Law Commission

Consultation Paper No 206

WILDLIFE LAW

A Consultation Paper

Any enquiries regarding this publication should be sent to us at The Law Commission, Steel House, Tothill Street, London SW1H 9LJ

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission
The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Hon Mr Justice Lloyd Jones (*Chairman)*,[1] Professor Elizabeth Cooke, Mr David Hertzell, Professor David Ormerod and Miss Frances Patterson QC. The Chief Executive is: Elaine Lorimer.

Topic of this consultation
This consultation paper considers reform to wildlife law.

Scope of this consultation
The purpose of this consultation is to generate responses to our provisional proposals.

Geographical scope
England and Wales.

Impact assessment
An impact assessment is available on our website.

Duration of the consultation
We invite responses from 14 August 2012 to **30 November 2012**.

How to respond
Send your responses either –

By email to: wildlife@lawcommission.gsi.gov.uk OR

By post to: Public Law Team (Wildlife), Law Commission, Steel House
11 Tothill Street, London, SW1H 9LJ
Tel: 020-3334-0262 / Fax: 020-3334-0201

If you send your comments by post, it would be helpful if, whenever possible, you could send them to us electronically as well (in any commonly used format).

After the consultation
In the light of the responses we receive, we will decide our final recommendations and we will present them to Parliament. It will be for Parliament to decide whether to approve any changes to the law.

Consultation Principles
The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: **https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance**.

Availability of this consultation paper and other documents
You can view/download this consultation paper and other documents (including the impact assessment) free of charge on our website at: **http://lawcommission.justice.gov.uk/consultations/wildlife.htm**.

[1] The Chairman to 31 July 2012 was the Rt Hon Lord Justice Munby.

Freedom of Information statement

We will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and we may attribute comments and include a list of all respondents' names in any final report we publish.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

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The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

THE LAW COMMISSION

WILDLIFE LAW

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CHAPTER 1
INTRODUCTION

1.1 In 2010, the Law Commission consulted on what should feature in our 11th programme of law reform. We were asked to include a project on wildlife law as part of the programme by the Department for Environment, Food and Rural Affairs. The 11th programme was published on 18 July 2011.

1.2 Initially, the project did not include consideration of appeals against decisions made by regulatory bodies in relation to licensing decisions. In March 2012, the Department asked us to include consideration of this issue, and we have done so.

INTRODUCTION TO WILDLIFE LAW

1.3 Historically, legal regimes dealing with wildlife have been associated with particular socio-economic structures. Wildlife was treated by the law as an economic or leisure resource, or as something to be controlled, rather than something worthy of protection in its own right. Until the twentieth century, wildlife law in England and Wales focused primarily on the creation and protection of rights over wildlife associated with land. So, for example, the Game Acts of the nineteenth century sought to protect the economic interests in wildlife of those in control of the land on which the wildlife was present.[1]

1.4 However, the utilitarian status of wildlife within the legislative regime began to change towards the latter half of the nineteenth century. The Wild Birds Protection Act 1880 was, possibly, the first piece of UK domestic legislation concerned with wildlife conservation. This Act created a general offence of killing "wild birds" during the breeding season, as defined in the Act. However, in the case of landowners, the offence was limited to specific species listed in a schedule to the Act. In this way, the protection aspirations of those proposing the Bill were ultimately balanced against the interests of landowners.[2]

1.5 In the 1960s and 1970s, public awareness of wildlife, conservation and environmental protection increased, leading to a consequent change in political opinion on the matter.[3] This was driven by the growth of television during those decades, as well as highly publicised environmental disasters such as the oil tanker, Torrey Canyon, running aground in 1967.[4] The formation of the World Wildlife Fund for Nature (WWF) in 1961, the United Nature Educational, Scientific and Cultural Organisation (UNESCO) Conference on Man and the Biosphere in

[1] Night Poaching Act 1828; Game Act 1831; Game Licences Act 1860; Ground Game Act 1880.

[2] Wild Birds Protection Act 1880, s 3. See K Cook, *Wildlife law: conservation and biodiversity* (2004) p 15.

[3] M Bowman, P Davies and C Redgwell, *Lyster's International Wildlife Law (*2nd ed 2010) p 11.

[4] See P W Birnie, A E Boyle, C J Redgwell, *International Law and the Environment* (3rd ed 2009).

1968, and the United Nations Conference on the Human Environment in 1972 demonstrated a change in political attitude in this area.[5]

1.6 By 1980, organisations, including the WWF and UNESCO, had prioritised living resource conservation and sustainable development, as set out in the World Conservation Strategy 1980 and adopted by the United Nations General Assembly as the World Charter for Nature in 1982. The relationship between environmental protection and economic development was cemented by the establishment of the World Commission on Environment and Development in 1987. Its report stressed the importance of biodiversity, a recognition of the totality of life on Earth, rather than a preoccupation with particular named species.[6] This development culminated in the United Nations Conference on Environment and Development in Rio de Janeiro, better known as the Rio Earth Summit, described as "arguably the most momentous event in the history of international wildlife law".[7] The Rio Earth Summit was the first attempt to place the management of global biological resources on a legal footing.

1.7 Domestically, some species, it could be argued, are regarded as worthy of protection irrespective of how threatened their future was. Others are protected because there is a proven conservation problem.

1.8 The principal result of numerous legislative interventions[8] is a series of self-contained, species-specific legislative regimes. Consequently, the current law is a patchwork of competing provisions. Some measures are fairly broad, such as those for wild birds; others are focused on a single species, such as badgers. Some measures are concerned with the rights of landowners; others are underpinned by protection and conservation goals.

THEMES IN WILDLIFE LAW

1.9 Given its origin and development, there is no homogenous purpose or theme to wildlife law. It has varying, and sometimes conflicting, aims and roles. However, we suggest that there are four principal strands which have emerged over time.

1.10 First, the law provides the framework within which wildlife can be controlled, so that it does not interfere unduly with the conduct of human activity. Second, the law allows for the exploitation of wildlife as a valuable natural asset.[9] Third, the law protects individual animals from harm above a permitted level (animal welfare). Finally, the law seeks to conserve wildlife as part of our common natural heritage.

[5] M Bowman, P Davies and C Redgwell, *Lyster's International Wildlife Law (*2nd ed 2010) p 12.

[6] World Commission on Environment and Development*, Report of the World Commission on Environment and Development: Our Common Future* (1987).

[7] M Bowman, P Davies and C Redgwell, *Lyster's International Wildlife Law (*2nd ed 2010) p 18.

[8] For example, the Protection of Badgers Act 1992 and the Conservation of Seals Act 1970.

[9] C T Reid, *Nature Conservation Law* (3rd ed 2009) p 1.

Control

1.11 Control is possibly the oldest element of wildlife law. Certain laws imposed duties on landowners, or others, to control the populations of species seen as pests: for example, birds that destroy crops, birds of prey, wolves and foxes.[10]

1.12 The theme has continued into modern legislation. Wildlife is managed to permit the building of a road, the development and operation of an airport, or to protect the raising of game stock. The modern practice, though, is that rather than mandatory control by killing, the law now allows for discretionary freedom from prohibitions on killing or taking.

Exploitation

1.13 Wildlife law creates rights to exploit animals present on an owner or occupier's land. The law then excludes others from being able to interfere with those rights, traditionally through the creation of crimes such as poaching.[11]

1.14 Concurrent with the rights to take or kill wild animals are hunting seasons, which limit those rights. Hunting seasons were not aimed primarily at the protection of wildlife as a part of our natural heritage but to prevent the possible adverse consequences of over-exploitation for other rights holders.

Welfare

1.15 Our legislative rules which address animal welfare considerations can be seen as descended from the nineteenth century movements that led to the foundation of such institutions as the Society (later, the Royal Society)[12] for the Prevention of Cruelty to Animals in 1824.

1.16 Although frequently tied to conservation considerations, welfare is concerned more with protecting an individual animal from harm, rather than the survival of a species's population. Indeed, it is not impossible for welfare considerations to conflict with conservation imperatives.

Environmental conservation

1.17 The final theme, with a far shorter heritage, looks to conserve the natural environment. This is construed as something in the common ownership of (or held in trust by) humanity. Initially, the mainstream of the conservation movement focused on the safeguarding of particular species that were deemed worthy of protection.

1.18 Conservation, however, has developed into the protection of biodiversity. This ties the conservation of individual species with the development of research into the functioning of ecosystems and the need to mitigate some of the effects that climate change is having on our natural heritage.[13] This grew from environmental

[10] C T Reid, *Nature Conservation Law* (3rd ed 2009) p 1.

[11] See, for example, Game Act 1831, s 1.

[12] See, *Royal Society for the Prevention of Cruelty to Animals*, http://www.rspca.org.uk/in-action/aboutus/heritage (last visited 25 July 2012).

[13] M Bowman, P Davies and C Redgwell, *Lyster's International Wildlife Law* (2nd ed 2010).

concerns during the post-war period, and led to the creation of specialist agencies such as the Food and Agriculture Organisation and the International Maritime Organisation.[14]

1.19 All of these themes are present in our current law, both on a national and international level. However, the extent to which they feature in a specific rule depends very much on the individual species, and the type of conduct being considered. Most importantly, these themes often conflict. Therefore, depending on the situation, the legal framework must either seek to allow conflicts to be reconciled or prioritise one theme above the others.

SCOPE

1.20 The project encompasses consideration of the species-specific provisions allowing for the conservation, control, protection and exploitation of wildlife present within England and Wales. It covers, therefore, the species-specific protection afforded to wild birds and other animals under part 1 of the Wildlife and Countryside Act 1981, the species protection provisions in the Conservation of Habitats and Species Regulations 2010,[15] and Acts covering individual species (or limited groups of species).[16] The project also includes consideration of Acts dedicated to welfare protection, such as the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996. Control provisions, such as those for invasive species,[17] are included in scope, as are Acts providing for the exploitation of certain species.[18]

Wildlife

1.21 The project takes a wide approach to wildlife. This is partly because one of the principal pieces of legislation, the Wildlife and Countryside Act 1981, deals with both plants and animals. The project's scope, consequently, includes consideration of wild animals, plants and fungi.

1.22 The wide scope could, potentially, be taken to include the management of commercial fish stocks. However, we are not considering the subject matter of the Common Fisheries Policy. Similarly, agriculture, and the subject matter and implementation of the Common Agricultural Policy are excluded.

Limitations

1.23 There are four particular constraints on this project, which require explanation here. We ask for consultees' views on the fourth limitation, marine extent, as this has been the subject of considerable debate and the issue is essentially one of degree. We can see advantages and disadvantages to the approach we have taken. In relation to the other three, we regard the decisions as being less

[14] P Sands and P Klein, *Law of International Institutions* (6th ed 2009).

[15] SI 2010 No 490.

[16] Such as the Conservation of Seals Act 1970 and the Protection of Badgers Act 1992.

[17] The principal provision for England and Wales is currently Wildlife and Countryside Act 1981, s 14.

[18] For example, the Deer Act 1991 and the Game Act 1831.

questions of degree, rather binary questions as to whether a particular subject is within or outside the scope of the project.

Habitats

1.24 The legislative provisions on habitats are excluded from the project. The purpose of the project is to reform the law relating to wildlife. While the protection of wildlife is, of course, inextricably linked to the protection of habitats, the project would become a significantly more extensive review of environmental law were we to include both habitat and wildlife legislation.

Levels of species protection

1.25 We are not provisionally proposing fundamental changes to the level of protection afforded to a particular species. The appropriate level of protection that should be accorded to a particular species is ultimately a decision which requires the resolution of a number of conflicting concerns. Further, it is a judgement that may require the assessment of technical scientific information. On both counts, these are not judgements that can appropriately be made by a law reform body composed of lawyers. They are political and policy decisions which should be taken by the appropriate authorities, subject to scientific advice.

1.26 An exception to this approach is where a specific level of protection is required by EU law. In such circumstances, the level of protection is a matter of legal interpretation rather than a political or scientific decision.

1.27 We are not considering reform to the Hunting Act 2004. Given its political sensitivity, the level of controversy attached to it and the Coalition Agreement commitment to hold a vote on its repeal,[19] we will not be considering the Hunting Act 2004.

General schemes

1.28 Many legislative schemes have an impact on wildlife, sometimes a profoundly important one. For example, the Animal Health Act 1981 gives the Secretary of State wide-ranging disease control powers, which can include culling wildlife.

1.29 However, the principal focus of these regimes is not the regulation or protection of wildlife but the protection of agriculture or public health. Consequently, reform to their provisions is outside the scope of our project.

[19] HM Government, *The Coalition: our programme for government* (May 2010) p 18.

Marine extent

1.30 We have limited ourselves to the consideration of legislative schemes effective to the limit of territorial waters (that is, 12 nautical miles seaward of the baseline[20]). Further, we have not included legislation concerned with the management of certain commercial fish stocks.[21]

1.31 This means that the project includes the complete territorial extent of the overwhelming majority of wildlife legislation in England and Wales, which extends only to 12 nautical miles seaward of the baseline. The exception is the Offshore Marine Conservation (Natural Habitats) Regulations 2007,[22] which extend from 12 nautical miles to 200 nautical miles seaward of the baseline. There is accordingly no legal overlap between the two regimes.

1.32 However, we accept that this is not the only way in which we could have set the scope of the project. It would have been possible for us to draw a line separating marine provisions from terrestrial ones, allowing for the subsequent creation of a purely marine regime and for us to consider solely terrestrial provisions. Alternatively, it would have been possible for us to consider one single regime to 200 nautical miles. The way that we have structured the project, and the flexibility of the system we are provisionally proposing, does not preclude the marine extent, or the potential split of marine and terrestrial regimes, being revisited in the future.

Question 1-1: Do consultees think that the marine extent of the project should be limited to territorial waters?

WALES

1.33 The Welsh government is embarked currently on an ambitious reform programme to create a Natural Environment Framework for Wales.[23]

1.34 The policy and approach of the Welsh Government is set out in its Living Wales programme. A consultation on the principles of the policy was carried out between September and December 2010, with another January to May 2012.[24]

1.35 Within the Framework process, the Welsh Government is considering substantial institutional reform and the reform of devolved environmental, planning, wildlife management and habitat protection law. This concerns two main areas. First, Natural Resource Management which considers how decision-making should

[20] The baseline is an administrative line drawn around the coast of a country which smoothes off the edges of that state and allows territorial waters to be defined by reference to it. Therefore, the outer extent of the territorial waters of a state is set at 12 nautical miles on a line drawn perpendicular to the baseline. See further: United Nations Convention of the Law of the Sea 1982, art 5.

[21] See, for example, the Statutory Instruments made under the Sea Fish Conservation Act such as SI 2008 No. 691 on the conservation of tope.

[22] SI 2007 No 1842.

[23] Under part 4 of the Government of Wales Act 2006, nature conservation is a devolved matter: sch 7, subject 6 (environment). Animal welfare (except hunting with dogs) is also devolved: sch 7, subject 1.

[24] Welsh Government, *Consultation Document: A Living Wales – a new framework for our environment, our countryside and our seas* (2010); *Sustaining a Living Wales* (2012).

take natural resource issues into account. Second, establishing a new single environmental agency – the National Resources Body for Wales. This would undertake the current duties of the Countryside Council for Wales, Environment Agency in Wales and Forestry Commission in Wales. It would have the potential to undertake further functions currently delivered by other organisations. The new National Resources Body for Wales will become operational on 1 April 2013.[25]

1.36 We have therefore sought to integrate our work with the work of the Welsh Government.

1.37 The final output of the project will be legislation. It may well be, therefore, that we will recommend that our conclusions are implemented in different legislative forms in England and in Wales.

OUTLINE OF CONSULTATION PAPER

1.38 This Consultation Paper is divided into nine subsequent chapters and two appendices.

1.39 Chapter 2 gives an overview of significant external obligations placed on the UK. This includes consideration of the Wild Birds Directive and the Habitats Directive, which are the two principal EU Directives that affect this project.

1.40 Chapter 3 outlines the main features of the current domestic legislative regime. This encompasses the species-specific provisions located in part 1 of the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.

1.41 Chapter 4 puts the case for reform, showing what we see to be the core flaws in the current law. The chapter also sets out current thinking, by the UK Government and the EU, on regulation, and then explains the regulatory approach we have adopted in the reform chapters that follow.

1.42 Chapter 5 explains the basic structure of the regulatory regime we are provisionally proposing. This includes setting out certain general reforms, such as the use of principles in decision making, that affect the whole system.

1.43 Chapter 6 provisionally proposes specific reforms to the current regime for the conservation, protection and exploitation of wildlife species protected as a matter of EU law.

1.44 Chapter 7 makes provisional proposals for the regime for species protected solely as a matter of domestic law. This includes certain simplifications to the current statutory provisions and the re-design of the crime of poaching.

1.45 Chapter 8 puts forward a new series of provisions dealing with what are termed "invasive non-native species". These are species the control of which is necessary due to the adverse effects they can have on local biodiversity.

[25] Welsh Government, *Consultation Document: Natural Resources Wales –- Proposed Arrangements for Establishing and Directing a New Body for the Management of Wales' Natural Resources* (2012). The consultation period ran from February to May 2012.

1.46 Chapter 9 concerns methods of ensuring compliance with the regulatory regime we are provisionally proposing. Here, we outline our provisional proposals for greater regulatory reliance on civil sanctions.

1.47 Chapter 10 considers appeals. Here, we discuss whether decisions made within our provisionally proposed regulatory regime could or should be subject to a new appeals process.

1.48 Appendix A provides an overview of the structure and operation of the EU. Much domestic wildlife law is descended directly from EU directives, or is the result of rulings from the Court of Justice. Therefore, for those unfamiliar with the area, we offer a brief introduction to the key features of the EU and EU law.

1.49 Appendix B lists our provisional proposals and consultation questions.

OTHER MATERIALS

1.50 We publish this Consultation Paper with a summary of the paper, and a consultation impact assessment, outlining monetised and non-monetised costs and benefits to the new regime we are provisionally proposing. These publications can be found on our website[26] and are available in printed form on request.

[26] See, Law Commission, http://lawcommission.justice.gov.uk/consultations/wildlife.htm (last visited 27 July 2012).

CHAPTER 2
INTERNATIONAL OBLIGATIONS

INTRODUCTION

2.1 This chapter considers the obligations placed on the domestic law of England and Wales as a result of either international agreements or EU law. This chapter is split into four sections:

(1) international law obligations;

(2) EU treaty provisions relevant for wildlife law;

(3) EU wildlife legislation; and

(4) conclusions.

2.2 In order to clarify the particular nature of EU obligations, we have included a general explanation of EU law in Appendix A.

INTERNATIONAL LAW OBLIGATIONS

2.3 The policy underpinning international wildlife law does not necessarily reflect the traditionally land-focused approach of domestic wildlife regulation. Rather, international wildlife law is frequently driven by an understanding that the protection of a given species requires an international solution, in order to reflect the geographic range of that species.

2.4 The international conventions outlined below are the backdrop to much EU and UK wildlife legislation.

Convention on the Conservation of European Wildlife and Natural Habitats 1979 (the Berne Convention)

2.5 Due to increasing concern about the levels of wildlife protection across Europe in the late 1970s, the Committee of Ministers of the Council of Europe established a panel of experts to prepare a new treaty to protect European wildlife. The resulting Berne Convention, as it is more commonly referred to, was approved in June 1979, opened for signature on 19 September 1979 and entered into force on 1 June 1982.[1]

2.6 The Berne Convention is probably the most important international treaty for our purposes. The EU is a signatory to the Convention, as are all EU member states, and it forms part of the backdrop to much EU legislative action.

2.7 The preamble to the Convention sets out the reasons for the Council of Europe's action, which includes the recognition that:

> Wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations.

2.8 The species protection provisions are contained in articles 5 to 9 of the Berne Convention. The most important provision for our purposes is article 6. This states that contracting parties shall take "appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in appendix [2]". Appendix 2 lists those species subject to strict protection, including, for instance, the grey wolf and the Algerian hedgehog. It then prohibits particular activity, such as all forms of deliberate capture and keeping and deliberate killing, for appendix 2 species.

2.9 In "taking appropriate and necessary measures", contracting states must have regard to article 2 of the Berne Convention,[2] which provides that:

> The contracting parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub species, varieties or forms at risk locally.

2.10 Requisite measures should include the regulation of sale, possible temporary prohibition on exploitation and the prohibition of indiscriminate methods of capture and killing.[3] In particular, contracting states should prohibit the methods specified in appendix 4 to the Convention.[4]

2.11 Articles 4 to 8 set out the Berne Convention's habitats and species protection provisions. The Convention provides a list of situations where the contracting state can make exceptions to these articles, "provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned". The possible reasons include action taken "in the interests of public health and safety, air safety or other overriding public interests".[5]

2.12 The Berne Convention also requires each contracting party to "strictly control the introduction of non-native species".[6] Recommendations issued subsequent to the entry into force of the Convention state that the contracting parties must prohibit the deliberate introduction of non-native species, except where they have been

1 M Bowman, P Davies, C Redgwell, *Lyster's International Wildlife Law* (2nd ed 2010) p 297.

2 Convention on the Conservation of European Wildlife and Natural Habitats 1979, art 7(2).

3 As above, arts 7 and 8.

4 This prohibits a number of methods of killing, capture and other forms of exploitation, including snares, live animal decoys, electrical devices capable of killing and stunning, mirrors and other dazzling devices, explosives, nets, and poison.

5 Convention on the Conservation of European Wildlife and Natural Habitats 1979, art 9. We consider the possible reasons in greater depth in Chapter 5, when setting out our provisionally proposed reforms.

6 As above, art 11(2)(b).

granted prior authorisation by a regulatory authority.[7]

2.13 The negotiations for the Berne Convention were both a legal and political driver for the adoption of the EU Wild Birds Directive, which is considered later in this chapter. It also led to the Habitats Directive, which uses a lot of the terminology adopted within the Berne Convention.

International Plant Protection Convention 1951 (IPPC)

2.14 In force since 1952 and with 177 signatories, the IPPC seeks to secure "common and effective action to prevent the spread and introduction of pests or plants and plant products and to promote appropriate measures for their control".[8]

2.15 The IPPC covers any invasive non-native species that may be considered a plant pest. It seeks internationally agreed standards on the use of phytosanitary measures[9] to prevent the spread of organisms potentially harmful to plants and plant products.

Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (the Ramsar Convention)

2.16 Established in Ramsar, Iran in 1972, the Convention is an intergovernmental treaty committing member countries to maintain the ecological character of their "Wetlands of International Importance". While this is primarily an agreement concerning habitats, two resolutions concern invasive non-native species.[10] They both call upon member countries to address the problems of invasive non-native species, including that "steps be taken to identify, eradicate and control invasive non-native species in their jurisdictions".[11]

Convention on the International Trade in Endangered Species 1973 (CITES)

2.17 Aware of the fast-growing trade in wildlife, in 1963 the General Assembly of the International Union for Conservation of Nature and Natural Resources called for "an international convention on regulations of export, transit and import of rare or threatened wildlife species or their skins and trophies". Almost 10 years later, the UN held its first major conference on international environmental issues, the Stockholm Conference, marking a turning point in the development of international environmental policy. CITES was a direct result of the Stockholm Conference.

7 Recommendation R 14 (1984) of the Committee of Ministers of the Council of Europe to member states concerning the introduction of non-native species; Recommendation No 57 (1997) of the Standing Committee, on the introduction of organisms belonging to non-native species into the environment.

8 International Plant Protection Convention 1951, art I.

9 This is defined as "any legislation, regulation or official procedure having the purpose to prevent the introduction and/or spread of pests": International Plant Protection Convention 1951, art II.

10 *7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971)* San José, Costa Rica, 10-18 May 1999; and *8th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971)* Valencia, Spain, 18-26 November 2002.

11 *7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971)* San José, Costa Rica, 10-18 May 1999.

2.18 The Convention recognises explicitly "that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade".[12]

2.19 CITES regulates international trade in wild animals and plants which are listed in the three appendices to the Convention. While it prohibits, with a few exceptions, the trade in species that are threatened with extinction (listed in appendix I), CITES also allows controlled trade in species whose survival is not presently threatened but may become so unless trade is controlled (listed in appendix II).

2.20 The principal rules implementing CITES are contained in an EU regulation.[13] Therefore domestic law reform opportunities are strictly circumscribed.

Convention on Biological Diversity 1992

2.21 The Convention on Biological Diversity 1992 is a UN convention that was opened for signature at the Earth Summit in Rio de Janeiro. The Convention's objectives are "the conservation of biological diversity" and its "sustainable use".[14]

2.22 "Biological diversity" is defined as:

> The variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.[15]

2.23 The Convention goes on to place certain obligations on contracting states. For the purposes of our project, the Convention requires that contracting states, including that they develop national strategies for the conservation and sustainable use of biological diversity.[16]

2.24 Contracting states are also placed under a duty to prevent the introduction of, or control and eradicate "those alien species which threaten ecosystems, habitats or species".[17]

2.25 Section 40 of the Natural Environment and Rural Communities Act 2005 makes specific reference to the Convention on Biological Diversity, as we explain in Chapter 3.[18]

[12] Convention on the International Trade in Endangered Species 1973, preamble.

[13] Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, Official Journal L 61 of 3.3.1997 p 1.

[14] Convention on Biological Diversity 1992, art 1.

[15] As above, art 2.

[16] As above, art 6(a).

[17] As above, art 8(h).

[18] See Chapter 3, para 3.7.

United Nations Convention on the Law of the Sea 1982 (UNCLOS)

2.26 UNCLOS came into force in 1994. It seeks to settle and codify "all issues relating to the law of the sea". There are 159 signatories to the Convention,[19] which defines matters such as "territorial waters". It also requires action from signatory states, so:

> States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.[20]

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus Convention)

2.27 The Aarhus Convention was adopted in 1998 and entered into force in October 2001. The Convention requires contracting states to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters.[21] Specifically, the three fundamental "pillars" of the Aarhus Convention are:

(1) access to environmental information;

(2) public participation in environmental decision-making; and

(3) access to justice.

2.28 Article 4 makes provision for the first pillar, access to environmental information. It requires public authorities, in response to a request for environmental information, to make such information available to the public, within the framework of national legislation, including, where requested, copies of the actual documentation containing or comprising such information.

2.29 In respect of the second pillar, article 6 requires that, during an environmental decision-making procedure for specific activities,[22] members of the public affected or likely to be affected are informed about the proposed activity, the envisaged procedure, the opportunities for the public to participate, the time and venue of any public hearing, and so on. Article 6(7) requires procedures for public participation which allow the public to submit any comments, information, analyses or opinions considered relevant to the proposed activity. Meanwhile, article 6(8) ensures that due account is taken of the outcome of the public participation.

[19] United Nations Convention on the Law of the Sea 1982, preamble.

[20] As above, art 196(1).

[21] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art 1.

[22] As above, art 6(1) and annex I.

2.30 As regards the third pillar, article 9(2) requires that affected members of the public, who have a sufficient interest or whose rights are impaired, have access to a review procedure before a court of law or an independent and impartial body to challenge the legality of any decision, act or omission which is subject to the provisions of article 6. Equally, article 9(3) requires that where they meet the criteria, if any, laid down in national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment.

EU TREATY PROVISIONS RELEVANT FOR WILDLIFE LAW

2.31 In this section we consider the specific provisions of EU law which are relevant to our project. At the outset, it needs to be remembered that the EU has no inherent jurisdiction. It, therefore, needs a treaty basis for all legislative action. Wildlife regulations and directives are legislated principally under what is now title 20 of the Treaty on the Functioning of the European Union, which concerns the environment. Environment was added as a competence by the Single European Act 1987. Legislation earlier than 1985, including the Wild Birds Directive,[23] relied on the general power to legislate for the completion of the creation of the "Common Market".[24]

2.32 The relevant articles are articles 191 to 193 of the Treaty on the Functioning of the European Union. Article 191 sets out the general policy and objectives for the EU, with the objectives listed as being:

(1) preserving, protecting and improving the quality of the environment;

(2) protecting human health;

(3) prudent and rational utilisation of natural resources; and

(4) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2.33 The EU is to "aim at a high level of protection taking into account the diversity of situations in the various regions of the Union".[25]

2.34 Article 192 of the Treaty on the Functioning of the European Union provides a legislative basis, requiring – except for certain matters unrelated to our project – that legislation be made under the "ordinary legislative procedure", as described in Appendix A to this Consultation Paper.

[23] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 1998 on the protection of the environment through criminal law, Official Journal L 328 of 6.12.2008 p 28, art 2(b)(i).

[24] This was contained in what was article 235 of the Treaty Establishing the European Economic Community 1957.

[25] Treaty on the Functioning of the European Union, art 190(2).

