

# NATURE CONSERVATION (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1 - Biodiversity**

##### *Section 1 Duty to further the conservation of biodiversity*

23. *Section 1* places a general duty on public bodies and office-holders to further the conservation of biodiversity.
24. Public bodies and office-holders (collectively referred to in these Notes as “public bodies”) are defined in section 58(1) as including all bodies which carry out functions of a public nature. Courts, tribunals or other bodies exercising judicial power are not, however, public bodies for the purposes of the Act. The Act extends to all public bodies which operate in Scotland.
25. All public bodies are required to comply with the duty when exercising any functions. The duty does not, however, override the proper exercise of those functions. This means that public bodies have a legal obligation to further the conservation of biodiversity in the course of carrying out their functions.
26. In exercising the duty, public bodies must have specific regard to the 1992 Rio Convention on Biological Diversity and to any Scottish Biodiversity Strategy designated by the Scottish Ministers under section 2 of the Act. Whilst compliance with the duty is obligatory, public bodies may have significant discretion in relation to the particular action which they consider to be necessary in any particular situation. The new duty is not intended to be narrow or prescriptive, but the purpose of it is to place the onus on public bodies to take direct responsibility for the impacts which their policies and operations may have on the natural environment.
27. Although the Act itself confers no extraterritorial powers, it should be noted that the duty to conserve biodiversity is not limited solely to the biodiversity of Scotland. It applies to biodiversity in a global sense and public bodies in Scotland do therefore need to consider the effect of decisions taken, or activities carried out, within Scotland insofar as those decisions or activities may have implications in relation to biodiversity conservation outwith Scotland. This might be illustrated by the example of a public body in Scotland which is considering whether to purchase products made from materials sourced from a tropical rainforest. The biodiversity implications of that purchasing decision would need to be considered by the public body.

##### *Section 2 Scottish Biodiversity Strategy*

28. This section places a specific duty on the Scottish Ministers to designate a strategy for the conservation of biodiversity, to be known as the Scottish Biodiversity Strategy. The designated Strategy may consist of a number of subsidiary individual strategies, should this be deemed appropriate by the Scottish Ministers.

29. Once designated, the Strategy must be published. The Scottish Ministers must then lay a report on its implementation before the Scottish Parliament every three years. The first report must be made within three years of the date on which the Strategy is formally designated for the first time.
30. In addition, the Scottish Ministers must publish lists of particular species and habitats which they consider to be of principal importance in relation to conservation of biodiversity. The lists are to be published within one year of the formal designation of the Scottish Biodiversity Strategy and the Scottish Ministers are empowered to review, revise and republish the lists as they consider necessary.

## **Part 2 – Conservation and Enhancement of Natural Features**

### ***Chapter 1 – Sites of Special Scientific Interest***

#### **Notification of sites of special scientific interest**

##### ***Section 3 Duty to give notification of sites of special interest***

31. Subsection (1) places a duty on SNH to notify, as a site of special scientific interest, any land which it considers to be of special interest by reason of its flora, fauna, geology or geomorphological features. These features are the “natural features” of the land and are defined as such, for the purposes of the Act, in subsection (2). It might be noted that in common usage the abbreviation “SSSI” is used for “site of special scientific interest” and that practice has been adopted in these Notes.
32. Where it considers a site to be of special interest SNH must notify that fact to the interested parties listed in section 48(2). Procedures to be followed by SNH in notifying an SSSI are set out in schedule 1 to the Act which is introduced by section 10.
33. Subsection (3) qualifies the duty in subsection (1) by requiring SNH to have regard to certain criteria and guidance when reaching a view on whether land is of special interest. Such guidance, covered by paragraph (b) of subsection (3), may be a formal document setting out SSSI selection criteria and issued under section 54. But guidance to SNH is also provided by subsection (3)(a). This requires SNH to have regard to the contribution which any individual SSSI is likely to make to the representativity of the overall SSSI series in Scotland.
34. When taken as a whole, the SSSIs notified in Scotland will form a coherent series of protected sites. To be properly representative of the diversity and geographic range of the natural features of Scotland it is considered that this series could, for example, include, at one end of the spectrum, sites which are exceptionally rare or unique and, at the other, an adequately representative sample of sites which are more widespread or common.
35. Subsection (3)(a) also requires SNH to give consideration to the Scottish contribution to the conservation of natural features at the British and European levels. In this sense the Act recognises that Scotland has a particular responsibility in relation to the conservation of sites, species and habitat types which are characteristic of, and more prevalent in, the more northern parts of the British Isles but which are not necessarily well represented elsewhere in Great Britain or the European Union.
36. The fact that a particular type of site may be fairly common in Scotland but unusual at a British or European level is a factor which SNH must take into account. In particular this means that SNH, when evaluating the relative interest of a site, should give consideration to the status and conservation requirements of relevant species or habitat types against a wider British or European backdrop, as well as considering them within the context of Scotland.

37. On that basis a properly representative series could legitimately include a relative over-representation of certain features in relation to the natural heritage of Scotland, in order to ensure that an adequate Scottish contribution is made to the conservation of such natural features in Britain or Europe. It should not however under-represent natural features which are characteristic of Scotland simply because such features are common elsewhere. To do so would result in a series which would not be properly representative of the natural features found in Scotland, and such a series would therefore be at odds with the requirements of section 3(3).
38. Subsection (4) specifies that the notification given to interested parties as a consequence of the duty in subsection (1) must be accompanied by a number of supplementary items which specify the extent and special characteristics of the site, as well as providing such other general information as SNH believes appropriate. The accompanying documentation must in particular:
- describe the site;
  - specify the natural features of the site which are regarded as being of special interest;
  - list any acts or omissions which are likely, in the opinion of SNH, to be damaging to those features of interest; and
  - specify the location and boundaries of the site and provide a map delineating the site.
39. Subsection (5) defines a shorthand, technical term by which the notification given to the interested parties by virtue of subsection (1) *plus* the detailed documentation specified in subsection (4) is to be known for the purposes of the Act. These items, taken together, constitute the “SSSI notification” for the area of land in question.
40. Subsection (6), in conjunction with section 48(2), defines the point in time when the SSSI notification has effect. From that point the site is formally an SSSI and benefits from the protective mechanisms set out in the subsequent provisions of the Act.
41. Subsection (7) provides a shorthand, technical term for the potentially damaging acts or omissions which are listed in the SSSI notification by virtue of subsection (4)(a)(iii). These acts or omissions are to be known as “operations requiring consent”. This term is further abbreviated for the purposes of these explanatory Notes as “ORC”.

#### ***Section 4 Site management statements***

42. This section requires that each SSSI notification must be accompanied by a site management statement prepared by SNH. The site management statement does not form part of the SSSI notification, but is a separate document which provides practical guidance to the owners and occupiers of the SSSI in relation to conservation and enhancement of the protected natural feature. It may also contain other information, including information which promotes the understanding and enjoyment of the natural feature by the general public.
43. The role of the site management statement is to complement and expand upon the rather technical and scientific information in the SSSI notification. To that end, SNH can use a site management statement to provide information and advice, in non-scientific language wherever possible, setting out how land managers can best secure the long-term protection of the site. At a practical level it will, for example, allow SNH to assist land managers in planning and carrying out operations on the site in ways which are consistent with, and sensitive to, the conservation needs of the SSSI. Overall, the site management statement is intended to assist owners and occupiers, and their employees or contractors, to manage the site responsibly and in the most effective manner.

44. SNH can make use of site management statements as evolving documents. The provisions in subsections (3) and (4) enable the statements to be reviewed and updated in a manner which ensures that they continue to fulfil their purpose effectively. That process of review may be initiated either by SNH or by the owner or occupier of land within the SSSI.

### ***Section 5 Enlargement of sites of special scientific interest***

45. This section permits SNH to enlarge an existing SSSI, by adding an additional area of land (the “extra land”) to the original site. SNH is permitted to do so only where the combined site, comprising the original site and the extra land, can be regarded as being of special interest. The principal purpose of this provision is to enable land, which ought reasonably to have been included within the original site at the time when that original site was notified, to be incorporated within the site at a later date.
46. This might take place, for example, when new data come to light demonstrating the value or importance of the extra land – whether in its own right as land of intrinsic special interest or as land which is not perhaps inherently of special interest in itself, but which is demonstrably important to the effective conservation and management of the existing SSSI. The procedure in section 5 enables this to happen without having either to notify the additional land as an entirely separate SSSI or to denotify the original site and then re-notify the whole of the larger area from scratch. The procedure is sufficiently flexible to cover both a significant enlargement of an SSSI (for example, where a significant area of extra land of special interest is added) or a minor outward adjustment to the boundary of the site (for example, where the size of the site is increased only in a minor sense, perhaps for reasons associated with the effective management of the existing site). It should be noted that changes and adjustments which decrease the size of the SSSI are covered by section 9.
47. Any debate about the merits or otherwise of the enlargement must relate to the case for including the *extra* land. Section 5 does not allow the case for the original site to be debated as part of the process for including the land. Notification of the change is therefore confined solely to interested parties (see section 48(2)) in relation to the extra land. Representations from interested parties are similarly confined to those which are relevant to the case for or against inclusion of the extra land. Representations in relation to the original site (such as, for example, arguments putting the case for its denotification) are not competent in this context.
48. The procedures associated with enlargement are otherwise essentially the same as for initial notification and the arrangements set out in Schedule 1 again apply. In addition, SNH must have regard to the selection criteria prescribed in section 3(3)(a) and in guidance under section 54 in making the case for the combined area of land, just as it would for a new SSSI.
49. Notification under this section must update the original SSSI notification to properly reflect the natural features of the combined land and the guidance provided to land managers via the site management statement must likewise be updated in order to cover the enlarged site. Provision for updating the ORC list in the SSSI notification covering the combined site is made separately in section 6 and other variations to the notification can be made separately using the power conferred by section 8.

### ***Section 6 Review of operations requiring consent***

50. This section regulates any review of the ORCs listed in an SSSI notification. The times at which the process of review and revision can be carried out are subject to the constraints which are set out in subsections (1) and (2).
51. Subsection (1) gives SNH the power to review the ORC list when it thinks fit and obliges it also to do so on the request of any owner or occupier of the site. Subsection (2), however, limits the ability of SNH to carry out such a review more frequently than

every 6 years, unless it has first obtained the consent of every owner or occupier. Thus, SNH can neither initiate reviews nor be obliged to carry out a review by an owner or occupier outwith the 6 year cycle, unless it has secured agreement from the owners and occupiers of the land affected.

52. Subsection (2) should be read in conjunction with the transitional provisions in paragraphs 3(a) and 5 of Schedule 5. These define the date on which the first 6 year period commences in relation to existing SSSIs and make special arrangements allowing SNH to conduct a structured programme of review of ORC lists during that initial 6 year period. SNH has been specifically tasked by the Scottish Ministers with reviewing those ORC lists which have been derived (as a consequence of paragraph 3(b) of schedule 5) from the PDO (“potentially damaging operations”) lists used for SSSIs under the 1981 Act. That review is to be undertaken in line with the policy that the new ORC lists should be more closely targeted and should deal with credible potential threats to the site, rather than (as has tended to happen in the past) simply listing all activities which might, theoretically, damage the site. Reserve powers exist, in section 7 and by using nature conservation orders, to cover the rare situations where activities which are genuinely detrimental to the SSSI interest have not been listed on an ORC list.
53. The 6 year period between ORC reviews reflects the existing site condition monitoring programme, which assesses the conservation status and condition of natural features across the SSSI series. It is this programme which yields the principal data which are required to inform a major review of the ORC list. There is nothing however to prevent more frequent reviews where there is mutual agreement between SNH and the owners and occupiers of the site that it would be sensible to do so.
54. Subsection (3) specifies that agreement to a review is given by owners and occupiers where *either* every owner and occupier explicitly consents *or* no reasonable objection to the proposal is received within 28 days. Where there are multiple owners and occupiers on a site and one individual seeks, without good cause, to block a review for which there is clear majority support amongst other owners and occupiers, it is unlikely that this will be regarded by SNH as a “reasonable objection”.
55. Subsection (4) enables SNH, in carrying out a review of the list of ORCs, also to review existing consents which it has given under section 16 of the Act allowing operations specified on the ORC list to be carried out. This is because a review of the ORC list may substantially alter that list and the detail of the particular operations specified in it, in order to ensure the protection of the site. Since ORC consents work, in practice, to modify the effect of the ORC list, it would be difficult to review that list without also considering the implications of existing consents. SNH may consider it would also be undesirable for consents to remain in place where it is clear that the operation is damaging the site and the consent is no longer consistent with the entry on the ORC list to which the consent originally related. Section 16 makes provision for the subsequent modification or revocation of ORC consents following a review under section 6(4).
56. Subsection (5) provides that SNH must amend the ORC list for any site where, on completion of an ORC review, it is of the opinion that operations should be added to or removed from the list or where it believes that an existing entry should be modified.

### ***Section 7 Addition or modification of operations requiring consent: urgent situations***

57. This section sets out the detail of a special procedure whereby SNH may, having obtained the consent of the Scottish Ministers, alter an ORC list for a site with immediate effect. This is an emergency measure which allows an unlisted operation to be added to the ORC list at very short notice where it becomes apparent that damage to the site may result if the unlisted operation is carried out. SNH may also modify any existing entry on the ORC list in the same way (so that, for example, the existing entry is extended sufficiently to cover the operation which is posing a threat to the site).

58. SNH is limited in its power to change the ORC list on an emergency basis by subsection (2). This requires SNH to make a case to the Scottish Ministers explaining why it considers the alteration to the ORC list is necessary and why it considers the situation to be one of urgency. SNH cannot make the change to the ORC list unless the Scottish Ministers consent.
59. The effect of a change to the ORC list by means of section 7 is that the owner or occupier will be required to seek consent from SNH for an operation which may have previously been lawful. On receipt of an application for consent SNH may then be willing to allow the operation to proceed subject to conditions, or it may refuse consent. Applications for consent to carry out ORCs are dealt with in section 16 and appeals procedures are set out in section 18.

### ***Section 8 Variation of SSSI notifications***

60. This section enables SNH to vary certain aspects of the SSSI notification following the point at which the SSSI notification, and therefore the SSSI, has been confirmed under the terms of paragraph 10 of Schedule 1.
61. This section allows SNH to vary the description of the land and the list of features of special interest, as well as any miscellaneous “other information” contained in the SSSI notification by virtue of section 3(4)(a)(iv). It does not however allow SNH to vary the boundary of the SSSI (e.g. by enlarging the site) or alter the list of ORCs for the site. Separate procedures are provided in sections 5 and 6 in relation to these components of the SSSI notification.

### ***Section 9 Denotification of sites of special scientific interest***

62. This section provides a process by means of which an existing SSSI (or any part of an existing SSSI) may be denotified. The procedure set out in this section is in essence the reverse of the notification process specified in section 3. SNH must first determine that a site (or part of a site) is no longer of special interest, having applied essentially the same criteria as used for site selection and notification and restated in section 9(3). This includes a requirement to consider the contribution which the site makes to the SSSI series as a whole, both in relation to the natural features of Scotland and to those of Great Britain and of the member States of the European Union.
63. Having determined that the site, or part of the site, no longer satisfies those criteria, SNH must then give a revocation or modification notification to the interested parties in the same way as for an initial notification. In the case of a denotification, however, the information given to the interested parties, rather than detailing the special interest of the site, must set out SNH’s reasons for regarding the site or part of it as no longer being of special interest.
64. Where part only of the site is to be denotified, the interested parties are those individuals and bodies specified in section 48(2) who have an interest in relation to the particular part of the site which is to be denotified. SNH is not required to notify parties who have an interest in relation to other parts of the site only, although section 48(2)(k) gives it power to do so (and to inform other individuals and organisations who are not otherwise interested parties) where it may be appropriate to inform a wider audience of the proposed change. As with enlargement (see section 5), the denotification process is sufficiently flexible to cover scenarios ranging from the denotification of an entire site through to minor adjustments to the boundary of an SSSI.

### ***Section 10 Notifications relating to sites of special scientific interest: procedure***

65. This section introduces Schedule 1, which sets out procedures to be followed in relation to the notification of SSSIs under section 3(1), and their subsequent enlargement (section 5) or denotification (section 9).

