

## RE: SECTION 4 of the WILDLIFE AND COUNTRYSIDE ACT 1981

### ADVICE

#### Introduction

1. I am asked by the British Association of Shooting and Conservation (BASC), to advise on the interpretation of section 4 of the Wildlife and Countryside Act 1981 (WCA) as it applies in England and Wales.
2. The reason for the advice is the decision by Natural England (NE) to revoke three general licences issued under s.16 WCA, namely GL/04/05/06 (the general licences), with effect from 25 April 2019. The decision was announced on 23 April 2019. This is therefore an urgent issue for BASC.
3. In summary my advice is as follows:
  - (1) Sub sections 4(3) – (6) WCA are the provisions which provide the most obvious route to an exemption from criminal liability to persons who presently control and manage certain wild birds under the general licences.
  - (2) This is because both s. 4(3)(c) and the general licences are potential means of escaping criminal liability arising from the basic offence created by s.1WCA and because this subsection and the general licences refer to a need to prevent, ‘*serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing, timber fisheries or inland waters*’;
  - (3) The defence under s. 4(3)(c) is however much narrower than the exemption provided by the general licences. Moreover it can only operate if the individual concerned complies with additional statutory obligations;
  - (4) It is uncertain as to how s.4(3)(c) would operate in the context of a criminal trial. The interpretation of the Act in this context is likely to be highly fact specific. It follows that any

individual who seeks to rely on the defence afforded by s.4(3)(c) as a legal exemption allowing for the control and management of wild birds should take legal advice that deals with their own particular circumstances;

- (5) Put simply therefore, s.4(3)(c) cannot be regarded as an effective substitute for the general licences in the control and management of what have traditionally been regarded as pest species;
- (6) There is another possibility which might allow for the control and management of pest species, namely, the exemption provided by s.4(2)(c). In simple terms, this is an exemption from criminal liability if the individual can show that the killing of a wild bird was the incidental result of a lawful operation and that the killing could not reasonably have been avoided;
- (7) There is however no direct authority on the operation of s.4(2)(c) as an alternative to the general licences. Moreover, given the terms of s.4(3)(c), I think it is doubtful that the courts would hold that the broader exception ousts the narrower exception. An argument to the effect that farming is a lawful activity, the killing of wild birds is incidental to that activity and such killings cannot reasonably be avoided, would therefore be unlikely to succeed in a criminal trial.
- (8) It follows that the exemptions provided by both s.4(3)(c) and s.4(2)(c) appear to have extremely limited use as a means to allow for the lawful management and control of pest species.

## **The Statutory Framework**

4. The statutory framework against which this advice is set, is that the WCA states that all birds are protected, and section 1 creates the basic offence of killing or taking a wild bird, the taking of eggs or the destruction of a nest. There are however exceptions and defences to this basic offence.
5. Until the recent decision of NE, the main exception and means of controlling pest species had been under the general licences issued under section 16 WCA.

6. It is noteworthy and of practical importance that the legal guidance issued by the Crown Prosecution Service in respect of Wildlife Offences acknowledges the existence of pest species as identified in the general licences and the primacy of the general licences as the means of exemption from criminal liability in the control and management of the species so identified. This is because the licences provide a reasonably detailed scheme which attempts to set out what acts are lawful and what acts are unlawful in respect of pest species.
7. Additionally in *RSPCA v Cundy* [2001] EWHC Admin 906 (Silber J.), the High Court emphasised (at paragraph 25) the need for strict compliance with the statutory scheme in the following terms,

*“It is important at this juncture to recall that the opening words of section 16(1) of the Act, show that the provisions disapplying the penal sanctions in this Act and covered by the licence “do not apply to anything done for” any of the statutory purposes set out in that provision. This indicates that the exonerating provisions in section 16 can only be triggered into operation by a licence which only permits activities for one or any of the statutory purposes listed in section 16(1), as otherwise these opening words of the subsection are otiose and redundant. In other words a section 16 licence could not assist anybody who would not otherwise be guilty if that person was doing an act but not for one of the statutory purposes. A licence granted under section 16(1) of the act will not assist a person carrying out an act covered by the licence but not for a statutory purpose.”*
8. It followed that Mr Cundy, who had, in his large garden, been shooting starlings (a species which were then under licence and hence lawful quarry), with his airgun (a lawful means of despatch) ought to have been convicted of a section 1 offence because there was no evidence that he was shooting the starlings for any of the statutory purposes identified in the licences which were then in force.
9. Although the merits and origins of the current general licences are beyond the scope of this advice, the decision in *Cundy* suggests that the licences are the opposite of a ‘free for all’ as regards the killing of pest species.
10. In particular it is necessary to look closely at the section 16 purposes under which the general licences are issued. The fact that there are different statutory purposes helps to explain why there have been three general licences in force for essentially the same pest species. The purposes are as follows.