EU WILDLIFE LEGISLATION

2.35 In this section, we outline particular EU legislation that is referred to later in the Consultation Paper.

The Wild Birds Directive

2.36 The Wild Birds Directive[26] was the first piece of EU legislation specifically focused on conservation. It was the direct result of wider international movements, as detailed above, particularly the 1972 UN Conference on the Human Environment (the Stockholm Conference) and the work leading to the Council of Europe's Convention on the Conservation of European Wildlife and Natural Habitats 1979.

2.37 Much of the jurisprudence of the Court of Justice on the Wild Birds Directive has been used to shape the application of other pieces of legislation, such as the Habitats Directive.

2.38 The Court of Justice in *WWF Italy*[27] held that the provisions of the Wild Birds Directive are capable of direct effect, if unconditional and sufficiently precise. This is despite the fact that it does not specifically grant rights to individuals, which is a requirement for direct effect in non-environmental matters. In fact, in *Grosskrotzenburg*, the Court of Justice rejected the argument that the conferral of rights on individuals was necessary for environmental matters.[28]

2.39 Therefore provisions of the Wild Birds Directive can be relied on before the courts of member states. This is irrespective of whether they have been transposed into national law, provided they are sufficiently clear and the deadline for transposition has passed.

Consolidation

2.40 The original Wild Birds Directive on the conservation of wild birds[29] and subsequent amendments made to it, particularly to the annexes, were consolidated in Directive 2009/147/EC.[30] What follows is based on the provisions of the consolidated version of the Wild Birds Directive.

General purpose

2.41 The Wild Birds Directive's preamble highlights the decline of wild bird species' numbers. It states that the decline represents a serious threat to the natural environment. Given that European wild birds are migratory across member states, the preamble declares that the decline is a cross-border problem engaging common responsibilities.[31] In attempting to arrest decline, the preamble

[26] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal L 103, of 25.4.1979 p 1.

[27] Case C-118/94 *WWF Italy v Regione Veneto* [1996] ECR 1223.

[28] Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paras 24 to 25.

[29] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal L 103 of 25.4.1979 p 1.

[30] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, Offical Journal L 20 of 26.1.2010 p 7.

[31] As above, preamble, recitals 3, 4 and 5.

suggests that conservation should ensure "the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe".

Scope

2.42 The Wild Birds Directive "relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the member states to which the Treaty applies" and it "covers the protection, management and control of these species and lays down rules for their exploitation".[32]

2.43 Consequently, the Directive's scope and the obligations it places on member states is Europe-wide. *It follows, therefore, that a legislative regime that is limited to protecting only species native to the UK would contravene the Directive.*[33] The wide scope of the Wild Birds Directive follows the approach taken in the Council of Europe's Convention on the Conservation of European Wildlife and Natural Habitats 1979, noted above.

2.44 The Directive applies to wild birds, their eggs, nests and habitats.[34] For the purpose of our project, however, and in line with the scope outlined in Chapter 1,[35] we are only concerned with the first three of these.

Overarching obligation and basic approach to species protection

2.45 The key obligation placed on member states by the Directive is contained in article 2, which provides that:

> Member states shall take the requisite measures to maintain the population of the species referred to in article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

2.46 The Directive does not determine an absolute level of protection. Rather, the Directive allows a balance to be struck. Ecological, scientific and cultural requirements for the protection of wild birds can be offset by economic and recreational requirements. However, this balancing process relates only to maintaining a population level. The Court of Justice has held that article 2 does not constitute a separate derogation from later obligations in the Directive not to kill or take wild birds.[36]

[32] Directive 2009/147/EC, art 1(1).

[33] See, for instance, Case 252/85 *Commission v France* [1988] ECR 2243 and Case C-149/94 *Ministère Public v Vergy* [1996] ECR I-299. Provisions protecting the "national biological heritage" of France were held to contravene the Directive.

[34] Directive 2009/147/EC, art 1(2).

[35] See Chapter 1, paras 1.20 to 1.24.

[36] Case C-262/85 *Commission v Italy* [1987] ECR 3073.

2.47 In achieving the overarching obligation in article 1, the basic approach to species protection provided for in the Directive is as follows:

(1) The killing, capturing, disturbing, keeping and marketing of wild birds is prohibited. So, too, is the destruction, damaging or removal of their nests and eggs.

(2) Exceptions to the general prohibitions are permitted for species specifically listed in annexes 2 and 3 to the Directive, subject to specific requirements, such as observing breeding seasons. Consequently, their sale can be permitted,[37] and they can be hunted.[38]

(3) The general prohibitions and the requirements for their exception can be departed by way of "derogations"[39] as provided by article 9 and only when certain restrictive requirements are met, such as the absence of other satisfactory solutions.[40]

General prohibitions

2.48 The first species-specific obligation placed on member states requires them to "take the requisite measures to establish a general system of protection for all species of birds referred to in article 1".[41] The general system should prohibit:

> (a) deliberate killing or capture by any method;
>
> (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests;
>
> (c) taking their eggs in the wild and keeping these eggs even if empty;
>
> (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive; and
>
> (e) keeping birds of species the hunting and capture of which is prohibited.

2.49 This is the default position for the protection of wild birds. The default prohibitions apply unless there is an exception or derogation which an individual can rely on, as provided for by the Directive.

2.50 The prohibitions, contained in article 5(a), (b) and (d) of the Wild Birds Directive, are restricted to "deliberate" action.

[37] Directive 2009/147/EC, art 6.

[38] As above, art 7.

[39] The term "derogation" is used to mean giving permission to do something that would otherwise be prohibited. In domestic law, this is handled by the creation of particular defences and by issuing licences.

[40] See, for instance, Case C-247/85 *Commission v Belgium* [1978] ECR 3029.

[41] Directive 2009/147/EC, art 5.

2.51 Further to the basic provision in article 5, member states are under an obligation to prohibit the sale, transport for sale and offering for sale of live or dead wild birds and their parts or derivatives.[42]

2.52 Member states are required to prohibit the use of:

> All means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species.[43]

2.53 In particular, member states should prohibit the use of those methods listed in annex 4, which includes snares, night shooting sights, explosives and automatic weapons. Member states should also prohibit hunting from certain methods of transportation, such as aircraft, motor vehicles and boats driven at over 5 km/h.[44]

Hunting

2.54 Article 7 of the Wild Birds Directive allows for the hunting of species listed in annex 2, "owing to their population level, geographical distribution and reproductive rate throughout the Community". Annex 2 draws a distinction between those species which may be hunted in any member state (part A) and those which may only be hunted in particular member states (part B). Part A includes the common pheasant, wood pigeons, dovecote pigeons and Canada geese. Part B, for UK purposes, includes the common magpie.

2.55 Permitted hunting must not "jeopardise conservation efforts".[45] Member states must ensure also that the practice of hunting, including falconry, "complies with the principles of wise use and ecologically balanced control of the species of birds concerned". Further, that this practice maintains the species' populations and accords with measures taken in pursuance of the obligation in article 2.[46]

2.56 Hunting permitted under article 7 cannot take place "during the rearing season or during the various stages of reproduction".[47] This has caused significant problems, with differing interpretations of what amounts to a rearing season used by different member states.[48] In an effort to standardise interpretation across the EU, the European Commission has produced guidance with the Committee of Representatives of Member States for the adaptation to technical and scientific progress (the "ORNIS committee").[49]

[42] Directive 2009/147/EC, art 6.

[43] As above, art 8.

[44] As above, annex 4, points (a) and (b).

[45] As above, art 7(1).

[46] As above, art 7(4).

[47] As above, art 7(4).

[48] See, for instance, Case C-435/92 *Association Pour la Protection des Animaux Sauvages and Others v Préfet de Maine-et-Loire* [1994] ECR I-67.

[49] See European Commission, *Key Concepts document on Period of Reproduction and prenuptial Migration of huntable bird Species in the EU* – available at: http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/key_concepts_en.htm (last visited 27 July 2012).

Derogations from articles 5 to 8

2.57 The prohibitions in articles 5 to 8 are not absolute. Member states can "derogate" from them, but only where there is "no other satisfactory solution" and only for specific reasons.[50] The permitted reasons include "in the interests of public health and safety", "in the interests of air safety" and to "prevent serious damage to crops, livestock, forests, fisheries and water".[51]

2.58 The Court of Justice has held that the derogations must be "set out in national provisions which are sufficiently clear and precise". This is because:

> Faithful transposition becomes particularly important in a case in which the management of the common heritage is entrusted to the member states in respect of their respective territories.[52]

2.59 Court of Justice case law on derogations suggests that they should be interpreted restrictively, in order to prevent the overall purpose of the Directive being undermined.[53]

2.60 Three terms in particular have been problematic in respect of both transposition and interpretation. These are considered next.

To prevent serious damage to crops, livestock, forests, fisheries and water

2.61 The question here is what level of damage is required before it is considered "serious" enough to allow action to be taken. If a low bar is set, then this would potentially deprive the Wild Birds Directive of its efficacy as it would be fairly easy to prove some damage in most cases and exceptionally easy in the case of predators. In interpreting "serious damage", the Court of Justice has held that:

> The aim of [article 9(1)(a)] of the Directive is not to prevent the threat of minor damage. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive.[54]

2.62 In its guidance on the Habitats Directive, but based on the above case on the Wild Birds Directive, the Commission suggests that the same wording in the Habitats Directive means that "mere nuisance and normal business risk are not covered".[55]

[50] Directive 2009/147/EC, art 9.

[51] As above, art 9(1)(a). The full list of possible derogations is considered in greater detail in Chapter 5, where we set out our provisional proposals for reform.

[52] Case C-60/05 *WWF Italia and Others v Regione Lombardia* [2006] ECR I-5083.

[53] Case 262/85 *Commission v Italian Republic* [1987] ECR 3073; Case C-118/94 *WWF Italy v Regione Veneto* [1996] ECR 1223; Case C-10/96 *Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne* [1996] ECR 6775.

[54] Case C-247/85 *Commission v Belgium* [1978] ECR 3029, para 56.

[55] European Commission, *Guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007) p 55.

Taking, keeping or other judicious use of certain birds in small numbers

2.63 The "judicious use of certain birds in small numbers" can include hunting.[56] Therefore, hunting can be allowed in circumstances wider than those permitted under article 7, as set out above, but only if there is "no other satisfactory solution" and "under strictly supervised conditions and on a selective basis". Therefore, species not listed in annex 2 can be hunted when these conditions are satisfied,[57] and those species contained in annex 2 can be hunted in the breeding season.[58]

2.64 In *WWF Italia*, the Court of Justice held that the concept of small numbers must be determined on the basis of "strict scientific data".[59] It is not a "judicious" use if there are no restrictions in place to ensure that the population is maintained at a satisfactory level.[60]

2.65 Given the restrictive nature of the derogation, national legislation permitting derogation must specify clearly and precisely the criteria to be applied and require the decision-making body to apply those criteria.[61]

No other satisfactory solution

2.66 This is the key concept when permitting derogation from the general prohibitions in the Wild Birds Directive. The requirement is probably the most contentious part of article 9. In determining whether a solution is "satisfactory", European Commission guidance, relying on the Court of Justice's approach in *Ligue Royale Belge pour la Protection des Oiseaux v Région Walloone*,[62] stipulates that:

(1) if another solution exists, any argument that is not "satisfactory" will need to be strong and robust;

(2) any determination that another solution is unsatisfactory should be based on objectively verifiable factors;

(3) close attention needs to be paid to the scientific and technical evaluation of these factors;

(4) another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation; and

[56] Case C-247/85 *Commission v Belgium* [1987] ECR 3029, para 17.

[57] Case C-118/94 *WWF Italia v Regione Veneto* [1996] ECR I-1223, para 21.

[58] Case C-182/02 *Ligue pour la protection des oiseaux and others* [2003] ECR I-12105, para 17.

[59] Case C-60/05 *WWF Italia and Others v Regione Lombardia* [2006] ECR I-5083, para 29.

[60] Case C-182/02 *Ligue pour la protection des oiseaux and others* [2003] ECR I-12105, para 17.

[61] Case C-118/94 *WWF Italia v Regione Veneto* [1996] ECR I-1223, paras 23, 24 and 25.

[62] Case C-10/96, *Ligue Royale Belge pour la Protection des Oiseaux ASBL, Société d'Etudes Ornithologiques AVES ASBL v Région Walloone* [1996] ECR I-6775.

(5) the solution finally selected must be objectively limited to the extent necessary to resolve the specific problem or situation.[63]

2.67 In *Commission v Netherlands*, the Court of Justice held that the Dutch law which provided for permits to kill or capture birds did not conform with article 9(1). This was because "the wording of [the Dutch law] does not make the grant of permits conditional upon the absence of any other satisfactory solution".[64]

2.68 In *Ligue pour la Protection des Oiseaux*, the Court of Justice held that the requirement of "no other satisfactory solution" is not made out where licensed use coincides "without need" with closed seasons required for hunting under article 7 of the Wild Birds Directive.[65]

Obligation to prevent the introduction of certain species

2.69 Article 11 of the Directive also imposes an obligation on member states to prevent the introduction of species which may threaten European biodiversity. It provides that:

> Member states shall see that any introduction of species of bird which do not occur naturally in the wild state in the European territory of the member states does not prejudice the local flora and fauna. In this connection they shall consult the Commission.

Reporting

2.70 Each year member states should report to the European Commission on how they have granted permission for the conduct of an activity which would otherwise be prohibited.[66] Furthermore, member states must report on their general implementation of the Wild Birds Directive every three years.[67]

Implementation

2.71 The obligations contained in the Wild Birds Directive are primarily implemented in relation to land and territorial waters within England and Wales through part 1 of the Wildlife and Countryside Act 1981. However, this is not the only vehicle for implementation. The Game Acts should also be seen as the relevant domestic measure for the species which they cover.

[63] European Commission, *Guide to Sustainable Hunting under the Birds Directive* (2008) paras 3.4.10 and 3.4.12.

[64] Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031.

[65] Case C-182/02 *Ligue pour la protection des oiseaux and others* [2003] ECR I-12105, para 17.

[66] Directive 2009/147/EC, art 9(3).

[67] As above, art 12(1).

Habitats Directive

2.72 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,[68] the Habitats Directive, is the second major piece of EU law that we consider.

2.73 The provisions of the Habitats Directive are capable of "direct effect", according to the Court of Justice in *Landilijke Vereniqina*.[69] Therefore, as with the Wild Birds Directive, certain provisions could be relied on before the courts of member states, irrespective of transposition.

General purpose

2.74 The Habitats Directive was the EU's response to an increasing deterioration of habitats and the increasing number of wild species determined as "seriously threatened" across Europe. It was decided that EU action, rather than relying on the intervention of individual member states, was required, as "the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature".[70]

2.75 The aim of the Directive is to:

> contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the member states to which the Treaty applies.

2.76 The primary obligation placed on member states is to put in place measures "designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest". In assessing what measures should be taken, member states can take into account "economic, social and cultural requirements and regional and local characteristics".[71]

2.77 The Directive defines the "conservation status" of a natural habitat as being "favourable" when:[72]

(1) population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;

(2) the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future; and

(3) there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

[68] Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206 of 22.7.1992, p 7.

[69] Case C-127/02 *Landilijke Vereniqina* [2004] ECR I-7405, para 66.

[70] Directive 92/43/EEC, preamble. fourth recital.

[71] As above, art 2.

[72] As above, art 1.

2.78 Member states must:

> undertake surveillance of the conservation status of the natural habitats and species referred to in article 2 with particular regard to priority natural habitat types and priority species.[73]

2.79 The surveillance obligation has been held to be fundamental to meeting the obligations placed on member states by the Court of Justice.[74]

Prohibited activity

2.80 While we deal with prohibited activity further in Chapter 7, it is useful to explain here that the Directive sets out species-specific provisions in articles 12 to 16. Article 12 provides that member states shall take "the requisite measures to establish a system of strict protection for the animal species listed in annex 4(a) in their natural range".[75] Annex 4 lists Community species in need of strict protection, more commonly referred to as "European Protected Species". Part (a) lists animals species, which includes certain bats and marine mammals,[76] and part (b) lists plants. Requisite measures include prohibiting:

> (a) all forms of deliberate capture or killing of specimens of these species in the wild;
>
> (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
>
> (c) deliberate destruction or taking of eggs from the wild; and
>
> (d) deterioration or destruction of breeding sites or resting places.[77]

2.81 Unlike article 12(a) to (c), article 12(d) does not require deliberate action. The Court of Justice has held that the prohibition therefore includes non-deliberate acts and that this interpretation is both in keeping with the purposes of the Directive and is proportionate.[78]

2.82 Member states shall prohibit "for these species" the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before the Directive is implemented.[79]

2.83 Article 13 makes similar provisions to article 12 but for plants.

2.84 Whilst some species are deemed to warrant the level of protection required by article 12, the Habitats Directive also includes a second, lower, level of

[73] Directive 92/43/EEC, art 11.

[74] Case C-6/04 *Commission v UK* [2005] ECR I-9017.

[75] Directive 92/43/EEC, art 12(1).

[76] That is, cetacea.

[77] Directive 92/43/EEC, art 12(1).

[78] Case C-98/03 *Commission v Germany* [2006] ECR I-53; Case C-6/04 *Commission v UK* [2005] ECR I-9017.

[79] Directive 92/43/EEC, art 12(2).

protection. This other level of protection concerns species whose maintenance may require management measures, which are listed in annex 5. Member states, based on the results of monitoring conducted in pursuance of the Habitats Directive, should take such measures as are necessary to maintain a favourable conservation status.[80]

2.85 Article 15(1) prohibits the use of certain methods of capture and killing, even where capture and killing is allowed in respect of species listed in either annex 4(a) or annex 5. Prohibited methods include non-selective traps and crossbows.[81]

Deliberate action

2.86 There has been recent case law from the Court of Justice[82] and guidance for the purposes of the Habitats Directive issued by the European Commission on the meaning of deliberate action.[83] The guidance document proposes the following definition:

> "Deliberate" actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.[84]

2.87 However, it should be noted that the Commission's reference to action which "will most likely lead to an offence" is narrower than the Court's reference in *Commission v Spain* to "accepted the possibility of ... killing", or "knew that they risked" it.[85]

2.88 The deliberate action does not, necessarily, have to be against a particular individual of a species but could merely be with the possibility of affecting a member of a protected species.[86]

Exceptions

2.89 As with the Wild Birds Directive, the prohibitions listed above are not absolute. If there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range,[87] member states may derogate from the articles 12, 13, 14 and 15(a) and (b) for the reasons contained in article 16. The reasons are

[80] Directive 92/43/EEC, art 14.

[81] As above, annex 6(a).

[82] Case C-221/04 *Commission v Spain* [2006] ECR 5415; Case C-103/00 *Commission v Greece* [2002] ECR I-1147.

[83] European Commission, *Guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007).

[84] As above, p 36.

[85] Case C-221/04 *Commission v Spain* [2006] ECR 5415, paras 71 and 73.

[86] Case C-221/04 *Commission v Spain* [2006] ECR 5415.

[87] Directive 92/43/EEC, art 16(1). The possible derogations are considered in full in Chapter 5, where we set out our provisionally proposed reforms.

essentially those in the Berne Convention and include "in the interests of public health and public safety, or for other imperative reasons of overriding public interest".[88]

2.90 As with derogations under the Wild Birds Directive, the Court of Justice has held that the derogations need to be interpreted restrictively.[89]

Reporting

2.91 Where a member state has permitted activity that is normally generally prohibited, it has to report this to the European Commission. The reports should be sent every two years. The Habitats Directive contains a prescriptive list for these reports, which includes the requirement that the justification for each permission granted is included.[90] This regime is more detailed than that for wild birds, as set out in the Wild Birds Directive. Finally, on reporting, member states have to report on the implementation of the Habitats Directive within their territory, including on the conservation status of species protected under the Directive, every six years.[91]

Implementation

2.92 The Habitats Directive is transposed into the law of England and Wales by the Conservation of Habitats and Species Regulations 2010,[92] made under section 2(2) of the European Communities Act 1972.

EU implementation of the Aarhus Convention[93]

2.93 The European Union is a party to the UN's Aarhus Convention, mentioned above. In 2003, two EU directives concerning the first and second pillars of the Convention were adopted:

(1) Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC; and

(2) Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.[94]

[88] Directive 92/43/EEC, art 16.

[89] Case C-06/04 *Commission v UK* [2005] ECR 9017.

[90] Directive 92/43/EEC, arts 16(2).

[91] As above, art 17.

[92] SI 2010 No 490.

[93] We discuss the importance of the Aarhus Convention further in Chapter 10.

[94] Provisions for public participation in environmental decision-making are also found in a number of other environmental directives, such as Directive 2001/42/EC on the assessment of certain plans and programmes on the environment and Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

2.94 Directive 2003/4/EC, which covers the first pillar of the Aarhus Convention, access to environmental information, was transposed in England and Wales through the Environmental Information Regulations 2004.

2.95 The implementation of Directive 2003/35/EC, which covers the second pillar of the Aarhus Convention, public participation in environmental decision-making, into UK law is more complex. Given the many discrete policy areas involved, the provisions for public participation have been split over 50 different legal instruments and thus different government departments.[95]

2.96 Furthermore, in October 2003 the European Commission presented a proposal for a directive on access to justice in environmental matters, which would address the third pillar of the Aarhus Convention, access to justice.[96] The proposal effectively required the implementation of the Aarhus Convention in full by member states. The European Parliament supported the proposal, but there was such strong opposition in the Council of Ministers that negotiations on the directive have, since 2004, been shelved.[97]

2.97 The proposal for an environmental access to justice directive was part of the "Aarhus package", also consisting of a proposal for a decision to approve the Convention on behalf of the EU[98] (which has since been adopted)[99] and a proposal for a regulation to apply the provisions of the Convention to Community institutions and bodies.[100] The latter was adopted in September 2006.[101]

CONCLUSIONS

2.98 International agreements, such as the ones considered above, set benchmarks for national action whilst protecting a certain level of national autonomy. The exercise of that autonomy has to be seen in the context of domestic political imperatives and other international agreements or obligations.

2.99 However, despite the autonomy afforded the UK, where there has been no EU legislation in a particular area, we would expect our proposed regime to reflect our international obligations. We accept that international law does not place the same kind of obligations on the UK as EU law. The position in relation to EU law,

[95] See http://archive.defra.gov.uk/environment/policy/international/aarhus/ (last visited 27 July 2012); http://archive.defra.gov.uk/environment/policy/international/aarhus/pdf/compliance-summary.pdf (last visited 27 July 2012).

[96] COM (2003) 624.

[97] See http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=186297#364384 (last visited 20 June 2012). Nevertheless, the Court of Justice has taken an expansionist approach to the role of the Aarhus Convention as a matter of EU general law, thereby giving the third pillar of the Aarhus Convention some domestic effect: see Chapter 10, paras 10.67 to 10.71.

[98] COM (2003) 625.

[99] Decision 2005/370/EC.

[100] COM (2003) 622.

[101] Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, Official Journal L 264 of 25.9.2006, p 13, entered into force on 28 September 2006 and applicable as of 17 July 2007.

however, is markedly different. As we explain in Appendix A, EU law is binding on the UK and obligations contained in directives, such as the Birds and Habitats Directives, have to be transposed into domestic law.

2.100 The position in relation to the Aarhus Convention is particularly complex. As we explore in Chapter 10, there has been an expansionist approach taken by the Court of Justice to the role of Aarhus as a matter of EU general law. This follows the withdrawal of a proposal for a general access to justice in environmental matters Directive which would have required full implementation of the Aarhus Convention by member states.

2.101 In general, we suggest that when transposing EU obligations the preferable approach is frequently, although not always, to use the exact terminology employed by the directive in question or the wording used by the Court of Justice when ruling on a matter of EU law. This reduces the chances of an infringement and meets with the current Government's policy of favouring "copy out" of EU obligations.[102]

[102] See Chapter 4, paras 4.26 to 4.27.

CHAPTER 3
CURRENT DOMESTIC LEGAL REGIMES

INTRODUCTION

3.1 In this chapter we consider the legal regime in place within England and Wales which concerns wildlife.

3.2 Outlined first are the two principal conservation regimes: part 1 of the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010 (the "Habitats Regulations 2010").[1] The first seeks to implement the provisions of the EU's Wild Birds Directive,[2] and the second does the same for the Habitats Directive.[3]

3.3 However, the Wildlife and Countryside Act 1981 does not transpose all of the obligations contained in the Wild Birds Directive. The relevant regime for some wild birds, namely game birds, is still contained in the pre-Victorian "Game Acts", principally the Game Act 1831. Moreover, the Wildlife and Countryside Act 1981 does not only seek to implement obligations contained in the Wild Birds Directive; it also establishes purely domestic protective regimes for species that are not wild birds, such as bats.

3.4 The legal regimes contained in the Wildlife and Countryside Act 1981 and the Habitats Regulations 2010 form only part of the landscape, however. There are other legal regimes which address the conservation, welfare, exploitation and control of wildlife. These may be wide, multi-species legislation such as the Salmon and Freshwater Fisheries Act 1975. Equally, they may concern a limited number of individual species (or even only one), such as the Deer Act 1991 or the Protection of Badgers Act 1992.

3.5 Having considered the species-specific regimes, we consider two Acts which impose general duties: the Wild Mammals (Protection) Act 1996 and the Animal Welfare Act 2006.

3.6 However, before moving on to consider the specific wildlife regimes, we consider the Natural Environment and Rural Communities Act 2006, which imposes a legal duty on public bodies to take into account biodiversity when exercising their functions.

[1] SI 2010 No 490, referred to as the "Habitats Regulations 2010".

[2] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Official Journal L 103 of 25.4.1979 p 1. Original Directive and amendments consolidated as Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, Official Journal L 20 of 26.1.2010 p 7.

[3] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal L 206 of 22.7.1992 p 7. The requirements of the Wild Birds and Habitats Directives were considered in Chapter 2.

Natural Environment and Rural Communities Act 2006

3.7 The Natural Environment and Rural Communities Act 2006 contains two provisions which are of relevance to our project. First, the Act requires that every public authority, in exercising its functions, must have regard, so far as is consistent with the proper exercise of those functions, to the conservation of biodiversity. Particular regard, when considering the conservation of biodiversity, must be had to the United Nations Convention on Biological Diversity 1992.[4] Biodiversity is to be taken as including restoration of or increase in a species population.[5]

3.8 The 2006 Act also requires that the Secretary of State, in respect of England, and the Welsh Ministers, in respect of Wales, must publish a list of organisms and habitats which in their opinion are of principal importance for the conservation of biodiversity.[6] These lists must be kept under review and either Natural England or the Countryside Council for Wales must be consulted on them, depending on whether the list is for England or Wales.[7]

3.9 Whilst taking into account the general biodiversity duty in section 40 of the 2006 Act, the Secretary of State (for England) and the Welsh Ministers (for Wales) must take such steps as appear to be reasonably practicable to further the conservation of organisms and habitats included in such lists. They must also promote the taking of such steps by others.[8]

Our approach

3.10 In the coming sections we map the basic approach of the domestic legal regime and explain its principal provisions. We do not set out each and every wildlife offence or every regulatory provision, such as those relating to trapping or the sale of wildlife; rather, we seek to explain the basic system and its fundamental tenets.

3.11 As we outlined in Chapter 1,[9] we are not considering current provisions relating to habitats protection.

WILDLIFE AND COUNTRYSIDE ACT 1981

3.12 Part 1 of the Wildlife and Countryside Act 1981 is the primary legislative vehicle by which the Wild Birds Directive is transposed into domestic law. It also protects other wildlife, including certain listed plants and creates a scheme to deal with any introduction of non-native wildlife, which may include wild birds. For convenience, we deal with those provisions here, although they are not concerned with the implementation of the Wild Birds Directive.

4 The United Nations Convention on Biological Diversity 1992 is considered in the previous chapter.

5 Natural Environment and Rural Communities Act 2006, s 40(1).

6 As above, ss 41(1) and 42(1).

7 As above, ss 41(2), 41(4), 42(2) and 42(4).

8 As above, ss 41(3) and 42(3).

9 See Chapter 1, para 1.24.

Basic structure and approach

3.13 The basic approach of the Wildlife and Countryside Act 1981 reflects that adopted by the Wild Birds Directive and earlier domestic legislation such as the Protection of Birds Act 1954, which it repealed.

3.14 The operation of the 1981 Act relies upon the scheduling of species. The legal regime applicable to a particular species is dependent upon how it is allocated within the schedules. For example, schedule 5 lists those wild animals which are afforded protection under section 9 of the Act, such as types of butterfly, turtle and bat. Appendix B sets out the list of schedules and contains examples of species contained therein.

3.15 The Act creates a series of offences prohibiting certain defined activity. The protection is graduated, with some situations or activity being afforded tighter protection than others. Nesting, for example, is afforded a high degree of protection.[10] The Act then allows certain, normally prohibited activity to be undertaken by "authorised persons", for specific reasons set out in the Act.