#### ***Schedule 1***

## ***Notifications relating to sites of special scientific interest: procedure***

### **Application of Schedule**

66. [Paragraph 1](#) applies Schedule 1 to the notification of SSSIs under section 3(1), the notification of enlargements under section 5 and the denotification of SSSIs under section 9.

### **Publication**

67. [Paragraph 2](#) ensures that SNH must publish information describing the general effect of notifications under sections 3(1), 5(1) and 9(1). The objective is to ensure that the general public should reasonably be aware that an SSSI is being created, enlarged or removed. The minimum requirement is that information should be published in a local newspaper circulating in the area in which the SSSI is situated. SNH also has discretion as to other means of publicising the notification. The SNH website could, for example, provide a key mechanism for making such information publicly available. This provision allows SNH to give consideration to and to use other appropriate means designed to bring notifications are brought to the attention of a wider audience.

### **Content of notification**

68. [Paragraph 3](#) details the information which must be given to the interested parties when SNH provides notification of an SSSI, its enlargement or denotification and which must also be contained in the related notice required under paragraph 2.
69. It is a requirement of paragraph 3 that any such notification, and any notice published under paragraph 2 in the press, on the internet or elsewhere, must name a place where the full notification can be inspected free of charge at any reasonable time and from where a copy of the relevant documentation can be obtained or purchased.
70. [Paragraph 3\(c\)](#) ensures that SSSI notifications, notifications of enlargement and denotifications, and related notices give information about the right to make representations to SNH. The formal date of notification is defined in section 48(2) and the deadline for the submission of representations cannot be less than 3 months after this date. SNH must also specify the manner in which representations are to be made (including, for example, the address to which they are to be sent and whether representations can be made by e-mail as well as by letter).

### **Confirmation or withdrawal of notification**

71. [Paragraph 4](#) requires that an SSSI notification, notification of enlargement or denotification must be formally confirmed or withdrawn by SNH within one year of the date on which it was given. Provision is made to allow the period of one year to be extended in accordance with arrangements set out in paragraph 12. SNH is obliged to consider any representations which have been made in relation to the notification before confirming it. As noted above, representations must be made within the period specified in the notification and in the notice given under paragraph 2 which, by virtue of paragraph 3(c), cannot be less than 3 months.
72. [Paragraph 5](#) deals with the situation in which SNH fails to confirm a notification within the one year period (or within any period as extended by virtue of paragraph 12). If a notification is not formally confirmed by the deadline, it is to be treated as if it had been withdrawn by SNH on the day on which the period allowed for confirmation expired. In such circumstances the notification no longer has any effect and the SSSI ceases to exist. It should, however, be noted that a failure to confirm the notification does not invalidate any effects it may have had during the period prior to non-confirmation – for example, if decisions under regulatory regimes or the planning system had been influenced by the existence of the SSSI.

### **Modification of notification**

73. Paragraphs 6 to 8 enable SNH to modify a notification prior to confirmation. Notifications may be modified by amending the matters specified in the SSSI notification (defined in section 3(4)) and SNH is accorded a degree of flexibility in this connection during the period prior to the notification being confirmed.
74. Thus the description of the land, the natural features which are of special interest or the miscellaneous other information included in the SSSI notification may be added to, removed or amended. This may, for example, be done where SNH requires to correct part of the notification or accepts a particular point made by an objector. SNH may also amend the boundaries of the site to reduce its coverage, for example, where it considers that a particular area should in fact be excluded from the site. SNH is not however permitted to use its pre-confirmation power of modification to extend the boundaries of the site or to add to the ORC list. Separate procedures exist in sections 5, 6 and 7 to allow changes to these particular components of the SSSI notification. These powers can be used before as well as after confirmation.

### **Referral to Advisory Committee**

75. Paragraph 9, together with section 21(6) to (8), sets out SNH's obligations in situations where representations (including objections to the site) have been lodged in accordance with paragraph 3(c).
76. Where any valid representation has been received and it relates to the natural features specified in the notification (e.g. it is an objection concerning the appropriateness or accuracy of the information contained in an SSSI notification by virtue of section 3(4)(a)(ii) or it concerns SNH's reasons for considering a site no longer to be of special interest) SNH cannot then confirm the notification until it has referred the representation to the Advisory Committee on SSSIs ("ACSSSI) and considered any advice received from ACSSSI.
77. The role and operations of ACSSSI are defined in section 21 (for which see paragraphs 153 to 162 of these notes ). The need to allow sufficient time for ACSSSI to consider objections, and for SNH properly, in turn, to consider ACSSSI's advice, prior to expiry of the deadline for confirmation of the SSSI was one of the key reasons for extending the confirmation period from 9 months (under the 1981 Act) to one year (under this Act).

### **Notice of decision to confirm or withdraw**

78. Paragraph 10 obliges SNH to give formal notice of any decision to confirm or withdraw a notification. Notice must be given to the interested parties (see section 48(2)) and must be publicised, including in at least one local newspaper and by any other means which SNH thinks fit, in accordance with the requirements of paragraph 2. A failure to give such notice within the deadline for confirmation leads, by virtue of paragraph 5, to the notification being deemed to have been withdrawn.
79. Paragraph 11 deals with the situation in which an objection to the notification has been referred to ACSSSI. In such cases the person who lodged the objection must be provided not only with notice of the confirmation or withdrawal of the notification but must also be given a copy of the advice which ACSSSI had given to SNH in relation to the matters raised by that objector.

### **Extension of period during which notification is to be confirmed or withdrawn**

80. Paragraphs 12 and 13 provide for the extension of the period within which a notification must be formally confirmed or withdrawn. An extension may be made in the event of a referral to ACSSSI, but the extension can be for no more than an additional 6 month period. Thus the notification is required, in most situations, to be confirmed or withdrawn within no more than 18 months of the date on which it was originally

given. If this does not happen it will be deemed (by virtue of paragraph 5) to have been withdrawn.

81. Where no objections have been received which are required under section 21 to be referred to ACSSSI, paragraph 13 does however allow for the period for confirmation or withdrawal to be extended for an unspecified period where this is by mutual agreement between SNH and all owners and occupiers of land within the SSSI in question. In such circumstances confirmation could take longer than 18 months. Such an agreement may, for example, be reached where SNH is engaged in constructive but very detailed negotiations with owners and occupiers and they are content with the progress of those negotiations.
82. [Paragraph 14](#) specifies the manner in which agreement to an extension of the period for confirmation or withdrawal is to be obtained by SNH. Agreement is given either where every owner and occupier explicitly consents or where no reasonable objection is received within 28 days of SNH making a proposal for extension. The concept of reasonableness is applied here in order to prevent one individual from blocking an extension for petty reasons and thereby thwarting the wishes of the overwhelming majority of owners and occupiers of the site. A similar principle applies elsewhere in the Act, for example in relation to the review of ORC lists (see section 6(3)(b)).
83. [Paragraph 15](#) requires SNH to inform the interested parties of any extension to the period for confirmation or withdrawal. This is particularly relevant to the situation foreseen in paragraph 14(b) where no reasonable objection is received.

### ***Section 11 Effect of SSSI notification***

84. Subsection (1) defines the point at which modifications to an SSSI notification, or alterations made to an SSSI notification by virtue of sections 5 to 9, take effect. Original SSSI notifications have effect from the date on which they are given (see sections 3(6) and 48(2)) and they have effect in their modified or amended form as of the date on which notice of the relevant change is given.
85. Subsection (2) provides that, where SNH gives notice (under paragraph 10 of Schedule 1) that it has withdrawn a notification of enlargement (given under section 5(1)), the original SSSI notification continues to have effect in its unaltered, original form. In other words, the notification reverts to the *status quo ante* and the situation continues as if the proposal for enlargement had never been made. It should be noted that this does not invalidate the effects which any notification given under section 5(1) may have had during the period between notification and withdrawal – for example where a decision by a regulatory body or under the planning system may have been influenced by the notice of enlargement.
86. Subsection (3) provides that an SSSI notification ceases to have effect when SNH gives notice (under paragraph 10 of Schedule 1) of its decision to withdraw the SSSI notification. It also provides that a denotification of a whole SSSI does not, in contrast to a partial denotification, have effect until the relevant notification under section 9(1) is confirmed. A default arrangement covering the situation in which SNH fails to take a decision is covered separately in paragraph 5 of Schedule 1.

### **Exercise of functions in relation to sites of special scientific interest**

#### ***Section 12 Exercise of functions by public bodies etc.***

87. [Section 12](#) applies to the exercise by a public body of any function on, or so far as affecting, any land which is of SSSI status.
88. This general duty is therefore invoked whenever a public body exercises a function in relation to any part of the SSSI series, whether the function affects a part of one SSSI, the whole of an SSSI or a variety of areas of land on a number of different SSSIs. In

essence, public bodies must comply with the obligations set out in section 12 wherever their policies or operations impinge on, or are likely to affect, SSSI land.

89. Subsection (2) requires public bodies to:
- consult SNH in relation to the exercise of the function;
  - have regard to any advice received from SNH as a result of such consultation; and
  - take reasonable steps, when exercising the function, to both further the conservation and enhancement of protected natural features and to maintain and enhance the representative nature of SSSI series as a whole.
90. As with the biodiversity duty in section 1, the general duty in relation to SSSIs does not override other statutory obligations. Public bodies must still carry out their primary functions in a proper and effective manner. But in doing so they must also act to further the conservation, maintenance and enhancement of individual SSSIs and the wider SSSI series.
91. Subsection (3) ensures that the relationship between the general duty in section 12 and the more specific obligations in sections 13 to 15 is clear. Compliance with section 12 does not absolve a public body from the need to comply with the more detailed requirements regulating specific operations which are likely to damage any natural feature for which an SSSI has been notified. The provisions of *both* section 12 *and* sections 13 to 15 must be complied with. Section 12 is an overarching duty. Sections 13 to 15 describe how to deal with situations in which specific operations are likely to damage an SSSI. The interplay between section 12 and sections 13 to 15 is particularly important where a public body is considering the option to proceed with an operation against SNH advice. In such cases, the public body remains bound by its general obligation under section 12 (for which see section 14(3)(c)).

## **Operations affecting sites of special scientific interest**

### ***Section 13 Operations by public bodies etc.***

92. Subsection (1) prohibits a public body from carrying out any operation which is likely to damage any natural feature by reason of which an SSSI notification has effect, unless certain conditions are met. These are that either:
- SNH has given explicit written consent to the operation in accordance with section 13(4);
  - the provisions of section 14(1) apply (i.e. consent has effectively been given in some other form or the operation is necessary in an emergency); or
  - the provisions of section 14(2) apply (i.e. the operation satisfies the conditions set out in subsection (3) allowing the public body to proceed in the face of a refusal of consent by SNH).
93. Contravention, without reasonable excuse, of this section is a criminal offence under section 19.
94. Subsection (2) provides that the obligations imposed by subsection (1) apply whether or not the operation would take place on land within an SSSI. This means that operations by a public body which would be likely to damage the protected natural features of an SSSI are controlled under section 13 even where they take place outwith the formal boundary of the site. What matters is whether the operation is likely to damage the protected natural features. Where the operation is taking place is not relevant.
95. It is important to note in this context that public bodies, unlike private land managers, are required to do more than merely seek consent for operations on the formal ORC list for a site. The effect of not limiting this provision to ORCs is intended to require public

bodies need to be more pro-active in their approach. Public bodies must, for example, assess potential risks to any SSSI (including an SSSI on adjacent land to that on which they intend to carry out operations) when planning and carrying out any operation. In this sense, public bodies must take responsibility for anticipating any potential threat to a site, whilst private owners and occupiers are not obliged by section 16 to think beyond the ORC list notified to them by SNH or to consider the impacts of their activities on a neighbouring SSSI. The activities of public bodies are regulated by sections 13 and 14. For more on the position of private owners and occupiers, see the notes on section 16, below.

96. Subsection (3) requires that an application for SNH's consent to an operation must specify the nature of the operation, provide details of the proposed dates on which the operation will start and finish, and define the land on which the public body proposes to carry out the operation.
97. Subsection (4) provides that where SNH has received an application as specified under subsection (3), it may either consent to the operation or refuse its consent. Where SNH consents to the operation it is entitled to do so subject to such conditions as it sees fit.
98. Subsection (5) makes it explicit that any conditions imposed under subsection (4) can, in particular, restrict the manner in which the operation is to be carried out or specify that the operation may only be carried out on part of the land in question. SNH may also stipulate that the operation can only be carried out for, or within, a certain period of time (for example, outwith the breeding season for important species). The types of conditions which may be imposed by SNH are not however limited to the examples given in subsection (5).
99. Subsection (6) obliges SNH to provide written advice to the public body when giving or refusing consent to an operation. Such advice must include advice on how to minimise the type of damage to the protected natural feature by reason of which an SSSI notification has effect. The provision of such advice is not optional and this section ensures that SNH will provide appropriate conservation and ecological advice and guidance to other public bodies which will allow them to carry out a permitted operation in the most appropriate and least damaging manner.
100. Subsection (7) requires SNH to provide reasons for either refusing consent or giving consent subject to conditions. This is intended to ensure the transparency and openness of decision-making and to make it easier for decisions by SNH to be challenged by the public body in question where it believes SNH has wrongly refused consent or imposed unreasonable conditions.
101. Subsection (8) ensures certainty by deeming any application for consent under section 13 to have been refused if SNH has failed to respond within 28 days of the date of application. Where SNH neither gives nor refuses consent, and the application is therefore treated as having been turned down, the public body has the option of proceeding under section 14(2)(a).

#### ***Section 14 Operations by public bodies etc.: authorised operations***

102. Subsection (1) sets out details of the situations in which SNH consent to an operation is not required by a public body. These are effectively situations in which consent has already been given via another route, or where action is necessary in an emergency. The particular circumstances are where:
  - permission has already been given by a regulatory authority under section 15. The regulator is obliged under section 15 to have regard to SNH advice before giving permission and this subsection obviates the need for SNH to give separate permission for the operation. SNH consent is contained within the regulatory permission;

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- explicit planning permission has been granted. Again, SNH advice is taken into account by the planning authority and separate permission from SNH for the operation is not required by this subsection. It should be noted that this exemption applies only to the explicit grant of planning permission and does not remove the need to obtain SNH permission for an operation undertaken as a permitted development for which planning permission is not needed;
  - an operation is carried out in order to deal with an emergency situation. This exemption can only be invoked where SNH is informed as soon as possible after the need for the emergency operation becomes clear;
  - an operation is carried out in accordance with a management agreement between SNH and the public body. In concluding the agreement SNH will have consented to the operation; and
  - an operation is carried out in accordance with some other, formally-agreed plan for the management of land which has been approved in writing by SNH. For example, a forest management plan setting out a programme for forestry operations and land management activity over an extended period of time. The operations specified within such a management plan could be consented to in advance by SNH if it were to decide to approve the plan and gave such approval in writing.
103. Subsection (2) allows public bodies to proceed with an operation, in certain closely defined circumstances, even where SNH has refused consent or has imposed conditions which are unacceptable to the public body. But it may only do so where all of the conditions set out in subsection (3) have been met. It should be noted that failure by SNH to take a decision within 28 days in response to an application under section 13(3) is deemed to be a refusal of consent and the provisions of this subsection would therefore apply.
104. Subsection (3) sets out the conditions which have to be met if a public body intends to proceed with an operation in the face of SNH opposition. The conditions are that:
- no action can be taken until the 28 day period for consideration of the original application has expired;
  - notice must be given to SNH of the proposed start date for the operation;
  - that start date cannot be less than 28 days from the date on which notice of the intention to proceed with the operation is given;
  - the notice given to SNH must set out what the public body has done, or proposes to do, in response to any advice which may have been received from SNH in relation to the operation;
  - the operation must be carried out in a manner which causes as little damage or disturbance to the natural feature specified in the SSSI notification as is reasonably possible in all the circumstances;
  - in seeking to avoid damaging or disturbing that feature the public body must have regard to any advice received from SNH; and
  - the public body must comply with its general duty in relation to SSSIs and the SSSI series, as set out in section 12(2)(c).
105. Subsections (4) and (5) govern certain situations in which a public body proceeds with an operation and that operation causes damage to a protected natural feature. The situations in question are where the operation has been carried out on the basis of permission from a relevant regulatory authority, where it is an emergency operation and where it has been carried out in the face of a refusal of consent from SNH or where conditions imposed by SNH have been set aside. In these cases, the public body is

obliged to consult with SNH on how best to restore the damaged feature and it must, so far as is reasonably practicable, then carry out that restoration work in accordance with SNH advice. Failure to do so is a criminal offence under section 19.

