

NATURE CONSERVATION (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Protection of Wildlife Schedule 6

Protection of Wildlife

Miscellaneous

374. [Paragraph 14](#) inserts a new section 15A after section 15 of the 1981 Act. Section 15A is intended to provide additional protection for wild animals and birds by introducing the offence of possession of a pesticide that contains one or more prescribed active ingredients. These active ingredients will be prescribed by order made by the Scottish Ministers. This allows the Scottish Ministers to prescribe ingredients which, for example, they know to have been used in illegal killing of wild birds and animals. Section 15A(2) provides a statutory defence of showing lawful use i.e. that possession of the pesticide was for the purposes of doing anything in accordance with regulations made under section 16(2) of the [Food and Environment protection Act 1985 \(c.48\)](#) or the [Biocide Products Regulations 2001 \(S.I. 2001/880\)](#) or any regulations which replace those regulations. Section 15(3) provides definitions of “pesticides” and “prescribed active ingredient”. It also provides for an order making power empowering the Scottish Ministers to prescribe ingredients of pesticides.
375. [Paragraph 15](#) rationalises the treatment of wild birds, animals and plants, in terms of licensing procedures under section 16 of the 1981 Act. Section 16 of the 1981 Act allows for a variety of otherwise prohibited actions to be authorised on an exceptional basis, by means of a licence issued by, as the case may be, either SNH or the Scottish Ministers.
376. [Paragraph 15\(a\)](#) has the effect of removing provision for the taking of lapwing eggs for human consumption. Licences for this purpose have not in practice been issued for many years and the conservation status of lapwing is such that the taking of lapwing eggs under section 16(2)(b) of the 1981 Act is no longer considered appropriate. Paragraphs 15(b) and (c) make a number of minor changes to subsection (3) of section 16. These reflect the addition of new provisions earlier in the 1981 Act for which licences may need to be considered. Clarifications and minor extensions to the existing terms of section 16(3) are also made. Amongst these is the option to licence the control of protected animals in order to conserve wild birds. This is of particular relevance in the context of concerns about the impact of otherwise protected animals which have been introduced into environments (and in particular onto remote islands) where they are not naturally present. In such situations it may be appropriate to consider the removal, under licence, of the introduced species from the environment on which it is having a detrimental impact.

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377. Paragraph 15(d) makes the granting, under section 16(4), of any licence in relation to birds subject to the requirement that there should be no other satisfactory solution. This reflects the requirements of Council Directive 79/409/EEC (“the Birds Directive”).
378. Paragraph 16 extends the enforcement provisions in section 19 of the 1981 Act. In doing so it builds upon the related amendments already made by the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#) and reflects analogous enforcement provisions found in both section 43 and paragraph 26(7) of Schedule 6 by extending and broadening the enforcement powers available to the police.
379. Paragraph 16(a) aims to clarify the terms of existing section 19(1) of the 1981 Act and enables a constable to search or examine any thing which a person whom the constable suspects with reasonable cause is committing or has committed an offence under Part I of the 1981 Act, may then be using or have in their possession. The amendment extends the existing power of search so that a constable may also search or examine any thing which such a person may have used or may have had in their possession.
380. The effect of the revisions to section 19(1) is to extend the powers of a police officer who has reasonable cause to suspect that any person is committing or has committed an offence to, without any requirement for a warrant, take a range of actions to search for and secure evidence. The powers apply whether or not the identity of the suspected perpetrator is known.
381. The actions which the police officer is entitled to take are:
- to stop and search the suspect, if there are reasonable grounds for believing that evidence of the offence may be found on the suspect’s person;
 - to search for, search or examine any thing which that person may be using, may have used or may currently have, or have had, in his/her possession if there is reasonable suspicion that evidence of the commission of the offence is to be found in or on that thing; and
 - to seize and detain for the purposes of proceedings any thing which may be evidence of the commission of the suspected offence.
382. In addition, the constable has a specific power of arrest, which was provided under the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#).
383. Amendments are made in paragraph 16(b) to section 19(2) of the 1981 Act. The result is that, in order to exercise the powers conferred under subsection (1), a police officer who has reasonable suspicion that an offence is being or has been committed may, under the terms of subsection (2), enter any land other than a dwelling or lockfast premises. This is a power of entry without any requirement for a warrant.
384. The definition of “land” for the purposes of this Act is set out in The Scotland Act 1998 (Transitory and Transitional Provisions)(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 as including any “building and other structures, land covered by water, and any right or interest in or over land”. Access may also be had to any body of water under the provisions of subsection (2) on the basis that the “land” in question includes any substructure below it and any column of water or air above it. It should be noted that access may be had to any building which is not lockfast, provided that building is not a dwelling. The word “dwelling” has been used here in preference to the term “dwelling-house” – found in the existing 1981 Act – in order to clarify that the exclusion applies to any habitation used as a dwelling and not simply to habitations which are “houses”. This is with the aim of ensuring compliance with human rights principles.
385. Access to any lockfast premises or dwelling may only be effected under warrant and paragraph 16(3) updates the terms of section 19(3) of the 1981 Act. Where a warrant