3.16 Finally, the Act allows certain activity to be licensed. The licences that are granted can take the forms of individual, class and general. Individual licences are granted to named applicants or, if the licence so provides, a person authorised to conduct the activity. Class licences are relatively broad but, unlike general licences, are restricted to particular groups. Those eligible to use the licence are listed in the licence itself. The licence and category may be very restrictive, such as an "aerodrome manager".[11] General licences are the broadest category of licence. Those able to rely on them are listed within the licence and that category can be very wide, such as an owner or occupier of land. The type of licence available is dictated by the level of risk created by the particular activity to the species concerned, and the degree of protection that a species is afforded.

Wild birds

3.17 The transposition of the Wild Birds Directive within the Wildlife and Countryside Act 1981 is based around the definition of a "wild bird", as prescribed within the Act itself. A "wild bird", for the purposes of part 1 of the Wildlife and Countryside Act 1981, is defined as:

> Any bird of a species which is ordinarily resident in or is a visitor to the European territory of any member state in a wild state but does not include poultry or, except in sections 5 and 16, any game bird.[12]

3.18 Poultry are, therefore excluded totally from the scope of part 1. Game is generally excluded but not in relation to the prohibition on the use of certain methods for

[10] Wildlife and Countryside Act 1981, s 1(1)(b).

[11] WML CL 12: Class licence to kill or take certain wild birds to preserve air safety.

[12] Wildlife and Countryside Act 1981, s 27. "Poultry" is defined as domestic fowls, geese, ducks, guinea-fowls, pigeons and quails, and turkeys, with domestic geese and ducks being defined as any "domestic form" of either geese or ducks. A "game bird" means, in this context, "pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan".

taking and killing, and the consequent licensing is.[13] Game is subject to the Game Acts, considered later in this chapter.

Prohibited activity

3.19 The basic offences, modelled on the Wild Birds Directive and the Protection of Birds Act 1954, are contained in section 1(1) of the Wildlife and Countryside Act 1981. It is an offence to intentionally:

(1) kill, injure or take any wild bird;

(2) take, damage or destroy the nest of a wild bird included in schedule ZA1;

(3) take, damage or destroy the nest of any wild bird while that nest is in use or being built; or

(4) take or destroy an egg of any wild bird.

3.20 Whilst these offences require intention, certain offences do not. Consequently, it is an offence to have in one's "possession or control" any live or dead wild bird, any part of a wild bird, anything derived from such a wild bird, or an egg (or any part of an egg) of a wild bird.[14]

3.21 This offence is not committed, however, if the person can show that the bird or egg had not been taken or killed, had been lawfully killed or taken, or had been lawfully sold (whether to him or any other person).[15] This requires the accused to justify their actions.

3.22 It is an offence either intentionally or recklessly to disturb any wild bird listed in schedule 1 while it is building a nest or while it is near, on or in a nest containing eggs or young. It is also an offence intentionally or recklessly to disturb the dependent young of such a bird.[16]

3.23 For the purposes of section 1, "wild bird" does not include any bird that is shown to have been bred in captivity. The exception is where such a bird has been lawfully released into the wild as part of a re-population or re-introduction programme.[17]

3.24 Additional protection can be granted to wild birds by the Secretary of State issuing an order declaring an area one of special protection for birds listed in the order. Along with the basic offences, as contained in section 1, the order makes it

[13] Wildlife and Countryside Act 1981, s 27. "Method" can refer to a prohibition on using a particular item to kill or take an animal, such as the use of badger tongs, or the manner in which an item is used, such as driving a vehicle in excess of a particular speed limit when pursuing an animal.

[14] As above, s 1(2).

[15] As above, ss 1(3) and 1(3A).

[16] As above, ss 1(5)(a) and (b).

[17] As above, s 1(6).

an offence to enter an area of special protection unless permitted to do so under the order.[18]

3.25 The offences in section 1 protect wild birds whatever the method used. However, part 1 of the 1981 Act also protects wild birds from the use of certain methods for taking them from the wild or killing them. Therefore, it is an offence to place items "calculated to cause bodily injury to a wild bird", such as a "springe, trap, snare".[19] This offence is committed as soon as the item is set, irrespective of whether any wild bird is in fact killed, injured or taken. Other prohibited methods for killing or taking wild birds include "any bow or crossbow", "any automatic and semi-automatic weapon", "any shot-gun of which the barrel has an internal diameter at the muzzle of more than one and three-quarter inches", "the use of any mechanised vehicle in immediate pursuit of a wild bird for the purpose of killing or taking that bird" and the use of decoys.[20]

3.26 It an offence to sell, or offer or expose for sale, or possess or transport for the purpose of sale, any live wild bird, other than a bird included in part 1 of schedule 3,[21] or an egg of a wild bird or any part of such an egg. It is also an offence to publish, or cause to be published, any advertisement that could be understood as conveying that a person buys or sells a wild bird or its eggs.[22]

3.27 It is an offence for a person not registered to sell dead birds, other than those listed in schedule 3, parts 2 and 3. Those listed in part 2 can be sold at all times,[23] and those listed in part 3 can be sold from 1 September to 28 February.

3.28 The competitive showing of wild birds, or birds where at least one of its parents is a wild bird, is an offence, unless the wild bird (or the wild bird parent, where relevant) is of a species listed in schedule 3, part 1.[24]

3.29 Certain birds, if kept, have to be registered.[25] Although this used to be a very long list, it has been shortened over time. The relevant schedule[26] now contains only nine bird species, including the Peregrine Falcon.

3.30 Where any bird, not just a wild one, is kept captive, then the manner in which it is kept has to be sufficient for it to stretch its wings freely, otherwise an offence is committed. This does not apply to poultry or where birds are being conveyed, exhibited or examined by a vet.[27]

[18] Wildlife and Countryside Act 1981, ss 3 and 3(1)(b).

[19] As above, s 5(1)(a).

[20] As above, s 5(1)(c) to (e).

[21] Schedule 3 includes the Blackbird and the Chaffinch. It also relates to those birds bred in captivity: Wildlife and Countryside Act 1981, s 6(6).

[22] Wildlife and Countryside Act 1981, s 6(1)(a) and (b).

[23] Which only contains the Wood Pigeon.

[24] Wildlife and Countryside Act 1981, s 6(3).

[25] As above, s 7(1).

[26] As above, sch 4.

[27] As above, s 8(1) to (2).

3.31 Finally, it is an offence to release birds for the purpose of being shot immediately after release, or to be the owner or occupier of land used for that purpose.[28]

Defences

3.32 It is not an offence for a person to kill, take, or injure in the attempt to kill, species listed in part 1 of schedule 2 to the Wildlife and Countryside Act 1981 outside the close season.[29] This includes the tufted duck, Canada goose, moorhen, golden plover and the common snipe.

3.33 Some close seasons are listed in the Act.[30] Where not specifically defined, the close season is defined as 1 February to 31 August.[31] Close seasons can be varied by the Secretary of State, or a period of special protection can be declared.[32]

3.34 Certain other action is exempted from the prohibitions contained in sections 1 to 3. Section 4(1) protects actions permitted under other legislation, such as the destruction of wildlife to protect animal populations under section 21 of the Animal Health Act 1981. Section 4(2) protects action taken to assist a wild animal, such as tending it, or where the breach of sections 1 to 3 was "the incidental result of a lawful operation and could not reasonably have been avoided".

3.35 More general exceptions to sections 1 and 3 are contained in section 4(3). Therefore, an "authorised person" shall not be guilty of an offence if it can be shown that the person's action, relating to wild birds not listed in schedule 1, was for the purpose of:

(1) preserving public health or public or air safety;

(2) preventing the spread of disease; or

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

3.36 Authorised persons charged cannot avail themselves of the defence of "preventing serious damage to livestock etc" unless they can show that there was no other satisfactory solution. The defence is unavailable where the need for a licence was apparent but the person failed to apply for a licence permitting the activity in a reasonable time, or where such an application had been determined.[33] The defence, therefore, can only be relied on where immediate action is required and it is not possible to apply for a licence. It is, consequently, not a substitute for the licensing process in section 16 of the Wildlife and Countryside Act 1981, which is considered below.

[28] Wildlife and Countryside Act 1981, s 8(3).

[29] As above, s 2.

[30] For instance, under Wildlife and Countryside Act 1981, s 2(4)(c), the close season for wild ducks and geese runs from 21 February to 31 August.

[31] Wildlife and Countryside Act 1981, s 2(4)(d).

[32] As above, ss 2(5) to (6).

[33] As above, s 4(4) to s 4(5).

3.37 An "authorised person" is defined as:

(1) the owner or occupier, or any person authorised by the owner or occupier, of the land on which the action authorised is taken;

(2) any person authorised in writing by the local authority for the area within which the action authorised is taken;

(3) as respects anything done in relation to wild birds, any person authorised in writing by the Welsh Ministers, any of the GB conservation bodies, a district board for a fishery district within the meaning of the Salmon Fisheries (Scotland) Act 1862 or an inshore fisheries and conservation authority; or

(4) any person authorised in writing by the Environment Agency, a water undertaker or a sewerage undertaker.[34]

Wild animals

3.38 The Wildlife and Countryside Act also protects certain wild animals, other than wild birds. Section 9 makes it an offence to kill, take or injure any animal listed in schedule 5 to the Wildlife and Countryside Act 1981. Schedule 5 includes cetaceans and bats. The offence is broadly the same as the birds' offence in section 1. It also prohibits harm or damage to a structure or place used for shelter or protection by the animals contained in schedule 5.[35]

3.39 The use of certain methods listed in section 11, such as a self-locking snare, is prohibited for the use against any wild animal. Other methods, such as any automatic weapon, are prohibited in relation to those animals listed in schedule 6, which includes bats and badgers.[36]

Defences

3.40 Section 10 provides for exceptions to section 9, which mirror many of the defences available to wild bird offences.[37] However, it does not provide for defences of "preserving public health or public or air safety" or "preventing the spread of disease". Further, section 10 provides a defence to the prohibition on harming a structure or place used by an animal for shelter or protection if the action takes place in a dwelling house. The defence is not available in relation to bats outside the "living area" of a dwelling house.[38]

[34] Wildlife and Countryside Act 1981, s 27.

[35] As above, s 9 and s 9(4).

[36] As above, ss 11(1) to ss 11(2) and s 11(6).

[37] Many of the species listed in schedule 6 are there not as a result of EU law but because of domestic choice. There is, however, some overlap with species protected by the Habitats Directive.

[38] Wildlife and Countryside Act 1981, s 10(5).

Plants

3.41 Certain plants listed in schedule 8 are given specific protection by section 13. This is similar to that extended to wild birds and protected animals.

Licensing

3.42 Section 16 is the key provision, as it allows for the granting of licences. Section 16(1) provides that sections 1, 5, 6(3), 7 and 8 and orders under section 3, all concerning wild birds, do not apply to anything done under, and in accordance with the terms of a licence granted by the appropriate authority.[39] The available reasons for granting a licence range from the general, such as "for the purpose of conserving wild birds" or "preserving public health or public or air safety", to the very specific, such as for the purpose of "taxidermy".

3.43 The appropriate authority should not grant a licence unless it is satisfied that there is no other satisfactory solution.[40] It should not grant licences for certain reasons, such as photography or taxidermy, except on a selective basis and in respect of a small number of birds.[41]

3.44 Originally, section 16 of the Wildlife and Countryside Act 1981 did not expressly refer to the requirement that there be no other satisfactory solution. It was amended in 1995 to ensure compliance with the Wild Birds Directive.

3.45 When granting a licence, these may be:

(1) to any degree, general or specific;

(2) granted either to persons of a class or to a particular person;

(3) subject to compliance with any specified conditions;

(4) modified or revoked at any time by the appropriate authority; and

(5) valid for the period stated in the licence.[42]

3.46 Certain elements must be contained in a licence pertaining to wild birds. Therefore, the licence must:

(1) specify the species of wild birds in respect of which, the circumstances in which, and the conditions subject to which, the action may be taken;

(2) specify the methods, means or arrangements which are authorised or required for the taking of the action; and

[39] In England this is Natural England, through agreement made under section 78 of the Natural Environment and Rural Communities Act 2006, and in Wales it is Welsh Ministers, under SI 1999 No 672, art 2(a) and schedule 1. Within "the English inshore region", out to 12NM, the appropriate authority is the Marine Management Organisation: Wildlife and Countryside Act 1981, ss 16(8A) and 16(12); Marine and Coastal Access Act 2009, s 322.

[40] Wildlife and Countryside Act 1981, s 16(1A)(a).

[41] As above, s 16(1A)(b).

[42] As above, s 16(5).

(3) not exceed two years.[43]

3.47 Licences can be granted in relation to other protected species,[44] where the appropriate authority is satisfied there is no other suitable solution. The permitted reasons for doing so are more restrictive than for wild birds, and include:

(1) for the purpose of preserving public health or public safety;

(2) for the purpose of preventing the spread of disease; or

(3) for the purpose of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries, if it is done under and in accordance with the terms of a licence granted by the appropriate authority.[45]

3.48 Similar to licences for wild birds, a licence to kill wild animals must:

(1) specify the area within which, and the methods by which the wild animals may be killed; and

(2) not exceed two years.[46]

General licences and the "pest" species list

3.49 The development of general licences was partly in response to the initiation of infraction proceedings against the UK by the European Commission. This concerned the "pest list" in part 2 of schedule 2, which permitted certain species to be killed all year round. As a result of the European Commission's action, the Government agreed to alter the way in which it dealt with the "pest species" and part 2 of schedule 2 now has no species listed in it. Instead, section 16 of the 1981 Act has been used to issue a number of licences in respect of those species.

3.50 General licences can only be relied on in the circumstances contained in the licence. Of particular note are conditions 3 and 12. Under condition 3, the general licence can only be relied on

> in circumstances where the authorised person is satisfied that appropriate legal methods of resolving the problem such as scaring and proofing are either ineffective or impracticable.[47]

3.51 Condition 12 states that a person convicted on or after 1 January 2010 of a wildlife offence, as detailed in the licence,[48] cannot rely on the general licence. A person so convicted would, therefore, need to obtain an individual licence.

[43] Wildlife and Countryside Act 1981, s 16(5A).

[44] Under Wildlife and Countryside Act 1981, ss 9(1), 9(2), 9(4) and 9(4A), 11(1) and 11(2) and 13(1).

[45] As above, s 16(3).

[46] As above, s 16(6).

[47] See, for example, WML-GL04: Licence (general) to kill or take certain wild birds to prevent serious damage or disease.

Invasive non-native species

3.52 Restrictions on the introduction of new species are provided for in section 14 of the Wildlife and Countryside Act 1981. This is considered in detail with other relevant provisions dedicated to invasive non-native species in Chapter 8.

Varying schedules

3.53 As we have noted above, the application of part 1 of the Wildlife and Countryside Act is absolutely dependent on its schedules. Consequently, the procedure for amending the schedules in section 22 is particularly important.

3.54 Schedules 5 and 8 to the Wildlife and Countryside Act 1981 must be reviewed every five years,[49] pursuant to section 24(1). Recommendations for any amendments to protections are made by nature conservation agencies.[50]

3.55 There are no formal time limits on the amendment process in respect of any of the schedules to the 1981 Act.

Order-making power

3.56 The order-making procedure for part 1 is located in section 26 of the Wildlife and Countryside Act 1981.[51]

3.57 Any regulations or order, except orders under sections 2(6), 3, 5 and 11, is subject to annulment in pursuance of a resolution of either House of Parliament. No order under section 5 or 11 can be made unless the draft order has been laid before and approved by a resolution of each House of Parliament.[52]

3.58 Except in the case of an order under section 2(6) which creates periods of special protection outside close seasons, the Secretary of State or Welsh Ministers should give any local authority and person affected an opportunity to submit objections or representations with respect to the subject matter of the order.[53]

3.59 The Secretary of State should consult with whichever one of the advisory bodies is considered best able to advise on the order.[54] In the case of an order under section 22(3), the conservation bodies instigate the procedure.

3.60 Finally, should the Secretary of State be so minded, a public inquiry can be held before an order is made.[55]

[48] By which is meant offences under the Wildlife and Countryside Act 1981, the Conservation (Natural Habitats &c.) Regulations 1994, the Conservation of Habitats and Species Regulations 2010, the Protection of Badgers Act 1992, the Deer Act 1991, the Hunting Act 2004, the Wild Mammals (Protection) Act 1996, the Animal Welfare Act 2006 and the Protection of Animals Act 1911 (all as amended).

[49] Natural England, Countryside Council for Wales and Scottish Natural Heritage through the Joint Nature Conservation Committee to the Secretary of State.

[50] As above.

[51] The power to vary schedules is contained in Wildlife and Countryside Act 1981, s 26.

[52] Wildlife and Countryside Act 1981, s 26(2) to s 26(3).

[53] As above, s 26(4)(a).

[54] As above, s 26(4)(b).

Wildlife inspectors

3.61 Wildlife Inspectors and their powers are dealt with by sections 18A to 18F of the Wildlife and Countryside Act 1981.[56] A wildlife inspector is defined as a person authorised in writing under section 18A by the Secretary of State or National Assembly for Wales.[57]

Power to enter premises

3.62 A wildlife inspector may, at any reasonable time, enter and inspect any premises for the purpose of:

(1) ascertaining whether a group 1 offence[58] is being or has been committed;

(2) verifying any statement, representation, document or information supplied by an occupier in connection with a group 1 licence[59] application, or the holding of a Group 1 licence; and

(3) ascertaining whether conditions of a group 1 licence have been complied with.[60]

Examining specimens and taking samples

3.63 An inspector who has entered the premises under the section 18B power above may examine any specimen and take a sample from it. A "specimen" for these purposes is defined as any bird, other animal or plant, or any part or thing derived from such. A "sample" is defined as a sample of blood, tissue or other biological material.[61]

3.64 No sample may be taken from a live bird, other animal or plant except for the purpose of establishing its identity or ancestry. An inspector may, however, take and remove from the premises a specimen which is not a live bird, other animal or plant, if there are reasonable grounds for believing that it is evidence of a group 1 offence.[62]

3.65 Similar provisions exist in section 18D of the Wildlife and Countryside Act 1981 pertaining to group 2 offences.[63]

[55] Wildlife and Countryside Act 1981, s 26(4)(c).

[56] These were inserted by the Natural Environment and Rural Communities Act 2006.

[57] Wildlife and Countryside Act 1981, s 18A(1).

[58] A group 1 offence means an offence under Wildlife and Countryside Act 1981, ss 1, 5, 9(1), 9(2) or 9(4), 11, 13(1) or 14ZA: see Wildlife and Countryside Act 1981, s 18B(2).

[59] A licence permitting action which would otherwise be a group 1 offence.

[60] Wildlife and Countryside Act 1981, s 18B.

[61] As above, s 18C(3) to 18C(4).

[62] As above, s 18C(5) to 18C(7).

[63] A group 2 offence means an offence under Wildlife and Countryside Act 1981, s 6, 7, 9(5), 13(2) or 14.

Offences in connection with enforcement powers

3.66 It is an offence to intentionally obstruct a wildlife inspector acting in the exercise of its powers or to fail to make available a specimen when requested. It is also an offence for a person, with the intent to deceive, to falsely pretend to be a wildlife inspector.[64]

GAME ACTS

3.67 The Game Acts cover game species[65] as listed in the Acts and date from pre-Victorian times. When the Wild Birds Directive came into force, it was decided that the Game Acts could be used to satisfy the UK's obligations under that Directive. Hence, game species are specifically exempted from the regime contained in part 1 of the Wildlife and Countryside Act 1981.[66]

3.68 The basic approach of the Game Acts is to prohibit the killing or taking of game in close seasons, which are defined in the statute. For example, section 3 of the Game Act 1831 defines the close season for partridge as "between the first day of February and the first day of September in any year" and for pheasant as "between the first day of February and the first day of October in any year".

3.69 There is no licensing provision to allow activity during the close seasons. Also, there is no need to explore alternative "satisfactory solutions" before a person can act, as is the case with wild birds within the Wildlife and Countryside Act 1981 regime considered above.

3.70 The 1831 Act goes on to criminalise certain activity, such as trespassing in search of game.[67] Poaching at night is prohibited under the Night Poaching Acts of 1828 and 1844.

CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

3.71 The Conservation of Habitats and Species Regulations 2010[68] were brought in following the outcome of *Commission v UK*,[69] an infringement action brought successfully by the European Commission challenging the transposition in the earlier Conservation (Natural Habitats) Regulations 1994.

3.72 The stated aim of the Habitats Directive is to "contribute towards ensuring bio-Diversity",[70] and measures taken pursuant to this Directive should be designed to

[64] Wildlife and Countryside Act 1981, s 19XB.

[65] Under the Game Act 1831, this includes hares, pheasants, partridges, grouse, heath or moor game, black game.

[66] The exclusion of game birds does not apply to the prohibition of certain methods or killing or taking under Wildlife and Countryside Act 1981, s 5. Game legislation has been heavily amended, and much of it has been repealed by the Regulatory Reform (Game) Order 2007.

[67] Game Act 1831, s 31.

[68] SI 2010 No 490.

[69] Case C-6/04 *Commission v UK (Habitats)* [2005] ECR I-9017.

[70] Directive 92/43/EEC, art 2(1).

maintain or restore at favourable conservation status species of wild flora and fauna of Community interest.[71]

Offences

3.73 Any person who does any of the following to a European Protected Species commits an offence:

(1) deliberately captures, injures or kills any wild animal of a European Protected Species;

(2) deliberately disturbs wild animals of any such species;

(3) deliberately takes or destroys the eggs of such an animal; or

(4) damages or destroys a breeding site or resting place of such an animal.[72]

3.74 When considering the disturbance of a European Protected Species, particular regard should be had to activity which will do any of the following:

(1) impair the ability of a wild animal to survive, to breed or reproduce, or to rear or nurture their young;

(2) in the case of animals of a hibernating or migratory species, impair the ability of a wild animal to hibernate; or

(3) to affect significantly the local distribution or abundance of the species to which the wild animals belongs.[73]

3.75 European Protected Species are listed in schedule 2 to the Conservation of Habitats and Species Regulations 2010. Schedule 2 lists those species contained in annex 4(a) to the Habitats Directive which have a "natural range which includes any area of Great Britain".[74] This includes bats (typical and horseshoe).

3.76 It is also an offence to be in possession of, to transport, sell or exchange, or to offer for sale or exchange, any of the species (live or dead; whole or in part) listed in annex 4(a) to the Habitats Directive.[75]

3.77 Similar provisions to those for wild animals are contained in regulations 44 to 46 for European Protected Species of plants, as listed in schedule 5.

Defences

3.78 The Conservation of Habitats and Species Regulations 2010 set out certain defences which prevent the commission of the offence. The defences are listed in regulation 42. Some are welfare-related and include killing a seriously injured

[71] Directive 92/43/EEC, art 2(2).

[72] Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 41(1).

[73] As above, reg 41(2).

[74] As above, regs 40 and 41(1).

[75] As above, regs 41(3) and 41(4).

animal that has no reasonable chance of recovery. Others relate to taking for the purposes of sampling[76] and species outside their "natural range".[77]

3.79 There are two requirements for reliance on an available defence:

(1) there was no satisfactory alternative; and

(2) the action was not detrimental to the maintenance of the species concerned at a favourable conservation status in their natural range.

3.80 It is, however, for the prosecution to show that the activity breached these requirements.[78]

Prohibited methods

3.81 It is an offence to use certain methods to kill or take animals, such as using explosives, crossbows or semi-automatic or automatic weapons.[79] These prohibited methods can, however, be licensed, as explained below.

Licensing

3.82 The approach adopted is far stricter than that adopted in relation to the Wild Birds Directive through part 1 of the Wildlife and Countryside Act 1981. Activity can be licensed under regulation 53(1) for specific purposes. These are more restrictive than those under section 16 of the Wildlife and Countryside Act 1981, in relation to wild birds. They include the following:

(1) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(2) preventing the spread of disease; or

(3) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.[80]

3.83 A licence can only be granted if the relevant authority, either Natural England or the Welsh Ministers, is satisfied that that there is "no satisfactory alternative". Further,

> that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.[81]

[76] Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 42(2) to 42(3).

[77] For example, as above, reg 42(8)(b).

[78] As above, regs 42(9) and 42(10).

[79] As above, reg 43.

[80] As above, reg 53(2).

[81] As above, regs 53(9)(a) and (b).

3.84 The licence must stipulate:[82]

(1) the species or subspecies of animal or plant to which the licence relates;

(2) the maximum number of specimens which may be taken or be in the possession or control of the person authorised by the licence, or which particular specimens may be taken or be in the possession or control of that person; and

(3) the conditions subject to which the action authorised by the licence may be taken and in particular –

(a) the methods, means or arrangements by which specimens may be taken or be in the possession or control of the person authorised by the licence,

(b) when or over what period the action authorised by the licence may be taken, and

(c) where the licence authorises any person to take specimens, the area from which they may be taken.

Varying schedules

3.85 The Habitats Regulations 2010 themselves contain no provision for amending the schedules and there is no additional secondary legislation which provides for amendment. To have such a provision in the Habitats Regulations 2010 themselves would be contrary to the European Communities Act 1972.[83] Therefore the amendment process in section 2(2) of the European Communities Act 1972 must be used.

PROTECTION OF ANIMALS ACT 1911

3.86 Most of this Act has been repealed or is outside the scope of this project, as it applies to animals in general. However, one provision is relevant. The Act requires that a person who sets any spring trap set to catch a hare or a rabbit, or places one such that it is likely to catch a hare or a rabbit, must check the trap at least once a day, between sunrise and sunset.[84]

[82] Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 53(8).

[83] European Communities Act 1972, Schedule 2, para 1(1)(c).

[84] Protection of Animals Act 1911, s 10. An individual failing to do so shall be liable, upon summary conviction, to a fine not exceeding level 1 on the standard scale.

CONSERVATION OF SEALS ACT 1970

3.87 The Conservation of Seals Act 1970 makes it an offence to use poison or any firearm, other than one permitted by the Act, to kill or take seals.[85]

3.88 The Act also establishes close seasons for common and grey seals, making it an offence to kill those seals during their close season. The Secretary of State may make orders prohibiting the killing of seals at other times.[86]

3.89 It is a defence if the seal is severely disabled, if the action is taken to protect fishing gear, or if the action is taken under a licence issued by the Secretary of State.[87]

3.90 The Act gives powers of entry to persons authorised by the Secretary of State to enter onto land in order to obtain information on seals to allow the Secretary of State to perform their functions, or to kill or take seals for the purpose of protecting fisheries.[88]

3.91 It is an offence to attempt any of the Act's prohibited activities. The penalty provided for are fines up to level 4, except where preventing a person authorised by the Secretary of State to enter onto land – where the penalty is a fine up to level 3.[89]

SALMON AND FRESHWATER FISHERIES ACT 1975

3.92 The bulk of provisions in the Salmon and Freshwater Fisheries Act 1975 apply to salmon, trout, eels, lampreys, smelt, shad, freshwater fish and any specified fish in any waters.

3.93 Like the Game Acts, the 1975 Act does three principal things. First, it prohibits certain methods for the taking of the fish listed above, such as firearms within the meaning of the Firearms Act 1968.[90] Second, the Act allows the Environment Agency to license activity otherwise prohibited.

3.94 Finally, the Act also requires the Environment Agency to create a licensing scheme for the fishing of the species mentioned above, such that those participating in fishing must currently have a licence if aged 12 or above.[91] The Environment Agency may also authorise a person to use any method, other than a licensable means of fishing, to fish.[92]

[85] Conservation of Seals Act 1970, s 1. Permitted firearms have ammunition with a muzzle energy of at least 600 footpounds and a bullet of not less than 45 grains. The equivalent metric values are approximately 813.5 joules and 2.9 grams respectively.

[86] As above, s 2 to s 3. The close season for grey seals is 1 September to 31 December and for common seals it is 1 June to 31 August.

[87] As above, ss 9 and 10.

[88] As above, s 11.

[89] As above, s 5 and s 8.

[90] See, for example, Salmon and Freshwater Fisheries Act 1975, ss 1 and 5.

[91] See Salmon and Freshwater Fisheries Act 1975, part 4.

[92] As above, s 27A.

3.95 However, as well as the offences concerning the fish listed above, some offences apply to fish generally. Therefore, it is an offence to use an explosive substance, and any poison or other noxious substance, or any electrical device with the intent to take or destroy fish in any water up to six nautical miles from the baseline. It is a defence if the action was conducted for a scientific purpose, for the protection, improvement or replacement of fish stocks, or where the person has the written permission of the Environment Agency.[93]

DEER ACT 1991

3.96 The Deer Act 1991,[94] which was the result of a Law Commission consolidation exercise,[95] applies to all deer of the species mentioned in the Act, whether wild or not.