### ***Section 15 Consent by certain regulatory authorities***

106. **Section 15** sets out the procedures to be followed where the permission of a relevant regulatory authority is needed before an operation affecting an SSSI may be carried out. Relevant regulatory authorities are to be defined for the purposes of the Act in a separate order made by the Scottish Ministers. It is not intended that planning authorities should be treated as regulatory authorities in this context, since statutory requirements for planning authorities to consult SNH in relation to planning applications already exist separately in planning legislation.
107. Subsection (3) requires a relevant regulatory authority to notify SNH before deciding whether to permit any operation which would be likely to damage a natural feature specified in an SSSI notification. Such notification to SNH must specify the nature of the operation, the proposed dates of commencement and completion, as well as the land on which it is proposed to carry out the operation.
108. Subsection (4) specifies that the obligation to consult SNH applies even if the proposed operation would take place outwith the land of an SSSI. As with section 13(2), what matters is whether the operation would be likely to damage the site, not where it is taking place. Again, the Act places a special responsibility on regulators as public bodies to anticipate and assess potential risks to SSSI land in a pro-active sense and, where they are public bodies, in accordance with the general duty set out in section 12.
109. Subsection (5) prohibits the authority from deciding whether to give its permission until 28 days have elapsed from the date of the notification to SNH under subsection (2) unless SNH has notified the authority that it does not need to wait until then. This provision is intended to ensure that SNH has sufficient time to provide advice, without unnecessarily delaying a decision if one can be taken quickly. For its part, SNH will require to be sensitive to the needs of regulators, who are themselves normally obliged to respond to applications within statutorily defined timescales.
110. Subsection (6) requires the relevant regulatory authority to have regard to any advice received by SNH when deciding to give its permission for an operation, and, where it does give its permission, in deciding whether any conditions should be attached to its permission.
111. Subsections (7) to (10) govern the situation in which a relevant regulatory authority decides not to follow advice from SNH, where that advice is not to grant permission for an operation or where it advises the regulator to impose certain conditions. Where this happens, certain conditions are imposed automatically and the regulator is obliged to inform both SNH and the applicant of the situation. This includes the requirement on the regulator – in addition to setting out the nature of the permission given and any terms and conditions – to explain what it has done, or proposes to do, in consequence of the advice given by SNH. The regulator must make it explicit that it has taken its decision in the face of SNH advice.
112. The first automatic condition imposed via subsection (10) is that the operation cannot commence before the expiry of a 28 day period from the point at which the regulator has informed SNH that its advice has not been followed. The provision for a 28 day period between notice being given to SNH and the permitted start date for the operation allows SNH time, if necessary, to seek an interdict under section 45 and/or to advise the Scottish Ministers of the situation (in which case the Scottish Ministers would also have the option of prohibiting the operation by means of a nature conservation order).
113. The obligation on the regulator to make it clear to the applicant that permission has been granted in the face of opposition from SNH is intended to ensure that the

applicant is aware of the possibility that the permission could be challenged and the operation prohibited. In such circumstances the applicant may, for example, wish to avoid incurring significant expenditure in connection with the proposed operation until the situation has been more fully resolved.

114. The second condition is that the applicant is obliged, as a condition of the permission granted by the regulator, to carry out the operation in such a way as to minimise, as far as is reasonably practicable in all the circumstances, any damage or disturbance to the protected natural feature.

***Section 16 Operations by owners or occupiers of sites of special scientific interest***

115. Subsection (1) prohibits an owner or occupier of land within an SSSI from carrying out, or causing or permitting to be carried out an ORC, except with written consent from SNH. Contravention of this provision is a criminal offence under section 19. Consent is obtained on application under subsection (2). The requirement for consent is set aside in certain specified circumstances defined in section 17(1).
116. It should be noted that, by virtue of section 17(4), sections 16 and 17 do *not* apply to any public body which is the owner and occupier of SSSI land. This means that any operations carried out on SSSI land by, or on behalf of, a public body will be dealt with under the provisions of sections 13 and 14, rather than under sections 16 and 17. The effect of sections 16 and 17 is therefore limited to private owners and occupiers. This distinction between public bodies and private owners and occupiers is reflected in the notes which follow.
117. It should also be borne in mind that “public body” has a broad meaning in the context of the Act and that it encompasses any body which is carrying out functions of a public nature. Because of this, there may occasionally be circumstances in which a body which usually carries out functions in a private capacity may be responsible to carry out functions of a public nature in one area of activity (e.g. if a public body sub-contracts some of its functions to it). The body would be a “public body” in that context. Where a body has dual capacity the application of the Act will be determined by whether or not, in any particular circumstance, the body is acting in pursuance of its public functions or whether it is operating in a purely private capacity.
118. In contrast to public bodies, a private land manager is required by section 16 only to have regard to the ORC list notified to him/her by SNH. Whilst public bodies are obliged to be pro-active and to anticipate any potential risks, there is no strict legal requirement imposed by section 16 on private land managers to think more generally about non-ORC list operations which might be likely to damage the SSSIs natural features.
119. If an operation is not on the ORC list then consent is not required from SNH and the owner/occupier does not have to consult SNH. Neither is there any legal obligation on the owners or occupiers of neighbouring land to consult SNH about the potential impacts of operations on their land on adjacent SSSI land. It should be noted however that powers have been provided within the Act (in section 7, via nature conservation orders, and in section 45) which allow SNH or the Scottish Ministers to take emergency action to address potential threats from otherwise unregulated operations, should it prove necessary to do so. Private land managers, whilst not formally obliged to look beyond the immediate context of the ORC list, are advised to be generally aware of the existence of these special powers.
120. Subsection (2) specifies that an application for consent to carry out an ORC must detail the nature of the operation, set out the proposed dates of commencement and completion and define the land on which it is proposed to carry out the operation.
121. Subsection (3) provides that SNH may, on receipt of an application made under subsection (2), consent to or refuse permission for an operation. Where it consents to the ORC it may impose such conditions as it thinks fit.

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122. Subsection (4) makes it explicit that any conditions imposed under subsection (3) can, in particular, restrict the manner in which the operation is to be carried out or specify that the operation may only be carried out on part of the land in question. SNH may also stipulate that the operation can only be carried out for, or within, a certain period of time (for example outwith the breeding season for important species). The conditions imposed by SNH are not however limited to the examples given in subsection (4).
123. Subsection (5) provides that SNH may, on completion of a review of ORCs and related consents under section 6(4), modify or withdraw consent to an operation by giving notice to the person to whom consent was given. SNH may also modify or withdraw consent where it considers that carrying out the operation even in accordance with the consent will damage the SSSI in a manner which was not foreseen at the time the consent was given. In the latter case, (i.e. where subsection (5)(b) applies) SNH may only modify or withdraw the consent with the agreement of the Scottish Ministers and this proviso is set out in subsection (6).
124. It should be noted that the modification or withdrawal of consent may affect the ability of a land manager to continue with the established management of the land and that this may, in turn, give rise to a right to a compensatory management agreement in accordance with subsection (9). SNH is required to have regard to the *Financial Guidelines* to be published as statutory guidance under section 54 in deciding whether it should offer to enter into such an agreement.
125. Subsections (7) and (8) define the point at which a modification or withdrawal of consent take effect. In the case of a modification or withdrawal under subsection (5) (a) (i.e. following an ORC review carried out under section 6(4)) the change does not take effect until the expiry of the deadline for any appeal against the decision or, where an appeal has been brought, the point at which it is withdrawn or finally determined. Appeals must be lodged, by virtue of section 18(2) within 28 days of notice being given by SNH.
126. In the case of a modification or withdrawal under subsection (5)(b), for which SNH has obtained the agreement of the Scottish Ministers, the change has immediate effect. This means that any operations covered by the consent must also cease (or be altered to reflect the modified consent) with immediate effect. An appeal must again be lodged within 28 days (see section 18(2)) but operations would only be permitted to resume in the originally consented form in the event that any appeal is determined in favour of the land manager.
127. Subsection (9) obliges SNH to offer to enter into a management agreement in certain specified circumstances. In doing so, SNH must act in accordance with the *Financial Guidelines* which are to be published as statutory guidance under section 54. Copies of the *Financial Guidelines* can be obtained from the address given in paragraph 18 of these notes.
128. The circumstances in which SNH is required to offer a management agreement are described in subsection (9) and are subject to two requirements.
129. Firstly, the obligation to offer an agreement can only apply where SNH:
- refuses to consent to an operation being carried out;
  - makes its consent subject to conditions; or
  - modifies or withdraws its consent.
130. SNH must also have regard to the *Financial Guidelines* in determining whether it should enter into a management agreement. Where SNH considers that it should offer an agreement it must make such an offer on such terms and conditions as it thinks fit, having had regard to the formal guidance contained in the *Financial Guidelines*. The terms and conditions offered may include provision for any payments to the

land manager which SNH, having had regard to the *Financial Guidelines*, consider appropriate in the circumstances.

131. Subsection (10) requires SNH to give an applicant reasons for a decision to make its consent subject to conditions, to refuse consent, to modify or withdraw its consent, or not to offer to enter into a management agreement in pursuance of subsection (9)(a). This provision is intended to ensure the transparency and openness of decision-making and to make it easier for any aggrieved party to challenge such a decision in an informed and effective manner. Specific rights of appeal are dealt with in section 18.

***Section 17 Operations by owners or occupiers of sites of special scientific interest: authorised operations***

132. Subsection (1) specifies the particular circumstances in which a private owner or occupier does *not* require SNH's consent before carrying out an ORC. These are effectively situations in which consent has already been given via another route, or where action is necessary in an emergency. The particular circumstances are where:
- permission has already been given by a relevant regulatory authority under section 15. The regulator is obliged under section 15 to have regard to SNH advice before giving permission and this subsection obviates the need for SNH to give separate permission for the operation;
  - explicit planning permission has been granted. Again, SNH advice is taken into account by the planning authority and separate permission from SNH for the operation is not required by this subsection. It should be noted that this exemption applies only to the explicit grant of planning permission and does not remove the need to obtain SNH permission for an operation undertaken as a permitted development for which planning permission is not needed;
  - an operation is carried out in order to deal with an emergency situation. This exemption can only be invoked where SNH is informed as soon as possible after the need for the emergency operation becomes clear;
  - an operation is carried out in accordance with a management agreement between SNH and the owner or occupier. The exemption covers operations carried out directly by the land manager as well as those carried out on his/her behalf (for example, by a contractor). In concluding the management agreement SNH will have consented to the operation; and
  - the operation is necessary in order to comply with the requirements of a land management order ("LMO"). In seeking such an order, SNH will have identified ORCs which may need to be carried out and the order will include an appropriate consent to those operations. LMOs are covered in sections 29 to 37.
133. It might be noted that, for private owners and occupiers, there is no equivalent to the provision in 14(1)(e) allowing for operations in accordance with an agreed management plan for the site. This is intentional and reflects the fact that public bodies are under a general duty, by virtue of section 12, to conserve and enhance SSSIs. As a result they are accorded a greater degree of freedom and flexibility in managing SSSIs, but are also placed under the more onerous legal obligation to think beyond the limits of the ORC list provided by SNH and to guard against any potential damage to the natural features of the site.
134. Subsections (2) and (3) govern certain situations in which a land manager proceeds with an operation without SNH consent, either on the basis of permission from a relevant regulatory authority (given, for example, in the face of SNH opposition under sections 15(7) to (10)) or in an emergency situation, and that operation causes damage to the natural features of an SSSI. In these cases, the land manager is obliged to consult with SNH on how best to restore the site and he/she must then carry out that restoration work in accordance with SNH advice. Failure to do so is a criminal offence under section 19.

135. Subsection (4) specifies that sections 16 and 17 do not apply to operations on SSSI land where the owner or occupier of the land in question is a public body and that public body is acting in the exercise of its functions. Sections 13 and 14 apply instead. This effectively means that operations carried out by public bodies are governed by sections 13 and 14, whilst operations carried out by private land managers are covered by sections 16 and 17. The unusual circumstance in which a body may be exercising public functions in some situations and acting as a private owner or occupier in others is discussed above in connection with section 16.

### ***Section 18 Appeals in connection with operations requiring consent***

136. Section 18 sets out rights of appeal and the procedures to be followed in mounting an appeal against certain decisions by SNH. The distinction drawn between private owners and occupiers and public bodies remains relevant and the appeal mechanisms in section 18 are intended for use by private land managers. Public bodies have alternative options (including in particular those set out in sections 14(2) and (3)) where consent to an operation is refused, conditioned, modified or withdrawn by SNH, or where the terms of a management agreement are unacceptable. The general expectation is that public bodies should seek a negotiated solution when in disagreement with each other, and should not need to resort to the courts.
137. Subsection (1) specifies the circumstances in which a private owner or occupier may appeal to the Scottish Land Court if aggrieved by a decision by SNH to:
- impose conditions when giving consent to an ORC;
  - refuse consent to an ORC;
  - modify or withdraw any consent to an ORC;
  - refuse to enter into a management agreement in accordance with section 16(9); or
  - make a management agreement subject to terms and conditions (including the amount of any payment) which are unacceptable to the owner or occupier.
138. Subsection (2) specifies that an appeal under section 18 must to be made within 28 days of the date on which SNH notified the appellant of the decision being appealed.
139. Subsection (3) provides a failsafe arrangement which protects an applicant for an ORC in situations where SNH has failed to make a decision on the application within a reasonable period. Since the applicant cannot proceed with the operation in the absence of explicit consent without committing a criminal offence, this subsection provides a remedy if SNH fails to reach a decision on the application.
140. The solution provided in subsection (3) is that, if four months have elapsed since the application was lodged, the application will be deemed to have been refused, thereby enabling the applicant to refer the matter immediately to the Scottish Land Court. The four month period within which SNH must make a decision on the original application has been set at four months on the basis of practical experience in applying the provisions of the 1981 Act. That period can be extended by mutual agreement, in order to allow for situations in which, for example, negotiations are proceeding constructively but the issues are complex and a longer period is needed to reach a final agreement.
141. Subsection (4) provides a similar failsafe arrangement in relation to management agreements. If a land manager believes, on the basis of section 16(9), that SNH should have offered to enter into a management agreement, and if SNH has not done so within 4 months of the date of a decision to refuse, condition, modify or withdraw consent, the land manager is entitled to refer the matter to the Scottish Land Court.
142. Subsection (5) requires the Scottish Land Court to determine any appeal on its merits, rather than simply by way of judicial review. The Court is therefore empowered to look

into the facts of the case and is *not* confined merely to examining whether, for example, SNH acted unreasonably or whether it failed to follow procedures correctly. In essence, the Scottish Land Court is entitled to examine the entire case from scratch and to reach its own decision based on its own reading of the information presented to it. The Court may dispose of the case by making such order as it thinks fit. In particular, the Court is able to:

- uphold the original decision by SNH;
- overturn the original decision and direct SNH to give consent;
- overturn the original decision to impose conditions on a consent and quash any or all conditions which SNH may have imposed;
- overturn the original decision and direct SNH to offer a management agreement; and
- overturn the original decision to impose conditions as part of a management agreement and quash any or all conditions which SNH may have imposed.

143. In addition, over and above the ability to quash conditions imposed by SNH, subsection (6) enables the Scottish Land Court to direct SNH as to the particular conditions which it should impose instead of those original conditions when consenting to an ORC or offering a management agreement in line with the ruling made by the Court. The Court consequently has significant powers to shape the detailed terms and conditions of any consent or management agreement, should it feel it necessary to do so. The ability to make any other order as the Court sees fit, in section 18(5)(f) extends that flexibility still further.

