



Stephanie Hepburn, a Senior Associate in our rural disputes team, and Emma De Saily, an Associate in our rural team, take a closer look at the law surrounding wildlife crime in Scotland, with a particular focus on vicarious liability for the harming of wild birds.

It has long been a criminal offence to unlawfully kill, trap or injure wild birds in Scotland. This was first established under the Wildlife and Countryside Act 1981 (the “1981 Act”). The Wildlife and Natural Environment (Scotland) Act 2011 (the “2011 Act”), which came into force on 1 January 2012, restates this point. For the purposes of the 2011 Act a wild bird is one that is of a species that is resident in or a visitor to the EU in a wild state. It excludes game birds legally killed in season.

Perhaps more significantly the 2011 Act also introduced the concept of vicarious criminal liability, with the effect that, in certain circumstances, landowners could be held responsible for the actions of employees, agents, contractors and tenants who commit a relevant offence. The latest Wildlife crime in Scotland annual report was published in December 2019 and covers data obtained from financial year 2017 to 2018. Police Scotland recorded 236 reports of wildlife crime.

The purpose of this article is to provide landowners and employers with a practical guide on the vicarious liability provisions in the 2011 Act.

## What is a ‘relevant offence’?

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The 1981 Act sets out a list of offences (as amended by the 2011 Act) which, in summary, includes the following:

- killing, injuring or taking any wild bird;
- damaging or destroying nests;
- taking or destroying a wild bird’s egg;
- preventing a wild bird from using its nest, or disturbing a wild bird while it is building a nest or is near a nest containing eggs or young;

- disturbing dependent young of a wild bird or harassing any wild bird;
- setting traps or poison to kill, or setting them in a place likely to cause injury to, any wild bird;
- possessing a prescribed pesticide; or
- attempting to do any of the above.

## Whose actions are covered?

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### Employees and agents

The vicarious liability provisions in the 2011 Act specifically target those who have rights for the management of the land in relation to the killing or taking of wild birds, the habitat of any birds, the presence of birds’ predators, or the release of birds from captivity for shooting. This means that a landowner can be vicariously liable for an offence committed by their employee or agent, even where they have the legal right to kill wild game birds.

In practical terms, the person committing the underlying offence is likely to be a gamekeeper, and the person potentially subject to vicarious liability would be the landowner or employer. However, it is important to bear in mind that a formal employment contract does not need to be in place for vicarious liability to apply.

### Those providing a relevant service

The 2011 Act also applies where a person is ‘providing relevant services’ for someone with legal rights in relation to the management of wild birds on the land. This could potentially apply to sporting and/or farming tenants who are providing a relevant service for the landowner.



## What is a 'relevant service'?

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Carrying out relevant services is defined as managing or controlling any of the following:

- (i) the operation or activity of killing or taking any wild birds on or over that land;
- (ii) the habitat of any such birds on that land;
- (iii) the presence on or over that land of predators of any such birds; or
- (iv) the release of birds from captivity for the purpose of their being killed or taken on or over that land.

Proceedings may be taken against the landowner under the vicarious liability provisions whether or not they are also taken against the offender.

## What defences are available to landowners and employers?

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Where an offence has been committed by a third party, landowners may avoid conviction under the vicarious liability provisions in the 2011 Act if two criteria are met. Firstly, the landowner must show that they did not know that the offence was being committed. Secondly, the landowner must also show that they took all reasonable steps and exercised all due diligence to prevent the offence from being committed.

Both conditions of the defence must be satisfied in order to avoid vicarious liability. This places a proactive duty on landowners to prevent offences being committed by their employees, agents, contractors or others who may be providing a relevant service. There are however some practical actions that landowners can take to ensure that 'all reasonable steps' are taken.

## Penalties

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The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 came into force on 21 July 2020. It increased the sentences for a significant number of wildlife offences, including those relating to wild birds. The maximum fine for many of these offences has increased to £40,000 and/or imprisonment for one

year. For those offences considered by the Scottish Government to be the most serious, such as those involving the injuring or the unlicensed killing or taking of wild animals, the maximum sentence would be increased to five years' imprisonment and/or an unlimited fine.

These penalties apply to both the person committing the offence and to the person found to be vicariously liable.

## What practical steps can be taken?

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Although a necessary part of the defence is to show that the landowner was not aware that the offence was being committed, wilfully disregarding an offence or not taking action to prevent the offence being committed will not avert a conviction for vicarious liability. Landowners and employers must take a proactive, preventative approach.

In practical terms, some examples of taking 'all reasonable steps and exercising all due diligence' may involve:

- ensuring that all contracts (including those with employees and independent contractors and leases with those providing a relevant service under the 2011 Act) include a requirement to comply with all statutory obligations and refrain from any illegal activities;
- obtaining full and proper references before engaging employees, contractors and tenants having a responsibility for wildlife;
- issuing clear instructions to employees on the law and illegal activities;
- clearly outlining any activities that you may wish to be informed about before the employee carries them out;
- providing best practice guides and training to employees about their legal responsibilities;
- setting up spot checks of practices and regular reviews of employees to ensure that the law is being complied with; and
- ensuring good record keeping of all of the above.



## Have there been any convictions?

Since coming into force, there have been a number of convictions of landowners under the vicarious liability provisions in the 2011 Act. The first of these concerned a gamekeeper who laid poison on the estate which killed a buzzard. As a result the gamekeeper was personally fined £4,450 and vicarious liability charges were brought against the landowner. In the case against the landowner, there was no suggestion that the landowner had instructed the gamekeeper to lay the poison or even that he was aware that the gamekeeper was doing this. However, the defence outlined above did not apply as the landowner had not taken all reasonable steps to prevent the offence from being committed. This makes very clear that turning a blind eye to the illegal practices of gamekeepers is not an option. The landowner was fined just £675, although it was reported in the press following the conviction that the estate's subsidies were reduced by £66,000 as a result of the conviction.

The second vicarious liability case came as a result of a gamekeeper using an illegal leg hold trap which killed a buzzard. In this case the landowner was given a fine of £3,200.

With the introduction of much more stringent penalties in the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020, the fines in these two cases may be thought to be modest compared what the fines would have had been had the prosecution taken place under the new regime.

*For more information, please contact Stephanie Hepburn in our rural disputes team or Emma De Saily in our rural team.*

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