3.97 The Act creates an offence of intentionally killing, taking or injuring deer on another's land, without the consent of the owner or occupier of the land, or otherwise authorised.[96] It is also an offence to attempt the prohibited action.

3.98 The Act also regulates the killing and taking of deer through seasons. It is an offence to kill or take certain deer listed in schedule 1 to Act in its close season,[97] unless an exemption applies. Exemptions include:

(1) in the case of the occupier of the land where the action is taken, reasonable grounds for believing that deer had caused damage to crops and that the action is necessary to prevent further damage that is likely to be serious;[98]

(2) an act done in pursuance of an order issued under section 98 of the Agriculture Act 1947;[99]

(3) taking for the purposes of moving the deer from one place to another or taking alive for scientific or educational purposes under a licence issued by either Natural England or the Countryside Council for Wales;[100] and

(4) taking or killing under a licence issued by Natural England or Welsh Ministers.[101]

[93] Salmon and Freshwater Fisheries Act 1975, s 5.

[94] Amended by the Regulatory Reform (Deer) (England and Wales) Order 2007 (SI 2007 No 2183).

[95] Deer Bill: Report on the Consolidation of Certain Enactments Relating to Deer (1991) Law Com No 197.

[96] Deer Act 1991, s 1.

[97] As above, s 2.

[98] As above, s 7.

[99] As above, s 6.

[100] As above, ss 8(1) and 8(2).

[101] As above, s 8(3A).

3.99 The Act prohibits certain methods for the killing or taking of deer, such as firearms listed in schedule 2 to the Act, or a spear.[102] Prohibited methods can be licensed by Natural England or the Countryside Council for Wales.

3.100 The maximum penalties allowed for by the Act are a fine not exceeding level 4 or three months imprisonment, or both.[103]

PROTECTION OF BADGERS ACT 1992

3.101 It is an offence to wilfully kill, injure or take, or attempt to kill, injure or take, a badger, except as permitted under the 1992 Act.[104] It is also an offence to do any of the following:

(1) cruelly ill-treat a badger;

(2) use any badger tongs in the course of killing or taking, or attempting to kill or take, a badger;

(3) dig for a badger, unless authorised to do so under the Act; or

(4) use for the purpose of killing or taking a badger any firearm other than that authorised by the Act.[105]

3.102 For the purposes of the digging offence:

> Where there is evidence from which it could reasonably be concluded that at the material time the accused was digging for a badger he shall be presumed to have been digging for a badger unless the contrary is shown.

3.103 Section 3 makes it an offence, amongst other things, to destroy, damage or disturb a badger sett.

3.104 It is not an offence under either section 1(1) or section 3 if it can be shown that the action was "an incidental result of a lawful action"[106] or necessary to prevent "serious damage to land, crops, poultry or any other form of property".[107] In the latter case, the defence is not available if the person acting had not taken reasonable steps to obtain a licence, or had an application determined for a licence authorising that action.[108] Licences can be issued under section 10 of the Protection of Badgers Act 1992.

[102] Deer Act 1991, s 4.

[103] As above, s 9.

[104] Protection of Badgers Act 1992, s 1(1).

[105] As above, s 2(1). An authorised firearm is a smooth bore weapon of not less than 20 bore or a rifle using ammunition having a muzzle energy not less than 160 footpounds and a bullet weighing not less than 38 grains, see Protection of Badgers Act 1992, s 2(1)(d).

[106] As above, s 6(c).

[107] As above, ss 7(1) and 8(1).

[108] As above, ss 7(2) and 8(2).

PESTS ACT 1954

3.105 There are two principal reasons why the Pests Act 1954 concerns our project. First, it prohibits generally the use of, sale of and possession of spring traps, unless of an authorised type, and used in an approved manner (that is, approved under the Act or licensed).[109]

3.106 Second, it makes special provisions for rabbits. Under section 1, the whole of England and Wales, except the City of London, the Isles of Scilly and Skokholm Island, is designated under a rabbit clearance order.[110] Occupiers of land under a rabbit clearance order must take such steps as are necessary for the killing or taking of wild rabbits on their land. Where it is not "reasonably practicable" to kill such rabbits, occupiers must take such steps as are necessary to prevent damage by wild rabbits.[111]

3.107 There is no evidence that the Pests Act 1954 provisions in relation to rabbit clearance are enforced currently.

WILD MAMMALS (PROTECTION) ACT 1996

3.108 There are two important pieces of general animal welfare legislation: the Wild Mammals (Protection) Act 1996 and the Animal Welfare Act 2006. These are to be seen as additional to the welfare provisions in other Acts, such the prohibition on the use of certain methods in the Wildlife and Countryside Act 1981, and dedicated species-specific welfare Acts, such as the Deer Act 1981.

3.109 The Wild Mammals (Protection) Act 1996, which was the result of a Private Member's Bill, creates an offence in section 1 such that:

> If, save as permitted by this Act, any person mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering he shall be guilty of an offence.

3.110 There are exceptions. For example, it is not an offence if the attempted killing of any such wild mammal is "an act of mercy" or if the action is authorised by or under any enactment.[112]

3.111 A "wild mammal" is any mammal which is not a "protected animal" within the meaning of the Animal Welfare Act 2006.[113]

[109] Pests Act 1954, ss 8 and 9.

[110] Rabbit Clearance Order No. 148.

[111] Pests Act 1954, s 1.

[112] Wild Mammals (Protection) Act 1996, s 2.

[113] As above, s 3.

ANIMAL WELFARE ACT 2006

3.112 The Animal Welfare Act 2006 would on the face of it seem to be outside the scope of our project. Under section 4 of the Animal Welfare Act 2006, it is an offence to cause "unnecessary suffering" to a "protected animal", either through a person's action, or their failure to act. A protected animal is a vertebrate, other than man, which is of a kind commonly domesticated in the British Isles, under either permanent or temporary control of a person, and not living in a wild state.[114]

3.113 However, the Animal Welfare Act 2006 can include wild animals taken into the control of somebody, either temporarily or not, for which they become responsible. Consequently, its remit does extend to wildlife management.[115]

3.114 The Animal Welfare Act 2006 makes it an offence for someone responsible for an animal to permit, or fail to take steps to prevent, the acts, or failure to act, of another person that cause an animal to suffer unnecessarily.[116] In considering this, the court should consider what it was reasonable to do, in all the circumstances to prevent the unnecessary suffering occurring.

3.115 It can be seen from this that the Animal Welfare Act operates in conjunction with the welfare provision in the Wild Mammals (Protection) Act 1996.

Powers of inspectors

3.116 There are a number of provisions in the Animal Health Act 2006 relating to the powers of inspectors to enter property.

3.117 If an inspector reasonably believes that an animal is in distress, the inspector may take steps to alleviate that distress. This includes removing the animal, and its offspring if necessary.[117]

3.118 An inspector may use reasonable force in entering the premises for these purposes, but only where it appears to the inspector that entry is required before a warrant can be obtained.[118] If accompanied by a police officer, an inspector may also stop and detain a vehicle in order to enter and search it.[119]

3.119 There are further powers of entry for inspectors when searching for evidence of commission of offences. This requires the application and authorisation of a warrant by a magistrate.[120]

[114] Animal Welfare Act 2006, ss 1 and 2.

[115] As above, s 3.

[116] As above, s 4(2).

[117] As above, s 18.

[118] As above, s 19 (1) and 19 (3).

[119] As above, s 54 (1). This relates to an inspector's powers exercised under ss 19 (1), 19 (4) or 23 (1).

[120] As above, s 23 (1).

3.120 Further, an inspector may enter farming premises to carry out an inspection.[121] This includes checking compliance with welfare regulations[122] to ascertain whether any offence has been committed in relation to such animals. This does not include premises used as a private dwelling.[123]

3.121 Schedule 2 to the Animal Welfare Act 2006 sets out in detail inspectors' powers of entry, inspection and search.

OVERVIEW OF THE PROCESS

3.122 *Figure 1* below illustrates the processes contained within the regulatory framework for taking/killing certain species, such as those protected under either the Wildlife and Countryside Act 1981 or the Conservation of Habitats and Species Regulations 2010.[124]

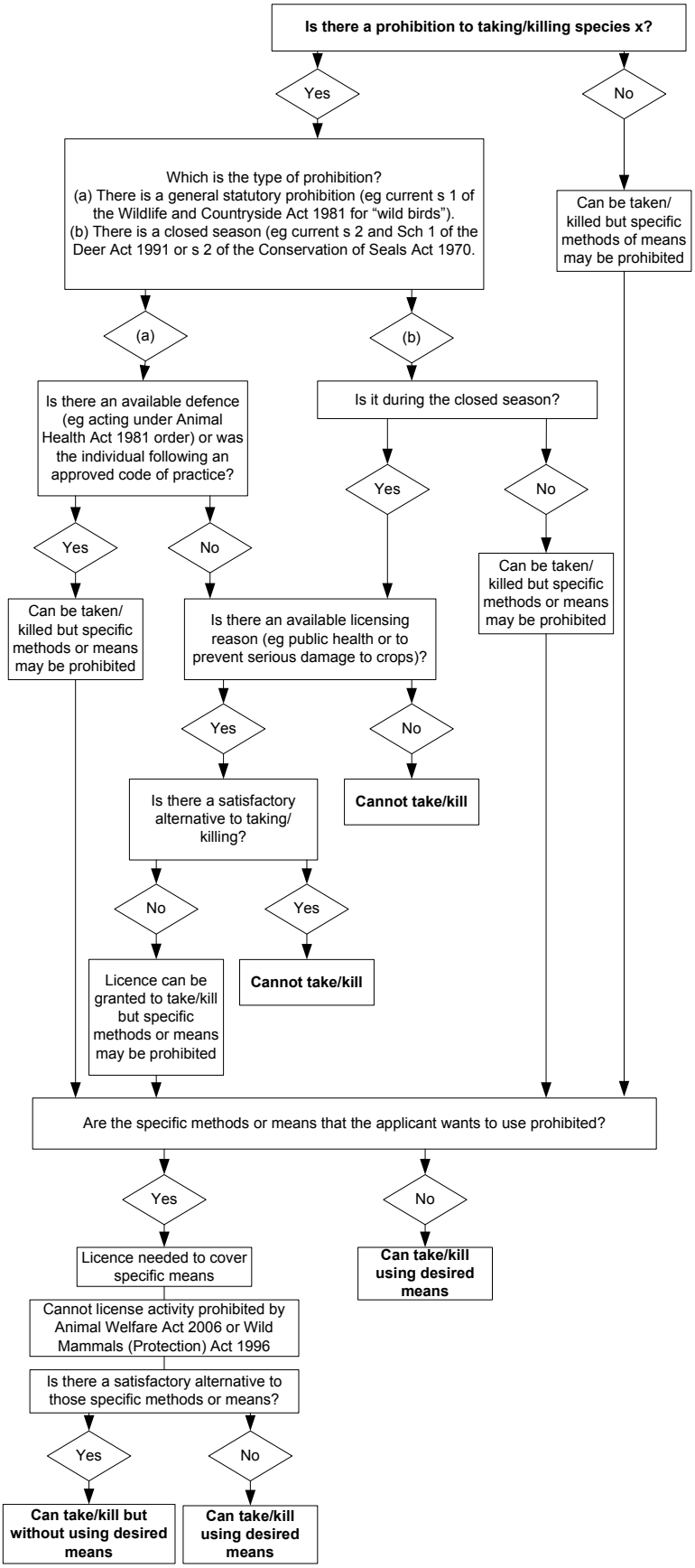
[121] Animal Welfare Act 2006, s 28.

[122] As set out in Animal Welfare Act 2006, s 12.

[123] As above, s 28 (3).

[124] SI 2010 No 490.

FIGURE 1: TAKING/KILLING FLOWCHART



CHAPTER 4
THE CASE FOR REFORM AND OUR APPROACH TO REFORM

INTRODUCTION

4.1 Having set out an overview of the current domestic and international legal regimes in the previous chapters, we now consider the case for reform.

THE CASE FOR REFORM

4.2 There are, in our opinion, a number of problems with the current law:

(1) it is unnecessarily confusing and complicated, with inconsistent provisions over a number of statutes;

(2) there is no basis in domestic legislation for the licensing of hunting, except in limited circumstances

(3) it contains inconsistencies;

(4) it contains gaps;

(5) it is unduly reliant on a single regulatory technique; and

(6) it lacks flexibility.

4.3 Below we give examples for each of these problems. We give other examples also in the subsequent chapters.

The law is unnecessarily confusing and complicated with inconsistent provisions over a number of statutes

4.4 This is partly the result of the manner in which wildlife law has been enacted. Each piece of legislation (and its subsequent amendments), including the Wildlife and Countryside Act 1981, has been a reaction to a particular pressure on domestic law, whether domestic or external. The introduction and content of the Wildlife and Countryside Act 1981 was driven by the Wild Birds Directive. However, it also reflected earlier domestic legislation, such as the Protection of Birds Act 1954. The Conservation of Habitats and Species Regulations 2010[1] is the domestic implementation of the EU Habitats Directive. Each of the species-specific Acts, such as the Conservation of Seals Act 1970 and the Protection of Badgers Act 1992, were driven by concerns focused on those particular animals. Several Acts are the result of private Member's Bills, and may not have been drafted with a view to fitting with the rest of domestic legislation.[2]

4.5 One of the adverse outcomes of the current construction of wildlife law has been the duplication of provisions. Certain species are dealt with by more than one statute or other legislative provision. For example, the Pipistrelle bat is a

[1] SI 2010 No 490.

[2] An example would be the Wild Mammals (Protection) Act 1996.

European Protected Species, within the Habitats Directive. Consequently, its taking and killing and the destruction of its resting place is prohibited.[3] Its shelter is also protected by the Wildlife and Countryside Act 1981.[4] Certain methods of taking or killing the Pipistrelle bat are prohibited under the Habitats Regulations 2010;[5] and many of same methods are also prohibited under the Wildlife and Countryside Act 1981.[6]

4.6 We accept that a certain level of complexity is, in part, an inevitable consequence of the breadth of wildlife law. Wildlife is complicated and the law concerning it needs to apply in a range of different situations and reflect a range of (potentially competing) interests. In other cases, however, there appears to be little obvious rationale and it is, therefore, something we should aim to reform and improve.

4.7 An example of unnecessary complexity is the provision for hunting of wild birds. The hunting of wild birds is currently provided for in three different ways. Certain birds can be hunted under schedule 2, part 1 to the Wildlife and Countryside Act 1981.[7] Game birds are covered by the Game Acts.[8] For other species, including woodpigeon, general licences are relied on for hunting. This is a confusing approach.

There is no basis in domestic legislation for the licensing of hunting except in limited circumstances

4.8 The use of general licences for hunting is probably outside the powers in the Wildlife and Countryside Act 1981. The list of possible reasons for granting a licence under the 1981 Act does not include "sport" or "food". The list does include "for the purpose of preventing serious damage to … crops",[9] which is one of the reasons for which the general licence relied on for hunting certain species (such as woodpigeon) is issued.[10]

4.9 Further, it is hard to see how the organisation of a shoot meets the licence condition requiring users "to satisfy themselves that other appropriate legal methods of resolving the problem are either ineffective or impracticable".[11]

4.10 Hunting is not prohibited by the Wild Birds Directive, and is in fact explicitly permitted under article 7 subject to certain conditions. So the activity is not prohibited as a matter of EU law, but there is generally no basis for licensing it under domestic law. Therefore, the domestic law needs reforming to allow it to do what it already purports to do.

3 Conservation of Habitats and Species Regulations 2010, reg 41(1).

4 Wildlife and Countryside Act 1981, ss 9(4)-9(5).

5 Conservation of Habitats and Species Regulations 2010, reg 43.

6 Wildlife and Countryside Act 1981, s 11, sch 6.

7 This includes the Mallard, Moorhen and Golden Plover.

8 Game means "pheasants, partridges, grouse, heath or moor game, black game" for these purposes: Game Act 1831, s 2.

9 Wildlife and Countryside Act 1981, s 16(k).

10 General Licence GL04.

11 As above, condition 3.

The law contains inconsistencies

4.11 The first example we give relates to the specific offence of breaching a licence condition. It is an offence to breach a condition for a licence issued under the Conservation of Habitats and Species Regulations 2010[12] or a licence issued under the Protection of Badgers Act 1992.[13] There is no similar offence in the Wildlife and Countryside Act 1981. The breach of licence conditions offence is a useful one. Whilst it is true that where a licence condition has not been complied with then reliance on the licence is not possible, and whatever the underlying offence is concerned with will probably have been committed. However, relying on prosecuting the underlying offence may not be appropriate in all circumstances. For example, a licence may contain technical conditions such as those relating to monitoring or making licence returns which require the supply of data to the regulator. The lack of a breach of licence conditions offence means that the only way of enforcing these technical conditions is to prosecute the underlying offence.

4.12 A further example of inconsistency concerns the defence, in the Wildlife and Countryside Act 1981, of acting under an Animal Health Order made under the Animal Health Act 1981. Such a defence is not available in relation to European Protected Species, or for controlling badgers. Therefore disease control activity (even where an Animal Health Order has been issued) which may affect European Protected Species or badgers would still have to be separately licensed under either the Habitats Regulations 2010 or the Protection of Badgers Act 1992. The different treatment of the species and legislative regimes is difficult to understand.

The law contains gaps

4.13 The regime within England and Wales for the control of invasive species[14] contains no "emergency provisions". If a species is not new to Great Britain or listed in schedule 9, part 1, of the Wildlife and Countryside Act 1981, then it cannot be controlled. Therefore the control of a species already present within Great Britain relies on the updating of schedule 9. However, reacting quickly to an emerging situation is vital to the effective control of invasive species. Consequently, we suggest that the regulatory regime would benefit from having "emergency powers".[15]

4.14 Second, the provisions relating to invasive species lack the power to make certain demands of individuals, such as requiring the destruction of invasive species, permitting access or having a general power to require notification.[16] Concerning the latter, it is important to note that the collection of data is an

[12] SI 2010 No 490, reg 48.

[13] Protection of Badgers Act 1992, s 10(8).

[14] Wildlife and Countryside Act 1981, s 14; Destructive Imported Animals Act 1932; and Conservation of Habitats and Species Regulations 2010, reg 52.

[15] We discuss this further in Chapter 8 at para 8.66.

[16] Section 5(2) of the Destructive Imported Animals Act 1932 imposes a notification requirement. This applies in relation to any species that are the subject of an order under section 10, However, this is not the same as the more general power available in Scotland, following the insertion of section 14B into the Wildlife and Countryside Act 1981 (by the Wildlife and Natural Environment (Scotland) Act 2011, s 14(5)).

important part of any response to invasive species. Requiring notification can be a crucial tool in a control strategy. Recent reforms in Scotland have included the power to require notification of the presence of invasive species by individuals.[17]

The law is unduly reliant on a single regulatory technique

4.15 The current regime essentially criminalises certain activity, then provides limited defences to such activity and/or licences it.

4.16 We are not convinced that this should be the only methodology available, and suggest that reliance on only one approach does not allow for other ways of achieving the desired regulatory ends. Such an approach is essentially binary: you are either law-abiding or a criminal, with the stigma that comes with such labelling. However, as we have stated, the law is complicated, and even if our regulatory regime is put in place, although there will be improvements it still will have some complications. Therefore, criminalising regulatory transgressions may not always be the appropriate way of ensuring beneficial outcomes. It may be better to provide the non-compliant individual or organisation with advice or guidance.

4.17 At the other end of the scale, the criminalisation of activity and the sentences available may not be effective enough to control certain serious transgressions. The available fines can easily be internalised by high profit-earning businesses, and it must be remembered that many of the actors involved in wildlife are large economic ones.[18] On that basis, the use of other economic tools, such as preventing those committing serious transgressions from continuing in a particular business (until they can prove that their future behaviour will accord with wildlife law) may be merited.

4.18 The point we are making is that the current regime does not utilise all of the potential options available, either because they are not available currently as a matter of law or because practice has not developed. We explore this in more detail in Chapter 9.[19]

The law lacks flexibility

4.19 There are instances where the sort of flexibility we now require of regulatory regimes is not present. This is due, in part to the age or preferences of the legislation in question. For instance, it is not possible to amend close seasons for some species by order; those with close seasons set by the Game Act 1831 or the Deer Act 1991. Rather, if the close season is to be amended then primary legislation would be required, at least for deer.[20] There is an argument that the Game Act 1831 could be amended by an order made under section 2(2) of the

[17] Wildlife and Countryside Act 1981, s 14B, as will be inserted by the Wildlife and Natural Environment (Scotland) Act 2011, s 14(5). The relevant section of the 2011 Act entered into force on 2 July 2012. See also our discussion in Chapter 8, para 8.51 to 8.63.

[18] See R Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) and PHampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) p 7;

[19] See Chapter 9, paras 9.1 to 9.69.

[20] The last changes to the deer close seasons were made by Regulatory Reform Order Si 2007 No 2183, not by primary legislation.

European Communities Act 1972, as fulfilling our requirements under the Wild Birds Directive.

4.20 A further issue with close seasons is that there is no power to create new ones for animals which do not currently have them. Therefore the currently regulatory regime cannot reflect any change in species protection preferences without recourse to primary legislation.

REGULATORY APPROACHES

4.21 Making the case for reform is only a part of our task. We must also design a reformed regime that:

(1) improves the current regime;

(2) meets our international obligations;

(3) accords with regulatory good practice; and

(4) follows general law reform principles, such as the need for clear, transparent and comprehensible law.

4.22 We begin that process by considering certain principles and regulatory aims that could inform our reforms.[21] Some of these are based in EU law, which forms the backdrop to much of the legislation we are considering; some are current suggested practice within the UK Government.

Government approach to regulation

4.23 The Government has focused on what has become known as the "Better Regulation Agenda" as its key regulatory approach over the last decade. At its simplest, better regulation asks for regulation to be justified in terms of cost/benefit analysis.

4.24 Better regulation is associated with reducing the regulatory "burden". At the core of the Government's approach is that "traditional 'command and control' regulation should be seen as the last, not first, resort".[22] The non-exhaustive list of alternative approaches it provides for are:

(1) self-regulation;

(2) co-regulation;

(3) information and education;

(4) economic; and

(5) using existing regulation.

[21] See Chapter 9, paras 9.1 to 9.61.

[22] Department for Business, Innovation and Skills, *Reducing Regulation Made Simple: Less regulation, better regulation and regulation as a last resort* (2010) para 23.

4.25 Currently, government policy requires that regulation should only be resorted to:

(1) having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches;

(2) where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches; and

(3) where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate, accountable, consistent, transparent and targeted.[23]

4.26 In the specific context of transposition of EU obligations, the Government has committed itself to "Guiding Principles" for the transposition of EU law, such that the Government will:

(1) wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;

(2) endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;

(3) always use copy out for transposition where it is available, except where doing so would adversely affect UK interests, for example by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain to the Reducing Regulation Committee the reasons for their choice;

(4) ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and

(5) include a statutory duty for Ministerial review every five years.[24]

4.27 The requirement for copy out, that is use of the exact wording in a Directive, is to prevent what the Government refers to as "gold plating". This is where burdens are placed on individuals or businesses that go further than the strict requirements of the directive

4.28 The Government has also developed policy based around the adoption of the enforcement principles included in the Hampton and Macrory reviews.[25] This requires enforcement to be risk-based and focused. It also requires that advice

[23] Better Regulation Commission, "Better regulation - from design to delivery: Annual Report" (2005) pp 26 to 27.

[24] See http://www.bis.gov.uk/policies/bre/improving-eu-regulation/guiding-principles-eu-legislation (last visited 27 July 2012); and HM Government, *Transposition guidance* (2011) para 1.3.

[25] P Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005); R Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 10. See also Chapter 9, paras 9.15 to 9.17.

should be used where possible, that unnecessary bureaucracy (form-filling) be reduced and that consistent penalties be applied.

The EU's developing approach to regulation and good governance

4.29 In a recent Communication, the European Commission committed itself to using what it terms "smart regulation" within its decision making process. It has also highlighted the need for such an approach to be adopted by member states in order to fulfil EU policy outcomes.[26] Since 2002, it has also pursued a "better regulation" agenda,[27] and highlights the need for regulation to be:

(1) well targeted;

(2) correctly implemented at the right level; and

(3) proportionate to need.[28]

4.30 The Commission also accepted, in a separate document, the need to suppress unnecessary administrative burdens, especially in "difficult economic times".[29]

4.31 The Commission's adoption of better regulation ties in with its development of EU principles for good governance, which were a reaction to a perceived dissipation of trust in the EU. As the *White Paper on European Governance* put the problem:

> Many people are losing confidence in a poorly understood and complex system to deliver the policies that they want. The Union is often seen as remote and at the same time too intrusive.[30]

4.32 In the White Paper, the Commission suggested that central to good governance are the requirements of "openness", "participation", "accountability", "effectiveness", and "coherence".[31] These are not necessarily exclusive and some issues will cut across various headings. These, particularly effectiveness, are imperative to the proper transposition of directives.

4.33 The way that the EU is seeking to organise the effective implementation of EU law was set out in 2007.[32] The Commission highlighted that "laws do not serve their purpose unless properly applied and enforced".[33] By this, the Commission was focusing on the application, including transposition, of EU law by member

[26] European Commission, *Smart regulation in the European Union* COM (2010) 453 final, p 9.

[27] European Commission, *European Governance: Better Law Making* COM (2002) 275 final.

[28] European Commission, *Better Regulation – simply explained* (2006) p 1.

[29] European Commission, *Reducing administrative burdens in the European Union* COM (2009) 16 final, p 1.

[30] European Commission, *The White Paper on European Governance* COM (2001) 428 final, p 3.

[31] European Commission, *The White Paper on European Governance* COM (2001) 428 final, p 10.

[32] European Commission, *A Europe of results – applying community law* COM (2007) 502 final.

[33] As above, p 1.

states. The Communication included the stated intention to make improvements to the infringement system and concluded that:

> The timely and correct application of Community law is essential to maintain a strong foundation for the European Union and ensure that European policies have intended impacts, bringing benefits to citizens. The European institutions and member states share an interest in keeping this foundation strong and need to make an even stronger commitment to assign high priority to the correct application of law.[34]

4.34 Within the specific confines of environmental law, the Commission highlighted perceived problems with the national laws implementing EU environmental law. This included incomplete transposition of directives. The Commission also highlighted specific concerns of the European public. In particular, it noted that "making it easier to bring cases before a national judge should enable problems to be resolved closer to the citizen". Such action would also "reduce the need for Commission intervention". In highlighting this requirement, the Commission drew on the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.[35]

4.35 The assertion follows a well developed line of Commission reasoning and Court of Justice jurisprudence that started with *Van Gend en Loos* and *Costa v ENEL* in the early 1960s.[36] Essentially, the reasoning goes, the most effective method of ensuring the effective implementation of the EU law is through the courts (and, we suggest, tribunals) of member states. This has been seen as a more effective means of securing the operation of EU norms within member states than infringement actions.

Conclusions

4.36 We intend for the discussion above to contextualise and explain the choices we set out below. In particular, the regulatory requirements for flexibility, openness, the use of a wide range of tools and a desire to reduce regulatory burdens are consistent themes.

OUR APPROACH TO REGULATED ACTIVITY

4.37 This section is divided into five sub-sections:

(1) maintaining the core of current policy;

(2) effective, clear and transparent transposition of our EU obligations;

(3) improved flexibility;

[34] COM (2007) 502, p 11.

[35] European Commission, *Communication on implementing European Community environmental law* COM (2008) 773 final, p 6. We outlined the Aarhus Convention in Chapter 2, at paras 2.27 to 2.30.

[36] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1; Case 4/64 *Costa v ENEL* [1964] ECR 585.

(4) using existing tools where possible; and

(5) aligning our provisionally proposed regime with other, non-EU, international treaties.

Maintaining the core of current policy

4.38 One of our purposes in this project is to make the current set of wildlife preferences work, and allow those subject to the law to understand clearly the obligations placed on them and the options available to them. Our role is not to alter the levels of protection afforded to particular species.

Effective, clear and transparent transposition of our EU obligations

4.39 As we set out in Appendix A, EU law requires that the transposition of directives is effective and clear. Further, as we set out above, current Government guidance on transposition states that directives should be copied out, unless an alternative is preferable and can be justified. The first is a requirement of EU law; the second is a good basic principle, providing the need to copy out is not applied too restrictively. Directives, by their very nature, are designed to give flexibility to the member states. If rigidity were required then the appropriate EU legislative tool would be a regulation.