## **Offences and Byelaws**

### ***Section 19 Offences in relation to sites of special scientific interest***

144. Subsection (1) provides that it is an offence for any person to intentionally or recklessly damage any natural feature specified in an SSSI notification. It should be noted that the offence is one which extends to members of the general public and to public bodies, such as statutory undertakers, which are carrying out operations on SSSI land. The inclusion of acts by third parties, and not just those carried out by the owners and occupiers of the site, is one of the fundamental differences between the Act and the previous provisions of the 1981 Act.
145. The concept of “damaging” natural features of an SSSI is defined further in sections 58(2) and (3) and includes both causing the natural feature to deteriorate and disturbing and harassing the fauna for which the site has been notified.
146. Subsection (2) provides a statutory defence to the offence in subsection (1). A person is not guilty of the offence of recklessly damaging the natural features of an SSSI if the act can be shown to be the incidental result of an otherwise lawful operation. Certain further conditions require to be satisfied in order for the defence to be effective. The person who carried out the act must *either* have taken reasonable precautions to avoid damage to the site *or* he/she should be able to demonstrate that the damaging consequences of the lawful operation could not reasonably have been anticipated. It is also necessary to show that, once it became apparent that damage was being caused, the person took all reasonable steps to minimise that damage.
147. Subsection (3) makes it an offence for any public body to carry out an operation which is likely to damage the natural features of an SSSI unless it has obtained SNH consent or one of the other exemptions allowed for in section 13(1) applies. It is also an offence for any private owner or occupier to carry out an ORC without SNH consent or where the exemptions specified in section 17(1) apply. These offence provisions are subject to a reasonable excuse defence.

148. Subsection (3) also makes it an offence for both public bodies and private owners and occupiers to fail to restore an SSSI in accordance with sections 14(5)(b) and 17(3)(b), for example where damage has resulted from an emergency operation. Again, a reasonable excuse is a defence.
149. Subsection (4) provides that a person found guilty of an offence under this section will be liable on summary conviction to a fine of up to £40,000, and on conviction on indictment to a fine (that is, to a fine which can be set at whatever level the Court thinks fit, including in excess of £40,000, having had regard to the facts of the case).
150. Subsection (5) provides that it is not a defence to proceedings under subsection (3) for contravention of sections 13(1) or 16(1) to show that the operation did not in fact damage the natural features of the site. In fact the offence is one of carrying out the operation without having obtained consent (or without one of the exemptions in sections 14 and 17 applying). It is therefore immaterial whether or not the operation actually resulted in damage to the SSSI and a defence based on the argument that no damage was caused is irrelevant.

### ***Section 20 Byelaws***

151. Subsection (1) allows SNH to make byelaws to protect SSSIs. This will allow SNH to deal with a variety of actions that may damage an SSSI such as fly-tipping, the driving of vehicles off-road or the setting of fires.
152. Subsection (2) applies sections 20(2), 20(3), 106 and 107 of the [National Parks and Access to the Countryside Act 1949 \(c.97\)](#) to the making of byelaws under the Act in the same way as they apply to the making of byelaws under the 1949 Act. Those sections, amongst other things, set out various prohibitions and restrictions which byelaws may contain and relevant procedures.

### **Supplementary**

#### ***Section 21 Advisory Committee on Sites of Special Scientific Interest***

153. Subsection (1) provides for the continuation of the Advisory Committee on Sites of Scientific Interest (referred to as “the Advisory Committee” in the Act and as “ACSSSI” in common usage). ACSSSI was established under section 12 of the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#) and the provisions of section 21 carry forward its role in a largely unaltered form under the new Act.
154. ACSSSI has the advisory functions relating to SSSIs conferred on it by section 21. It is important to note that ACSSSI’s role is purely advisory in character. It does not operate as a tribunal and has no powers to determine appeals. It is however required to operate independently and to provide objective, scientific advice to SNH.
155. Subsection (2) provides that the Scottish Ministers shall be responsible for the appointment of the convener and other members of the Advisory Committee, and that they may do so on such terms as may be set by them. Appointees to the Advisory Committee shall, to the best of the Scottish Ministers’ knowledge, have suitable scientific knowledge and experience in relation to flora, fauna or the geological or geomorphological features of the land.
156. Subsection (3) requires the terms and conditions set on appointment of members to the Advisory Committee to include arrangements for the payment of remuneration and allowances to them by SNH.
157. Subsection (4) excludes any member of SNH, or any committee appointed by SNH, from being appointed to the Advisory Committee.
158. Subsection (5) allows the Scottish Ministers, from time to time, to give directions relating to the procedure of the Advisory Committee.

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159. Subsections (6) and (7) set out circumstances in which representations made to SNH are to be referred to ACSSSI. Only SNH may refer a matter to the Advisory Committee, but it must do so where:
- any person with a direct legal interest in the land (“interest in land”, as defined in section 58(1)), makes a representation in relation to either the “scientific case” for notification of the SSSI (i.e. the reasons why the site should be notified on the basis of the particular natural features listed in the SSSI notification) or the “scientific case” for denotification;
  - the person making the representation does not agree to withdraw it; and
  - the representation is made *either* within the time limit for representations specified in the original notification (not less than 3 months from the date of notification – see paragraph 3(c) of schedule 1) *or* at least 10 years have elapsed since the original notification or since the last representation.
160. In effect this means that an objection to an SSSI must be referred to ACSSSI if it relates to the scientific case for or against the site and is submitted within the initial 3 month period for representations. The issue can then be revisited and referred back to ACSSSI every 10 years, if necessary.
161. Subsection (8) obliges SNH to refer any unresolved scientific objections to ACSSSI in accordance with subsections (6) and (7), and requires it both to consider any advice received from ACSSSI and then to take such action as it thinks fit in consequence of any such advice.
162. The effects of any referral to ACSSSI, as far as the SSSI notification and confirmation processes are concerned, are dealt with separately in paragraph 9 of Schedule 1.

**Section 22 - SSSI Register**

163. This section makes provision for the creation of an authoritative new public register of SSSIs to be overseen and maintained by the Keeper of the Registers of Scotland (“the Keeper”).
164. Paragraphs 12 and 13 of Schedule 5 make arrangements for the continuation of the existing register, established by the 1981 Act, until such time as the new register provided for in section 22 has been established.
165. Subsection (1) places a duty on the Keeper to keep a register of all SSSI notifications, copies of certain other notices and notifications under the Act which amend or alter the original notification, and any other information in relation to SSSI notifications required by regulations under subsection (3).
166. The notices which must be registered are those given under section 5 to 9 and under paragraphs 10 and 15 of Schedule 1. These cover the enlargement of sites, changes to the ORC list, other variations to the SSSI notification, denotifications, notices confirming or withdrawing a notification and notices extending the period within which the notification must be confirmed.
167. Subsection (2) requires the Keeper to ensure that the SSSI register is available for public inspection at all reasonable times.
168. The intention of the new register is that it should provide an authoritative, central source of information about the extent and legal status of SSSI land. It will be accessible in electronic form and will be searchable. To that end, the Scottish Ministers are empowered in subsection (3) to make regulations specifying the form and manner in which the register is to be kept, the information which it is to contain, procedures and arrangements for amending the register and requiring SNH to supply documents and information to the Keeper in an appropriate format. The Scottish Ministers may also specify the fees (if any) which may be charged by the Keeper for the provision of reports

and other information. The regulations may also make provision as to the evidential status of copies and extracts from the register when used in a legal context.

## ***Chapter 2 -Nature Conservation Orders***

### ***Section 23 Nature conservation orders***

169. Subsection (1) empowers the Scottish Ministers to make a nature conservation order, which wholly or partially prohibits the carrying out, or the carrying out in a particular way, of a specified operation on specified land.
170. Subsection (2) specifies the purposes for which an NCO may be made. The purposes are: for the conservation of the feature(s) of interest of an SSSI or any other feature of natural heritage which the Scottish Ministers consider to be of special interest; or to facilitate compliance with an international obligation.
171. Subsection (3) specifies the land to which an NCO can apply, namely, land which is or forms part of an SSSI, any other land which the Scottish Ministers believe to be of special interest by reason by virtue of its natural heritage, land contiguous to or otherwise believed to be associated with an SSSI or other land considered to be of special interest, or any combination of the aforementioned land.
172. Subsection (4) allows Ministers to include particular conditions in the NCO. Those conditions may, for example, prohibit or permit the prohibited operation only at particular times, in a particular place, when carried out in a particular manner or in accordance with other specified conditions. Examples might include a ban on the operation being carried out during the breeding season, the permitting of limited operations on part of the site or a ban which permits traditional, low-impact methods of working but prohibits the use of heavy machinery.
173. Subsection (5) provides a defined shorthand term which can be used to refer to the operations which are banned under the terms of the NCO. These are to be known as “prohibited operations”.
174. Subsection (6) provides that an NCO comes into immediate effect on being made by the Scottish Ministers. Any operation prohibited under the NCO must cease immediately the NCO is made. Failure to do so is a criminal offence by virtue of section 27.
175. Subsection (7) defines the point at which an NCO ceases to have effect. The NCO falls unless it is confirmed in accordance with the provisions of Schedule 2 – whether that non-confirmation is explicit and represents a clear decision not to confirm the NCO or whether it occurs because the Scottish Ministers have failed to take a definite decision.
176. Where an NCO has been confirmed by the Scottish Ministers and continues in force in the longer term, it may be revoked under section 24. Where the Scottish Ministers decide to revoke an NCO, it ceases to have effect immediately, on the date on which the revoking order is made. During the parliamentary passage of the Act, Ministers made it clear that NCOs should not remain in place longer than is necessary.

### ***Section 24 Amendment or revocation of nature conservation orders***

177. This section allows the Scottish Ministers to amend an NCO or to revoke the NCO in whole or in part.
178. Subsection (1) provides that the Scottish Ministers may amend or revoke an NCO by order and that such an order will be known as an amending order or revoking order respectively.
179. Subsection (2) enables an amending order to: add to, modify or remove the prohibited operations specified in the NCO; modify the NCO in relation to the circumstances in

which particular operations are not prohibited, in line with section 23(1)(b); and extend or restrict the area of land to which the order applies.

180. Subsection (3) provides that an amending order, like the original NCO and any revoking order, comes into immediate effect on being made by the Scottish Ministers.
181. Subsection (4) provides for an amended NCO to have effect as amended for as long as the amending order which amends it has effect.
182. Subsection (5) provides that a revoking order may revoke the NCO for part of the original area covered by the NCO (thereby, in effect, amending it by reducing its extent).
183. Subsection (6) provides that a revoking order, like the original NCO and any amending order, comes into immediate effect on being made by the Scottish Ministers.

### ***Section 25 Nature conservation orders and related orders: procedure***

184. This section introduces Schedule 2. Schedule 2 sets out the procedures that must be followed when NCOs, amending orders and revoking orders are made.

#### **Schedule 2**

### ***Nature conservation orders and related orders: procedure***

#### **Application of schedule**

185. Paragraph 1 clarifies that this Schedule applies to NCOs and to any amending orders and revoking orders which affect NCOs.

#### **Consultation**

186. Paragraph 2 requires the Scottish Ministers to consult SNH in relation to any proposed NCO, amending order or revoking order before making it. The Scottish Ministers must have regard to any representations made by SNH before they make the order.

#### **Notification**

187. Paragraph 3 requires the Scottish Ministers to give notice of the making of an order under this section as soon as practicable after making it. Notice must be given to the interested parties (see section 48(2)). The notice must also be publicised in at least one relevant local newspaper and by such other means (including the internet) as the Scottish Ministers think fit.
188. Paragraph 4 provides that a notice under paragraph 3 must set out the order or describe its general effect. The notice must also state whether the order has taken effect. This paragraph also provides that, where the notice does not set out the order, it must specify where a copy of the order may be inspected free of charge and at all reasonable hours and how to obtain a copy of the order. Finally, sub-paragraph 4(c) provides that the notice must, where it relates to an NCO or amending order, specify the period during which and how representations may be made about the order. This sub-paragraph establishes that the period for such representations must be at least 3 months from the date on which the notice was given. This minimum period for representations is the same as that specified for representations in relation to the notification of SSSIs in Schedule 1.

#### **Confirmation of orders**

189. Paragraph 5 requires the Scottish Ministers to decide either to confirm or not to confirm an order to which this Schedule applies (i.e. an NCO, amending order or revoking order) within one year of the date on which the order is made. They must do so only after having considered any representations and after having considered any report which may have been submitted by a person appointed under paragraph 10 for the purposes of

holding an enquiry or hearing representations. The period within which confirmation must take place may be extended by agreement, in accordance with paragraph 12.

190. Paragraphs 6 and 7 provide that the Scottish Ministers are entitled to make modifications to the order prior to confirmation and they may confirm an order which has been modified. Where modifications are made, however, any changes must be detailed in the notice of confirmation required under paragraph 8. The modifications which are made cannot have the effect of extending the area of land covered by the NCO.
191. Paragraph 8 requires the Scottish Ministers to give notice of their decision to confirm or not to confirm an order as soon as practicable after making that decision. Notice of this decision must be given to the interested parties and publicised in accordance with the notice requirements set out in paragraph 3.
192. Paragraph 9 provides that any modifications to an order will have effect as soon as notice of confirmation of the order in its modified form is given by the Scottish Ministers in accordance with paragraph 8.

### **Inquiry or other opportunity to be heard**

193. Paragraph 10 provides that the Scottish Ministers must either cause a local inquiry to be held or appoint a person to hear representations if representations in relation to the order have been made within the period allowed for the lodging of representations and the representations are not subsequently withdrawn.
194. Paragraph 11 requires that any local inquiry, to be held as a consequence of paragraph 10, should be conducted in accordance with the relevant provisions of section 210 of the [Local Government \(Scotland\) Act 1973 \(c.65\)](#).

### **Extension of period**

195. Paragraph 12 ensures that the Scottish Ministers may only extend, or further extend, the period in which an NCO must be confirmed with the express agreement of every owner and occupier to which the order relates. The period of time must be agreed by all parties and agreement is to be obtained in accordance with paragraph 13.
196. Paragraph 13 specifies that agreement to extend the period in which an NCO must be confirmed is obtained if the Scottish Ministers give notice of the proposed extension to every owner and occupier of the land to which the order relates and either every owner and occupier consents to the extension, or no reasonable objection is received within 28 days. This latter arrangement allows for extension in situations where either no-one feels strongly enough to bother responding or where a minority or respondents seek to block the extension for petty reasons in a way which is, for example, at odds with the clear desire of the majority of owners and occupiers.
197. Paragraph 14 requires the Scottish Ministers to notify the interested parties if they do extend or further extend the period within which an NCO must be confirmed.

### **Recording or registration of orders**

198. Paragraph 15 requires that any order made under this Schedule and any notice given by the Scottish Ministers to confirm or not to confirm an NCO or amending order, be recorded in the General Register of Sasines or registered in the Land Register of Scotland, whichever is appropriate at the time of registration. All existing NCOs under the 1981 Act have been recorded or registered in the same way.

### **Section 26 Review of nature conservation orders**

199. It is the intention that NCOs should not remain in place longer than is necessary. Section 26 both empowers and requires the Scottish Ministers to keep the number

and impact of NCOs under review by requiring them to review each NCO at regular intervals to determine whether it should be amended or revoked. The Scottish Ministers may, for example, wish to amend or revoke an order which has become outdated or has outlived its usefulness.

200. Subsection (1) allows the Scottish Ministers to carry out a review of an NCO when they see fit, for the purpose of determining whether to amend or revoke the NCO. The provisions of subsection (1) enable the Scottish Ministers to carry out a review in response to requests for review from parties affected by the order, where it appears to the Scottish Ministers to be appropriate and reasonable to do so. They may take action to review an NCO at any time.
201. Subsection (2) supplements subsection (1) by obliging the Scottish Ministers to review each NCO at least every 6 years, if they have not already done so on a more frequent basis. This ensures that NCOs cannot be left in situ for extended periods of time without the Scottish Ministers being required to consider, at regular intervals, whether they remain relevant and necessary.