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is issued to search premises or a dwelling, new provision has been made permitting reasonable force to be used in order to enter the premises in question.

386. [Paragraph 16\(d\)](#) makes provisions for new subsections (4) to (8) to be appended to the existing text of section 19 of the 1981 Act.
387. Subsection (4) makes further provision in relation to the validity and expiry of a warrant. A warrant continues in force until the purpose for which it was issued has been satisfied. A warrant may however be time-limited by the sheriff when it is issued. Where this is the case, the warrant ceases to be valid when that time-limit is reached.
388. Subsection (5) places an explicit requirement on any police officer entering land (whether or not on the basis of a warrant) to, if asked, give evidence of their authority to enter the land to the occupier of the land or to anyone acting on behalf of the occupier.
389. Subsection (6) provides that a police officer who enters any land in the exercise of powers conferred by section 19 (whether or not on the basis of a warrant) is entitled to be accompanied by any other person, in order for that person to assist the police officer in the exercise of the powers conferred on him/her. The police officer may also take onto the land any necessary machinery, equipment or other materials and may take and remove samples of any articles or substances from the land. The use of an assistant, machinery and equipment and the taking of samples can, by virtue of subsection (7), be regulated under the terms of a warrant.
390. Where land is unoccupied or the occupier is absent, a police officer who enters the land under section 19 is obliged by subsection (8) to leave the land as effectively secured against unauthorised entry as it was when the police officer entered.
391. [Paragraph 17](#) inserts two new sections into the 1981 Act. Section 19ZC relates to the powers and role of wildlife inspectors and section 19ZD sets out the powers to take samples for DNA analysis.
392. The existing sections 6, 7 and 14 of the 1981 Act provide powers of entry for wildlife inspectors. (The term “wildlife inspector” is newly defined, in section 19ZC(1), as a person authorised as such by the Scottish Ministers). Section 19ZC(2) requires any such authorisation to be in writing and provides that it is subject to any conditions or limitations specified in it. The current sections 6 and 7 of the 1981 Act include a power of entry to dwellings. Section 14 provides the power of entry to land. Section 19ZC complements these existing powers. It is intended to expand and clarify the powers of authorised persons and is intended also to ensure proper compliance with the requirements of human rights legislation.
393. Section 19ZC(3) empowers wildlife inspectors to enter and inspect premises in order to ascertain whether an offence related to a sale, bird registration or non-native species has been or is being committed, provided these powers are exercised at a reasonable time and where required, evidence of authorisation is shown.
394. Section 19ZC(4) provides that no automatic power of entry to a dwelling can be exercised. Entry to a dwelling may only be had, in connection with sections 19ZC(a) to (c), in situations where the dwelling is occupied by people who have:
- submitted applications or obtained licences under section 16 authorising acts relating to the keeping or sale of protected birds, animals and plants (alive or dead);
 - submitted applications or obtained licences to release specimens to the wild in circumstances that would otherwise be prohibited under section 14 of the 1981 Act;
 - applied for or been granted registration documents (for the purposes of section 7 of the 1981 Act) for schedule 4 birds.
395. It is intended that this power of entry will be subject to further, non-statutory, safeguards provided in a non-statutory Code of Practice, copies of which will be available from

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the Scottish Executive, Wildlife and Habitats Division, Victoria Quay, Edinburgh, EH6 6QQ.