4.40 As we noted above, the preference in current Government guidance for copying out is to avoid gold-plating and consequently increasing the burdens placed upon individuals beyond those required by a directive. The argument runs that if the exact wording in a directive is used then the burdens imposed can only go as far as required by that directive. Clearly, when choosing alternative language to that used in a directive, care must be taken not to go beyond that required by the directive. However, we do not accept that choosing alternative language, or a slightly different approach, necessarily leads to gold-plating. Choosing alternative means and varying the approach adopted from copying out the provisions of a directive exactly may allow those provisions to fit better with existing legal structures present in England and Wales, whilst also ensuring the outcomes required by the directive.

4.41 In our view, copying out the language or approach used in a directive may lead to confusion, and thereby increase the burden placed on those governed by the transposed regime. It has to be remembered that terms within the directives are chosen to work for all the legal systems within the EU – where all, except the UK's and the Republic of Ireland's, are civil. Consequently, a directive may contain a term designed to work within the directive, explaining what it requires as a matter of EU law, but which would not work if applied within the law of England and Wales generally.

4.42 Therefore, in transposing the regime contained in the Wild Birds and Habitats Directives, we have kept an open mind as to what is the best way to achieve the ends required by the Directives – as it is that, in the last resort, which counts.[37]

[37] European Commission, *A Europe of results – applying community law* COM (2007) 502 final; European Commission, *Communication on implementing European Community environmental law* COM (2008) 773 final.

Improved flexibility

4.43 This is the first time that wildlife law, in its modern form (since the Wildlife and Countryside Act 1981), has been reviewed as a whole. Therefore it is important that the regime created is sufficiently flexible to change with developing scientific understandings (on issues such as the effects of climate change) and changing political preferences. Essentially, there should be sufficient capacity for change within the legal regime to allow for possible contingencies.

4.44 In a review of the different regulatory approaches, Gunningham has explained the usefulness of flexibility thus:

> The limitations of each of the major policy innovations, and of the architectures that underpin them, lead to a plea for pragmatism and pluralism. None of the policy instruments or perspectives … work well in relation to all sectors, context or enterprise types. Each has weaknesses as well as strengths, and none can be applied as an effective stand-alone approach across the environmental spectrum.[38]

4.45 He went on to suggest that:

> Such a conclusion suggests the value of designing complementary combinations of instruments, compensating for the weaknesses of each, with the strengths of others, whilst avoiding combinations deemed to be counterproductive or at least duplicative… From this perspective, no particular instrument is privileged. Rather, the goal is to accomplish substantive compliance with regulatory goals by any viable means using whatever regulatory or quasi-regulatory tools that might be available.[39]

Using existing tools where possible

4.46 One of the objectives that emerges from general regulatory theory is the use of existing tools, where possible. We suggest that this is a sensible approach for law reform in general, and for this project in particular. There is no need to invent a completely new, and untested, regime if there is a suitable one in existence that could either be used by adopting the existing regime, or by transposing its core provisions into our new regulatory regime.

Aligning our provisionally proposed regime with other, non-EU, international treaties

4.47 In Chapter 2 we outlined a series of relevant international treaties, including the Berne Convention and the Aarhus Convention.[40] As we stated there, we would normally expect our domestic law to reflect the obligations placed on the UK as a result of treaties it has signed up to. When we consider certain provisional proposals, particularly in relation to access to justice in Chapter 10 on appeals, we highlight the role of these Conventions further.

[38] N Gunningham, "Environment law, regulation and governance: Shifting architectures" (2009) 21 *Journal of Environmental Law* 179, 210.

[39] As above.

[40] See Chapter 2, paras 2.5 to 2.13 and paras 2.27 to 2.30.

CHAPTER 5
THE NEW FRAMEWORK FOR WILDLIFE REGULATION

INTRODUCTION

5.1 In this chapter we introduce the new framework for wildlife regulation. In the following chapters, we show how this framework will function in relation to specific sectors of the regulatory regime: species protected under EU law; species protected solely by domestic legislation; and invasive non-native species.

5.2 Here we make provisional proposals on the core features of the new, single framework. The regulatory decisions taken under our new regime, and the specific approaches in Chapters 6 to 8 would be backed up by the provisional proposals on compliance contained in Chapter 9. Appeals from the decisions made under the new regime, and the species-specific provisions in Chapters 6 to 8, would benefit from the new appeals processes we set out in Chapter 10, and judicial review.

5.3 Later in this chapter, we explain the reasons why we have taken certain choices. Here, though, it is worthwhile introducing them, so that they can be seen together.

The basic elements of our reformed regime

5.4 First, we consider whether the new regime should continue to cover the entire membership of certain species, rather than merely those members of a species which are wild. Some statutes focus on wild examples of species, such as "wild birds"; other statutes, such as the Game Act 1831 or the Deer Act 1991, cover all members of particular species – whether wild or not. We examine whether current preferences should be continued within our new regime.

5.5 Second, we provisionally propose that there should be a single statute which covers the species-specific law on the conservation, protection and exploitation of wildlife. We do not look at the protection of its habitats, which is outside our scope. Nor do we think it needs to include the wildlife welfare provisions contained in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996 – which should be consolidated within the Animal Welfare Act 2006 (so far as they relate to wildlife). We think to include those provisions would add to confusion and separate unnecessarily the welfare regime for all animals into wild and domesticated.

5.6 Third, we provisionally propose that the regulatory regime should have specific statutory factors to be taken into account when public bodies are taking decisions under the new statute. This, we suggest, would help ensure openness and balance in decision making.

5.7 Fourth, we suggest that the regulation of individual species continue to be organised on a species by species basis. Therefore, the regime applicable to a species would be dependent on the particular species (or groups of species, such as "wild birds"). This is the current underlying approach and we do not suggest

changing it. However, we provisionally propose a new regime for updating the organisation of species-specific regimes.

5.8 Finally, we favour the use of the full range of regulatory techniques, such as permissive provisions, class licences and general licences. The full use of such a range adds clarity to the regime, whilst also potentially reducing the regulatory burden (as fewer licences may have to be applied for).

Contents of this chapter

5.9 This chapter is divided into six further sections as follows.

(1) Extent of the new regime – does it only cover "wildlife"?

(2) Rationalisation and simplification – a single statute?

(3) Statutory factors for decision-making.

(4) Species organisation – what provisions apply to which species?

(5) Regulatory technique for species protection.

(6) Regulatory tools.

EXTENT OF THE NEW REGIME – DOES IT ONLY COVER "WILDLIFE"?

5.10 Setting the boundaries for this project is not straightforward. Certain current statutes limit their scope to wild examples of the species they cover. For example, section 1 of the Wildlife and Countryside Act 1981 applies to "wild birds" but not to birds that have been bred in captivity.[1] This reflects the approach of the Wild Birds Directive, which covers "birds in the wild state".[2]

5.11 Similarly, the Conservation of Habitats and Species Regulations 2010 focus on wild animals of a European Protected Species, as this is the approach adopted in the Habitats Directive which they transpose.[3] The Habitats Directive itself was focused on "wild flora and fauna of Community interest".[4]

5.12 There are other Acts which apply to all members of a species. This includes the Game Act 1831, which includes "hares, pheasants, partridges, grouse, heath or moor game, black game", whether they are wild or reared.[5]

[1] Wildlife and Countryside Act 1981, s 1(6).

[2] Directive 2009/147/EC, art 1(1).

[3] SI 2010 No 490, reg 41.

[4] Directive 92/43/EEC, art 2(2).

[5] Game Act 1831, s 2. Reared pheasants are regulated also by the Wildlife and Countryside Act 1981 and the Animal Welfare Act 2006. See Chapter 3, paras 3.68 to 3.71.

5.13 Similarly, the Deer Act 1991 applies to all deer for some of its provisions, such as the prohibition on poaching, or to all members of a particular species when prohibiting certain activity, such as taking within a close season.[6]

5.14 There are potential problems with limiting our scope to simply "wild animals". This would mean that reared game would not be protected from the use of certain methods for taking and killing during the bulk of its lifespan.[7] However, the vast majority of the pheasant population is reared.

5.15 A way of continuing to protect game could be to retain the Game Acts for reared species, with our new regulatory regime only applying to truly wild examples of game species. This, however, would not be in accordance with our task of simplifying the law. The current Game Acts, and its offences, would apply to reared game, whereas wild game would be covered by our regime, and its offences. This would necessitate identifying whether an individual bird (when taken or killed) was reared or truly wild.

5.16 The same would be the case with deer. The Deer Act 1991 applies to deer and affords all deer a certain level of protection. If only wild deer were covered by our regulatory regime, then the large number of deer bred for food would either be stripped of the protection currently afforded them relating to the prohibition on the use of certain methods of taking or killing, or would have to continue to be covered by the Deer Act 1991 – which would then only cover reared deer.

5.17 If the Acts covering deer and game were simply repealed without replacement then the protection for economic interests afforded by the poaching crimes in both the Game Act 1831 and the Deer Act 1991 would be removed for reared game or deer.

5.18 Therefore, we suggest that where species are entirely covered by an Act, for instance, game under the Game Acts or deer under the Deer Act 1991, then that approach should be retained.

RATIONALISATION AND SIMPLIFICATION – A SINGLE STATUTE?

5.19 As we highlighted in Chapter 4, many of the problems with the legal regime arise because the governing provisions are strewn across various enactments. This makes it difficult for individuals to discover the exact legislative regime that applies to a particular species (or even to know where they should look).

5.20 A single statute for wildlife management would have definite benefits. It would allow for increased consistency (where different terms have been used to mean the same thing in different statutes). It would also mean that there is a comprehensive statute for those interested in wildlife law, rather than users having to trawl through the myriad of existing statutes.

[6] Deer Act 1991, s 1 refers to all deer. Schedule 1 to the Deer Act 1991 proscribes close seasons for the Chinese water deer, fallow deer, red deer, red/sika deer hybrids, roe deer and sika deer. The notable omission, the muntjac, it is treated as an invasive non native species and therefore not given a close season.

[7] Currently provided for by the Wildlife and Countryside Act 1981, s 5.

Provisional Proposal 5-1: We provisionally propose that there should be a single wildlife statute dealing with species-specific provisions for wildlife conservation, protection, exploitation and control.

General welfare provisions

5.21 In Chapter 3, we introduced the general welfare provisions in the Animal Welfare Act 2006. The Act creates a general regime ensuring a basic level of animal welfare protection. In the case of wild animals, it applies to those "under the control of man" (whether permanently or temporarily) – and therefore (possibly temporarily) not truly "wild" at that point.[8] The 2006 Act is the general statute for animal welfare, and is understood as such by those who rely on it. There are, of course, other welfare-minded provisions in other statutes,[9] one of which (in particular) we consider below.

5.22 The incorporation of the Animal Welfare Act 2006 provisions as they relate to wildlife would necessitate the creation of duplicate regimes. For instance, section 8 of the 2006 Act makes it an offence to cause an animal fight to take place. Both dog fighting and badger baiting[10] are covered by this provision. Therefore, if wildlife was removed from the Animal Welfare Act 2006, the same offence would have to exist in both the new wildlife regulatory regime, to cover badgers, and the Animal Welfare Act 2006, to cover dog fighting.

5.23 Most importantly, we can see a good reason for the current provisions in the Animal Welfare Act 2006 remaining together. The regime in which the general welfare provisions are located currently is a modern, comprehensive one.

5.24 However, we do consider reform of the Wild Mammals (Protection) Act 1996 to be worthwhile. The 1996 Act applies to any mammal not covered (as a protected animal) by the Animal Welfare Act 2006.[11] The two Acts naturally dovetail together, as a result of amendments contained in the Animal Welfare Act 2006.[12]

5.25 Consequently, rather than having the two complementary provisions located in different statutes, we suggest that there is merit to consolidating the two Acts' provisions. As we stated above, the Animal Welfare Act 2006 is meant to be the comprehensive statute. Therefore, we suggest it would be sensible to transfer the prohibitions set out in the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006.

Provisional Proposal 5-2: We provisionally propose that our proposed single statute should not include the general welfare offences in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996.

[8] Animal Welfare Act 2006, s 2(b).

[9] Such as the gun requirements in the Deer Act 1991, ss 6(5) and 6(6).

[10] That is, to set dogs on a badger.

[11] Wild Mammals (Protection) Act 1996, s 3.

[12] Animal Welfare Act 2006, s 13.

Provisional Proposal 5-3: We provisionally propose that the provisions in the Wild Mammals (Protection) Act 1996 be incorporated into the Animal Welfare Act 2006.

STATUTORY FACTORS FOR DECISION-MAKING

5.26 In this section, we consider the use of statutory factors within the regulatory regime. The decision makers we are referring to are the Secretary of State, Welsh Ministers, Natural England, the Marine Management Organisation and (currently) the Countryside Council for Wales.

5.27 One potential criticism of our current domestic law is the lack of transparency, and this can lead some to think that priority is given to a particular interest. There is an argument that the introduction of statutory factors could play a role in ensuring transparent decision-making and thereby improve the engagement of those representing competing interests. Statutory factors would show specific factors that need to be considered, and in many cases balanced, in coming to a particular decision.

5.28 There are examples of balancing factors in EU and domestic law,[13] including those in both the Wild Birds and the Habitats Directives. The factors seek to ensure an appropriate balance is struck when a decision has to be taken. So, for example, achieving or maintaining a particular population level or protecting individual members of a species can be balanced against economic factors. The balancing factors listed in both the Wild Birds and Habitats Directives are, by placing an obligation on the member state, binding on the institutions of the member state, including the courts.[14]

5.29 Where a species is not the subject matter of either of the Directives, the balancing obligations are not binding, notwithstanding that a decision-maker should probably take such factors into account in order to reach a rational decision within the context of normal administrative law requirements.

5.30 So, in relation to species covered by EU law, a decision-maker has to take into account the objectives contained in the relevant Directive, as a matter of EU law – and this covers much of our wildlife law. As a matter of domestic law, there is no concurrent obligation. This means, without domestically enshrined factors, we would continue a distinction between the protection of certain species directly covered by the EU Directives where the factors are relevant and others where they are not.

5.31 It would be far clearer and simpler if there were factors that the user of our new regulatory regime could see on the face of the statute and which would be taken into account transparently whenever decisions were being taken, irrespective of the source of the protective regime for the given species.

5.32 This is not a completely new model; domestic legislation already requires one environmental consideration to be taken into account by all public bodies. Section

[13] Access to Justice Act 1999, s 8(2); Mental Capacity Act 2005, ss 4(3), 4(6) and 4(7); Family Law Act 1996, s 33(6).

[14] Case C-224/01 *Gerhard Kobler v Republik Österreich* [2003] ECR I-10239.

40 of the Natural Environment and Rural Communities Act 2006 requires every public authority to have regard to "conserving biodiversity" in the exercise of their functions.[15]

5.33 It may be argued that the inclusion of factors add nothing to the legal regime, as they would be existing material considerations in the decision-making process. Decisions will be made and challenged on existing legal grounds and given that the inclusion of factors adds nothing of use then there is no value to them.

5.34 We disagree. Decisions made without such factors could still lack the requisite transparency that we suggest is beneficial to a regime. Factors give clarity to what has to be addressed. They, therefore, become part of the process of ensuring that balanced decisions are made. This, of itself, is a beneficial outcome.

5.35 Given that factors, or their equivalent, already exist in EU law, and that there is now one in domestic environmental law, we think that it would be correct to apply a series of factors to all decision-making under our proposed statute.

Provisional Proposal 5-4: We provisionally propose that the new regulatory regime should contain a series of statutory factors to be taken into account by decision makers taking decisions within that regulatory regime.

The factors

5.36 Wildlife law must ensure that competing interests are taken into account and a balanced, transparent and rational decision is reached, one appropriate to the specific facts that the decision is concerned with. As we outlined in Chapter 1, there are competing interests within wildlife regulation, such as conservation, welfare, control and exploitation. Sometimes, conservation interests should predominate, while at other times economic interests should prevail. This is a reality recognised by the Directives that underpin much of our wildlife law.

5.37 Unfortunately, it is not possible to trace across the factors in the Wild Birds Directive and the Habitats Directive exactly, given the differences between them.

5.38 The Wild Birds Directive requires that member states take requisite measures to maintain wild bird populations "at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements".[16]

5.39 The Habitats Directive, which came later, requires member states to take measures "designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest". Furthermore, "measures taken pursuant to this Directive shall take account of

[15] "Public authority" is drawn widely and includes Ministers, the National Assembly for Wales, all public bodies, any person holding an office under the Crown, any person holding an office created or continued in existence by a public general Act, any person holding an office whose remuneration is paid out of money provided by Parliament and any statutory undertaking: Natural Environment and Rural Communities Act 2006, s 40(4).

[16] Directive 2009/147/EC, art 2(1).

economic, social and cultural requirements and regional and local characteristics".[17]

5.40 We suggest that a better option would be to introduce a statutory factor broader than "favourable conservation status", one which could be interpreted to mean "favourable conservation status" in the case of Habitats Directive species, and to accord with the requirements of the Wild Birds Directive, for wild birds. In the case of other species, covered neither by the Wild Birds or the Habitats Directive, the term can be broad enough to allow development by the government (through guidance) or the courts – which may bring it into line with EU law.

5.41 Currently, as we outlined above and in Chapter 3,[18] every public authority must, in exercising its functions, have regard to the purpose of conserving biodiversity. In doing so, particular regard is to be had to the UK's obligations under the UN Convention on Biological Diversity.[19] Therefore, public authorities should have regard to the obligation to "develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes".[20]

5.42 Given that this obligation is already placed on decision makers, there is an argument that it need not be repeated. However, one of the reasons for provisionally proposing factors is to show clearly that balanced decisions are being taken and list the factors that have to be taken into account. Therefore, rather than rely on that obligation being read with the other duties we are considering here, we suggest that "preserving and conserving biodiversity" should be included in the list of factors. We suggest that it is inappropriate to attempt to define "biodiversity", as that would reduce future flexibility; however, it would be appropriate to suggest that regard is had to the UN Convention on Biodiversity.

5.43 Taking our lead from the objectives contained in the Directives, there are two further factors that we suggest should be included: economic implications of the decision, and wider social factors.

5.44 Including the economic implications of the decision as a factor requires the decision maker to take into account clearly the benefit of activity such as farming, forestry or other economic development. The Directives recognise clearly the necessity for economic activity and we suggest that our domestic legislation should too.

5.45 The next factor, "wider social factors", accepts that there are other concerns than those of conservation, the environment or economic activity. Certain activity, such as managing access for walking or mountaineering, does not fall into those categories but may be a factor in the management of certain populations. Therefore, the protective measures put in place to protect certain species should take into account the possibility of access by those walking and mountaineering.

[17] Directive 92/43/EEC, art 2(2) and 2(3).

[18] See footnote 15 above, and Chapter 3, paras 3.7 to 3.9.

[19] Natural Environment and Rural Communities Act 2006, s 40(1) and 40(2).

[20] UN Convention on Biological Diversity 1992, art 6(a).

Consequently, there needs to be the potential for such activity to be taken into account.

5.46 There is one final factor which we wish to consider: animal welfare. There is a particular issue here. The factors considered above are essentially taken from existing obligations, be they in EU law or domestic law. Any inclusion of animal welfare would be an extension of domestic provision beyond that required by the EU or already provided for domestically.

5.47 However, animal welfare is becoming increasingly prevalent in domestic law. First, there is the Animal Welfare Act 2006, though that only applies in a limited way to wildlife. Second, there are the species-specific regimes that prohibit certain methods of taking and killing, sometimes for population reasons but also for welfare reasons.[21] Therefore, taking welfare into account is already part of our domestic law.

5.48 We suggest that "animal welfare" could be added to the list of factors that decision makers must have regard to when taking decisions concerning wildlife within our provisionally proposed regime. Specifically, the welfare of those animals potentially affected by a decision should be considered. This would apply to all licensing decisions, including the issuing of general licences. Welfare would, however, only be one of the factors – it would have to be balanced with the others in reaching a decision under the Act.

5.49 Therefore, we suggest that the following factors would be appropriate for the legislative regime we are proposing:

(1) conservation of the species about which the decision is concerned;

(2) preservation and conservation of biodiversity;

(3) economic implications;

(4) wider social factors; and

(5) the welfare of those animals potentially affected by the decision.

Provisional Proposal 5-5: We provisionally propose that the factors listed in paragraph 5.49 above should be formally listed, to be taken into account by public bodies in all decisions within our provisionally proposed wildlife regime.

Question 5-6: Do consultees think that the list of factors we suggest is appropriate? Do consultees think that there are other factors which we have not included that should be?

[21] See, for instance: Wildlife and Countryside Act 1981, ss 5(1), 11(1) and 11(2); Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 43; Deer Act 1991, s 4; Protection of Badgers Act 1992, s 2(1).

SPECIES ORGANISATION – WHAT PROVISIONS APPLY TO WHICH SPECIES?

5.50 Currently, as we explain in Chapter 3, wildlife law offers differing levels of protection to different species, and also protects different species from different types of activity. Some of these differences are the function of domestic legal preferences; others are imposed on the domestic legal system by the Wild Birds and Habitats Directives.

5.51 Consequently, any regulatory regime needs to reflect these different preferences, and allow for them to be varied in the future in order to provide a comprehensive and flexible instrument. It must also assist users of the regulatory regime, so that they are able to understand as easily as possible what provisions are relevant in relation to the subject matter they are considering (such as wanting to manage woodland which may contain dormice).

5.52 One way of thinking about this is to see the regulatory regime as incorporating a series of lists, which determine protective status.[22] This builds on the current organising principles in wildlife legislation, of scheduling species. The placing of a species in a particular table and list would determine the specific legal regime that would be applied to it. This would allow our proposed statute to deal with the complicated nature of wildlife law in a clear and coherent manner, as illustrated below.

FIGURE 2: EXAMPLE SPECIES TABLE

Applicable section	*Lapwing*	*Chaffinch*	*Common Pheasant*	*Pipistrelle Bat*
Section a	✓	✓		
Section b	✓	✓	✓	
Section c			✓	
Section x				✓

5.53 In *figure 2,* the table shows that *section a* applies to both the lapwing and the chaffinch. *Section b* applies to the lapwing, the chaffinch and the common pheasant. *Section c* applies to the common pheasant. *Section x* applies to the pipistrelle bat.

5.54 Species are grouped into particular categories under our existing law.[23] For instance, the pipistrelle bat, used in our example table, is a European Protected Species under regulation 40 of the Conservation of Habitats and Species Regulations 2010, and listed in schedule 2 to those Regulations. Therefore,

[22] This is only an option, exact drafting technique is a matter for later consideration by Parliamentary counsel.

[23] Wildlife and Countryside Act 1981, s 27.

organisation can be simplified. So, *figure 3* below, based on our example table (*figure 2*), could be accompanied with schedules, containing lists of individual species.

5.55 The simplified table is illustrated in *figure 3* below.

FIGURE 3: REVISED EXAMPLE TABLE

Applicable section	*Category A*	*Schedule y*	*Schedule z*
Section a	✓		
Section b	✓	✓	
Section c		✓	
Section x			✓

Key	
Category A	Wild birds except those in schedule y
Schedule y	Birds (hunting permitted)
Schedule z	European Protected Species animals

Provisional Proposal 5-7: We provisionally propose that wildlife law continue to be organised by reference to individual species or groups of species, so as to allow different provisions to be applied to individual species or groups of species.

PROVISIONS FOR UPDATING LISTS

5.56 In Chapter 3, we set out the current provisions for updating schedules and updating lists. The order-making procedures for part 1 of the Wildlife and Countryside Act 1981 are located in section 26 of the Wildlife and Countryside Act 1981.[24]

5.57 Except for orders concerning the temporary extension of up to 14 days of close seasons for wild birds, the Secretary of State or Welsh Ministers should give any

[24] The order-making power to vary schedules is contained in Wildlife and Countryside Act 1981, s 22.

local authority and person affected an opportunity to submit objections or representations with respect to the subject matter of the order.[25]

5.58 The Secretary of State should also consult with whichever one of the advisory bodies is considered best able to advise on the order. Should the Secretary of State be so minded, a public inquiry can be held before an order is made.[26]

5.59 The current regime for updating schedules seems to ensure that all necessary stakeholders are consulted, or at least given the opportunity to participate in the process. We suggest that the order-making procedures in section 26 of the Wildlife and Countryside Act 1981 would provide a suitable model for similar procedures in the new regime we are provisionally proposing. This is consistent with our policy of using existing, comprehensible provisions where possible

Provisional Proposal 5-8: We provisionally propose that the new regime for wildlife use section 26 of the Wildlife and Countryside Act 1981 as the model for its order-making procedures.

5.60 However, there is one issue which is problematic, which is ensuring that all listing is reviewed periodically.

Periodic review

5.61 Keeping the basic listing, or scheduling, up to date is important to the proper functioning of the regulatory regime. There is already a requirement in the Wildlife and Countryside Act 1981 for this to happen for some schedules. So, the Great Britain conservation bodies acting through the Joint Nature Conservation Committee may at any time, but definitely every five years from 30 October 1991, advise the Secretary of State on updating schedules 5 and 8 to the 1981 Act. The Secretary of State must lay this advice before Parliament but is under no obligation to follow the advice or to explain why any advice is not being taken. There are no similar requirements for the review of other schedules in the Wildlife and Countryside Act 1981, such as schedule 9 concerning invasive species.[27]

5.62 There are two criticisms we make here. First, that it is not a requirement to review all of the existing schedules. Second, whilst we accept the giving of advice should not bind the Secretary of State to a particular course of action, transparency would suggest that there should be an explanation as to why advice from a specialist conservation body is not being followed.

Provisional Proposal 5-9: We provisionally propose that there should be a requirement to review all listing of species periodically.

Provisional Proposal 5-10: We provisionally propose that where the Secretary of State decides not to follow advice made by a regulator (such as Natural England) on updating a list there should be a duty on the Secretary of State to explain why the advice is not being followed.

[25] Wildlife and Countryside Act 1981, s 26(4)(a).

[26] As above, s 26(4)(b) and (4)(c).

[27] See Chapter 9.

5.63 The current regime in the Wildlife and Countryside Act 1981 uses five years as the maximum review period. This has worked without any apparent concern about the five year period. We see no need to change the period.

Provisional Proposal 5-11: We provisionally propose that five years should be maintained as the maximum period between reviews of the listing of species within the regulatory regime.

5.64 Such a regime would not necessarily apply in the same way to species listed because of EU obligations, although it would be possible to review and strengthen the protection of an EU protected species beyond that required by EU law.

REGULATORY TECHNIQUE FOR THE MANAGEMENT OF LISTED SPECIES

5.65 In the coming section we set out the basic regulatory technique for those species that the regime chooses to protect, or otherwise regulates by way of listing. The adoption of a particular regulatory technique must, of course, accord with our underlying aims, including that of using existing provisions where possible. Further, it must satisfy our international obligations, especially those contained within the Wild Birds and Habitats Directives.

5.66 The current approach is to prohibit certain activity, permit certain exceptions, provide specified defences and allow for the licensing of prohibited activity. This reflects the approach in the Wild Birds and Habitats Directives, which require member states to prohibit certain activity, permit exceptions to the prohibitions and, finally, allow for limited derogations from the prohibitions. In this context, derogation means the possibility of conducting activity which would otherwise be prohibited, provided that certain conditions are met (such as no other satisfactory solution and for an approved purpose).

5.67 The use of defences and licensing, acknowledging that there are no defences in the Directives, are both instances of derogations (and hence the limited nature of domestic defences).

Prohibited activity

5.68 The existing legal regimes prohibit certain activity, normally by criminalising certain behaviour. There are two ways in which this occurs. Firstly, some activity is prohibited generally, such as setting a springe or trap without a licence.[28] Second, certain activity is prohibited for particular species. This is achieved by generally prohibiting an activity unless a licence is obtained or a defence is available. Some activity is only prohibited temporarily. For instance, it is an offence to take and kill game during its close season, unless an exception applies.

5.69 There are, however, certain changes that need to be made. This is to reflect recent rulings by the Court of Justice on the Habitats Directive.[29] There are also areas where we suggest that simplifications can be made and consistency

[28] Wildlife and Countryside Act 1981, s 5.

[29] Case C-221/04 *Commission v Spain* [2006] ECR 5415; Case C-103/00 *Commission v Greece* [2002] ECR I-1147.

improved, whilst preserving the underlying statutory purpose. The specific changes we are provisionally proposing as a result of EU law are considered in detail in Chapter 6.

Close seasons

5.70 There is a specific issue with prohibitions that it is appropriate to address here: the lack of powers for creating or amending close seasons. Close seasons are already present for some species covered by the current regime, and are required for wild bird species, the hunting of which is permitted under article 7 of the Wild Birds Directive.

5.71 In Chapter 4 we highlighted the lack of a general power to vary close seasons as one of the criticisms of the current regime.[30] The nature of the current legislation, especially the piecemeal way in which it has developed, means that there is no general power under existing statutes to create new close seasons – as desired by some for Brown and Mountain Hares. We consider this a significant flaw in the system, as primary legislation would be needed to create a new close season for many species, or to amend the close season for some that already have close seasons (such as deer).