### ***Section 27 Offences in relation to nature conservation orders***

202. This section establishes that a criminal offence is committed, if an operation prohibited by an NCO is carried out (or is permitted or caused to be carried out) on land to which the NCO applies. The penalty for such an offence is a fine of up to £40,000 on summary conviction. On conviction on indictment, the Court is empowered to impose any fine (including one in excess of £40,000) which appears to it to be appropriate in the light of the facts of the case.
203. Subsection (2) states that it is not a valid defence to argue that the prohibited operation did not in fact cause damage to the natural features protected by the NCO. It is the carrying out of the prohibited operation which constitutes the offence in this case, not the causing of damage. Any argument that no damage was done is therefore irrelevant.

### ***Section 28 Reports***

204. This section requires SNH to include details of any NCO, amending order or revoking order made during the course of the reporting year in its annual report submitted under section 10(2) of the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#). This requirement is in addition to the registration or recording of orders in the Land Register or General Register of Sasines.

## ***Chapter 3 - Land Management Orders***

### ***Section 29 Proposals for land management orders***

205. This section provides for the circumstances and manner in which SNH may apply to the Scottish Ministers for the making of a land management order (“LMO”). It also specifies the land to which such an order may apply.
206. The land in respect of which SNH may make such an application is defined by subsection (1) as being land which:
- is, or forms part of, an SSSI;
  - is contiguous to, or which SNH considers to be otherwise associated with, an SSSI;  
or
  - is a combination of those types of land.
207. Subsection (2) specifies that SNH may propose to the Scottish Ministers that an LMO should be made where any of subsections (3) to (5) apply and SNH considers that an

order is necessary or expedient for the purpose of conserving, restoring or otherwise enhancing the natural feature(s) specified in an SSSI notification.

208. Subsection (3) sets out the first circumstances in which SNH may propose to the Scottish Ministers that they should make an LMO. That is, where SNH has offered to enter into a management agreement but has been unable to do so because the person to whom the agreement has been offered has refused or failed to enter into such an agreement.
209. Subsection (4) sets out the second circumstance, where that the terms of a management agreement are not being complied with by the person with whom it has been concluded.
210. Subsection (5) sets out the third circumstance, where SNH is unable to enter into a management agreement in relation to the land because it is not aware of (and cannot reasonably discover) the name and address of the owner or occupier of the land in question.
211. Subsection (6) qualifies the circumstance set out in subsection (5). It prevents SNH from applying for an LMO unless it has taken action in accordance with section 48(10). The action required is to affix a notice to some conspicuous object on that land giving notice to “the owners and any occupiers” and stating that SNH wishes to enter into a management agreement in relation to that area of land. At least 28 days must elapse between the notice being affixed on the land and any application to the Scottish Ministers.
212. Subsection (7) specifies the contents of any proposal from SNH to the Scottish Ministers for the making of an LMO. A proposal for an LMO must include a conveyancing description of the land to which it relates, a map on which the area is delineated, a description of the natural features in question and an explanation of what has been done by SNH and other parties in relation to any management agreement or offer of a management agreement. The proposal must specify the operations which SNH believes should be carried out on the land and define the persons who should carry out the operation, together with the methods to be used and the timescale within which the operation should be carried out. In addition, SNH must include a statement of the costs likely to be incurred by the person carrying out the operation and must indicate how much SNH will pay in respect of those costs. The application should also detail any operations which are *not* to be carried out on the land.

### ***Section 30 - Power to make land management orders***

213. This section confers on the Scottish Ministers the power to make an LMO. The Scottish Ministers are not bound to make an LMO in the same terms as proposed by SNH and they may make an LMO in terms they think appropriate, having considered all of the information available to them. They may also refuse SNH’s application and decline to make an LMO, as they see fit.
214. The Scottish Ministers must reach a decision on the application within 3 months of the expiry of the period allowed for representations to be made in relation to the SNH application. That period, defined in paragraph 4 of schedule 3, must be at least three months.
215. Before making any decision on an LMO application, the Scottish Ministers are obliged to consider the matters detailed in subsection (2). These are the SNH proposal for the LMO, any valid representations made by other parties in relation to the proposal, any other relevant information obtained by them from SNH or other parties by means of the powers to require the production of documents or provision of information given to them under paragraph 6 of Schedule 3.

***Section 31 - Content of land management orders***

216. Subsection (1) specifies what a land management order made under section 30 must contain. This includes a conveyancing description of the land, a map, details of the relevant natural features and the operations to be carried out, details of the persons who are required to carry out the operations, the methods and timing relevant to those operations, details of operations which are not to be carried out, the date on which the order comes into effect and its period of validity, and information on how to appeal against the order.
217. Subsection (2) defines any operation specified in the LMO as one which must *not* be carried out as an “excluded operation”. Excluded operations will in most cases equate to ORCs which SNH would not wish the land manager to carry out, notwithstanding the requirements of the LMO. Listing such operations as “excluded” allows the Scottish Ministers to retain the ability to regulate and control such activities which might have a detrimental effect on the SSSI.
218. Subsection (3) allows the Scottish Ministers to provide in the LMO for SNH to make payments to any person who incurs expense in carrying out an operation required under the LMO. Such payments must be reasonable given the requirements of the order and the nature of the work to be undertaken. “Reasonable” in this context means that it should neither be unreasonably high (which may represent an inappropriate use of public money) nor unreasonably low (which may be unfair to the person being obliged to carry out the work).

***Section 32 - Review of land management orders***

219. The intention is that LMOs (like NCOs) should not remain in place longer than is necessary. Section 32 both empowers and requires the Scottish Ministers to keep the number and impact of LMOs under review and allows them to amend or revoke any order which has become outdated or has outlived its usefulness.
220. Subsection (1) allows the Scottish Ministers to carry out a review of an LMO when they see fit for the purpose of determining whether to amend or revoke the LMO. The provisions of subsection (1) enable the Scottish Ministers to carry out a review in response to requests for review from parties affected by the order, where it appears to them to be appropriate and reasonable to do so. They may take action to review an LMO at any time.
221. Subsection (2) supplements subsection (1) by obliging the Scottish Ministers to review LMOs at least every 6 years, if they have not already done so on a more frequent basis. This ensures that LMOs cannot be left in situ for extended periods of time without Ministers being required to consider, at regular intervals, whether they remain relevant and necessary.
222. Subsection (3) provides the Scottish Ministers with the power to amend or revoke an LMO, if on the completion of a review they decide that amendment or revocation would be appropriate.

***Section 33 - Land management orders and related orders: procedure***

223. This section introduces Schedule 3. Schedule 3 sets out the procedures that must be followed when making any land management order or any amending or revoking order.

[Schedule 3](#)

## **Land Management Orders and Related Orders: Procedure**

### **Notification of proposals for land management order**

224. Paragraphs 1 to 5 of the Schedule specify the procedure SNH must follow when notifying a proposal for a land management order to the Scottish Ministers under section 29(2).
225. Paragraph 1 requires SNH to provide a copy of its LMO proposal, and the accompanying map, to every owner and occupier of land to which the proposal relates. SNH must also give notice to every other interested party (for the definition of “interested party” see section 48(2)) explaining the general effect of the proposed LMO. Details of all the interested parties (including the owners and occupiers) must be supplied to the Scottish Ministers, together with such other supplementary information as SNH believes appropriate.
226. Paragraph 2 obliges SNH to publicise the proposal in at least one relevant local newspaper and to use such other media for publicising the proposal (including the internet) as it thinks appropriate in the circumstances.
227. Paragraph 3 requires a notification under paragraph 1 or 2 to specify where a copy of the proposal and accompanying map can be inspected free of charge and obliges SNH to explain how members of the public may obtain a copy of the proposal and map at a reasonable cost. The notification must also specify how representations about the proposal can be made to the Scottish Ministers.
228. Paragraph 4 specifies that representations in relation to the LMO proposal must be made to the Scottish Ministers within 3 months of the date on which the interested parties were informed of the proposal. That period may be extended under the terms of paragraph 5.
229. Paragraph 5 sets out arrangements by which the Scottish Ministers may extend the period during which representations may be made under paragraph 4. They may do so of their own accord or on the application of any person. The period may be extended for a maximum of a further 3 months and the extension can be effected at any time during the initial 3 month period. The extension is effected by giving notice to the owners and occupiers who received copies of the proposal and to the other interested parties.

### **Power to require disclosure of information**

230. Paragraph 6 enables the Scottish Ministers to require SNH or any person to whom SNH has given notice of the LMO proposal, to disclose additional information. It also confers the power on the Scottish Ministers to specify the time and place as well as the form and manner in which such information should be made available to them.
231. Paragraph 7 limits the requirement to disclose information so as to exclude anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.
232. Paragraphs 8 and 9 provide that any failure or refusal to comply with a notice under paragraph 6 requiring the disclosure of information, or any alteration, suppression or destruction of such information, will constitute an offence punishable, on summary conviction, by a fine not exceeding level 5 on the standard scale. A defence of reasonable excuse may be advanced in relation to a failure to comply with a notice under paragraph 6.

### **Withdrawal of proposal**

233. Paragraph 10 allows SNH to withdraw a proposal to the Scottish Ministers under section 29(2) at any time prior to the making of an LMO. If SNH decides so to do, it must take action before the Scottish Ministers make any decision on the application and it must notify each person to whom it originally gave notice under paragraph 1.

### **Notification of decision on orders**

234. Where the Scottish Ministers decide to make, amend or revoke an LMO, paragraph 11 requires them to publish that decision in at least one relevant local newspaper and through any other medium (including via the internet) which they believe to be appropriate in the circumstances.
235. Paragraph 12 makes it clear that notice of any decision must also be given to the interested parties (including any owners and occupiers affected by the order).
236. Paragraph 13 sets out the information which must be provided in any notice of a decision made in relation to an LMO. The Scottish Ministers must specify their reasons for reaching the decision, set out the extent of any differences between the final order and the original SNH proposal, detail any amendments made (if the order amends an existing LMO) and explain the circumstances in which an appeal may be made against their decision to the Scottish Land Court. These provisions are intended to ensure the transparency and openness of decision-making and to enable any aggrieved party to challenge the LMO in an informed and effective manner.

### **Recording or registration of orders**

237. Paragraph 14 requires any LMO, amending order or revoking order to be recorded in the General Register of Sasines or registered in the Land Register of Scotland, whichever is appropriate at that particular time in relation to the area of land concerned. The practice of recording or registering orders reflects similar arrangements in relation to NCOs and ensures that the existence of any LMO is apparent to anyone who searched the relevant register.

### ***Section 34 - Appeals in connection with land management orders and related orders***

238. Subsection (1) establishes the right of any owner or occupier of land to which the LMO relates to appeal to the Scottish Land Court against the making of the initial LMO or any subsequent order. The appeal may challenge the decision to make the order or it may take issue with particular terms or conditions of the order.
239. Appeals must, by virtue of subsection (2), be made within 28 days of the date on which notice of the order was given by the Scottish Ministers.
240. Subsection (3) provides that the Scottish Land Court must consider an appeal on its merits and may make such other order as the Court thinks fit.
241. As with other appeals to the Scottish Land Court under the Act, subsection (3) provides that the Court should determine any appeal on its merits, rather than simply by way of judicial review. The Court is therefore empowered to look into the facts of the case and is *not* confined merely to examining whether, for example, the Scottish Ministers acted unreasonably or whether they failed to follow procedures correctly. In essence, the Scottish Land Court is entitled to examine the entire matter from scratch and to reach its own decision based on its own reading of the information presented to it. The Court may dispose of the case by making such order as it thinks fit. In particular, the Court is able to:
- affirm the decision made by the Scottish Ministers;
  - direct the Scottish Ministers to amend the order in such manner as the Court may specify; and
  - direct the Scottish Ministers to revoke the order.

### ***Section 35 - Effect of land management orders***

242. This section defines the point at which an LMO takes effect and the point at which it ceases to have effect.
243. An LMO, amending order or revoking order has effect as soon as the time limit for any appeal has expired or, where an appeal is lodged, as soon as the appeal is finally determined or when it is withdrawn. The period within which an appeal must be lodged is, in each case, 28 days (see section 34(2)).

### ***Section 36 - Offences in relation to land management orders***

244. Subsection (1) provides that a person who, without reasonable excuse, fails to carry out an operation required by an LMO will be guilty of an offence. The operation must be carried out in the manner prescribed by an LMO.
245. Subsection (2) provides that it is an offence for a person to carry out, or to cause or permit to be carried out, an excluded operation (defined in section 31(2)) unless the person has reasonable excuse for doing so.
246. Subsection (3) provides that a person found guilty of an offence under this section will be liable on summary conviction to a fine of up to £40,000, and on conviction on indictment to a fine (that is, to a fine which can be set at whatever level the Court thinks fit, including in excess of £40,000, having had regard to the facts of the case).

### ***Section 37 - Enforcement of land management orders***

247. This section allows SNH itself, where necessary, to carry out the operations specified in the LMO, where the terms of the LMO have not been complied with.
248. SNH is entitled to do so where it considers either that the operation has not been carried out within the timescales specified in the LMO or that it has been carried out otherwise than in the specified manner. In this situation SNH is not required to make any payments under the LMO and it may recover any payments already made. SNH is also empowered to recover from the person subject to the LMO any additional expenses which it has reasonably incurred in carrying out the operation itself. The intention is to protect the public purse from unnecessary additional costs which have arisen as a result of the failure by the person subject to the LMO to comply with the terms of the order.
249. Subsection (3) clarifies that “additional expenses” in this case means the difference between the actual cost to SNH of carrying out the operation and the amount it would have paid to the person who was required to carry out the operation under the terms of the LMO.

## ***Chapter 4 - General and Supplementary***

### ***Section 38 Ramsar Sites***

250. [Section 38](#) makes provision in relation to wetland sites designated as being of international importance in relation to the objectives of the Ramsar Convention.
251. Subsection (1) requires the Scottish Ministers to give SNH notice of any wetland designated in Scotland.
252. Subsection (2) requires SNH, on receipt of such a notice from the Scottish Ministers, to notify the owners and occupiers of the site, the relevant planning authority, any relevant National Park Authority, every relevant statutory undertaker and any relevant regulatory body.
253. Subsection (3) provides a full reference to the Ramsar Convention, including subsequent amendments, and provides that the terms of section 38 are also to apply in relation to any successor convention which replaces Ramsar.

254. It should be noted that the principal legal protection given to Ramsar sites in Scotland is provided by means of the SSSI and Natura 2000 systems. The provisions of this Act and the Conservation (Natural Habitats &c.) Regulations 1994 should therefore be consulted in relation to any activities or operations which might impact upon wetlands designated under the Ramsar Convention. Consideration should also be given to relevant provisions in the [Water Environment and Water Services \(Scotland\) Act 2003 \(asp 3\)](#).

### ***Section 39 Acquisition of land by SNH***

255. Subsection (1) provides that SNH may acquire all, or any part, of land defined under subsection (2), either by agreement with the owner or compulsorily. Where land is acquired by compulsory purchase, SNH requires the prior authorisation of the Scottish Ministers.
256. Subsection (2) defines the land that may be acquired under subsection (1). SNH is entitled to acquire:
- land which is an SSSI;
  - any other land to which an NCO or LMO applies; or
  - any other land which is contiguous to or associated with an SSSI or with land to which an NCO or LMO applies.
257. Subsection (3) provides that SNH may only acquire land compulsorily where it is necessary to secure the conservation, restoration or enhancement of a protected natural feature. “Protected natural feature” is defined in section 58(1) and means a natural feature which is specified in an SSSI notification or is protected by the terms of an NCO.
258. Subsection (4) provides that the power to acquire land under this section is to include the power to acquire a servitude or other right in or over land by the creation of a new right. This ensures that rights (other than simple ownership of the land) can also be acquired where this is important to achieving the objectives specified in subsection (3).
259. Subsection (5) provides that the [Acquisition of Land \(Authorisation Procedure\) \(Scotland\) Act 1947 \(c.42\)](#) applies in relation to any compulsory acquisition of land by SNH under this section. This applies procedures for acquisition, as well as provisions relating to compensation. SNH is to be treated under the 1947 Act as if it were a local authority.
260. Subsection (6) clarifies the ability of SNH to manage land acquired under this section. Whilst SNH already has powers under the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#) to acquire, hold or dispose of land, subsection (6) puts it beyond doubt that SNH is entitled to keep SSSI and related land under its direct management, where it considers this to be the most appropriate solution.
261. Subsection (7) ensures that, where SNH has purchased land compulsorily and it subsequently wishes to dispose of the land, or any interest in the land, it may only do so on terms which achieve the purpose for which the land was originally acquired. It would not, therefore, be legitimate for SNH to dispose of such land for purposes which it does not consider would secure the conservation, restoration or enhancement of the protected natural feature.