396. By virtue of section 19ZC(5), a wildlife inspector can require any specimen to be presented for inspection – wherever it is held – for the purpose of ascertaining whether an offence under section 6,7, 8(1), 9(5), 13(2), 14 or 14A is being or has been committed.
397. Section 19ZC(6) provides that people who have live specimens in their possession or control will be required to assist the inspector so that he can examine the specimen.
398. By virtue of section 19ZC(7) it is an offence to intentionally obstruct a wildlife inspector when that inspector is exercising these powers, or to fail to assist an inspector without reasonable excuse. Such an offence will attract a penalty, of up to level 5 on the standard scale, by virtue of section 21 which is amended by paragraph 19, or imprisonment of up to 6 months unless the offence is committed in relation to an inspector acting under the power to enter and inspect to ascertain whether an offence under section 14 or 14A is being committed. In that case there is also an option of conviction on indictment to imprisonment for up to 2 years or an unlimited fine or both.
399. Section 19ZD introduces powers for wildlife inspectors or constables to require blood or tissue samples for analysis (e.g. of DNA) to be taken from specimens.
400. Section 19ZD(1) applies where a constable suspects with reasonable cause that a specimen, which the constable has found in carrying out powers of search and seizure conferred by section 19, relates to an offence under Part I which is being or has been committed. In that situation, the constable is empowered to require the taking from the specimen a sample of blood or tissue for the purpose of determining its origin, identity or ancestry.
401. Section 19ZD(2) applies where a constable suspects with reasonable cause that an offence under Part I of the 1981 Act is being or has been committed in respect of any specimen. In such circumstances the constable can require any person to make available any other specimen in that person's possession or control which is thought to be or which the constable has reasonable cause to suspect is a specimen which would provide a sample from which the origin, identity or ancestry of the specimen in respect of which it is thought an offence is being committed can be established. This power could, for example, be used in cases where a specimen is claimed to have been bred in captivity from parents which were lawfully held in captivity. DNA testing of the parent birds or animals and comparison with the DNA of the offspring may establish the validity or otherwise of this claim.
402. Section 19ZD(3) empowers a wildlife inspector to require the taking of a sample of blood or tissue from a specimen which the inspector has found in the exercise of the powers of entry and inspection conferred by section 19ZC(3)(a) to (d). The taking of a sample can be undertaken for the purpose of ascertaining whether an offence under section 6, 7, 9(5), 13(2), 14 or 14A is being or has been committed.
403. Section 19ZD(4) empowers a wildlife inspector for the purpose of ascertaining whether an offence under section 6,7,9(5), 13(2), 14 or 14A is being or has been committed, to require any person to make available any other specimen in that person's possession or control which is thought to be or which the inspector has reasonable cause to suspect is a specimen which would provide a sample from which the origin, identity or ancestry of the specimen in respect of which it is thought an offence is being committed can be established.
404. The powers to require samples to be taken to determine the identity or ancestry of a live specimen (bird, animal or plant) is restricted by section 19ZD(5) by a qualification that it is only competent provided the person taking it considers that doing so will cause no lasting harm to that specimen. Section 19ZD(6) provides that for live birds and animals, the sample must always be taken by a veterinary surgeon.