5.72 Close seasons can work in a collection of different, although possibly complementary, ways. In part, they can be seen as a welfare provision, so they can prevent the killing and taking of animals when they are either pregnant or have dependent young. They also can have a role to play in population maintenance, in that the protection of a species during the breeding and rearing seasons is seen as a way of ensuring species populations at a time when taking or killing could have the greatest impact on species numbers. Finally, close seasons can be used as part of comprehensive species management. Lengthening the close season for one species (for example, a particular species of deer) whilst reducing it for another similar species (another type of deer) gives a preference (a "nudge") in favour of the former.

Provisional Proposal 5-12: We provisionally propose that the regulatory regime should have a general power allowing close seasons to be placed on any animal, and to allow for the amendment of close seasons by order.

Permitted activity

5.73 Under the Wild Birds Directive, certain activity can be permitted, as an exception to the general prohibition on the taking and killing of wild birds. The mechanism by which prohibited activity can be permitted is an area which we think can be reformed. In particular, we consider a simplified way to handle the possible hunting of wild birds,[31] as provided for by the Wild Birds Directive.[32]

[30] Chapter 4, paras 4.19 to 4.20.

[31] Chapter 6, paras 6.83 to 6.101.

[32] Directive 2009/147/EC, art 7.

Defences to criminal offences

5.74 Currently there are specific defences contained in existing legislation, for such activity as mercy killing.[33] We look to retain these defences, preserving their underlying purpose. However, as we explore in Chapters 6 and 7, we think there are certain simplifications that could be made – this includes a certain amount of harmonising across those species regulated currently by different statutory provisions.

Licensing

5.75 The final limb of our regulatory technique concerns licensing. Licensing, which is one part of the UK's transposition of its derogation options, is the way that activity otherwise prohibited can be permitted. The range of licensing is very large, going from permitting the killing and taking of bird species with large populations (where there is no satisfactory alternative), to allowing for the management of highly protected species, such as badgers. In the next section, we explore the range of licences available.

5.76 Given the approach adopted in the Directives, we suggest that it is necessary to continue the current regulatory technique: that is, to prohibit certain activity; permit certain exceptions; provide specified defences; and allow for the licensing of prohibited activity.[34]

Question 5-13: Do consultees think that the appropriate regulatory technique for the management of listed species is to prohibit certain activity, permit certain exceptions, provide specified defences and allow for the licensing of prohibited activity?

REGULATORY TOOLS

5.77 This section is broken down into six sub-sections addressing the following topics:

(1) existing licences – individual, class and general;

(2) use of general licences;

(3) duration of licences;

(4) breaching licensing conditions;

(5) codes of practice; and

(6) guidance.

Existing licences – individual, class and general

5.78 In Chapter 3, we noted the development of class and general licences. We explained that the development of general and class licences has been achieved administratively. There are no provisions that state when a general or class

[33] Wildlife and Countryside Act, s 4(2)(b).

[34] We discuss our provisional proposals to enhance the current technique in Chapter 5.

licence should or should not be used as opposed to an individual licence.[35] General licences are only issued for low risk activity.[36]

5.79 A question for us is whether we should define the circumstances in which the appropriate authority could use each of the different types of licence, limiting the use of general and class licences by statute.

5.80 We can see value in defining when a general or class licence could be used within the statutory regime, and when only an individual licence would be appropriate. To do so would add clarity.

5.81 However, to be so prescriptive would also remove flexibility from the regulatory regime. The advantage of the current regime is that new tools, such as class and general licences, can be developed without the need for legislative change. Therefore, we suggest that it is undesirable to seek to define the licences available. The choice of appropriate licence type is best regulated by the statutory factors we provisionally proposed above.

Question 5-14: Do consultees think that it is undesirable to define in statute individual, class or general licences?

Use of general licences

5.82 The issue we consider here is where a general licence can be issued which meets the terms of the potential derogation in either the Wild Birds or the Habitats Directives.

5.83 The licensing provisions in the Wildlife and Countryside Act 1981 require that the appropriate authority shall not grant a licence in respect of (amongst other things) the taking and killing of a wild bird protected under section 1 of the 1981 Act, unless satisfied that there is no other satisfactory solution.[37] Under the Conservation of Habitats and Species Regulations 2010, a licence shall not be granted unless the appropriate authority is satisfied that there is no satisfactory alternative.

5.84 The Wildlife and Countryside Act 1981 provision intends to transpose the provision in the Wild Birds Directive that allows a member state to derogate "where there is no other satisfactory solution".[38] Similarly, the regulation in the Conservation of Habitats and Species Regulations 2010 transposes the provision in Habitats Directive which allows a member state to derogate "provided that there is no satisfactory alternative".[39]

5.85 Derogations can only be used by a member state if there is "no other satisfactory solution" (Wild Birds) or whether there is "no satisfactory alternative" (Habitats Directive). In coming to the conclusion, the member state has to ensure

[35] See Chapter 3, paras 3.42 to 3.51.

[36] Natural England Licence GL/06.

[37] Wildlife and Countryside Act 1981, s 16(1A)(a); Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, reg 53(9)(a).

[38] Directive 2009/147/EC, art 9(1).

[39] Directive 92/43/EEC, art 16(1).

compliance with the overall object of the Directive: maintaining the population of wild birds under Article 2 of the Wild Birds Directive; ensuring favourable conservation status of species protected by the Habitats Directive. Although in neither case are these definitive requirements.

5.86 The Directives were never meant to be absolute; they accept in their provisions that wildlife is going to be killed and taken. However, they require member states to set in place an effective regime to ensure that the overall outcomes in the Directive are achieved.

5.87 For a member state to meet the requirement that there was "no satisfactory alternative" to the granting of a general licence, that action would have to be sufficiently tightly proscribed to ensure the favourable conservation status of the species in question. This is the headline obligation in the Habitats Directive that a member state must comply with. If the action taken by the member state (the granting of a general licence) cannot ensure this, then the terms of an acceptable derogation cannot be made out, and another mechanism should be used, such as the issuing of an individual licence.

5.88 General licences are granted subject to the condition that the licence user "can only rely on the licence in circumstances where the [licence user] is satisfied that the appropriate legal methods of resolving the problem such as scaring and proofing are either ineffective or impracticable".[40]

5.89 It is arguable whether this can meet the requirements of "strict protection" for the purposes of Article 12 of the Habitats Directive. Current practice is that they are only used for activity which poses a low risk to the species, which we suggest is within the terms of the potential derogation (the lack of control in the licence does not affect the headline obligation in the Directive).

Duration of licences

5.90 There are different maximum periods in wildlife law for the grant of licences. In this section we explore whether these could and should be standardised. Licences granted for wild birds under section 16(1) of the Wildlife and Countryside Act 1981 cannot exceed two years.[41] Licences to kill wild birds or wild animals under sections 16(2) and (3), which includes the licensing of prohibited means, also cannot exceed two years.[42] Otherwise, there is no time limit on the grant of a licence.

[40] Natural England, *Licence (general) to kill or take certain birds to conserve flora and fauna (including wild birds* (GL06), condition 3.

[41] Wildlife and Countryside Act 1981, s 16(5A)(c).

[42] As above.

5.91 Licences granted under the Conservation of Habitats Regulations 2010 are only time-restricted when they are licences to kill. Then the maximum duration is two years.[43] Under the Protection of Badgers Act 1992, there is no limitation as to the duration of the licence. The Deer Act 1991 proscribes a maximum duration of two years for a licence to take or kill deer.[44]

5.92 The current default practice for general licences is to grant them for one year. This is seen as useful as the periodic review allows for both minor and major amendments to be made. It is seen as a way of ensuring that the community that benefits is always aware of the current licence conditions. This is because they expect the licence to change on 1 January of any given year, and this is communicated through specialist media.

5.93 In the case of other licences, the non-killing or taking part of a licence may run for significantly longer than two years (for instance, where the licence to kill or take contains conditions requiring the monitoring of any mitigation proscribed by the licence).

5.94 The primary question is whether the time limits could be standardised. If they can, the secondary question is what the correct approach to standardisation would be. Time limits are there to minimise the risk that may arise from granting a long licence to kill or take as a result of unforeseen variations in population numbers and species distribution. Therefore, in order to ensure that an unduly extensive licence to kill could not be granted, licences to kill are restricted in general to two years (the exception being badgers). Licences for other activity, including trade, holding or keeping, are not similarly restricted as to duration. This is also the case for European Protected Species afforded "strict protection".[45] Two exceptions are for wild birds, where all activity is restricted by licences being for a maximum of two years, and deer, where licences for taking from the wild are also restricted to two years.

5.95 Whether the differences between the duration of licences can be justified turns on whether the restrictive regime for wild birds is correct. We suggest that there are some institutions[46] that hold dead wild bird specimens or wild bird eggs that have to be licensed, but where their continued holding of those wild bird specimens or wild bird eggs is not a threat of any kind to the wild environment. The current law does not, in the case of wild birds, allow for rational decision-making, and permit these institutions being granted a longer licence than two years. There will also be examples where the length of a given development project is going to be greater than two years, and therefore licences would have to be reapplied for even for the disturbance provisions, which reduces legal certainty for developers and increases the burden placed on them.

5.96 We do not, however, think that any change would necessitate the granting of long licences in all circumstances. There are mechanisms available to prevent such a practice developing, such as the factors contained in the scheme we are

[43] SI 2010 No 490, reg 53(10).

[44] Deer Act 1991, s 8(3G)(e).

[45] Directive 92/43/EEC, art 12.

[46] The Natural History Museum would be an example, or the Zoological Society London.

provisionally proposing, as set out in Chapter 6; judicial review; and the appeals process we outline in Chapter 10.

5.97 However, the length of licences remains a legitimate concern, and so we suggest that some form of back stop would be useful in reassuring those concerned that overly long licences could be issued. Therefore we think that there should be a limitation on licence length for those activities which require a licence but do not involve the killing of a member of a species. In such circumstances we suggest ten years would be an appropriate restriction on the maximum length of a licence.

5.98 Concerning killing, two years is the default position for species other than badgers. In relation to badgers, the lack of a restriction on the duration of a licence to kill seems a genuine anomaly, given the restrictions on duration for all other similarly protected species.

Provisional Proposal 5-15: We provisionally propose that the maximum length of a licence provision permitting the killing of member of a species, including licensing a particular method, should be standardised at two years for all species that require licensing.

Provisional Proposal 5-16: We provisionally propose that there should be formal limits of ten years for all other licences provisions.

Breaching licensing conditions

5.99 In Chapter 4, whilst outlining the case for reform, we highlighted the inconsistency of the offences of breaching a licence condition. We noted that such an offence is available under the Conservation of Habitats and Species Regulations 2010 and the Protection of Badgers Act 1992,[47] but is not for licences issued under the Wildlife and Countryside Act 1981.

5.100 A problem with this is that some statutes contain limitation periods for the underlying offences against which a licence is issued. The Wildlife and Countryside Act 1981 limitation period is two years.[48] For example, a licence could be granted permitting the taking or killing of a protected species, which includes an ongoing monitoring requirement which runs for 10 years. So, the killing or taking of a protected species is permitted provided that the licence conditions are complied with. However, the sanction for committing the underlying offence becomes unavailable two years after the taking or killing of the protected species. Therefore, there would potentially be no available sanction for failure to comply with the monitoring licence condition after two years have elapsed from the taking or killing of the protected species.

5.101 It would, of course, be possible to extend the limitation period. However, the two years is in itself an extension to the standard 6 months limitation period for offences triable summarily.[49]

[47] SI 2010 No 490, reg 48; Protection of Badgers Act 1992, s 10(8).

[48] Wildlife and Countryside Act 1981, s 20(2).

[49] Magistrates' Courts Act 1980, s 127(1).

5.102 The other potential advantage of having such an offence is that technical breaches of the licence can be treated in one way, and guidance issued. Such guidance would not obscure or confuse the issue of technical breaches with the simple commission of the offence of killing or taking.

Provisional Proposal 5-17: We provisionally propose that there should be a general offence of breaching a licence condition.

CHAPTER 6
SPECIES PROTECTED UNDER EU LAW

INTRODUCTION

6.1 In the previous chapter, we outlined the general scheme of a new regulatory regime. In this chapter, we consider reform to specific aspects of the current regulatory regime that deals with species protected as a matter of EU law, which in this context means those protected by the Wild Birds Directive and the Habitats Directive.

6.2 This chapter is essentially about ensuring the proper transposition of the two major directives for wildlife. After considering a basic definitional issue, how "wild bird" should be defined, we turn to the reform of the prohibitions contained in current domestic law.

6.3 We then move on to consider the defences available. We propose a reform to existing defences, making a provisional proposal to remove inconsistencies in the currently available defences. We then turn to permitted wild bird hunting, as provided for in the Wild Birds Directive, in order to meet the criticisms we made of the current regime in Chapter 4.

6.4 Finally we look at licensing provisions in the context of EU law. There we consider whether domestic law should transpose the term "judicious use" as a licensing purpose for wild birds and reporting.

DEFINING "WILD BIRDS"

6.5 This is one of the key definitions for the regulatory regime. The Wildlife and Countryside Act 1981 currently defines a wild bird for the purposes of that Act as:

> Any bird of a species which is ordinarily resident in or is a visitor to any member state or the European territory of any member state in a wild state but does not include poultry or, except in sections 5 and 16, any game bird.

Poultry is defined as "domestic fowls, geese, duck, guinea-fowls, pigeons and quails, and turkeys".[1]

6.6 The prohibitions in section 1 of the Wildlife and Countryside Act 1981 do not, however, apply to "any bird which it is shown to have been bred in captivity".[2]

[1] Wildlife and Countryside Act 1981, s 27. Excluded game birds are defined in Wildlife and Countryside Act 1981, s 27 as "any pheasant, partridge, grouse (or moor game), black (or heath) game or Ptarmigan".

[2] Wildlife and Countryside Act 1981, s 1(6).

6.7 The Wildlife and Countryside Act 1981 gives domestic force to the UK's obligations contained in the Wild Birds Directive. The aims of the Wild Birds Directive are contained in the preamble to the Directive, which states that:

> A large number of species of wild birds naturally occurring in the European territory of the member states are declining in number, very rapidly in some cases. This decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby.

The preamble notes further that wild birds constitute part of the "common heritage" of EU member states.

6.8 The Wild Birds Directive applies to "all species of naturally occurring birds in the wild state in the European territory of the member states to which the Treaty applies". It requires member states to "take the requisite measures to establish a general system of protection for all species of birds" included in that definition.[3]

6.9 In our view, the phrase ""naturally occurring in the wild state" refers only to those species that are indigenous to the relevant territory. This interpretation reflects properly the objectives of the Wild Birds Directive.

6.10 The alternative view is that a species is "naturally occurring" when it has a self-sustaining wild population. If a species "naturally occurring in the wild state" was construed to mean solely that it had a self-sustaining wild population, the definition would include species of domesticated birds, some of whom had escaped and established a viable self-sustaining wild population. It would also include invasive non-native species, such as monk parakeets, where these have similarly established self-sustaining wild populations. This is not what was intended by the Wild Birds Directive.

6.11 The expression used in domestic law instead of "naturally occurring in the wild state", is that a species is "ordinarily resident". We think it would be a less obvious reading of that term to restrict it to indigenous wild species. Given that the aim of the Directive is to protect indigenous EU wild bird populations, we think that it would be appropriate to transpose directly the definition in the Wild Birds Directive into a new Act, namely "naturally occurring in the wild state".

6.12 If we take this approach, then the question remains whether the exclusion of poultry is still necessary. It might be necessary if there were "naturally occurring" wild populations of poultry species in the EU, which were also kept as domesticated poultry. This is a matter of fact, on which we would be grateful for the views of consultees.

6.13 Game birds are largely excluded from protection under the Wildlife and Countryside Act 1981. They are covered instead by the Game Acts. Our intention is that all game birds should be included within our regulatory regime. Our initial view is that it would therefore be necessary to deem all game birds to be "wild birds" for the purpose of our new regime. In particular, the common pheasant is present in the EU as a result of human introduction, and we consider it

[3] Directive 2009/147/EC, art 1 and art 5.

appropriate for pheasant shooting to continue to be controlled under the same regime as that pertaining to other indigenous game birds. The other options in relation to the common pheasant would be to either treat it as livestock or to create a separate bird regime for it. Both would be disadvantageous to the shooting industry, and would not be conducive to the simplification of the legal regime.

6.14 Finally, there is an issue relating to the exclusion of captive bred birds. The Court of Justice has held that captive bred birds are not covered by the general protective regime in the Wild Birds Directive.[4] The current exclusion of captive bred birds, therefore, accords with EU law.

6.15 The issue for us is how best to transpose the EU legal position into domestic law. Here, we see two options. First, domestic law could remain silent on the status of captive bred birds, and rely on those using the legislative regime to interpret "wild bird" in accordance with the jurisprudence of the Court of Justice. Alternatively, domestic law could exclude captive bred birds expressly. The first accords with current preferences on direct transposition, or "copy out". The second option makes the legislation far clearer for ordinary users. The second option also allows for captive bred birds to be excluded except when part of a reintroduction or repopulation scheme, which we suggest accords with the Wild Birds Directive.[5]

6.16 We would welcome the views of consultees on the retention of the current express exclusion of captive bred birds.

Provisional Proposal 6-1: We provisionally propose that the definition for "wild bird" in Article 1 of the Wild Birds Directive (birds of a species naturally occurring in the wild state in the European territory of EU member states) be adopted in transposing the Directive's requirements.

Question 6-2: Do consultees think that the general exclusion of poultry from the definition of "wild bird" should be retained?

Question 6-3: Do consultees think it necessary to deem game birds "wild birds"?

Question 6-4: Do consultees think that the exclusion of captive bred birds in EU law is best transposed by solely transposing the provisions of the Wild Birds Directive, or by express reference to the exclusion?

PROHIBITED ACTIVITY AFFECTING WILDLIFE

6.17 In general, the provisions preventing specific activity have not been subject to significant complaint. We are not proposing root and branch reform of the existing law, and (subject to the discussion below) provisions such as section 1 of the Wildlife and Countryside Act 1981 should be carried across into the new regime in their current form.

[4] Case C-149/94 *Vergy* [1996] ECR I-299, paras 12 to 15.

[5] As is the case currently in the Wildlife and Countryside Act 1981, s 1(6).

6.18 However, there are four areas where there are either gaps in the current regime or where simplifications can be made without affecting the level of protection afforded a particular species.

6.19 First, we consider which offences are capable of being committed "recklessly". Primarily, this concerns how the term "deliberate" should be transposed into domestic law from the Wild Birds and Habitats Directives. We also ask how that may affect the protection afforded species purely as the result of domestic requirements, for instance, badgers under the Protection of Badgers Act 1992.

6.20 Second, we discuss the use of the term "disturbance" currently contained in part 1 of the Wildlife and Countryside Act 1981 and provisionally propose reform to the provisions on protecting the shelter or nesting or resting place of certain animals.

6.21 Third, we look at close seasons and make provisional proposals for a general power to impose close seasons on any species, and to amend existing ones, by order.

6.22 Finally, we ask consultation questions on the efficacy of certain specific methods of prohibition – the gun requirements in the Deer Act 1991 and the Conservation of Seals Act 1970.

Reckless commission

6.23 As we stated in Chapter 3, many of the provisions in the Wildlife and Countryside Act 1981 require a specific intention to injure or kill the particular animal.

6.24 Sometimes, though, legislation will criminalise the situation where an individual is aware of the possibility of potentially adverse consequences arising from their actions but proceeds with the actions in any event. In such a situation, the individual is considered to be reckless. Consequently, a greater range of activity is prohibited where "reckless" commission is included in an offence.

6.25 There are three elements of an offence where the possibility of recklessness being included in the definition of the crime can occur: conduct; consequence and circumstance. To use a wildlife example, the conduct would be shooting a gun or setting a trap. The consequence would be killing or taking a bird, and the circumstances would be whether the bird taken or killed was protected, or not.

6.26 Under the present law, a person needs to deliberately use the weapon, or set the trap. In other words, the conduct must be intended.

6.27 Currently, in relation to the consequence of the defendant's actions, the intention to kill or take a bird is required by law. This includes "oblique intention", which is where killing or taking was a virtually certain result of the person's actions and foreseen by him or her as such. Thus, where an individual intended to chop down a tree and the killing of resident birds was a virtually certain result of that action, but he did not act in order to kill the bird but for some other purpose (for example, for firewood), then the individual would still be said to have the intention to kill the birds.

6.28 If, however, the offence included an individual's recklessness as to the consequence of their actions, then the killing or taking a bird would be an offence if a person deliberately chopping a tree for firewood was aware of the possibility that a bird might be killed by his or her doing so, but chopped down the tree regardless.

6.29 Turning to the circumstances element, there are two principal approaches used in the criminal law when constructing the requirements for the circumstance element of a crime. First, the law may require that knowledge is needed, so that an individual needs to know the species in question or that it is one that is in fact protected. Alternatively, it may be sufficient that the defendant was reckless in the sense of foreseeing a risk that protection for that species might exist.

6.30 Over time the law has developed, either as a result of external EU pressures or domestic preferences. Particular statutes have been updated to include the possibility of elements of an offence being committed "recklessly". For example, in 2007 the prohibition on the disturbance of the shelter of certain animals[6] was expanded to include reckless disturbance.

6.31 In Scotland, the protection of wild birds, their nests and eggs was expanded in 2004 to include reckless commission.[7] Similar changes have not been in England and Wales, where the offence of protection of wild birds, their nests and eggs requires specific intention.

Transposing the EU term "deliberate"

6.32 The first thing we need to consider is whether it is necessary as a matter of EU law to include "recklessness" in the basic wildlife offences.[8]

6.33 The relevant provision in the Habitats Directive is article 12(1). It requires that member states take "the requisite measures to establish a system of strict protection for the animal species listed in annex 4(a) in their natural range".[9] Requisite measures include prohibiting:

> (a) all forms of deliberate capture or killing of specimens of these species in the wild;
>
> (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
>
> (c) deliberate destruction or taking of eggs from the wild;
>
> (d) deterioration or destruction of breeding sites or resting places.

[6] Wildlife and Countryside Act 1981, sch 5.

[7] Wildlife and Countryside Act 1981, s 1(1), modified by Nature Conservation (Scotland) Act 2004, sch 6 para.2.

[8] Such as the Wildlife and Countryside Act 1981, s 1(1).

[9] Annex 4(a) includes bats and cetacea amongst many other species.

6.34 There are only two cases from the Court of Justice on the interpretation of the term "deliberate".[10] Both concerned the Habitats Directive. In *Commission v Spain*, the Court of Justice offered the following:

> For the condition as to "deliberate" action in article 12(1)(a) of the Directive to be met, it must be proved that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such a capture.[11]

6.35 In *Commission v Greece*, the alleged infringement of the Directive was a failure to protect Loggerhead sea turtles from disturbance. Loggerhead sea turtles are a protected species under annex 4 of the Habitats Directive. The Greek authorities had put up notices on a beach used by sea turtles for breeding and rearing, explaining that its use may affect the turtles. On the basis of the notices, the Court of Justice was prepared to hold that an infringement had taken place.[12] Essentially, the Court accepted the notices as evidence that the risk was known by Greece and those using the beach. Therefore, since Greece then failed to prevent the continuation of the disturbance to sea turtles, there was an infringement of the strict protection requirements of article 12 of the Habitats Directive.

6.36 Both of these cases use a definition of "deliberate" that goes further than pure intention. Guidance on the transposition of article 12 of the Habitats Directive, issued by the European Commission,[13] proposes the following definition of "deliberate":

> "Deliberate" actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.[14]

6.37 The EU definition of "deliberate", therefore, includes the concept of subjective recklessness for both the circumstances and the consequences. So, the legal regime should protect species from an individual who is reckless as to whether the species is protected (circumstances) and an individual who is reckless as to

[10] Case C-221/04 *Commission v Spain* [2006] ECR 5415; Case C-103/00 *Commission v Greece* [2002] ECR I-1147.

[11] Case C-221/04 *Commission v Spain* [2006] ECR 5415, para 71.

[12] Case C-103/00 *Commission v Greece* [2002] ECR I-1147, para 35.

[13] European Commission, *Guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007).

[14] European Commission, *Guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007) p 36.

whether something is likely to be captured, killed or disturbed by their actions (consequences).[15]

6.38 Consequently, and in relation to article 12 of the Habitats Directive, "deliberate" activity in EU law should be interpreted as covering what in English terms would be "intentional" and "reckless" activity.

6.39 The next consideration is the potential transposition of article 5 of the Wild Birds Directive, which is currently transposed by section 1 of the Wildlife and Countryside Act 1981. Section 1 makes it an offence if "any person intentionally", amongst other things, "kills, injures or takes any wild bird".[16] Article 5 of the Wild Birds Directive requires member states to "take the requisite measures to establish a general system of protection for all species of birds referred to in article 1". Such measures should prohibit (amongst other things) the "deliberate killing or capture by any method".[17]

6.40 The question, therefore, is whether the same definition "deliberate" applies as that in the Habitats Directive?

6.41 There is an argument against using the same definition. Article 12 of the Habitats Directive concerns the "strict" protection of a specific set of species. Article 5 of the Wild Birds Directive concerns the general protection of wild birds. Therefore, it could be argued that wild birds require less protection and "deliberate" in the Wild Birds Directive should be construed more restrictively. We suggest that this should not be the case. The Court of Justice has used case law and certain terms interchangeably between the two Directives.[18] Therefore, we do not really see the development of two definitions of "deliberate" (one for each Directive) as a likely outcome, if the matter were ever to come before the Court of Justice.

6.42 Therefore, we adopt the same formulation for the transposition of "deliberate" in article 5 of the Wild Birds Directive as we do for the same term in article 12 of the Habitats Directive. Consequently, the prohibited activity should include action which in English terminology is understood as "reckless".

6.43 This may be an instance where simple copy-out of the Directive may not be the best option. Merely to use the term "deliberate" without further clarification could lead to the ordinary English meaning being used (which would not go as far as the case law of the Court of Justice). Therefore an alternative approach is necessary. On one hand, the interpretation of "deliberate" given in *Commission v Spain* could be used to define the term "deliberate" for our provisionally proposed regime. Alternatively, we could replace the term "deliberate" with "intentionally or recklessly". The latter is preferable, we suggest, as it is clearer for the users of the domestic regulatory regime, which would include magistrates' courts and

[15] Where used in statutes, the criminal law of England and Wales now interprets recklessness in its subjective sense: that the accused has foreseen a risk of the proscribed consequence or circumstance and unreasonably took the risk, following *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

[16] See further Chapter 3, para 3.20. In Scotland, under the Nature Conservation (Scotland) Act 2004, the offence was expanded in 2004 to include action taken "recklessly".

[17] Directive 2009/147/EC, art 5.

[18] See, for example, Case C-06/04 *Commission v UK* [2005] ECR 9017.

domestic lawyers, relying (as it does) on clear, well understood and established terms in the law of England and Wales.

Provisional Proposal 6-5: We provisionally propose using the term "intentionally or recklessly" to transpose the term "deliberately" in the Wild Birds and Habitats Directives.

"Recklessness" for domestically protected species

6.44 Certain species are afforded a level of protection not because of an EU obligation but because of domestic preferences. Species listed in schedule 5 to the Wildlife and Countryside Act 1981 are protected from intentional killing, injuring and taking.[19] Badgers, protected under the Protection of Badgers Act 1992, are another example of a species that would fit into this category. The 1992 Act protects badgers from "wilful" action.[20]

6.45 The question, therefore, is whether species such as the pine marten or the badger should be protected to the same level as other species are under EU law. Badgers and pine martens are not strictly protected species under the Habitats Directive. There is, therefore, no EU legal requirement for them being protected from reckless killing or taking.

6.46 To include "reckless" commission of killing and taking for these species would extend domestic protection significantly. The current use of the terms "wilful" or "intentional" is that which Parliament has set. However, to not include "reckless" commission would be to facilitate creation of another distinction within our existing legal structure: EU protected species would be protected from "reckless" taking and killing; domestically protected species would not.

6.47 The question, then, is whether the desire for a simplified system should override what is currently Parliament's stated preference. However, in approaching that, it is important to bear in mind that Parliament's stated preference was the product of earlier laws, which were drafted around the term "wilfully".[21] The current law in England and Wales, in relation to reckless killing and taking, does not accord with more modern approaches to species protection, as required by EU law, or as has have been put in place in Scotland (as we stated above). These include recklessness in the killing and taking prohibitions.

6.48 Against that, the Wildlife and Countryside Act 1981, though not the Protection of Badgers Act 1992, has been subject to significant amendment, so Parliament has had the opportunity to include recklessness in the taking and killing provisions. It has, however, amended the "disturbance" offences, which we consider below, such that these can be committed recklessly.

