

NATURE CONSERVATION (SCOTLAND) ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Protection of Wildlife Schedule 6

Protection of Wildlife

Wildlife and Countryside Act 1981 (c.69)

352. **Paragraph 1** makes provision for Part I of the 1981 Act to be amended as set out in paragraphs 2 to 25 of schedule 6. Attached to these Explanatory Notes is an annex containing a consolidated text of Part I of the 1981 Act for guidance purposes only.

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

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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 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.

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.

Protection of animals: offences

363. [Paragraph 8](#) amends the law in relation to the protection of wild animals by means of amendments to section 9 of the 1981 Act. The key changes include:
- new offences of recklessly carrying out acts prohibited by section 9, such as the killing, injuring or taking of any wild animal listed on Schedule 5.
 - the existing statutory defence to a charge of possessing a Schedule 5 animal (whether alive or dead) or anything derived from such an animal is amended. A person in possession of a protected animal, or anything derived from such an animal, must be able to show that, if the specimen originated in Scotland, it was acquired without contravening the [Conservation of Wild Creatures and Wild Plants Act 1975 \(c.48\)](#) or the 1981 Act. 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; and
 - a new offence of intentionally or recklessly disturbing or harassing whales, dolphins and porpoises (collectively referred to as cetaceans) or basking sharks. The provision in section 51 of the new Act for a Scottish Marine Wildlife Watching Code should be read in conjunction with the new criminal offence inserted at section 9(4A) of the 1981 Act. The new Code is likely to provide specific guidance on actions which are likely to disturb or harass marine wildlife, including cetaceans and basking sharks.
364. 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 9.

365. **Paragraph 9** amends section 10 of the 1981 Act and adjusts the circumstances in which the existing “incidental result” defence may be used in cases where the provisions of section 9 have been contravened. The defence can now only be deployed where the conditions set out in the new subsection (3A) are met.
366. In particular it must be shown firstly that the unlawful act (for example, the killing or taking of a protected animal) 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 (including, for example, disturbance to resting place used by the animal) once it became apparent that a contravention of the provisions of the 1981 Act had occurred. In addition, paragraph 9 amends section 10 by providing for a specific defence in relation to the possession or sale of protected animals or parts derived from such animals. A definition of the term “bred in captivity” is inserted into section 27 of the 1981 Act by paragraph 23 of Schedule 6. The effect of the provision and the definition is to ensure that a person who illegally removes protected animals from the wild for the purposes of breeding from them, cannot pass off their offspring as legal specimens. If the parents were not lawfully in captivity it remains an offence, for example, to possess or sell the offspring.
367. **Paragraph 9(c)** supplements the existing the provisions of sections 10(4) and 10(6) of the 1981 Act. Section 10(4) allows action to be taken against protected animals in certain special circumstances and section 10(6) restricts the use of that provision. New subsection (6A) further regulates the use of the power in 10(4) by specifying that any action taken under 10(4) must be reported to Scottish Ministers as soon as reasonably practicable after the action is taken.
368. **Paragraph 10** amends section 11 of the 1981 Act and further regulates certain methods of killing or taking wild animals, including in particular the use of snares. The key changes effected by paragraph 10 are:
- a new power for the Scottish Ministers to ban any type of snare (in addition to self-locking snares, which are already illegal) by order. This allows the flexibility to ban snares which may not be readily defined as free-running or self-locking;
 - a new offence of setting in position or otherwise using any snare which is, on the basis of its design and/or the manner in which it used, calculated to cause unnecessary suffering;
 - a modified offence, in section 11(2)(a), of setting in position any snare, trap, electrical device or poison which is likely (rather than calculated) to cause injury to animals listed in Schedule 6 to the 1981 Act;
 - a change to the requirement to inspect all snares at least once every day so as to ensure that more than 24 hours may pass between any two sequential inspections;
 - a new requirement, when carrying out such an inspection, to release or remove any animal caught in the snare, whether it is alive or dead. Failure to remove an animal is an offence in its own right, but the presence of a dead animal in any snare, if it is clear that the animal has been there for more than 24 hours, may also constitute evidence of an offence under section 11(3);
 - a new offence of possessing a self locking snare, without reasonable excuse. A reasonable excuse in this context may, for example, include a situation in which a gamekeeper or police officer comes across a self-locking snare and removes it, either for destruction or to preserve it as evidence. In such circumstances the possession of a self-locking snare should not constitute an offence, so long as the

illegal snare was destroyed as soon as reasonably practicable. Any person who wishes to possess self-locking snares (for example, as exhibits or for educational purposes) can apply for a licence under section 16(3) of the 1981 Act;