### ***Section 40 Restoration orders***

262. Subsection (1) provides that, where a person is convicted of an offence under section 19(1), or an offence under 19(3) or (4), 27(1) or 36(2), which has resulted in damage to an SSSI or land subject to an NCO, the court which convicts the person may require him/her to carry out operations necessary to restore, so far as is reasonably practicable, the natural feature to its former condition. The order may also specify the

time within which restorative action must take place and the extent of the restoration required.

263. Subsection (2) requires the court to have regard to any representations made by SNH in relation to the manner in which restoration of the natural feature should take place.
264. Subsection (3) allows the person against whom a restoration order was made to make an application to the court requesting that the order be discharged or modified. The court may do so if it believes there has been a change in circumstances that has made the compliance or full compliance with the restoration order either impracticable or unnecessary.
265. Subsection (4) specifies that a person subject to a restoration order, who fails (without a reasonable excuse) to comply with the terms of the order is guilty of an offence. A person guilty of an offence under this subsection will be liable on summary conviction to a fine of up to £40,000, and on conviction on indictment to a fine (that is, to a fine which can be set at whatever level the Court thinks fit, including in excess of £40,000, having had regard to the facts of the case).
266. Subsection (5) allows SNH to carry out operations specified in a restoration order and to recover the costs of doing so where the conditions of the order have not been fulfilled. Such costs are recoverable from the person against whom the order was made.
267. Subsection (6) provides that a restoration order is to be treated as a sentence for the purposes of any repeal or review.

#### ***Section 41 Signs etc.***

268. Subsection (1) allows SNH to put up, maintain or remove signs on any land or take any other action it considers necessary to provide information to the public about any land to which an SSSI notification, NCO, LMO, or byelaw made under section 20(1), relates.
269. Subsection (2) provides that it is an offence to damage or destroy any sign erected under subsection (1) or any other notice (for example, under section 48(10)) which has been affixed by SNH or the Scottish Ministers to an object on land for the purposes of giving notification under Part 2 of the Act. A person found guilty of an offence under this subsection is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale (currently £5,000).

#### ***Section 42 Change of owner or occupier.***

270. This section applies where a person with an interest in land within a SSSI or interest in land to which an NCO or LMO relates, disposes of that interest. "Interest in land" is defined in section 58(1). It also applies where the owner of such land becomes aware that it is occupied by an additional or a different occupier.
271. Subsection (2) requires the person with an interest in the land to send a notice to SNH advising of the change of ownership or occupation. A notice must also be sent, in the case of disposal, to the person to whom the interest is disposed and, in the case of a change of occupation, to the new or additional occupier. The notice must be sent within 28 days of the date of the date on which the person disposed of the interest or became aware of the change in occupation.
272. Subsection (3) requires that the notice given to SNH specifies the land concerned and give details of the person to whom the interest was disposed. In the case of a change of occupier, the notice must specify the date of the change, to the best of the owner's knowledge, and the name and address of the new occupier so far as those details are known.
273. Subsection (4) requires that the notice given to the new owner or occupier must identify any land covered by an SSSI notification, NCO or LMO and draw the attention of the

recipient to the existence of the notification or order. The notice must also, as far as reasonably practicable, be accompanied by a copy of all relevant documentation relating to the notification or order.

274. Subsection (5) clarifies that disposal of an interest in land takes place when the person disposes of it by way of sale, exchange, lease or through the creation of any servitude, right or privilege over that interest or by any other way (with the exception of the grant of a standard security).

### ***Section 43 Powers of investigation etc.: police***

275. This section provides certain powers, including powers of entry and investigation, which may be exercised by the police in relation to the investigation of SSSI offences. The powers conferred are broadly similar to those in section 19 of the 1981 Act, as amended by paragraph 16 of Schedule 6. A distinction is made in the Act between police powers (as here in section 43) and the powers of SNH and persons authorised by the Scottish Ministers (as in section 44 below).

276. A police officer who has reasonable cause to suspect that any person is committing or has committed an offence may, without any requirement for a warrant, take a range of actions to search for and secure evidence. The power applies whether or not the identity of the suspected perpetrator is known.

277. 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.

278. It should be noted that, in contrast to section 19 of the 1981 Act, no specific power of arrest is provided in relation to SSSI offences.

279. 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. The meaning 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 (without warrant) may be had to any building which is not lockfast, provided that building is not a dwelling.

280. Access to any lockfast premises or dwelling may only be effected under warrant and subsection (3) makes provision for the issuing of a warrant by a sheriff or justice of the peace. Where a warrant is issued to search premises or a dwelling, reasonable force may be used in order to enter the premises in question.

281. 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.

282. Subsection (5) places an explicit requirement on any police officer entering land (whether or not on the basis of a warrant) to give evidence of authority to enter the land to the occupier of the land or to anyone acting on behalf of the occupier if asked to do so.
283. Subsection (6) provides that a police officer who enters any land in the exercise of powers conferred by section 43 (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.
284. Where land is unoccupied or the occupier is absent, a police officer who enters the land under section 43 is obliged by subsection (8) to leave the land as effectively secured against unauthorised entry as it was when the police officer entered.

#### ***Section 44 Powers of entry: authorised persons***

285. This section enables a person who is authorised in writing by SNH to enter land, except for a dwelling or lockfast premises, at any reasonable time for the purposes set out in subsection (1).
286. Those purposes cover activities arising from the obligations and responsibilities placed on SNH under the Act. Thus, SNH has been given powers of entry which enable it to survey and assess land in order to determine, for example, whether to notify that land as an SSSI, whether to offer a management agreement to the owner or occupier or whether to propose an LMO. The full list of purposes is set out in paragraphs (a) to (l) of subsection 1.
287. Subsection (2) provides corresponding powers of entry for persons authorised by the Scottish Ministers. Fewer purposes are specified in paragraphs (a) to (c) of the subsection, since there are fewer instances in the Act – essentially only NCO and LMO powers – where the Scottish Ministers have specific functions which might potentially entail a requirement to enter land. As with the powers of entry conferred on SNH, a person authorised in writing by the Scottish Ministers may, enter land at any reasonable time, but only for purpose specified in this subsection.
288. Subsection (3) provides that the power to enter land by virtue of subsections (1) and (2) may – where the same purposes apply – be exercised in relation to any land other than the land in relation to which the power of entry is initially exercised. The practical effect of the provision is to allow an authorised person to enter other land – for example land which lies outwith the boundary of an SSSI or which is not covered by a particular NCO – on an incidental or consequential basis, in order to achieve the original purpose. Thus, for example, an authorised person carrying out an inspection of an SSSI with a view to determining whether or not the Scottish Ministers should make an NCO is entitled to enter not only the SSSI but other land, where it is necessary to do so in order to achieve the purpose of the inspection.
289. Subsection (4) makes it clear that persons authorised by SNH or the Scottish Ministers are not entitled to enter a dwelling or lockfast premises. Where an offence is suspected and there are grounds for believing that evidence of such an offence is to be found in lockfast premises or a dwelling, search warrants may be obtained by the police on the basis set out in section 43.
290. Subsection (5) ensures that the deliberate obstruction of a person authorised by SNH or the Scottish Ministers, whilst that person is exercising powers under this section, constitutes a criminal offence. The maximum fine for such an offence is level 5 on the standard scale. Obstruction of a police officer is already an offence under section 41 of

the [Police \(Scotland\) Act 1967 \(c.77\)](#) and no further provision is made in this connection by the Act.

291. Subsection (6) introduces Schedule 4 which specifies in further detail the procedures which must be followed, and the constraints which apply, when the powers of entry set out in this section are exercised. Particular provision is made in Schedule 4 covering the issuing of warrants for entry to land, although as noted above there is no provision for SNH staff or other persons authorised under section 44 to enter or search lockfast premises or dwellings.

#### [Schedule 4](#)

### ***Powers of Entry of Authorised Persons: Further Provision***

#### **Notice of entry to occupied land**

292. [Paragraph 1](#) specifies that notice must be given to the occupier (and, where practicable, also to the owner) of any land where a person authorised by SNH or the Scottish Ministers requires to enter the land for the purposes specified in section 44. The period of notice – either 24 hours or 14 days – is specified with reference to the purpose for which entry is required. Notice is not required where a person authorised by SNH or the Scottish Ministers enters the land in order to ascertain whether an offence is being or has been committed.

#### **Warrant for entry**

293. [Paragraph 2\(1\)](#) provides for situations in which entry to land by authorised persons is actively opposed by the owner or occupier, where it has proven impossible to give advance notice, as required under paragraph 1, or where giving notice would defeat the object of the proposed entry. In such circumstances, a person authorised by SNH or the Scottish Ministers may obtain a warrant for entry from a sheriff or justice of the peace. This sets aside the requirement for advance notice and the authorised person may also use reasonable force to effect entry to the land. In the event that the use of force is anticipated to be necessary, the authorised person may wish to request the assistance of the police. As already noted, a warrant cannot be granted to SNH staff and other authorised persons for entry to lockfast premises or a dwelling. Powers of entry and search in relation to lockfast premises and dwellings are available only to the police.
294. [Paragraph 2\(2\)](#) ensures that the sheriff does not grant a warrant simply on the basis that entry is opposed or expected to be opposed, unless he or she is satisfied either that, where paragraph 1 requires notice to be given, the required notice has in fact been given or that notice is not required because entry is necessary under section 44(1)(f) for the purposes of investigating a suspected offence.
295. In essence this means that SNH or the Scottish Ministers must have made genuine efforts to give notice of entry before seeking a warrant where the argument for the warrant is simply that entry has been refused or is likely to be refused. The granting of a warrant is not, however, subject to this requirement where the land is unoccupied (or the occupier is absent), where entry is necessary in order to investigate a suspected offence or where giving notice would defeat the object of gaining entry (for example, in cases where an NCO is being considered).
296. [Paragraph 2\(3\)](#) provides that the 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.

### **Evidence of authority**

297. [Paragraph 3](#) requires that a person entering land by virtue of section 44 or under warrant must, if challenged by the occupier or someone acting for the occupier, be able to produce evidence of his authority to exercise the power of entry.

### **Supplementary powers**

298. [Paragraph 4](#) enables an authorised person who enters land by virtue of section 44 to take with them any other persons, or any machinery, equipment or materials, which they may require in order to assist them in the exercise of their powers in relation to the land, or in relation to the conduct of any investigation. Samples may also be taken and removed from the land. The terms of a warrant issued under paragraph 2 can make particular provision regulating the use of such assistants, machinery, equipment or materials or the taking and removal of samples.

### **Duty to secure land**

299. [Paragraph 5](#) requires a person who exercises powers to enter land, which is either unoccupied or land from which the owner is temporarily absent, to ensure that the land is secured against unauthorised entry when they leave the land. The land must be secured to the same degree as it was before entry took place.

### **Compensation**

300. [Paragraph 6](#) sets out the extent to which SNH and the Scottish Ministers are liable in relation to damage which may result either from the exercise of the power of entry or from any subsequent failure to secure the land, as required in paragraph 5. Any dispute in relation to the amount of compensation is to be determined by arbitration.

### ***Section 45 SNH: power to enforce***

301. This section provides SNH with an explicit power to protect the biological and geological natural heritage of Scotland by means of civil proceedings. It allows SNH to apply to the court for interdict (or to seek any other appropriate remedy) in order to enforce compliance with particular sections of the Act or to prevent damage, more generally, to important natural features. Although it is arguable that SNH already has the necessary title and interest to be able to initiate civil proceedings, this provision puts the matter beyond doubt.
302. Subsection (1) provides a specific power for SNH to ask the sheriff or the Court of Session to require a public body to comply with its general, section 12, duty. That duty obliges public bodies to further the conservation and enhancement of SSSIs and to maintain or enhance the SSSI series. Where, therefore, a public body had failed to consult SNH, had failed to have regard to SNH advice or had not taken reasonable steps to fulfil its obligations in relation to the protection of SSSIs, it would be open to SNH to challenge those failings in court and to seek an appropriate remedy. Similar provision is made in relation to compliance by a regulatory body with the requirements of section 15. Any failure by a regulator to comply with its duties under section 15 could also be challenged via civil proceeding.
303. Subsection (2) makes more general provision for civil proceedings (whether or not proceedings under subsection (1) would be competent) where SNH believes that it is necessary to prevent operations from taking place on SSSIs or and similar land. SNH may apply to the sheriff or to the Court of Session for an order under subsection (2) where an actual or proposed operation is damaging or is likely to damage protected or important natural features.
304. The court is empowered to grant interdict or make any other order which is appropriate in the circumstances in order to safeguard any protected or important natural feature.

“Protected natural feature” is defined in section 58(1) and means a natural feature specified in an SSSI notification or protected by an NCO. Any order made by the court can also give protection to any other natural feature which is of national importance. In practice, this may include a feature which is of high standard but which has not yet been formally notified in an SSSI notification – for example, a feature on land which is being considered as an SSSI. As with NCOs, it is possible under section 45 to take action to give interim protection to such natural features in advance of formal notification of an SSSI. Similarly, the power under section 45 can also be invoked in order to protect natural features on a Natura 2000 site which has not been “underpinned” via the SSSI system (i.e. it has not been notified as both an SSSI and a Natura site).

305. The power given to SNH under this provision does not prevent any other party which has title and interest in the matter from initiating civil proceedings as an alternative to, or in parallel with, any action which SNH may take. That right to take proceedings is specifically preserved and protected by subsection (4).
306. Subsection (5) provides that the relevant court to which application should be made will be either the sheriff court or the Court of Session. The choice of court will depend on the nature of the case and the parties involved. A local matter involving a private landowner might, for example, most appropriately be heard by the sheriff for the area. A major case involving alleged non-compliance by a public body might, by contrast, be more appropriate to the Court of Session.

#### ***Section 46 Offences, penalties and time limits***

307. This section makes provision in relation to the prosecution of offences and the penalties which may be imposed.
308. Subsection (1) provides that a court must have regard, when imposing a fine for an SSSI offence, to any financial gain which the offence may have brought, or been likely to bring, to the offender. It is intended, for example, that in cases involving damage to SSSIs for commercial reasons (such as in the course of a development or construction project) the court should be able to impose penalties which adequately reflect the significance of the offence. The objective is to allow the courts to address situations in which the anticipated gains from damaging an SSSI would outweigh the likely penalties. This provision is designed to remove any incentive to commit an offence for financial gain.
309. Subsections (2) and (3) stipulate the deadline within which prosecutions for offences under Part 2 must be brought. Similar principles apply to wildlife offences under Part 1 of the 1981 Act, as amended by the Criminal Justice (Scotland) Act 2003 and paragraph 18 of Schedule 6 to this Act.
310. Summary prosecutions for SSSI offences must be brought within 6 months of the date on which sufficient evidence of the offence comes to the knowledge of the prosecutor (irrespective, subject to subsection (3), of when the offence actually occurred). If the prosecutor fails to take action within that 6 month period, the case automatically falls and no further action is possible.
311. In the absence of the provision in subsection (2), the terms of section 136 of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#) would require a summary prosecution to be brought within six months of the date on which the offence was actually committed. In the case of environmental and wildlife offences, it can be some time before the offence is discovered and expert evidence is obtained. This provision therefore ensures that an offender cannot escape prosecution simply by covering up his or her actions for 6 months.
312. Liability to prosecution is not, however, open-ended. Where proceedings have not been instituted within 3 years of the date on which the offence was committed, the case will automatically fall and no further action will be possible. In the case of a continuing

contravention of the law, which takes place over an extended period of time, the date on which the offence was committed is the last date on which the contravention occurred.

313. Subsection (4) specifies that any dispute in relation to the date on which sufficient evidence became available to the prosecutor should be settled by means of a signed certificate from the prosecutor stating the relevant date.