[19] Wildlife and Countryside Act 1981, s 9(1). Schedule 5, for the purposes of section 9(1), includes the Pine Marten, the Trembling Sea Mat and the Glutinous Snail. Sections 9(4) and 9(4A) protect certain species from intentional or reckless disturbance. Some Schedule 5 species are only protected from the disturbance, under s 9(4), or sale, under section 9(5).

[20] Protection of Badgers Act 1992, s 1.

[21] See, for instance, the Badgers Act 1973 or the Protection of Birds Act 1954.

6.49 We are undecided as to whether those species which are afforded heightened protection as a matter of domestic law should be protected from intentional and reckless activity. If they were, it would align domestically protected species afforded heightened protection with our transposition of the Habitats Directive. We, therefore, ask an open consultation question.

Question 6-6: Do consultees think that badgers protected under the Protection of Badgers Act 1992 or those protected currently by section 9(1) of the Wildlife and Countryside Act 1981 (from damage, destruction or the obstruction of access to a shelter or place of protection, or the disturbance of an animal whilst using such a shelter or place of protection) should be protected from intentional and reckless behaviour?

Disturbance provisions

6.50 Certain provisions protect species from disturbance, on occasion generally, though more normally in their place of breeding or rest.[22] Some provisions also protect the nesting, resting or breeding site itself. Here we consider those provisions in the context of transposing the term "disturbance" and potentially simplifying certain repetitious legal provisions.

6.51 Both the Wild Birds and the Habitats Directives require member states to ensure that species covered by the Directives are protected from disturbance. However, the term "disturbance" under the Wild Birds Directive only relates to "significant" disturbance.[23] In the current transposition, this limiting factor is omitted. Therefore, an option open to us is to provisionally propose that the term "disturbance" in domestic law, when transposed from article 5(1)(d) of the Wild Birds Directive, should be replaced by the term "significant disturbance" – in line with that article. If this option were used then it may be necessary to define what amounts to "significant", which would require the giving of specific examples. However, as we explore later, we are not convinced that including the term "significant" is necessary.

6.52 "Disturbance" under the Habitats Directive is (similarly to the Wild Birds Directive) left undefined. However, when this was transposed in the Conservation of Habitats and Species Regulations 2010, guidance as to what amounted to disturbance was offered. As a result, "disturbance" is to be taken to include activity which is likely to affect a species' ability to survive, to breed or reproduce, or to rear or nurture their young, or (in the case of animals of a hibernating or migratory species) to hibernate or migrate, or which may "affect significantly the local distribution or abundance of the species".[24]

6.53 We do not think that any definition or clarification of the term "disturbance" is necessary. We think the term is capable of being understood through its plain and ordinary meaning. If that is wrong, then its meaning should be determined by the courts (most importantly the Court of Justice).

[22] Wildlife and Countryside Act 1981, ss 1(5), 9(4)(b) and 9(4A); Conservation of Habitats and Species Regulations 2010, regs 41(1)(b) and 41(1)(d); and Protection of Badgers Act 1992, s 3(e).

[23] Directive 2009/147/EC, art 5(1).

[24] SI 2010 No 490, reg 41(2).

Question 6-7: Do consultees think that the term "disturbance" does not need to be defined or qualified within the provisionally proposed legal regime, when transposing the requirements of the Wild Birds and Habitats Directives?

Simplifying the disturbance provisions – potential repeat provisions

6.54 There are provisions that protect certain species from disturbance in the Wildlife and Countryside Act 1981,[25] the Conservation of Habitats and Species Regulations,[26] and the Protection of Badgers Act 1992.[27]

6.55 This is an area where it may be possible to simplify the protection, or consolidate it (at the very least). It is also an area where there *may* have been some "gold-plating" of the Habitats Directive;[28] however, we conclude below that there has not been.

6.56 European Protected Species[29] are protected by the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.[30] The latter goes further, as it covers all disturbance, rather than merely whilst occupying a shelter. Dolphins and whales (*cetacea*) are protected from disturbance by both the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010.[31] The former protects from disturbance and harassment, the latter only from disturbance. We are not sure whether the harassment provision adds anything; on the face of it, it is hard to see what could be harassment that is not also disturbance. An argument in favour of the current provisions is that harassment may apply to action against specific individuals, whereas this may not be the case for disturbance. This, however, does not necessarily amount to an argument in favour of retaining harassment but could be seen as an argument in favour of altering the definition of disturbance.

6.57 If there were distinct "shelters" for such mammals, then possibly there would be a difference. However, that is not really the position in the marine environment for such creatures as whales and dolphins.

6.58 The prohibitions in section 3(1) of the Protection of Badgers Act 1992 seem to be covered by the prohibitions in section 9(4) of the Wildlife and Countryside Act 1981. The only difference is the general prohibition on causing a dog to enter a badger sett. However, if the sett was occupied then the offence in section 9(4)(b)

[25] Wildlife and Countryside Act 1981, ss 1(5), 9(4)(b), 9(4A).

[26] SI 2010 No 490, reg 41(1).

[27] Protection of Badgers Act 1992, s 3(1)(e). See Chapter 3, paras 3.102 to 3.105.

[28] We explain the term "gold plating" in Chapter 4, at para 4.27.

[29] A "European Protected Species" is one listed in annex 4(a) of the Habitats Directive species with a natural range including Great Britain: SI 2010 No 490, reg 40. There are two European Protected Species, listed in Schedule 2 to SI 2010 No 490 but not schedule 5 to the Wildlife and Countryside Act 1981, they are the pool frog and the lesser whirlpool ram's horn snail.

[30] Wildlife and Countryside Act 1981, s 9(4); Conservation of Habitats and Species Regulations 2010, reg 41(1)(b).

[31] As above

of the 1981 Act would surely be made out. It is also hard to see how causing a dog to enter a sett could not "damage or destroy" the sett within the requirements of section 9(4)(a) of the 1981 Act. Consequently, we think that the protection from disturbance and of the sett itself would be covered adequately by the prohibitions currently within section 9(4) of the Wildlife and Countryside Act 1981, as if the badger were listed in schedule 5 to the 1981 Act.

6.59 European Protected Species, bar two, are protected by the Wildlife and Countryside Act 1981[32] and the Conservation of Habitats and Species Regulations 2010.[33] The 1981 Act goes further than the Conservation of Habitats and Species Regulations 2010, in that it also protects a shelter from obstruction to access. On the face of it, the 1981 Act also goes further than the Habitats Directive, as there is no need to protect a resting place from obstruction in article 12 of the Habitats Directive. This could, then, be read as "gold-plating" of the Habitats Directive.

6.60 However, this may turn on what is intended by the "deterioration" of a resting place, within article 12(1)(d) of the Habitats Directive. If that can be taken to mean the protection of a resting place from the loss of utility to the protected species, then obstruction of entry would surely come within that definition. We think that it does, given the level of protection that the Directive intends to afford – "strict" – to species under article 12. Therefore, we suggest that the protection afforded European Protected Species (which excludes the pool frog and the lesser whirlpool ram's horn snail) under section 9(4) of the Wildlife and Countryside Act 1981 does not amount to "gold-plating" the requirements of the Habitats Directive.

6.61 On the basis of the above we make three provisional proposals for consolidation and simplification and ask a specific consultation question on "gold plating".

Provisional Proposal 6-8: We provisionally propose that the disturbance provisions contained in sections 1(1)(aa), 1(1)(b), 1(5), 9(4) and 9(4A) of the Wildlife and Countryside Act 1981, regulation 41(1)(b) of the Conservation of Habitats and Species Regulations 2010 and section 3(1) of the Protection of Badgers Act 1992 can be brought together and simplified.

Question 6-9: Do consultees think that the badger would be adequately protected from disturbance, and its sett protected if covered only by the disturbance provision?

Question 6-10: Do consultees think that the protection afforded European Protected Species (except the pool frog and the lesser whirlpool ram's horn snail) under section 9(4)(c) of the Wildlife and Countryside Act 1981 does not amount to "gold-plating" the requirements of the Habitats Directive?

[32] Wildlife and Countryside Act 1981, s 9(4).

[33] Conservation of Habitats and Species Regulations 2010, reg 41(1)(b).

Disturbance and Habitats Directive protected species of flora

6.62 As we set out in Chapter 3, regulation 45 of the Conservation of Habitats and Species Regulations 2010[34] prohibits certain activity (such as picking) in relation to plants listed in Annex 4(b) of the Habitats Directive, which have a natural range that includes Great Britain. Regulation 45 also prohibits other activity, such as sale, for all species in Annex 2(b) and Annex 4(b) of the Habitats Directive.

6.63 It has been raised with us that "disturbance" should be added to the list of activities prohibited in relation to protected plants. However, the term "disturbance" is not used within Article 13 of Habitats Directive. Disturbance would, therefore, be a significant extension of the protection afforded to plants beyond that which is required by the Habitats Directive.

6.64 We think that the current provisions are the correct transposition of the requirements in Article 14 of the Habitats Directive.

PERMITTED ACTIVITY BY STATUTE

6.65 In certain circumstances, activity prohibited by statute can be permitted. In this section we consider two: specific defences; and the permitted hunting of wild birds. The third, licensing, is considered in the section following.

Specific defences

6.66 A number of wildlife statutes permit activity which would otherwise have breached a statutory prohibition. For example, it is a defence to demonstrate that killing a particular animal was necessary to alleviate its unnecessary suffering. This is usually where the animal has been injured otherwise than by the individual's own action.[35]

6.67 As we explained in Chapter 3,[36] the provisions in the two principal pieces of wildlife legislation, the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010, are the result of a series of amendments which were designed to modernise the provisions and bring them into line with EU law. No concerns about the general defences have been raised with us in pre-consultation meetings and having reviewed them we have no general concerns except as set out below.

6.68 However, there remain two defences which we suggest require attention: incidental result of a lawful operation; and acting under an Animal Health Order.

Incidental result of a lawful operation

6.69 It is a defence to the wild bird offences in section 1 of the Wildlife and Countryside Act 1981, if the defendant can show that the act "was the incidental result of a lawful operation and could not reasonably have been avoided".

[34] SI 2010 No 490.

[35] See: Wildlife and Countryside Act 1981, s 4(2)(b); Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, Regs 42(2)(a) and 42(2)(b)(i); Protection of Badgers Act 1992, s 6(b); Deer Act 1991, ss 6(2) and 6(4); Conservation of Seals Act 1970, s 9(2).

[36] Chapter 3, paras 3.12 to 3.66 and 3.71 to 3.85.

6.70 This defence was previously limited in its scope by the need to prove intention for the basic offences contained in section 1(1) of the Wildlife and Countryside Act 1981. However, as we are provisionally proposing that the basic offences can be committed by reckless behaviour, then the defence would take on a greater role, and one which is not necessarily consistent with the Wild Birds Directive.

6.71 There would be an overlap between activity where the individual did not intend to kill, injure or take the wild bird in question but was reckless as to the possibility of it being taken, injured or killed, and the "incidental result of a lawful operation and could not reasonably have been avoided". If this is the case, then the defence would be limiting the protection for wild birds that it is necessary to provide when transposing the Directive.

6.72 Defences similar to the current "incidental result of a lawful operation" in the Wildlife and Countryside Act 1981 have previously been found to be in breach of EU requirements under the Habitats Directive.[37] Most pertinently, in *Commission v UK*,[38] concerning the 1994 Habitats Regulations,[39] the Court of Justice found that a similar provision was incompatible with the regime in Articles 12, 13 and 16 of the Habitats Directive.

6.73 This, of course, was a case concerning the Habitats rather than the Wild Birds Directive. However, the case law has been used interchangeably between them, and we would expect the Court of Justice to take a similar approach should the matter of the current "incidental result of a lawful operation and could not reasonably have been avoided" defence ever come before it.

6.74 We, therefore, suggest that the best approach is to remove the defence currently located in section 4(2)(c) of the Wildlife and Countryside Act 1981.

Provisional Proposal 6-11: We provisionally propose the removal of the defence of action being the "incidental result of a lawful operation and could not reasonably have been avoided" located currently in section 4(2)(c) of the Wildlife and Countryside Act 1981.

Defence of acting under an Animal Health Order

6.75 Animal Health Orders[40] are the legislative tool that enables the state to react to severe disease outbreaks that will affect agriculture, such as foot and mouth disease. An order can be issued if the Minister is satisfied that the two criteria following are met:

> (a) that there exists among the wild animals a disease which has been or is being transmitted from wild animals to other animals; and
>
> (b) that destruction of wild animals "is necessary in order to eliminate,

[37] Directive 92/43/EC.

[38] Case C-06/04 *Commission v UK* [2005] ECR 9017, paras 109 to 114

[39] The Conservation (Natural Habitats) Regulations 1994, SI 1994 No 2716, Regs 40(3)(c) and 43(4).

[40] Made under Animal Health Act 1981, ss 21 to 22.

or substantially reduce the incidence" of that disease.[41]

6.76 Under an order, wild animals can be destroyed. The order can also permit methods of killing that would "otherwise be unlawful".[42] Importantly, the provision for activity that would "otherwise be unlawful" only relates to prohibited methods of killing. Therefore, it needs to be possible to kill an animal legally before prohibited methods can be used under an order. This can be achieved in three ways. First, there may be a specific defence within the relevant statute, which permits such activity under an Animal Health Order.[43] Second, the species in question may be one which is only protected from specific methods of taking and killing, rather than having broad, general protection. Foxes would fall into this category. Third, it may be an animal with a close season, but the activity is not taking place during that close season. Pheasants or deer when permitted under the Game Act 1831 would fall within this category. Fourth, it may be an animal the killing of which is licensed, for example under the Protection of Badgers Act 1992.

6.77 There was a similar defence to that in section 4(1)(b) of the Wildlife and Countryside Act 1981 in the Habitats Regulations 1997.[44] However, this was not repeated in the Conservation of Habitats and Species Regulations 2010.[45] There is no defence in the Protection of Badgers Act 1992. There are also no provisions in the Game Act 1831, either, for acting under an Animal Health Order, so that the order cannot be relied on in a close season.

6.78 The effect of the current position is that wild birds and other species protected under the Wildlife and Countryside Act 1981 can be taken and killed by the operation of an order made under section 21 of the Animal Health Act 1981. With badgers and European Protected Species, a licence would also have to be granted allowing for their killing and taking. This would have to be used in conjunction with any Order, as the powers of entry provided by the Animal Health Act 1981 may still be necessary.

6.79 This does not, to our mind, meet with Parliament's intent for the Animal Health Act 1981, which was designed to give Ministers intrusive powers allowing for the swift and effective removal of a threat to agriculture. The different positions afforded to species are more the result of other Acts, which have or have not given a defence for Animal Health Orders. The question then, is whether this differential treatment is necessary and justified.

[41] Animal Health Act 1981, ss 21(2)(a) and (b).

[42] As above, s 21(2) and 21(4).

[43] There is currently a defence in section 4(1)(b) of the Wildlife and Countryside Act 1981 acting in pursuance of an order made under either section 21 or 22 of the Animal Health Act 1981.

[44] Conservation (Natural Habitats) Regulations 1994, SI 1994 No 2716.

[45] Conservation of Habitats and Species Regulations 2010, SI 2010 No 490.

6.80 The lack of a defence does not alter the protection afforded to any of the animals protected by either the Protection of Badgers Act 1992 or even the Conservation of Habitats and Species Regulations 2010.[46]

6.81 An order granted under the conditions set out in section 21 of the Animal Health Act 1981 would fulfil the conditions for granting a licence under both the 1992 Act and the Conservation of Habitats and Species Regulations 2010. In the cases of the Protection of Badgers Act 1992 and the 2010 Regulations, the Secretary of State and Welsh Ministers can also issue the licence.[47]

6.82 Therefore, we suggest that the lack of a defence only increases that administrative burden on Government without altering the protection afforded to a species. On this basis, we think that there should be a general defence of acting under an Animal Health Order.

Provisional Proposal 6-12: We provisionally propose that there should be a general defence of acting in pursuance of an order for the destruction of wildlife for the control of an infection other than rabies, made under either section 21 or entry onto land for that purpose under section 22 of the Animal Health Act 1981.

Hunting of certain species of wild birds

6.83 In Chapter 4, we highlighted some of the problems with the current regime for the hunting of wild birds. Currently birds can be hunted under the Game Acts, schedules to the Wildlife and Countryside Act 1981 and general licences.[48]

6.84 Primarily hunting is conducted under the Game Acts, which we regard as outmoded pre-Victorian statutes. They lack the flexibility that modern regulatory regimes require, such as provision for close seasons or licensing; they are drafted in complicated language; and they are not integrated into the rest of the wildlife regime.

6.85 There are other criticisms of the current law. In the case of licences, we suggested that the current arrangements are, at the very least, susceptible to challenge, as hunting is not the purpose for which the general licence relevant is granted.

6.86 In this section we consider an alternative approach to regulating hunting of wild birds. It aims to balance adequately the protection of wild bird populations with the continuation of a legitimate and legal activity.

6.87 Article 7 of the Wild Birds Directive allows hunting to be permitted for species listed in Annex 2 of the Directive. Hunting of these species, according to the

[46] Conservation of Habitats and Species Regulations 2010, SI 2010 No 490.

[47] Protection of Badgers Act 1992, s 10(2); SI 2010 No 490, regs 3, 53 and 56(3).

[48] See Chapter 4, paras 4.8 to 4.10.

Directive, is permitted "owing to their population level, geographical distribution and reproductive rate throughout the Community".[49]

6.88 The approach in Article 7 reflects the acceptance that hunting is an integral part of life within member states. Further, that it is frequently (even predominantly) carried out as a recreational activity rather than to control species.[50] On that basis, it is hard to sustain hunting activity solely under the derogations within the Wild Birds Directive that allow, for instance, species to be taken or killed to prevent serious damage to crops.[51]

6.89 However, Article 7 does provide some restrictions on the hunting of birds. Permitted hunting must not "jeopardise conservation efforts". Member states must ensure that the practice of hunting "complies with the principles of wise use and ecologically balanced control of the species of birds concerned". Further, any practice must be compatible with the species' populations. Hunting permitted under Article 7 cannot take place "during the rearing season or during the various stages of reproduction".[52] Therefore, it would need to have closed seasons, which could be established under the power we provisionally proposed in Chapter 5.[53]

6.90 "Wise use" is at the core of permitted hunting under Article 7, as is "ecologically balanced control". If Article 7 were transposed directly (and that is a drafting issue properly considered later), tools would be necessary to ensure that "wise use" occurs.

6.91 Codes of practice are the regulatory tool that we consider appropriate for the hunting regime we are provisionally proposing. Codes can take many forms. Some current codes relevant in wildlife law are close to guidance. It is not an offence to breach their provisions, though breach can be taken into account when considering if an individual has committed a wildlife or welfare offence.[54] In other areas of the law, breach of a code of practice may reverse the burden of proof, such that that the defendant needs to show how they did not breach the underlying offence.[55] It is the latter we consider appropriate for Article 7 hunting, in relation to "wise use". So breach of an issued code of practice would mean that the underlying offence (taking and killing wild birds) would have been committed unless the defendant can show how their actions complied with "wise use".

[49] Annex 2 draws a distinction between those species which may be hunted in any member state (part A) and those which may only be hunted in particular member states (part B). Part A includes the common pheasant, wood pigeons, dovecote pigeons and Canada geese. Part B, for UK purposes, includes corvidae.

[50] European Commission, *Guide to sustainable hunting under the Birds Directive* (2008), paras 2.3.1 to 2.3.2.

[51] Directive 2009/147/EC, art 9(1)(a).

[52] Directive 2009/147/EC, art 7(1) and 7(4).

[53] See Chapter 5, paras 5.70 to 5.72.

[54] Under Animal Welfare Act 2006, s 14(4)(a), failure to comply with a code "may be relied on as tending to liability" under the general offence in section 4 of the Animal Welfare Act 2006.

[55] For example, having complied with statutory requirements in another way not contained in the code of practice. This is the model adopted by Health and Safety at Work etc Act 1974, s 17.

6.92 Therefore, the prosecution would have to prove that the defendant killed, injured, took or attempted such for a wild bird covered by the Article 7 regime. They would show that the code of practice was breached, for instance not taking such steps against indiscriminate killing as required by any code. If such a breach of the code were shown, then it would be for the defendant to show that they had in fact met the requirements of "wise use" in some other manner.

6.93 We envisage that it would be the Secretary of State or Welsh Minister who issued such codes, after consultation with relevant stakeholders. In such a case, they could be issued under the order making process we set out in Part 5.

6.94 There are two final points to be considered: reporting; and the continued role of licences. As we stated in Chapter 2, general licences do not require the reporting of the numbers of wild birds taken under them. Some stakeholders have raised concerns that any move away from general licences would lead naturally to the imposition of an extra burden on them, as they would have to make hunting returns. We suggest, as we explain below, that the reverse is true, and that reliance on the current system could make such additional burdens necessary.

6.95 There is a significant difference between reporting in permitted hunting, under Article 7, and licensing (derogating), under Article 9. The reporting requirement within the Wild Birds Directive for licensing requires the submission of specific implementation data to the European Commission.[56] This is stricter than the need to manage overall population numbers, and obtain data to that end, under Article 7.

6.96 If the European Commission decided in the future to require more specific returns of the numbers of wild birds taken under licences from member states, on the implementation of Article 9 of the Wild Birds Directive, then that would be possible. Currently, the UK does not make detailed returns on the number of individual birds taken or killed under general licences, and it would be impossible to do so given that the licences do not currently contain a reporting requirement.

6.97 The European Commission could however, require the return of exact numbers taken and killed under licences issued by member states. As a matter of domestic law, to impose a returns requirement in order to meet such a demand from the European Commission would be within the power to require "compliance with any specified conditions" currently in the Wildlife and Countryside Act 1981.[57]

6.98 Therefore, we suggest, using a transposition of Article 7 of the Wild Birds Directive reduces the risk of returns being required for huntable species.

6.99 On licences more generally, and were Article 7 accepted as the model for hunting, licences would still be required, as species covered by the permissive provisions could not be killed or taken at all under those provisions during the closed season. Therefore, if it was deemed necessary to take or kill a wild bird covered by the transposition of Article 7 during the closed season, then it would be necessary to obtain a licence (which would still only be available for specific

[56] Directive 2009/147/EC, art 9(3).

[57] Wildlife and Countryside Act 1981, s 16(5)(c).

purposes), or to prove that one was acting in accordance with a general defence.[58]

6.100 Licences would still have to be obtained to use prohibited methods, as the Wild Birds Directive prohibitions on the use of such cannot be displaced by a general permission.

6.101 We suggest that permitted hunting under a direct transposition of Article 7 of the Wild Birds Directive is therefore the preferred long-term option. It allows for a balance to be struck between those with an interest in hunting and the protection of the species concerned.

Provisional Proposal 6-13: We provisionally propose that Article 7 of Wild Bird Directive be transposed into the law of England and Wales.

Provisional Proposal 6-14: We provisionally propose that the transposition be accompanied by the establishment of species specific close seasons.

Provisional Proposal 6-15: We provisionally propose that the transposition be accompanied by codes of practice explaining "wise use".

Provisional Proposal 6-16: We provisionally propose that breach of the codes of practice would mean that the defendant would have to show how they had complied with "wise use", otherwise the underlying offence of taking or killing a wild bird would have been committed.

Provisional Proposal 6-17: We provisionally propose that such codes of practice be issued by either the Secretary of State or Welsh Ministers.

LICENSING

6.102 As with much of the current law on conservation, control and exploitation, our ability to reform the law here is severely circumscribed by the working of the Wild Birds and Habitats Directives.[59] However, there are two areas where there are issues that need considering:

(1) transposing the term "judicious use of certain birds in small numbers";

(2) "reporting", where we wish to discuss matters raised with us in pre-consultation meetings.

[58] Such as that in Wildlife and Countryside Act 1981, s 4(2)(b) ("mercy killing").

[59] In the case of the Wild Birds Directive, the transposition of the art 9 in section 16 of the Wildlife and Countryside Act 1981 was amended in 1995 to allow for additional licensing purposes.[59] The Habitats Directive's transposition is in a very recent legislative instrument, the Conservation of Habitats and Species Regulations 2010.

Transposing the term "judicious use of certain birds in small numbers"

6.103 As we explained in Chapter 3, section 16 of the Wildlife and Countryside Act 1981 provides for the granting of licences.[60] Certain provisions which protect wild birds[61] do not apply to anything done under, and in accordance with, the terms of a licence granted by the appropriate authority.[62] The Act sets out 13 different purposes for which a licence may be granted[63], seeking to transpose the requirements contained in the Wild Birds Directive.[64]

6.104 The main difference between the provisions of the Wild Birds Directive and the domestic version is that the Directive contains the term "judicious use of certain birds in small numbers",[65] whilst only specific instances of what amounts to "judicious use" are permitted in the 1981 Act. These include taxidermy and photography.

6.105 The question is whether it is preferable to adopt the term in the Directive or to retain the more restrictive approach in current domestic legislation. Both approaches comply with the Directive. The question is whether there is an advantage in including "judicious use". An obvious advantage is that using the exact terminology in the Directive follows the general preference for "copy out".[66] It, therefore, avoids any possible "gold-plating" of the Directive, and reduces the chance of the legal regime being overly restrictive.

6.106 Conversely, using "judicious use" could be criticised because it gives too much flexibility to the decision-maker and is wider than the current domestic preference. It is true that incorporating the term would increase the flexibility in the system. We suggest that the term taken as a whole, "judicious use of certain birds in small numbers" would mitigate concerns around flexibility. We accept that, unfortunately, there is no exhaustive definition of judicious use. The potential for adverse consequences would be limited further by the principles that decision-makers have to take into account, as we explored in Chapter 5.

6.107 On balance, we think the benefits of using the term (simplification and flexibility) outweigh any potential criticism.

Provisional Proposal 6-18: We provisionally propose that the term "judicious use of certain birds in small numbers" be one of the licensing purposes.

[60] Chapter 3, paras 3.42 to 3.51.

[61] Wildlife and Countryside Act 1981, ss 1, 5, 6(3), 7, 8 and orders under s 3.

[62] In England this is Natural England, through agreement made under section 78 of the Natural Environment and Rural Communities Act 2006, and in Wales it is Welsh Ministers, under SI 1999 No 672, art 2(a) and schedule 1.

[63] Wildlife and Countryside Act 1981, s 16(1).

[64] Article 9 lists 6 purposes for which a licence (derogation) may be granted.

[65] Directive 2009/147/EC, art 9(1)(c).

[66] See Chapter 4, paras 4.26 to 4.27.

Reporting

6.108 Member states are required to send a report to the Commission on their implementation of the Wild Birds and the Habitats Directives.[67]

6.109 The Commission has published reports from 2002 to 2008.[68] Each report demonstrates that the majority of member states fail, year on year, to report properly. In 2008, the last year for which a general report is available, Greece failed to submit a report at all and France submitted its report late. Thus far, the Commission has not undertaken any legal action against a member state for the late submission of a derogation report or for failure to report properly or at all.

6.110 Member states are required to submit a report to the Commission every two years on their use of the derogation mechanism contained in Article 16(1).[69]

6.111 There is considerable difference between the provisions in the two Directives. The older Birds Directive is considerably less prescriptive, and would not seem, on the face of it, to require the recording of all activity permitted under the derogations. The Habitats Directive, however, would seem to require reporting on all activity conducted under derogations.

6.112 We do not think that it is necessary to require the reporting of all members of a species taken or killed as a matter of law for our provisionally proposed regime. To do so would be a significant change that is not required by EU law, currently.

Question 6-19: Do consultees think that it is not necessary to require the reporting of all members of a species taken or killed as a matter of law for our provisionally proposed regime?

[67] Directive 2009/147/EC, art 9(3).

[68] The reports are available at http://ec.europa.eu/environment/nature/knowledge/rep_birds/index_en.htm (last visited 27 July 2012).

[69] Directive 92/43/EEC, art 16(2).

CHAPTER 7
REGULATION OF SPECIES PROTECTED SOLELY BY DOMESTIC LEGISLATION

INTRODUCTION

7.1 As we noted in Chapter 4, two of the principal difficulties with wildlife legislation are the range of statutes and the duplication of provisions within those statutes. In Chapter 5, we outlined the basic regime that we think should govern wildlife in the future. In Chapter 6, we set out how our provisionally proposed regime would deal with the regulation of species protected as a matter of EU law. In this chapter, we turn to species protected solely as a matter of domestic law. Largely this concerns species-specific statutes such as the Deer Act 1991 and the Protection of Badgers Act 1992. However, section 9 of the Wildlife and Countryside Act 1981 covers species not protected as a requirement of EU law, and we deal with those here too.