- a new offence of selling, or offering or exposing for sale, any self-locking snare (or any other type of snare which has been banned by the Scottish Ministers). “Sale” is defined in section 27 of the 1981 Act as including hire, barter or exchange. There is no reasonable excuse defence for the sale of an illegal snare;
- two new offences of being in possession of a snare on any land, and of setting a snare on any land, where the permission of the owner or occupier of that land has not been obtained. Reasonable excuse is a defence. These new provisions allow the owner or occupier of any land to determine his or her own policy in relation to snares. It will be possible, for example, for the owner or occupier to restrict the use of snares and to allow only named, trusted persons to make use of snares. It would also be possible for the owner or occupier to ban the use of snares entirely on their land. Prior to these new provisions it has not been illegal to set snares on another person’s land in order to control foxes and other pest species;
- a new offence of using a snare otherwise than in accordance with any procedures or requirements specified by the Scottish Ministers in an order, or of knowingly causing or permitting any other person to do so. An example of requirements which could be specified is that all legal snares should have a tag or other mark identifying the person who set the snare; and
- a new power to specify technical criteria and definitions and to specify in further detail circumstances in which an offence is to be regarded as having been committed. Amongst other things, this power allows a definition of the term “self-locking” to be set down in legislation, should this be considered appropriate.

Protection of Plants: Offences

369. **Paragraph 11** amends section 13 of the 1981 Act. It amends the law in relation to the protection of wild plants by introducing offences of recklessness and of knowingly causing or permitting an act to be carried out. It also lists certain qualifications which must be met by a person (accused of having committed an offence related to wild plants), who wishes to use the statutory defence provided under section 13(3) of the 1981 Act. The key changes effected by paragraph 11 are:

- a new offence of recklessly carrying out acts which are prohibited by section 13(1);
- additional protection for Schedule 8 plants. The new provision at section 13(1)(a) (ii) makes it an offence, in particular, to pick or destroy seeds or spores which are attached to such plants. The collection of seed may therefore take place only under licence and with the permission of the owner or occupier of the land on which they are growing. It should be noted that the term “wild plant” as used in the 1981 Act includes fungi and non-vascular plants (bryophytes, lichens, stoneworts and algae), hence the reference to spores as well as seeds;
- a revision of the existing statutory defence that an act, which results in unlawful damage to wild plants, was the incidental result of a lawful operation. The changes under this sub-paragraph provide that, if the unlawful damage caused by an unlawful act is the incidental result of a lawful operation or activity, a defence can now only be relied upon where a person took reasonable precautions for the purpose of avoiding carrying out the unlawful act or that the person did not and could not reasonably have foreseen that such action would result in an offence being committed and that steps were taken to minimise the damage once it became apparent; and

- the new offence of knowingly causing or permitting another person to carry out an act which is unlawful in relation to wild plants. This principle is already found elsewhere in the 1981 Act but has now also been inserted into section 13.