#### ***Section 47 Offences by bodies corporate etc.***

314. This section ensures that the directors and management of companies and other corporate bodies can be held personally responsible for offences carried out by the organisation, if that illegal act is committed with their consent or connivance, or where they have neglected to take action which would have prevented the illegal act. In such cases both the body corporate and the individuals responsible for directing and managing the affairs of that body (or who purport to act in that capacity) are liable.
315. Similar provisions are made in relation to the partners in a partnership and to the office bearers and members of an unincorporated association. In the particular case of a corporate body which is managed by its members, responsibility falls on each of its members, insofar as they have exercised or failed to exercise that management function. It should also be noted that, by virtue of subsection (1), an unincorporated association has legal personality for the purposes of a prosecution for an offence under Part 2 and it can be held liable in its own right.
316. Subsection (3) provides for any penalty imposed on a body corporate, a partnership or an unincorporated association to be recovered by civil diligence in accordance with section 221 of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#).

#### ***Section 48 Notices, applications etc.***

317. Subsection (1) specifies that any notice, notification, consent, request for review, proposal or application given or made in accordance with the terms of Part 2 of the Act must be in writing. Thus, a verbal request for consent to an ORC, for example, would not be valid and neither would a verbal consent given by SNH. This requirement for formal communications and decisions to be in writing may assist the resolution of disputes by providing more legal certainty than may be the case had events proceeded on the basis of verbal communication.
318. Subsection (2) defines the “interested parties” referred to at various points in Part 2 of the Act. The interested parties are those who are listed in paragraphs (a) to (k) and range from persons appearing to have a direct legal interest in the land through to the Scottish Ministers or SNH. “Interest” in relation to land is defined in section 58(1).
319. Subsection (2) also specifies that the date on which any notice or notification is deemed to take effect is the date on which the Scottish Ministers or, as the case may be, SNH receive a notice or notification. This provides certainty in relation to the precise date on which a notice or notification is held to take effect. The date of receipt by the Scottish Ministers or SNH can be identified precisely if evidence of receipt can be produced.
320. Subsection (3) ensures that a notice or notification is not invalidated in its entirety simply because any of the interested parties specified in this subsection have not received it. The provision covers situations in which any of the persons listed in paragraphs (a) and (f) to (k) of subsection (2), is mistakenly overlooked or for some other exceptional reason does not receive the notice or notification.
321. This might conceivably happen in the case, for example, of the owner or occupier of land on a large and complex SSSI. Although it is normally possible to determine who has an interest in a particular area of land, through both local enquiries and searches of registers of land, there may occasionally be instances where such information cannot be determined with absolute certainty. This provision is designed to try and prevent

any unnecessary disruption and expense which may arise if the notification is rendered invalid.

322. The provision also ensures the continuing validity of existing SSSI notifications, made under section 28 of the 1981 Act are continued in effect by the transitional arrangements in Schedule 5. The 1981 Act did not require any of the persons in paragraphs (f) to (k) to be formally notified, although in recent years SNH has been doing so as a matter of good administrative practice. Thus, for existing sites, the absence of a formal notification given to, for example, the local community council, will not invalidate the site. The same arrangement applies in relation to statutory undertakers, regulators, community bodies with an interest in the right to buy and other relevant persons, including those with a legal interest in the land. No formal requirement is imposed in the Act to retrospectively notify such interested parties in relation to existing sites. It is, however, expected of SNH that it will make every reasonable effort to ensure that everyone who requires to know of the existence of an SSSI will be given that necessary information.
323. The exemption provided for in subsection (3) does not, insofar as it relates to the owners and occupiers of land, represent an excuse for carelessness or poor practice on the part of SNH or the Scottish Ministers. In all cases, there is a clearly implied expectation that the notifying authority will take all reasonable steps to properly identify and notify the interested parties in relation to any area of land which is the subject of a notice or notification. The exemption should, therefore, only be invoked in cases where the notifying authority could not, in the circumstances, realistically have been expected to give notice or notification to the person concerned.
324. That general expectation – that all reasonable steps should be taken by the notifying authority – has been made a formal legal obligation in the Act where owners and occupiers are concerned. The requirement is set out in subsection (4)(a), in recognition of the particular significance of owners and occupiers in relation to protected land. The exemption in subsection (3) cannot therefore apply in relation to a failure to notify an owner or occupier unless SNH or the Scottish Ministers have taken all reasonable steps to notify all relevant owners and occupiers and have then actually taken action to notify each owner and occupier identified by that process. Further provision covering the action to be taken in relation to persons omitted in error from that notification exercise is made in subsections (11) and (12).
325. It might be noted that the reason an exemption has not been made in the case of a failure to notify the interested parties listed in paragraphs (b) to (e), is that it is inconceivable that SNH or the Scottish Ministers could not be aware, for example, of each other's identity or of the identity of the relevant planning authority for the area in question. This underlines the exceptional nature of the exemption provided in subsection (3) and, once again, emphasises the fact that it is intended to apply only to situations in which the notifying authority could not, in the circumstances, reasonably have been expected to have done things differently and thereby to have avoided the error.
326. Subsection (5) enables the Scottish Ministers by order to add to, remove or amend entries in subsection (2) which specify interested parties. This allows the list of interested parties to be updated in future, in line with changing circumstances and, for example, the effects of other legislation or land management practices.
327. Subsection (6) clarifies the point at which a notice or notification is deemed to have been given to any person. The giving of notice requires either the delivery of the notice or notification in person or its transmission by letter to the normal or last known address of the person. Arrangements are included which cater for the special case where the interested person is a corporate or public body. Subsection (10) covers the further special case in which the identity of the owner or occupier of the land is unknown.
328. Subsection (7) regulates the manner in which applications, proposals or consents are to be given or sent. The same arrangements as for the giving of notices or notifications (i.e. delivery in person or transmission by letter) apply. In addition, provision is

made for transmission by other reasonable means (bearing in mind the requirement in subsection (1) that applications etc. must be made in writing). This is intended to cover, in particular, the making of requests and applications, and the giving of consents, by e-mail where this is the most appropriate and convenient method of communication. Subsection (8) clarifies the status of material transmitted by electronic means. E-mails, faxes and other electronic communications are to be treated as being in writing if they are received in a form which is legible and is capable of being used for subsequent reference.

329. Subsections (9) and (10) cover the situation in which a notice or notification (or the offer of a management agreement under section 29(6)) must be given to the owners and occupiers of land and the identity of those owners and occupiers cannot reasonably be discovered. In such circumstances, special arrangements for the posting of a notice apply and where this is done, the notice, notification or offer is deemed to have been given or made as if it had been delivered to a person whose identity and address are known.
330. Subsections (11) and (12) make further provision in relation to the situation in which SNH or the Scottish Ministers fail or omit to give notice or notification to an owner or occupier in connection with an original SSSI notification, enlargement, denotification or the making of an NCO. The special exemption which protects the validity of the notice or notification in such circumstances is covered in subsections (3) and (4).
331. Where an omission of this kind has occurred, SNH (or the Scottish Ministers) must provide the owner or occupier with a copy of the notification or notice in question and any other information they consider appropriate in the circumstances. That copy and any additional information must be supplied as soon as SNH (or the Scottish Ministers) become aware of the identity of the omitted owner or occupier. It must also be provided if any person who should have received the original notice or notification draws the matter to the attention of SNH (or the Scottish Ministers) by making a request for a copy. SNH (or the Scottish Ministers) must then consider any representation made to them by the party in question and are obliged to take such action as they think fit having had due regard to the representations received.

### ***Section 49 Transitional arrangements***

332. This section introduces Schedule 5, which contains transitional and transitory provisions and savings consequential on the provisions of Part 2. In particular Schedule 5 rolls forward key elements of the existing SSSI system and provides, for example, for SSSIs notified under the 1981 Act to continue to have effect.

#### **Schedule 5**

### ***Part 2: Transitional Arrangements***

#### **Interpretation**

333. In paragraph 1, the “relevant day” is defined for the purposes of Schedule 5 as the day on which the repeals of the SSSI and related provisions in Part II of the Wildlife and Countryside Act 1981 (listed in paragraph 4 of schedule 7) come into force.

#### **Notifications under the 1981 Act**

334. Paragraphs 2 and 3 ensure that existing SSSIs continue to have effect when the new arrangements in the Act come into force. Any SSSI notification which has effect immediately before the relevant day and which has been confirmed (where confirmation was necessary under the legislation in force at the time the site was notified) is to be treated as an SSSI notification given under Part 2 of the Act.
335. It should be noted that paragraph 3(a) has a “year zero” effect in relation to existing SSSIs which have been confirmed and they are to be treated as having been notified

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

and confirmed under the Act on the commencement date of the new SSSI system created by the Act (i.e. the “relevant day”). References elsewhere in the Act (or in other legislation) to the date on which the SSSI was notified or confirmed will, therefore, for all existing SSSIs, be to the “relevant day” defined in paragraph 1, on which the new system takes effect. This is of relevance, for example, in relation to the ability of owners and occupiers to request a review of the ORC list for a site. SNH is not obliged to carry out such a review until 6 years from the relevant day, although in practice it will propose reviews during this period as part of the structured review programme which it has been asked to carry out.

336. Special reference is made to the [Wildlife and Countryside \(Amendment\) Act 1985 \(c.31\)](#) in paragraph 2(b) because prior to that Act no requirement existed to both notify and then confirm SSSIs.
337. [Paragraph 3\(b\)](#) has the effect of converting all existing lists of PDOs under the existing SSSI system into ORC lists under the new system. SNH has been tasked by the Scottish Ministers with reviewing and updating all lists converted in this way. Special arrangements are made in paragraph 5, which should be read in conjunction with the ORC review provisions in section 6, to enable a structured review programme to be carried out within the first 6 years following commencement of the new system.
338. Where SNH has given written consent to a PDO under the terms of the 1981 Act, that consent also continues in force, by virtue of paragraph 3(d), and is to be treated as a written consent under the new Act which permits the carrying out of the corresponding operation on the relevant ORC list (which itself will have been created from the old PDO list). Consents may however be reviewed as part of the ORC review process in section 6(4) and may be modified or withdrawn under section 16(5).
339. [Paragraph 3\(c\)](#) makes provision in relation to notices of intent (i.e. notices that a person intends to carry out an operation on the PDO list for a site) under the 1981 Act which are submitted to SNH within the 4 month period prior to the relevant day (i.e. during the 4 months prior to the commencement date for the new SSSI system). In order to avoid the inconvenience involved if such notices were simply to be deemed to be void, provision has been made to ensure that they can be considered by SNH, post commencement, as if they are valid applications for ORC consent under section 16(2) of the Act. This arrangement applies only to notices of intent which remain unresolved on the relevant day. Where SNH has given written consent to the proposed operation, that consent remains valid under paragraph 3(d). Where SNH has refused to give consent, the notice of intent falls and cannot be considered as a valid application for ORC consent. The period of 4 months specified in paragraph 3(c) reflects existing arrangements in the 1981 Act.
340. [Paragraph 4](#) requires SNH to ensure, as soon as practicable following the relevant day, that all existing SSSIs have a site management statement, as provided for in section 4 of the Act. It may do so either by preparing a new site management statement or by adopting an existing statement.
341. [Paragraph 5](#) suspends the effect of section 6(2) in order to enable SNH to implement a structured review of ORCs. If this were not done, SNH would not be able to review ORC lists which had been converted from existing lists of potentially damaging operations for 6 years after the Act comes into force, unless it were able to secure the agreement of owners and occupiers under section 6. This would potentially prevent it from implementing a structured review programme across the SSSI series.
342. [Paragraph 6](#) clarifies, for the avoidance of doubt, that a consent given by regulatory body prior to the provisions of the Act coming into force is not to be regarded as a valid consent in terms of section 15 of the Act. In other words, where a consent has been issued by a regulator prior to the commencement of section 15, the safeguards built into section 15 will not have applied and SNH will not have been formally consulted about the application. The applicant for consent will therefore still require to obtain

SNH consent separately before proceeding with an operation on an SSSI even though regulatory consent has been obtained.

343. [Paragraph 7](#) regulates the situation in which an SSSI is in the process of notification, but has not yet been confirmed at the point when the provisions of the Act come into force. In this circumstance the notification will proceed under the old arrangements of the 1981 Act and the relevant provisions of that Act continue to have effect for that purpose. Immediately it is confirmed, however, the SSSI will fall squarely within the terms of the new Act – [paragraph 3\(a\)](#) will convert it into an SSSI notified under the Act on the day confirmation is given under the 1981 Act.

### **Notifications under the 1949 Act**

344. A small number of SSSIs notified under the [National Parks and Access to the Countryside Act 1949 \(c.97\)](#) still exist. Paragraphs 8 to 10 allow for such notifications to continue in force, but in a more limited fashion than for SSSIs notified under the 1981 Act. 1949 Act sites were notified only to the planning authority for the area and, on a similar basis, they will have effect under the new Act only in relation to the general duty placed on public bodies by section 12.
345. SNH is empowered to revoke a 1949 Act site by the simple mechanism of giving notice to the interested parties. Any remaining 1949 Act sites can therefore, in due course, either be renotified by SNH under the new system or revoked.

### **Orders under section 29 of the 1981 Act**

346. [Paragraph 11](#) provides that NCOs made under the 1981 Act should continue to have effect. Again, the provision has a “year zero” effect and the NCO is to be treated as having been made and confirmed on the date the relevant provisions of the new Act are brought into force.
347. An NCO which has not yet been confirmed remains subject to the confirmation process set out in the 1981 Act until such time as it has been confirmed. The relevant provision of the 1981 Act continue to have effect for that purpose.
348. Despite that preservation of the 1981 Act provisions, the revocation of any 1981 Act NCO which has not yet been confirmed can be effected on the same basis as allowed in relation to NCOs under the new Act. Revocation will therefore have immediate effect.

### **Registers of notifications**

349. [Section 22](#) of the Act makes new arrangements for the provision and maintenance of, and access to, information about SSSIs, via a new SSSI Register under the authority of the Keeper of the Registers. Full development of the new Register may take some time so there may be a corresponding delay in bringing section 22 into effect. Paragraphs 12 and 13 therefore ensure that the existing arrangements set out in section 28(12) of the 1981 Act will continue in force until the new SSSI Register is operational.

## **Part 3 - Protection of Wildlife**

### ***Section 50 Protection of wildlife***

350. This section introduces Schedule 6. Schedule 6 makes changes to the existing provisions of the Wildlife and Countryside Act 1981 (“the 1981 Act”) and to the [Protection of Badgers Act 1992 \(c.51\)](#) (“the Badgers Act”). These changes update the arrangements contained in both the 1981 Act and the Badgers Act, in respect of:
- the protection afforded to birds, animals and plants;
  - dealing with wildlife crime; and

- significantly increasing penalties for badger-baiting and other acts of cruelty.

351. It should be noted that Part I of the 1981 Act, and in particular the enforcement and penalty provisions in sections 19 and 21, were amended by the Criminal Justice (Scotland) Act 2003. The changes effected by that Act, which are closely related in intent to the measures in Schedule 6, came into force on 26 March 2003.

## 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 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

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

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;

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- 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.
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 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:

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

- 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

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

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

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

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 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.

### ***Section 51 Scottish Marine Wildlife Watching Code***

421. **Section 51** obliges SNH to prepare and issue an advisory code covering whale and dolphin watching and other similar activities involving the watching of marine wildlife. The code is to be known as the Scottish Marine Wildlife Watching Code and is to provide recommendations, advice and information relating to both commercial and recreational wildlife watching activity. The Code is intended, in particular, to provide information on the avoidance of disturbance to marine wildlife.
422. SNH is obliged to review and revise the Code as appropriate. SNH must consult with interested persons before drawing up the Code and before making any revisions to it. SNH has a further obligation to publish the Code using appropriate media and to promote awareness and understanding of the Code.
423. Further specific provision in relation to the protection of cetaceans and basking sharks is made in paragraph 8(6) of Schedule 6.