- (1) GL/04: This refers to preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber fisheries or inland waters and preventing the spread of disease;
- (2) GL/05: This refers to preserving public health and public safety;
- (3) GL/06: This refers to the need to conserve wild birds and flora and fauna.

#### **The section 4 exceptions**

11. As amended, s.4 WCA (as applicable in England and Wales) is in the following terms:

***“4.— Exceptions to ss. 1 and 3.***

*(1) Nothing in section 1 or in any order made under section 3 shall make unlawful—*

*(a) anything done in pursuance of a requirement by the Minister of Agriculture, Fisheries and Food or the Secretary of State under section 98 of the Agriculture Act 1947, or by the Secretary of State under section 39 of the Agriculture (Scotland) Act 1948;*

*(b) anything done under, or in pursuance of an order made under, section 21 or 22 of the Animal Health Act 1981; or*

*(c) except in the case of a wild bird included in Schedule ZA1 or 1 or the nest or egg of such a bird, anything done under, or in pursuance of an order made under, any other provision of the said Act of 1981.*

*(2) Notwithstanding anything in the provisions of section 1 or any order made under section 3, a person shall not be guilty of an offence by reason of—*

*(a) the taking of any wild bird if he shows that the bird had been disabled otherwise than by his unlawful act and was taken solely for the purpose of tending it and releasing it when no longer disabled;*

*(b) the killing of any wild bird if he shows that the bird had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering;*

*or*

*(c) any act made unlawful by those provisions if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided.*

*(3) Notwithstanding anything in the provisions of section 1 or any order made under section 3, an authorised person shall not be guilty of an offence by reason of the killing or injuring of any wild bird, other than a bird included in Schedule 1, if he shows that his action was necessary for the purpose of—*

*(a) preserving public health or public or air safety;*

*(b) preventing the spread of disease; or*

*(c) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber fisheries or inland waters .*

*(4) An authorised person shall not be regarded as showing that any action of his was necessary for a purpose mentioned in subsection (3)(c) unless he shows that as regards that purpose, there was no other satisfactory solution.*

*(5) An authorised person shall not be entitled to rely on the defence provided by subsection (3)(c) as respects any action taken at any time for any purpose mentioned in that paragraph if it had become apparent, before that time, that that action would prove necessary for that purpose and either—*

*(a) a licence under section 16 authorising that action had not been applied for by him as soon as reasonably practicable after that fact had become apparent; or*

*(b) an application by him for such a licence had been determined.*

*(6) An authorised person shall not be entitled to rely on the defence provided by subsection (3)(c) as respects any action taken at any time unless he notified the agriculture Minister as soon as reasonably practicable after that time that he had taken the action.”*

12. An authorised person for the purposes of the Act is defined by section 27 WCA as:

*“(a) the owner or occupier, or any person authorised by the owner or occupier of the land on which the action authorised is taken.”*

13. In summary, a number of exemptions and defences to criminal liability are created by section 4. For these purposes sub section (1), which refers to exemptions for actions authorised by the government under other provisions and subsections (2) (a) and (b), which refer to therapeutic interventions in respect of wild birds, are not relevant.

14. The focus of the advice is on the separate defence and exemption provided respectively by

s.4(3)(c) and s.4(2)(c). For ease of reference, I will label the former as ‘the necessity defence’ and the latter as ‘the incidental exemption.’

s.4(3)(c) – the necessity defence.

