year ban provided for in section 7(3) of the 1981 Act to apply in cases where a person contravenes relevant provisions of the [Control of Trade in Endangered Species \(Enforcement\) Regulations 1997 \(S.I. 1997/1372\)](#) (“COTES Regulations”). The effect of this change is a person convicted of an offence under the COTES Regulations in relation to birds (other than offences under Regulation 9) will, in addition to any other penalty imposed by a court, be banned from possessing or controlling a Schedule 4 bird for 5 years from the date of the conviction.