Non-native species

370. The provisions of section 14 of the 1981 Act, regulating the keeping and release of non-native species, have been extended. The changes made paragraph 12 of by Schedule 6 include:
- provision adding hybrids of non-native animal species to the terms of section 14. In this context “animal” also includes birds. It is therefore an offence not only, for example, to release an animal which is a non-native but also to release any native species which has been crossed with a non-native animal;
 - provision extending the prohibition on the release of non-native animals included in Part I of Schedule 9 to situations in which such an animal is allowed to escape from captivity. The reference to “from captivity” replaces the existing reference in the 1981 Act to allowing an animal to escape “into the wild”. This rather narrower term is intended to tighten up controls on non-native animals; and
 - the reference to “the wild” is retained in relation to all plants specified in Schedule 9 and a new offence of planting or otherwise causing a hybrid of a Schedule 9 plant to grow in the wild is created.
371. [Paragraph 13](#) of Schedule 6 provides a new power for the Scottish Ministers to prohibit the sale, or the offering or exposing for sale, of any non-native bird, animal or plant they may specify and to prohibit the publication of advertisements offering to buy or sell any such bird, animal or plant. The term “sale” includes (by virtue of section 27 of the 1981 Act) the hire, barter or exchange of non-native species.
372. The Scottish Ministers may prohibit the sale etc. of specific non-native species by listing them in an order made under new section 14A, inserted into the 1981 Act by paragraph 13. The order may make the inclusion of any species subject to such exceptions as the Scottish Ministers believe to be appropriate and may be applied only to certain areas of Scotland and its application restricted to particular times of the year.
373. [Paragraph 13](#) also inserts new section 14B which provides a specific statutory power for the Scottish Ministers to issue guidance (or approve guidance issued by others) in relation to non-native species. Such guidance will provide recommendations, advice and information in relation to non-native birds, animals and plants. Although failure to comply with guidance does not in itself constitute a breach of legal duty, the guidance is admissible in evidence in the event of any criminal or civil proceedings. Failure to comply with, or to take adequate account of, the guidance can form part of the evidence presented by the prosecution in relation to any offence under sections 14 and 14A of the 1981 Act. An example might be where the guidance provides clear advice on avoiding the release of non-native species and that advice has demonstrably not been followed.

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.
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.

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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 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

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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 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.
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 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.

Protection of Badgers Act 1992 (c.51)

420. Paragraph 26 amends the Protection of Badgers Act 1992. The intention is to clarify certain aspects of the existing legislation; expand the degree of protection afforded to badgers and increase the penalties available in cases involving badger-baiting and other acts of cruelty. It also brings key aspects of the 1992 Act into line (in relation in particular to the enforcement powers available to the police) with the provisions of section 43 of the new Act and the amended section 19 of the 1981 Act. The principal effects of paragraph 26 are set out below.

- Paragraphs 26(2) and (8) make provision in relation to attempts to commit offences. A person who attempts to commit an offence under the 1992 Act is guilty of that offence and is liable to be proceeded against and to be punished accordingly. The principal provision is new section 11A, inserted into the 1992 Act by virtue of paragraph 8. The new section is closely modelled on existing section 18 of the 1981 Act.
- Minor changes have been made to section 3 and elsewhere with the intention of improving consistency with other wildlife legislation. Thus, in section 3, a provision is inserted to make it an offence to knowingly cause or permit an action which is unlawful. This reflects similar amendments being made via the new Act to the 1981 Act.
- The existing 1992 Act provides a number of defences to charges of taking or killing a badger. Changes have been made by paragraphs 26(4) to (6), which bring the terms of the 1992 Act closer to the comparable existing provisions in the 1981 Act. This is intended to aid enforcement and to limit the scope for abuse of the existing statutory defences.
- A specific power of arrest has been provided via paragraph 26(7). This means that the arrest powers available under the 1992 Act are the same as those available to the police in dealing with other wildlife crimes. The powers of entry and search available to the police, together with the safeguards governing the use of those powers, have also been brought into line with those in section 19 of the 1981 Act (as amended).
- Penalties under the 1992 Act have been upgraded by paragraph 26(9) to reflect what can be perceived to be the particularly abhorrent nature of badger digging and baiting offences. For those offences which are linked to activity of this type (including the related offences of causing a dog to enter a sett and selling a live badger) the option of prosecution on indictment has been provided. This brings with it a maximum 3 year jail term and/or an unlimited fine. Other penalties (e.g. for selling a live badger) have also been upgraded in relation to prosecutions under summary procedure and will now attract a potential 6 month sentence as well as a level 5 fine. This is consistent with the summary penalties available under the 1981 Act.
- The length of time available to the prosecutor for bringing a case is being increased for the majority of offences. This change is effected by paragraph 26(10). This will bring arrangements into line with both the new Act and the 1981 Act. The

*These notes relate to the Nature Conservation (Scotland) Act
2004 (asp 6) which received Royal Assent on 11 June 2004*

Fiscal must bring a prosecution within 6 months of the point at which sufficient evidence comes to his or her attention, subject to a maximum of 3 years from the date of commission of the offence. A provision clarifying the situation in cases of continuous contravention has also been provided.

- The liability of corporate bodies and their office holders under the 1992 Act has been clarified, also in paragraph 26(10) on a similar basis to elsewhere in the new Act.