15. The first point to note is that the purposes defined in the necessity defence are not as extensive as those covered by the general licences because the defence does not extend to the killing of a wild bird to conserve other wild birds or to conserve flora or fauna – the purpose covered by GL/06. By way of example therefore, as of 25 April 2019, shooting a magpie to preserve the nest of a blackbird is an illegal act without exemption.
16. More pertinently the defence can only be used if the individual complies with the additional conditions defined in sub sections (4) – (6) which are, in outline, as follows.
  - (1) That killing a wild bird was the only means of achieving the statutory purpose (which implies a strict construction of the necessity test);
  - (2) That the person who kills has either applied for an individual licence, or that there has been a determination of his licence application (this emphasises the primacy of the licence scheme); and
  - (3) The person who kills notifies the agriculture minister as soon as is reasonably practical after the killing.
17. The WCA does not make clear as to whether section 4(3)(c) places a legal burden on the defence or merely an evidential burden. In general, the determination of this issue in a criminal trial is fraught with legal uncertainty.
18. In addition, it is possible to envisage other difficult problems of interpretation if the defence is relied on e.g. under section 4(5), at what stage does it become ‘apparent’ that the necessity test will arise, requiring a person to apply for an individual licence? An arable farmer who plants a field of peas might reasonably foresee that there was a risk that pigeons might destroy his crop, but (it could be argued) the necessity would only become apparent when the birds descended.
19. Finally, the notification requirements of any killing and the need to apply for individual licences would appear to be requirements that are likely to increase the burdens of time and cost on the government departments that have to deal with these aspects of the administration of the WCA

s.4(2) (c) – the incidental exception

20. The first point to note is that this exception provides much broader relief when wild birds are killed than under the necessity defence. There is no strict test of necessity in respect of the killing and the additional requirements of sub sections (4) –(6) do not apply.
21. Additionally in *Eaton v Natural England* [2012] EWHC Admin 2401 (HHJ Waksman QC), the High Court gave a wide definition to the meaning of incidental under section 4(2)(c). The issue was an application for an injunction by Mrs Eaton, who was concerned that the building of a ten turbine wind farm at Hockley in Essex, by a power company (RWE) would lead to the commission of offences under s.1WCA and other provisions designed to protect birds and bats
22. More precisely, the court (at paragraph 1) defined the general nature of the claim as follows,

*“The basis of the application is the actual or threatened commission by RWE of offences under s1 of the Wildlife and Countryside Act 1981 (“the 1981 Act”) (transposing relevant provisions of the predecessor to the Wild Birds Directive 2009 – “the Wild Birds Directive”) and under Reg. 41 of The Conservation of Habitats and Species Regulations 2010 (“the 2010 Regulations”) (transposing relevant provisions of the Habitats Directive 1992 – “the Habitats Directive”), by reason of the death of protected species of birds and bats as a result of collision with the turbine blades and/or disturbance due to the ongoing process of construction.”*
23. Accordingly, this triggered consideration of the incidental exception provided for by s.4(2)(c) WCA (see paragraphs 24 – 26) and the EU habitats directive which imposed obligations on member states to protect mammals including bats (see paragraph 27).
24. Although strictly *obiter* (as the application was rejected on other grounds), the judgment (at paragraph 42) interpreted the meaning of incidental in the following terms

*“I accept that the relevant offences especially as transposed into the 1981 Act and the 2010 Regulations refer to the deliberate killing of any (ie single) bird or bat, as opposed to action in relation to their species and that in a paradigm case of the deliberate targeting and killing of one of them, for example by unauthorised hunting, the offence is made out. But once one leaves that very clear territory there must be limits to criminal liability where it is alleged in relation to some entirely different activity but with knowledge of a certain risk. That is evident from the terms of Art. 12 (4) (see paragraph 27 above) and its reference to incidental killing. That*

*expression cannot be confined to the case of a one-off accident (in such a case there is obviously no offence) because the subjects of Art. 12 (4) are surely particular activities where, as incidents of or to them, the killing of bats (for example) may occur from time to time. The point at which Member States are enjoined to take action is when such incidental killing has a significant impact on the species as a whole.*” [emphasis added].

25. There is therefore a curious anomaly between the restrictive nature of the necessity test (which bites on the killing of a single wild bird) and the apparent breadth of the incidental exception (which is only ousted when the killing has a significant impact on the species as a whole). Put bluntly, it appears strange that there is one law for the farmer and another law for the power company. At a minimum this logic would be relevant to the public interest test in any decision to prosecute under s.1 WCA.
26. Should a decision to prosecute be taken however then, as set out above, in the absence of a general licence, it would seem advantageous for any person who has to control and manage pest species to try and bring themselves under the wider exception.
27. The difficulty I foresee with that argument however, is that the prosecuting authority would suggest that this interpretation would render s.4(3) – (6) meaningless.
28. In conclusion therefore the removal of the general licences will create great uncertainty as to whether the killing of a wild bird is criminal or not and the provisions of s.4 WCA will not provide any easy answers to this uncertainty.

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