## **Part 4 – Scottish Fossil Code**

### ***Section 52 Scottish Fossil Code***

424. **Section 52** obliges SNH to prepare and issue a code setting out recommendations, advice and information relating to fossils. The Code is to be known as the Scottish Fossil Code and is intended, in particular, to provide guidance to both professionals and amateurs on good palaeontological and fossil collecting practice. The objective of the Code is to contribute to the protection of Scotland's geological natural heritage, and to promote the scientific understanding of that natural heritage, by providing information on the avoidance of damage to important fossil deposits, whether as a consequence of activities on the site or as a result of the unregulated removal of specimens.
425. SNH is obliged to review and revise the Code as appropriate. SNH must consult with interested persons before drawing up the Code and before making any revisions to it. SNH has a further obligation to publish the Code using appropriate media and to promote awareness and understanding of the Code.
426. Formal legal protection for the most important fossil sites in Scotland is provided by means of the SSSI system and the provisions in Part 2 of the Act. It should also be borne in mind that the unauthorised removal of property belonging to another person, including items such as fossils which are found on that other person's land, amounts to theft.

## **Part 5 – General**

### ***Section 53 Orders and regulations: general***

427. This section makes procedural provision for orders and regulations made under the Act.
428. Subsection (1) specifies that orders and regulations are to be made as statutory instruments. This does not, however, apply to NCOs, LMOs, or orders amending or revoking NCOs and LMOs. These orders are subject to their own detailed procedures which are set out in Part 2 of the Act and in Schedules 2 and 3.
429. Subsection (2) allows such statutory instruments to make such incidental, supplemental, consequential, transitional, transitory or saving provision as is considered necessary or expedient by the Scottish Ministers and can make different provisions for different purposes in different areas.
430. Subsection (3) supplements the powers conferred on the Scottish Ministers by section 56 by providing that an order under that section can modify any enactment, instrument or document. The power in section 56 allows the Scottish Ministers to make an order specifying such incidental, supplemental, consequential, transitional,

transitory or saving provisions as they consider necessary expedient of the purposes or in consequence of the Act.

431. Subsection (4) provides that the majority of statutory instruments made under the Act are to be subject to annulment in pursuance of a resolution of the Parliament (i.e. they will take effect unless the Scottish Parliament specifically votes to annul them). An exception to this general rule applies in relation to orders under section 56 (where the order contains provisions which add to, replace or omit any part of the text of an Act). In this particular case, an order may not be made unless a draft of the statutory instrument containing the order has been laid before and approved by resolution of the Scottish Parliament (i.e. the order will not take effect unless specifically approved by the Scottish Parliament).
432. An exception is also made in sub-section (4) in relation to Commencement Orders made under section 59. Commencement Orders are not subject to Parliamentary procedure. They take effect without any requirement for parliamentary approval.

### **Section 54 Guidance**

433. Subsection (1) empowers the Scottish Ministers to issue guidance (or to approve guidance issued by others) in connection with the new biodiversity duty in section 1 and the SSSI system established in Part 2 of the Act.
434. Such guidance may contain recommendations, advice and information for the assistance of public bodies in general (in relation to the biodiversity duty), SNH in particular (in relation to the SSSI system) and any other persons affected by the functions exercised by SNH in connection with the SSSI system. The guidance may be revised and re-issued by Ministers as appropriate and revisions made to guidance issued by others may also be approved.
435. Subsection (2) provides particular examples of the types of information guidance prepared or adopted under subsection (1)(b) (i.e. in relation to the exercise by SNH of functions in connection with the SSSI system) may contain. Such guidance may contain information about:
- the circumstances in which SNH should consider land to be of special interest (for the purposes of notifying, enlarging or denotifying SSSIs). Such guidance may set out statutory selection and deselection criteria which must be considered by SNH when considering whether or not to notify or denotify land as an SSSIs. The existing selection criteria are currently published by the Joint Nature Conservation Committee (“JNCC”) on behalf of SNH, English Nature and the Countryside Council for Wales on an administrative, rather than a statutory, basis. Further information can be found on the JNCC website. See both: [http://www.jncc.gov.uk/Publications/sssi/sssi\\_content.htm](http://www.jncc.gov.uk/Publications/sssi/sssi_content.htm) (for biological SSSIs) and <http://www.jncc.gov.uk/earthheritage/gcr/content.htm> (for geological SSSIs);
  - the circumstances in which SNH should offer to enter to enter into a management agreement, as well as the terms and conditions on which it should do so. This guidance will be published in the form of the *Financial Guidelines* already referred to at paragraph 18 above; and
  - the amounts which SNH should pay to anyone carrying out operations specified in an LMO.
436. Subsection (3) requires the Scottish Ministers, before issuing guidance, to consult SNH and any other persons who appear to the Scottish Ministers to have an interest in the subject matter of the guidance.
437. Subsection (4) requires the Scottish Ministers to publish guidance issued under this section. Publication may be in such a manner as the Scottish Ministers see fit and this may include publication by means of the internet or other electronic means.

**Section 55: Crown application**

438. This section deals with the application of the Act to the Crown.
439. Subsections (1) and (2) provide for the provisions on biodiversity (Part 1), SSSIs (Part 2) and the general provisions in Part 5 to bind the Crown. The provisions inserted by Part 3 (and Schedule 6) into the 1981 Act and the [Protection of Badgers Act 1992 \(c.51\)](#) will be governed, in so far as they apply to the Crown, by the provisions of those Acts. Neither currently binds the Crown. The amendments and repeals to other legislation made in Schedule 7 reflect that same principle and bind the Crown only to the same extent as did the enactments which are being repealed or amended.
440. It should be noted that, by virtue of subsection (1), Her Majesty is bound by Parts 1, 2 and 5 of the Act in her private as well as her public capacity. The principal practical effect of this is to extend the SSSI system to land (in particular the Balmoral Estate) which is owned by Her Majesty as a private individual. For the purposes of the Act, Her Majesty's private estate is treated as private land and the provisions of the Act apply to it in the same way as they apply to the land of any other private landowner.
441. Subsections (3) to (11) apply the SSSI provisions in Part 2 of the Act to Crown land with appropriate modifications.
442. "Crown land" is defined in subsection (9) for the purposes of this section as land which belongs to Her Majesty in right of the Crown, to an office-holder in the Scottish Administration or to a government department, or which is held in trust for Her Majesty for the purposes of the Scottish Administration or a government department. Crown land therefore equates, for the purposes of the Act, to what might be thought of as Her Majesty's "public" estate. Her Majesty's private property (such as Balmoral Estate) is not Crown land within the definition used in this Act.
443. Byelaws, NCOs and LMOs can only be made in relation to Crown land with the consent of the appropriate authority responsible for the land in question. An interest in land may only be purchased compulsorily where the appropriate authority consents. This permits action to be taken, for example, in relation to the activities of a tenant who occupies Crown land, or in relation (in the case of byelaws or NCOs) to the activities of third parties (including members of the general public) on Crown land. Such action does however require the agreement of the appropriate authority, as defined in subsection (10).
444. The Crown itself is exempt, under subsection (7) from criminal prosecution, but its acts or omissions may be declared illegal on application to the Court of Session if they contravene Part 2 of the Act. By virtue of subsection (8) Crown servants remain liable to prosecution on the same basis as any other person, if they contravene the provisions of Part 2 of the Act.
445. Subsection (10) provides a definition of the term "appropriate authority" used in section 55. Where land forms part of the Crown Estate, the appropriate authority will be the Crown Estate Commissioners. In the case of other land belonging to the Crown (e.g. land managed by the Scottish Administration or a government department) the appropriate authority will be the responsible office holder in the Administration or the relevant department. The Scottish Ministers are, by virtue of subsection (11), empowered to determine any dispute in relation to who is the appropriate authority in relation to any particular area of land. Their decision on the matter is final.

**Section 56: Ancillary provision**

446. This section allows the Scottish Ministers to make ancillary provisions by order. Such provisions can be of an incidental, supplemental, consequential, transitional, transitory or saving nature, as the Scottish Ministers think fit. Any such order which amends or repeals the text of an Act may be made only if a draft of the order is approved by the Scottish Parliament.

***Section 57: Minor and consequential amendments and repeals***

447. This section provides for the amendments and repeals set out in Schedule 7 to have effect.

***Schedule 7 - Minor and consequential amendments and repeals***

448. This Schedule makes minor and consequential changes to a variety of existing statutes. Many of the changes reflect the need to replace existing references to SSSIs and NCOs in other legislation with appropriate references to the new provisions in the Act.
449. Paragraph 1 amends paragraph 1(a) and (b) of Schedule 3 of the [Harbours Act 1964 \(c.40\)](#), which relates to the procedure for making harbour revision and empowerment orders. References to SSSIs, NCOs and LMOs under the Act are inserted. The repeal of natural heritage areas (by paragraph 8 of schedule 7) is also reflected.
450. Paragraph 2 amends the [Forestry Act 1967 \(c.10\)](#). Section 10 of the 1967 Act (application for felling licence and decision of the Commissioners thereon) is amended to insert a new paragraph (c) in section 10(2). The effect of this amendment is to empower the Forestry Commissioners to grant a felling licence subject to conditions when it appears to them to be expedient to do so for the purpose of conserving or enhancing the flora, fauna or geological or physiographical features, or the natural beauty or amenity, of any land. Paragraph 2 also amends section 12 of the 1967 Act (conditional licences). The effect of the amendment is to apply the restrictions on conditions which may be attached to a felling licence under section 12(1) to conditions where the Commissioners consider it expedient to attach conditions under section 10(2) (a) and (b). The amendment also has the effect of restricting the prohibition on imposing conditions on the grant of a felling licence where the licence is for trees on land subject to a forestry dedication covenant to conditions imposed under section 10(2)(a) or (b). As a result there are no statutory restrictions on the conditions which may be attached to a felling licence for nature conservation purposes.
451. Paragraph 3 amends section 10(4)(b), (c) and (d) of the [Conservation of Seals Act 1970 \(c.30\)](#), which confers a power to grant licences to kill or take seals. References to SSSIs and to NCOs are updated to reflect the provisions of the new Act.
452. Paragraph 4 repeals sections 28 to 34, 41, 50, 51, and 74(5A), as well as Schedule 11, of the [Wildlife & Countryside Act 1981 \(c.69\)](#). This has the effect of removing all existing SSSI and NCO provisions from Part II of the 1981 Act, together with associated provisions. The provisions retained in Part II include provisions relating to National Nature Reserves and Marine Nature Reserves.
453. Paragraph 5 repeals section 22(1)(b)(iii) of the [Road Traffic Regulation Act 1984 \(c.27\)](#).
454. Paragraph 6 repeals section 9(7) of the [Channel Tunnel Act 1987 \(c.53\)](#).
455. Paragraph 7 amends section 36(7) of the [Environmental Protection Act 1990 \(c.43\)](#), which creates the requirement to consult SNH before issuing waste management licences. References to SSSIs and NCOs are updated in line with the provisions of the new Act and a new reference to LMOs is inserted.
456. Paragraph 8 repeals sections 6 and 12 of the [Natural Heritage \(Scotland\) Act 1991](#). These repeals have the effect of repealing current legislative provision for Natural Heritage Areas (a designation which has never in fact been used) and existing references in the 1991 Act to the Advisory Committee on SSSIs. The provisions covering the Advisory Committee have been removed from the 1991 Act and analogous provisions are now to be found in section 21 and Schedule 1 of the new Act.
457. Paragraph 9 amends section 1(7) of the [Scottish Land Court Act 1993 \(c.45\)](#), which relates to the determination by the Court of Session on a point of law. This amendment ensures that where a matter has been put to the Scottish Land Court under

the provisions of the new Act the Court can state a case to the Inner House of the Court of Session on a point of law. The Land Court may do so on its own motion and must do so if asked by a party to proceedings. This means that the parties and the Court have access to the supreme civil court in Scotland in order to resolve, if necessary, any significant and difficult legal issues which may arise in the course of proceedings. The specific reference to the new Act is necessary because the term “enactment” does not, in this context, cover Acts of the Scottish Parliament.

458. Paragraph 10 amends the [Environment Act 1995 \(c.25\)](#) to reflect the new arrangements brought into effect by the new Act. References to Natural Heritage Areas are repealed in line with the change effected in paragraph 8 of this schedule.
459. Paragraph 11 amends the [Deer \(Scotland\) Act 1996 \(c.58\)](#). The amendment inserts into Schedule 3 to the 1996 Act (penalties for offences relating to deer) a penalty applicable to an offence under section 17(3) of the 1996 Act. It is an offence under 17(3) of the 1996 Act to kill or injure a deer by a method other than shooting. The effect of the amendment is that a person found guilty of an offence under section 17(3) is liable to a fine of level 4 on the standard scale for each deer in respect of which the offence is committed or three months imprisonment or both.
460. Paragraph 12 amends section 54(1) of the [Town and Country Planning \(Scotland\) Act 1997 \(c.8\)](#), which relates to land which it is not permissible to include in a simplified planning zone. References to Natural Heritage Areas are repealed, in line with the provisions of paragraph 8 of this schedule.
461. Paragraph 13 amends section 54 of the [Water Industry \(Scotland\) Act 2002 \(asp 3\)](#), primarily by removing redundant references to the protection of SSSIs. The new Act makes improved alternative arrangements in this connection, including via sections 1 and 12 to 15 of the Act.

### ***Section 58 Interpretation***

462. This section provides definitions of particular terms used in the Act and expands upon references in Part 2 to situations in which protected natural features are can be said to have been damaged.
463. Subsection (1) provides definitions of a series of terms used in the Act. These are self-explanatory. It should be noted that these terms have been specifically defined in section 58 because they have a specialist or technical meaning which may be different from the “ordinary” meaning which might otherwise be ascribed to them. Terms in the Act which are intended simply to have their ordinary meaning (or which are given a specific meaning elsewhere – see next paragraph) are not given a specific definition in this section.
464. The use of the word “land” represents an exception to this general rule. “Land” has already been given a statutory definition, which applies to Acts of the Scottish Parliament unless there is a clear contrary intention, in The Scotland Act 1998 (Transitory and Transitional Provisions)(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999. That definition includes any “building and other structures, land covered by water, and any right or interest in or over land”. In the light of this existing formal definition, a specific definition of land is not provided in section 58. That order also gives or attracts the meaning which is, unless a contrary intention, to be ascribed to other words and expressions used in ASPs (including, for example, “Act”, “person”, “property” and “writing”).
465. The definition of “public body or office holder” makes it clear that courts, tribunals and bodies exercising the judicial power of the State are not to be treated as public bodies for the purposes of the Act. If such bodies were to be subject to the duties imposed on public bodies by the Act this would potentially give rise to a conflict of interest in situations, for example, where a court (such as the Scottish Land Court or the Court of

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Session) were to be bound by one of the general duties in the Act at the same time as being required to rule on a dispute arising from the provisions of the Act. A particular difficulty would arise where a duty under the Act (for example in section 12) required a court to consult SNH and have regard to its advice in situations where SNH were a party to the case being heard.

466. Subsection (2) specifies that damaging a site includes actions which do not necessarily have a catastrophic or immediate impact, but which are such as to cause the site to deteriorate. The term “protected natural feature” also encompasses features which are not on an SSSI but which are protected by the terms of an NCO.
467. Subsection (3) deals with the related scenario, in which the fauna for which a site has been notified are disturbed or harassed to the extent that the special interest of the site is significantly diminished. Again, the use of the term “protected natural feature” means that the provision also extends to features protected by the terms of an NCO. This provision does not make it an offence simply to disturb birds or animals on an SSSI. But it does potentially give rise to a criminal offence, by virtue for example of section 19(1), where the disturbance is of such a nature and at such a level that the ability of the bird or animal population to maintain itself on the site in the future is called into question. The offence will occur where SNH (in the case of an SSSI) or the Scottish Ministers (in the case of land covered by an NCO) consider that either the special interest of the land has decreased significantly or that it is no longer of special interest.

***Section 59: Short title and commencement***

468. This section provides a short title for the Act, which may be cited as the Nature Conservation (Scotland) Act 2004.
469. Only sections 53, 56 and 59 of the Act come into force on Royal Assent. These provide powers in relation to orders and regulations, including orders making ancillary provision, and give effect to the short title and the power to bring the remainder of the Act into force.
470. The remaining provision of the Act will come into force on a date (or dates) appointed by the Scottish Ministers by means of a commencement order or orders. Commencement may take place in a number of stages (and see in particular the example of section 22, which is not intended to be commenced until the new SSSI Register has been fully developed).