

# **NATURE CONSERVATION (SCOTLAND) ACT 2004**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **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.

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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

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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 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

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(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).