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405. Section 19ZD(7) requires any person who has possession or control of a specimen (being a live bird or animal) from which a sample is to be taken to give such assistance to the person taking the sample as is reasonably required by that person.
406. Section 19ZD(8) enables a constable who is entering premises by virtue of the power conferred by section 19(2) and any wildlife inspector who is entering premises by virtue of the power conferred by section 19ZC(3), to take a veterinary surgeon with them where there are reasonable grounds for believing that such a person will be required for the exercise on the premises of powers under section 19ZC(1), (2) or (3) and (4).
407. The Control of Trade in Endangered Species (Enforcement) Regulations 1997 (“COTES”) already contain powers for wildlife inspectors to take samples, in certain circumstances, from species listed in consequence of Council Regulation 338/97/EEC on the protection of species of wild fauna and flora by regulating trade.
408. By virtue of section 19ZD(9) it is an offence to intentionally obstruct a wildlife inspector who is exercising the power to require a sample under section 19ZD(3); or to refuse without reasonable excuse to make a specimen available if required by virtue of the powers conferred by sections 19ZD(2) or (4), or to fail without reasonable excuse to assist an inspector or constable. A penalty of up to level 5 on the standard scale will apply.
409. [Paragraph 18](#) makes minor changes to section 20 of the 1981 Act. These provide for the overall time limit within which a prosecution must be brought to be extended from two to three years. Provision is also made for situations in which a continuous contravention of the law occurs. These changes are consistent with the provisions in relation to SSSIs in section 46(3) of the new Act.
410. [Paragraph 19](#) amends section 21 of the 1981 Act. It builds upon the amendments made the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#) and reflects the new sections and offences created and inserted into the 1981 Act via Schedule 6 of the new Act. The 2003 Act provided that fines of up to level 5 and/or the possibility of a custodial sentence of up to six months would be available for all Part I offences, with the exception of offences provided for in section 14 relating to non-native species. Paragraph 19 alters that situation by providing for an exceptional statutory maximum of £40,000 in cases where a person is convicted in summary proceedings of offences relating to non-native species. This exceptional maximum reflects the general approach to other serious environmental offences, including those involving damage to SSSIs or pollution offences, and recognises both the seriousness of the ecological damage and the economic cost which can potentially result from the release or escape of invasive non-native species.
411. [Paragraph 20](#) is intended to simplify the terms of section 22 of the 1981 Act which confers powers on the Scottish Ministers to update the Schedules to that Act. Specific provision is made to require the Scottish Ministers to consult SNH before making any alteration to the schedules. This is intended to ensure that changes will be informed by sound nature conservation advice and taken for nature conservation reasons. Variations to the Schedules are to be made (by virtue of section 26 of the 1981 Act) by statutory instrument, subject to annulment by the Scottish Parliament.
412. [Paragraph 21](#) makes consequential changes to section 26 of the 1981 Act and reflects the changes effected in relation to sections 11 and 22 of that Act.
413. [Paragraph 22](#) provides that, in future, regulations which implement Council Directive 92/43/EEC (“the Habitats Directive”) and subsequent Directives will be able to create offences, which on summary conviction attract a custodial sentence of up to six months. This overrides paragraph 1(1)(d) of Schedule 2 to the [European Communities Act 1972 \(c.68\)](#), (which would otherwise prevent the regulations from providing a penalty of more than three months’ imprisonment). The intention of the provision is to enable penalties in the Conservation (Natural Habitats &c.) Regulations 1994 covering wildlife

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offences to be brought into line with analogous offence provisions in the 1981 Act, as amended by the [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#) and the new Act. Changes to the 1994 Regulations will be effected separately by further regulations.

414. [Paragraph 23](#) amends section 27 (interpretation) of the 1981 Act and clarifies a number of points of detail. Sub-paragraph (a) clarifies the definition of “poultry” to confirm that it applies to the domestic (and not to the wild) forms of the species set out in section 27(1).
415. The definition of wild bird is extended in order to encompass all species, including sub-species, which are naturally occurring within the European territories of member states of the European Union. This reflects obligations arising under Council Directive [79/409/EEC](#) (“the Birds Directive”) and means, *inter alia*, that offences in the 1981 Act in relation to “wild birds” will apply in relation to species which are found in other member states but not in Great Britain. In particular, it will be an offence in Scotland to possess any bird or egg of such a species unless the requirements of section 1 of the 1981 Act, as amended, are satisfied.
416. Subparagraph (c) makes a minor amendment to the definition of ‘wild plant’ in section 27(1). “Wild plant” includes fungi (as well as non-vascular plants, such as bryophytes and stoneworts). The presence of fungi and non-vascular plants on Schedule 8 to the existing Act already implies that extended meaning, but this provision puts the matter beyond doubt.
417. [Paragraph 23\(3\)](#) also provides that an animal is only to be regarded as bred in captivity where that animal was bred from parents which were themselves legally in captivity at that time. This definition works in conjunction with the new provision in section 10(3) (ii) of the 1981 Act to ensure that a person cannot escape prosecution for the offence of taking protected animals from the wild or selling protected animals simply because he or she has been able to breed from specimens which were illegally obtained. The offspring of such illegal specimens remain themselves illegal and may not, for example, be sold.
418. [Paragraph 23\(4\)](#) inserts a new subsection (3ZA) in section 27 of the 1981 Act, extending protection, for the purposes of the 1981 Act, to all stages in the biological life cycle of wild plants, with the exception of seeds and spores. This provides that a plant does not in fact have to be “growing” (in the sense of the popular understanding of the term) at a particular time in order to enjoy protection. Dormant phases in the life cycle of a plant and bulbs, corms and rhizomes from which the more visible part of a plant will emerge are protected in the same way as for a plant at any other point in its life cycle.
419. [Paragraphs 24 and 25](#) create two new Schedules to the 1981 Act, in consequence of the new provisions inserted at sections 1(1)(ba) and 1(5B) by paragraph 2 of Schedule 6. Only one species has been included on Schedule A1 and 1A, but the Scottish Ministers have power to include further species on those Schedules by order.