

# NATURE CONSERVATION (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3 - Protection of Wildlife** Schedule 6

#### *Protection of Wildlife*

#### **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;

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

- 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.