7.2 This chapter is divided into four sections. First, we look at the current domestic offences which prohibit certain activity. Second, we consider the possibility of reform to the available defences to those offences. Third, we set out our provisional proposals on licensing. Finally, we consider issues raised by the existence of reverse burdens of proof in wildlife law.

PROHIBITED ACTS

Taking and killing

7.3 In domestic law, the prohibited wrongdoing concerning wild animals is expressed consistently.[1] It consists of killing, injuring or taking. The equivalent prohibition for plants is "picks, uproots or destroys".[2]

7.4 The mental element required for such offences is less consistent. In the majority of domestic provisions, the killing or taking must be intentional. This applies equally to plants, where picking, uprooting or destroying them is an offence if committed intentionally.[3]

7.5 In some cases, however, the killing, injuring or taking is required to be "wilful" rather than "intentional".[4] Some case law has found that "wilful" should be construed as "intentional". For example, it was noted that: "'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it".[5]

1 Salmon and Freshwater Fisheries Act 1975, ss 1 to 2; Wildlife and Countryside Act 1981, s 9(1); Deer Act 1991, s 2(1); Protection of Badgers Act 1992, s 1; Conservation of Seals Act 1970, ss 1 and 2.

2 Wildlife and Countryside Act 1981, s 13(1). Those plants protected are listed in sch 8.

3 As above.

4 Protection of Badgers Act 1992, s 1(1); Conservation of Seals Act 1970, s 3(2).

5 *R v Senior* [1899] 1 QB 283, pp 290 to 291 by Lord Russell of Killowen CJ. See also *Hall v Jordan* [1947] 1 All ER 826 at 827.

7.6 The leading case on the meaning of "wilful" is *R v Sheppard.*[6] The House of Lords held that there was wilful failure to provide adequate medical attention for a child if either it is done deliberately, or because the person does not care whether the child may be in need of medical treatment or not: "A parent who fails to provide medical care which his child needs because he does not care whether it is needed or not is reckless of his child's welfare."[7]

7.7 This interpretation of "wilful" in *Sheppard* was applied in several cases.[8] Consequently, it was been argued that "any provision containing the word 'wilfully' in the definition of a crime should be construed in accordance with the approach in *Sheppard*".[9] It has been pointed out that *Sheppard* left a number of ambiguities unanswered; but these were resolved by two recent cases.[10] It is now settled that "wilful" can be interpreted as including subjectively reckless. In other words, "if an individual has seen the risk of the prohibited circumstances or consequences and has nevertheless gone on unreasonably to take that risk, his conduct can be described as 'wilful'".[11]

7.8 On this construction, the Protection of Badgers Act 1992 and the Conservation of Seals Act 1970 offer more protection than the Wildlife and Countryside Act 1981 does for those species not protected as a matter of EU law (EU species were considered in Chapter 6). This is because it is sufficient to kill, injure or take recklessly as well as intentionally.

7.9 This inconsistency could be addressed in two different ways. First, any new provision could broaden the current offences to include "recklessly" in all killing, taking or injuring of certain wild animals. This would be consistent with the Protection of Badgers Act 1992 and the Conservation of Seals Act 1970. Or secondly, the word wilful could be removed, and replaced solely with "intentionally".

7.10 The first option would be consistent with other provisions concerning killing and taking in the Wildlife and Countryside Act 1981; those required by EU law; and as the non-EU required provisions apply in Scotland. It is now an offence to recklessly, as well intentionally, kill, take or injure animals listed in the Scottish version of schedule 5 to the Wildlife and Countryside Act 1981.

7.11 However, we are aware that if the conditions for the offences were satisfied by proof of recklessness as well as intention, the additional degree of protection would apply in relation to species listed in schedule 5 to the Wildlife and Countryside Act 1981. This amounts to over 120 species.

6 *R v Sheppard* [1981] AC 394.

7 As above, 418 by Lord Keith.

8 See for example *R v Gittins* [1982] RTR 363; *Att-Gen's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73.

9 Archbold Criminal Pleading Evidence and Practice (2012 ed) para 17:48.

10 *R v G* [2003] UKHL 50, [2004] 1 AC 1034; *R v D* [2008] EWCA Crim 2360, [2009] Crim LR 280. See D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) p 127.

11 D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) p 127.

7.12 The alternative view – to merely require intention for the offence – could have the opposite effect. It could remove some protection for badgers and seals, as killing, taking or injuring them would have to be a virtual certainty rather than a foreseeable risk as required for recklessness.

7.13 The middle ground would be to protect badgers and seals from intentional and reckless acts, and all other domestically protected species only from intentional acts. This option would mean treating species differently but that is already a feature of the current regime. However, it, does not necessarily simplify the current regime. Given the three options, we ask the following consultation question.

Question 7-1: In which of the following ways, (1), (2) or (3), do consultees think that domestically protected species not protected from taking, killing or injuring as a matter of EU law should be protected?

(1) All domestically protected species not protected as a matter of EU law should be protected from being intentionally and recklessly taken, killed or injured.

(2) Badgers and seals should be protected from being intentionally and recklessly killed, taken and injured; all other domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured. It would be possible subsequently to move species between the two groups by order.

(3) All domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured.

Prohibited Methods

7.14 Alongside prohibiting the killing, taking or injuring certain wild animals, domestic law also prohibits particular ways of carrying out those acts. The Wildlife and Countryside Act 1981 prohibits a range of methods for injuring, killing or taking any wild animal. These include use of self-locking snares, crossbows and explosives.[12]

7.15 Further, it provides that the use of specific articles which may cause injury, stun or kill is an offence. These articles include poisonous or stupefying substances, vehicles and semi-automatic weapons.[13]

7.16 While such provisions are broadly repeated in other statutes,[14] there are species-specific variations in the prohibited methods. For example, the use of badger tongs,[15] muscle-relaxing agents for deer,[16] and jacks, wires or snares for fish are

[12] Wildlife and Countryside Act 1981, s 11(1).

[13] As above, s 11(2).

[14] Salmon and Freshwater Fisheries Act 1975, s 1; Deer Act 1991, s 4; Protection of Badgers Act 1992, s 2(1).

[15] Protection of Badgers Act 1992, s 2(1)(b).

[16] Deer Act 1991, s 4(2).

prohibited.[17]

7.17 We recognise that the law in this area is disparate but we also acknowledge the reasons why this is the case. The prohibition of certain methods used to kill, take or injure animals and fish must be tailored to take into account the species in need of protection. For that reason, we do not consider that replacing these specific prohibitions with broader more general ones would assist, nor be practical. We would be concerned that any attempt to draw general prohibitions on methods may result in the reduction of protection in particular instances.

7.18 Within our new regulatory regime, it would be possible to amend the list of prohibited methods, by order. This could include prohibiting a particular method for all species.

Sale

7.19 Domestic law makes it an offence to sell certain wild animals and plants. The provision across the legislation is broadly similar. It is an offence "to sell, offer, or expose for sale"[18] specified wild animals, plants and fish spawn. There are variations: the Protection of Badgers Act 1992 makes it an offence to "offer for sale", rather than "expose for sale".[19] The latter is broader, as it includes a willingness to sell, as well offering to sell.[20]

7.20 The Wildlife and Countryside Act 1981 has an additional offence, where any person:

> publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell, any of those things, he shall be guilty of an offence.[21]

7.21 "Advertisement" is defined in the 1981 Act as including a catalogue, a circular and a price list.[22] Its inclusion as an offence, in addition to the offence of offering or exposing for sale suggests that the two are different. The provision appears to be wider than "expose or offer for sale", as it encompasses buying as well as selling. Further, the offence requires simply that the advertisement "is likely to be understood as conveying" purchase or sale of the animal or plant. This appears easier to prove than where a person *is* exposing or offering for sale. Further, it would also include the situation where someone does not have any goods to sell but is preparing a market.

[17] Salmon and Freshwater Fisheries Act 1975, s 1.

[18] Salmon and Freshwater Fisheries Act 1975, s 2(1)(b); Wildlife and Countryside Act 1981, s 9(5)(a) and 13(2)(a); Deer Act 1991, s 10(3)(a).

[19] Protection of Badgers Act 1992, s 4.

[20] In *Fisher v Bell* [1961] 1 QB 394, a flicknife placed in a shop window was found not to be an offer for sale under the law of contract but an "invitation to treat". To avoid such an interpretation under the law of contract, the phrase "expose for sale" has been used. For further discussion of the interpretation of "offer" in criminal offences see D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) p 924.

[21] Wildlife and Countryside Act 1981, s 9(5)(b). This is repeated at s 13(2)(b) for plants.

[22] As above, s 27.

7.22 However, there are legal provisions using "exposure for sale", which are clearly intended to encompass advertising.[23] Further, it seems inconceivable that in statutes after the Wildlife and Countryside Act 1981, such as the Deer Act 1991, an offence of exposing venison for sale would not include the advertising of it.

Question 7-2: Do consultees think that the offences of selling certain wild animals, plants and fish, should include the offences of offering for sale, exposing for sale, and advertising to the public?

Poaching

7.23 Although the word "poaching" appears in the title of some statutes,[24] none of them offers a definition of it. The clearest exposition of its meaning is to be found in the Deer Act 1991, which makes it an offence for a person to enter land without consent in search or pursuit of any deer with the intention of taking, killing or injuring them.[25]

7.24 The poaching of other animals is dealt with by a collection of statutes from the nineteenth century, which we have previously referred to as the Game Acts. Historically, poaching sought to prevent an individual from killing, injuring or taking those animals from which either that individual may gain a financial benefit, or deprive the landowner from doing so. In this regard, we aim to simplify the current law by which wild animals should be protected from poaching. This comprises game birds[26] and those wild animals and other birds listed in the Game Acts.[27]

7.25 We do not think it appropriate for us to extend the definition of poaching to species not currently protected. However, we do recognise that the markets for certain species may change in the future and that this, in turn may lead to the poaching of new species. To that end, we think that there should be a power to allow for new species to be added to the poaching offence. The method to add species to the offence would be similar to the power to vary schedules currently used for the Schedules to the Wildlife and Countryside Act 1981, as we discussed in Chapter 3.[28] We recognise also that a consequence of this power would be the potential to extend the scope of an offence by statutory instrument. However, this is consistent with the current powers under the Wildlife and Countryside Act 1981.

Provisional Proposal 7-3: We provisionally propose that there should be a power to amend the species covered by the crime of poaching.

[23] For example, the Knives Act 1997, s 4(b) states that a person markets a knife if he offers it for sale.

[24] Night Poaching Act 1828, Night Poaching Act 1844, Poaching Prevention Act 1862.

[25] Deer Act 1991, s 1(1). It is also an offence carry out such those acts while lawfully on the land, or to remove the carcass of any deer under s 1(2).

[26] Defined in the Wildlife and Countryside Act 1981, s 27(1).

[27] These are rabbits, hares, woodcock, snipe and bustards.

[28] See Chapter 3, paras 3.53 to 3.60.

7.26 Although the animals protected by the poaching offence are clear, other aspects of the offence are less so. The wording of the statutory provisions is inconsistent and unclear. While the Game Act 1831 "requires search or pursuit" of game,[29] the Night Poaching Act 1828 requires "taking or destroying" *or* "entering any land for that purpose".[30] This is in further contrast to the Night Poaching Act 1844, which makes it an offence to take or destroy rabbits or game "on any public road, highway, or path",[31] thus not requiring trespass on land.

7.27 This variation in definitions of poaching is unhelpful and raises questions about what harms and wrongs the offence is designed to protect against. To illustrate this, it is unclear whether the following would be considered poaching under the current law.

(1) D lawfully enters land for a purpose other than poaching, then kills a deer knowing he has no consent to do so.

(2) D enters land, not knowing he does not have consent, then kills a deer without consent to do so.

(3) D, standing on his own land, shoots a deer on V's land.

7.28 In our view, the offence of poaching is not or should not be in the future simply concerned with the protection of species.

Question 7-4: Do consultees think that the offence of poaching concerns matters beyond simply the control of species?

7.29 In our view, the current law is ambiguous about the importance of trespass as an element of the poaching offence. While unlawful entry on the land to kill or take animals constitutes poaching under the current law, our example (3) above would not.[32] Given that the animal is killed on V's land, without consent, the question is whether it is necessary to be guilty of poaching for D to have entered as a trespasser or whether it is sufficient that:

(1) he has entered lawfully and trespassed subsequently;

(2) has not entered but has committed trespass by use of a weapon; or

(3) has not entered or trespassed.

[29] Game Act 1831, s 30. It is not necessary to prove that the search or pursuit was in order to kill game at the time. See *Stiff v Billington* (1901) 84 LT 467, DC; *Burrows v Gillingham* (1893) 57 JP 423.

[30] Night Poaching Act 1828, s 1.

[31] Night Poaching Act 1844, s 1.

[32] There is an argument that this would amount to an actionable trespass of airspace by the bullet. For trespass to airspace, see *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411 (crane jib); *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P and CR 104 (oversailing scaffolding); and *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853.

7.30 We suggest that the offence of poaching is a wrongdoing committed against particular rights of the landowner. These are the landowner's exclusive exploitation rights to certain animals, such as deer or game. Poaching is the action of interfering with those rights without the landowner's consent to do so. This can usually only be achieved by someone who is on the landowner's property, but trespass is not at the core of the wrongdoing being targeted by this offence.

Question 7-5: Do consultees think that the offence of poaching should require proof of acting without the landowner's consent in relation to the animal rather than proof of trespass?

7.31 We take consent here to mean:

> if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the poaching in question had so consented, or would have so consented to it if he or they had known of the poaching and its circumstances.

7.32 On this basis, in scenario (1), D is initially not trespassing but has exceeded the consent the landowner has granted him when he kills the deer. D has deprived the landowner of their right to kill their own deer, whether as a leisure activity or to sell for profit. Similarly in (2), the offence is committed by infringing the landowner's rights (depriving the landowner of the opportunity to exercise the rights of a landowner, including the right to refuse consent). In (3) also, there is no trespass but there is the offence of poaching.

Provisional Proposal 7-6: We provisionally propose that a reformed offence of "poaching" should be defined by reference to whether the person was searching for or in pursuit of specified species of animals present on another's land, with the intention of taking, killing or injuring them, without the landowner or occupier's consent, or lawful excuse, to do so.

7.33 Further, we do not see the necessity for separate offences of day and night poaching. While we recognise that, historically, poaching at night has carried with it additional dangers for the landowner, and arguably additional wrongs by the defendant, we think these could be dealt with adequately as aggravating factors in sentencing.

Attempts

7.34 The prohibited acts noted above include provisions regarding the attempt of such acts.[33] The Criminal Attempts Act 1981 abolished common law attempt[34] but the 1981 Act attempt offence applies only in relation to offences triable on indictment or those other offences specifically listed. Consequently, most wildlife offences have to be specifically included in the statutory provisions for an attempt to commit them to be an offence.

[33] Salmon and Freshwater Fisheries Act 1975, s 2(2); Wildlife and Countryside Act 1981, s 18; Deer Act 1991, s 1(2)(a) and s 5; Protection of Badgers Act 1992, s 1.

[34] Criminal Attempts Act 1981, s 6(1).

Provisional Proposal 7-7: We provisionally propose that it should remain an offence to attempt the offences in the new provisionally proposed regime.

PERMITTED EXCEPTIONS

7.35 As we have noted previously, wildlife legislation does provide for exceptions to the prohibition of certain acts. Some of these are acts undertaken pursuant to a requirement by the Minister or the Secretary of State.[35] Further exceptions exist for acts carried out in pursuance of an order made under the Animal Health Act 1981 or where an authorised person can demonstrate that the killing or injuring of a wild animal was necessary for the purpose of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables and so on.[36]

7.36 Other exceptions concern the reason for killing or taking a wild animal. There are three broad exceptions: taking an animal to tend it, killing as an act of mercy, or that the unlawful act was the incidental result of a lawful operation that could not reasonably have been avoided.[37] For poaching, the exceptions concern the consent, or belief in it, from the owner, thus making entry on the land lawful.[38]

7.37 As noted for prohibited offences, some statutory exceptions are species-specific. For example, it is not an offence for keepers to shoot deer, which are kept for the production of meat, or as breeding stock, during the close season.[39] Equally, where an act is carried out to artificially propagate fish for scientific purposes, it will not be prohibited.[40]

7.38 There are also some exceptions to the use of prohibited methods. This includes specific weapons and ammunition.[41] Finally, there is the exception provided by undertaking acts with reasonable steps and exercising all due diligence to avoid committing the offence.[42]

7.39 We do not propose to alter the species specific exceptions as set out above. To do so would be to consider altering the protection levels for certain animals. As we note in Chapter 1, this is outside the remit of our project.

Provisional Proposal 7-8: We provisionally propose to consolidate the common exceptions to prohibited acts set out in existing wildlife legislation.

[35] Wildlife and Countryside Act 1981, s 10(1)(a).

[36] As above, ss 10(1)(b) or (4).

[37] Conservation of Seals Act 1970, s 9(2); Wildlife and Countryside Act 1981, s 10(3); Deer Act, s 6; Protection of Badgers Act 1991, s 6.

[38] Game Act 1831, s 30; Deer Act 1991, s 1(3).

[39] Deer Act 1991, s 2(3).

[40] Salmon and Freshwater Fisheries Act 1975, s 2(5).

[41] Salmon and Freshwater Fisheries Act 1975, s 5(2) permits the use of electronic devices for taking fish for scientific purposes. The Deer Act 1991, s 6(5) allows the use of a smooth bore gun not less gauge than 12 bore; has a barrel less than 24 inches long; and is loaded with a cartridge purporting to contain shot none of which is less than 0.203 inches.

[42] Wildlife and Countryside Act 1981, s 14(3).

LICENSING

7.40 As we have noted in Chapter 3, exceptions are also provided through the licensing of prohibited activity.[43] We have also set out our view on the selection of appropriate licences, adopting the principles considered in Chapter 5.[44] Here, we discuss two other licensing concerns: the lack of consistency in the current system, and activity concerning badgers.

Licensing and the Berne Convention

7.41 There is no standardised system for the licensing of domestically protected species in current legislation. We set out in some detail in Chapter 3[45] the variations in licences. These include the types of licence, and the range of reasons for granting a licence from the broad, such as "for the purpose of conserving wild birds", to the very specific, such as for the purpose of "taxidermy". These differences are a direct result of the legal regime being spread across different statutes, some of which predate by almost 150 years our international obligations.

7.42 We suggest that there is some room for increasing consistency in terminology and rationalising the licensing regimes without damaging the protection afforded to species.[46]

7.43 One option for rationalisation is to make use of the licensing conditions contained in the Berne Convention. Some species, such as badgers or those listed in schedule 5 to the Wildlife and Countryside Act 1981[47] are covered both by the Berne Convention and the law of England and Wales, However, these species are subject to a different set of licensing conditions to those contained in the Berne Convention.

7.44 We suggest that in order to fulfil our international obligations and simplify the law it would be advisable to use the Berne Convention licensing provisions, where they apply to a species already protected as a matter of domestic law. The Berne licensing conditions are:

(1) for the protection of flora and fauna;

(2) to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;

(3) in the interests of public health and safety, air safety or other overriding public interests;

(4) for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding; and

[43] See Chapter 3, paras 3.42 to 3.51.

[44] See Chapter 5, paras 5.26 to 5.49.

[45] See Chapter 3, paras 3.42 to 3.51. See also Chapter 5, paras 5.75 to 5.98.

[46] This was considered in Chapter 3.

[47] Protected under the Wildlife and Countryside Act 1981, ss 9, 11 and 13.

(5) to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.

7.45 The Berne licensing conditions are the same as those in article 16 of the Habitats Directive, and are therefore not unfamiliar in domestic law.

7.46 We do not think that such a change would adversely affect protection, as the decision-maker would still have to come to a rational decision and would have to take into account the statutory principles (which include conservation) we set out in Chapter 5. It would, however, allow for the regime for wildlife to be simplified. Given the nature of the issue, though, we ask a consultation question, rather than make a provisional proposal.

Question 7-9: Do consultees think that purely domestic licensing conditions should be rationalised using the conditions contained in the Berne Convention?

The Protection of Badgers Act 1992

7.47 The licensing of activity concerning badgers also requires additional consideration. The licensing provisions contained within it are distinct from those we have set out thus far.

7.48 The Protection of Badgers Act 1992 allows a Minister to grant a licence to any person, authorising that person to conduct otherwise prohibited activity under the licence.[48] The provision requires that an individual be named,[49] which creates a potentially unnecessary burden. The effect is that if, for example, a named digger operator fails to show up for work, then a replacement cannot be used (unless already on the licence).

7.49 The provision in the Protection of Badgers Act 1992 is not mirrored in other protective regimes. Under the Wildlife and Countryside Act 1981, a licence can be granted to "persons of a class or to a particular person".[50] Licences granted by way of the Conservation of Habitats and Species Regulations 2010 can also be granted to "persons of a class or to a particular person", such as airfield operators, except when providing for the taking or holding of specimens (where the individual or individuals have to be named).[51]

7.50 We think that the provisions in the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010 are preferable to the restrictive provisions in the Protection of Badgers Act 1992.

Provisional Proposal 7-10: We provisionally propose that both individuals and classes of persons be able to benefit from a badger licence

[48] Protection of Badgers Act 1992, s 10(2).

[49] And this is the requirement that Natural England places on badger licences.

[50] Wildlife and Countryside Act 1981, s 16(5)(b).

[51] SI 2010 No 490, reg 53(4) and reg 55(2)(b).

REVERSE BURDENS OF PROOF

7.51 There is a particular issue for certain possession and disturbance offences which concerns what is called the "reverse burden of proof". This is distinct from the above considerations, as it relates more to evidence, and to who needs to show what is prohibited, rather than what is or is not prohibited.

7.52 We consider this here, even though it concerns a wild bird offence, as evidential matters are really ones of domestic law rather than EU law. More importantly, positioning the consideration here allows all of the reverse burdens to be considered together.

The burden of proof in criminal law

7.53 In any criminal trial, the prosecution bear the burden of proving beyond a reasonable doubt that the defendant performed the relevant conduct and brought about any proscribed consequences in the relevant case with the fault element specified (for example, that he killed with intent). The defendant will carry the evidential burden of bringing any defence. In some cases the defendant must go further because the statute requires him to prove his defence. In such a case the defendant only has to satisfy the tribunal of fact on the balance of probability.

Reversing the burden of proof

7.54 There are number of offences which reverse the burden of proof.[52] For example, on being charged with having an article with a blade or point in public place, the burden falls on the defendant to prove "he had good reason or lawful authority for having the article with him in a public place".[53] Where the burden is reversed, the *standard* of proof is lower. The defendant must satisfy the fact-finders that the elements of the defence are made out on the balance of probabilities. The prosecution must establish its case so that the fact-finders are sure.[54]

Compatibility of reverse burdens with article 6(2) European Convention on Human Rights

7.55 Article 6(2) of the ECHR guarantees the presumption of innocence in criminal proceedings. The question arises whether a reverse legal burden imposed by statute is incompatible with article 6(2). Lord Bingham suggested that:

> The task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence.[55]

7.56 Consequently, and following *R v Lambert,*[56] a reverse burden will not inevitably give rise to a finding of incompatibility. The factors which a court will consider

[52] See for example Trade Descriptions Act 1968, s 24(1); Road Traffic Offenders Act 1988, s 15(3).

[53] Criminal Justice Act 1988, s 139.

[54] *R v Summers* (1952) 36 Cr App R 14; *R v Carr-Briant* [1943] KB 607.

[55] *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 at [31].

[56] *R v Lambert (Steven)* [2001] UKHL 37, [2002] 2 AC 545 by Lord Hope at [87].

were summarised by Lord Bingham in *Sheldrake v DPP.*[57] The central concern is that a trial should be fair, which necessitates reasonableness and proportionality in any decision to reverse a burden of proof. It has been suggested that

> The obvious drawback to a test so reliant on notions of fairness, reasonableness and proportionality is that views may reasonably differ so that in many cases it will be as possible to reach a rational conclusion of compatibility as incompatibility.[58]

7.57 A number of provisions that reverse the legal burden of proof have been ruled compatible. These include that the accused provides a good reason for possessing a bladed article in a public place;[59] the defence of consuming alcohol before providing a specimen for analysis but after the alleged excess alcohol offence;[60] and the defence for a person charged with an offence to show that he believed on reasonable grounds that the use of the sign was not an infringement of a registered trade mark.[61]

Reverse burdens in wildlife law

7.58 There are two wildlife crimes which impose a reverse legal burden. The first concerns the possession of birds or eggs, and the second is digging for badgers. Each is dealt with separately below.

Possession of birds

7.59 It is an offence for any person to have in their possession any part of a wild bird, or its eggs. The burden falls on the accused to demonstrate that the bird or egg had not been killed or taken in contravention of the relevant provisions.[62]

7.60 In our view, the reverse legal burden for this offence is justified for two reasons. In reaching this conclusion, we bear in mind the factors for using reverse burdens outlined by Lord Bingham above.[63]

7.61 First, it is very difficult for the prosecution to prove the provenance of a bird or its eggs. In contrast, the burden on the accused to account for their possession of a wild bird or its eggs is not heavy.

7.62 Second, the offence is designed to sustain the population of wild and often rare, birds. Reversing the burden on defendants is a proportionate measure to achieve this aim. This was supported by Brown LJ who considered such provisions of the

[57] *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 at [21].

[58] *Blackstone's Criminal Practice* (2012) para F3.13.

[59] Criminal Justice Act 1988, s 139(4), see for example *L v DPP* [2001] EWHC Admin 882, [2003] QB 137.

[60] Road Traffic Offenders Act 1988, s 15(3), see for example *R v Drummond* [2002] EWCA Crim 527, [2002] 2 Cr App R 25.

[61] Trade Marks Act 1994, s 92(5).

[62] Wildlife and Countryside Act 1981, s 1(2) and s 1(3).

[63] *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264 at [21].

Wildlife and Countryside Act 1981 to be an "absolute prohibition against the doing of certain acts which undermine the welfare of society".[64]

Provisional Proposal 7-11: We provisionally propose that the current burden of proof on a person accused of being in possession of wild birds or birds' eggs should be retained.

Digging for badgers

7.63 Section 2(2) of the Protection of Badgers Act 1992 states that if, in proceedings for an offence of digging for a badger,

> There is evidence from which it could reasonably be concluded that at the material time the accused was digging for a badger he shall be presumed to have been digging for a badger unless the contrary is shown.

7.64 This contrasts with the birds offences, where the provenance of the bird or egg is a matter which it is much easier for the defendant to prove than the prosecution. It does not appear reasonably necessary in all the circumstances to reverse the burden onto the accused.

7.65 On the other hand, there is the question of how to prove that the individual was digging for a badger, as opposed to another lawful activity. Without the reverse burden, it might be unduly difficult to make out the crime given the reality of where setts are located and the potential proximity to sites which could be disturbed lawfully. Consequently, we ask the following consultation question.

Question 7-12: Do consultees think that, as under the present law, a person charged with digging for badgers should have to prove, on the balance of probabilities, that he or she was not digging for badgers?

[64] *Kirkland v Robinson* (1987) 151 JP 377, [1987] Crim LR 643.

CHAPTER 8
INVASIVE NON-NATIVE SPECIES

INTRODUCTION

8.1 This Chapter is the third in which we consider regulated activity. Here we turn to the regulation of invasive non-native species. The Chapter is divided into six sections.

8.2 First, we introduce the concept of invasive species, and the potential harm that they can cause. Second, we explain the current regime in England and Wales for invasive non-native species, including both the underlying policy and the existing legislation. Third, we outline EU action relating to invasive non-native species. Fourth, we consider the case for the reform of the existing regime. Fifth, we set out lessons which can usefully be learned from recent reforms to the Wildlife and Countryside Act 1981 in Scotland, through the Wildlife and Natural Environment (Scotland) Act 2011. Finally, we outline our provisional proposals for reform.

WHAT ARE INVASIVE NON-NATIVE SPECIES?

8.3 Invasive non-native species have been defined as "species whose introduction and/or spread threaten biological diversity or have other unforeseen impacts".[1] The Secretariat of the Convention on Biological Diversity defines them as "an alien species whose introduction and/or spread threatens biodiversity".[2]

8.4 A species may become regarded as an "invasive non-native species" when it is introduced outside its natural range as a result of human intervention (whether deliberately or accidentally) and then considered a problem which regulators seek to address.

8.5 There are, however, numerous species that are not native to a habitat, but which are not considered to be invasive. Such species either have little impact on the habitat in which they are introduced, or offer positive benefits to it. This includes many crop plants, forestry species and farmed animals.[3]

8.6 Invasive non-native species are a large and growing problem and are regarded as one of the most serious threats to global biodiversity. They are probably the greatest threat to fragile ecosystems, such as those on small islands.

1 Department for Environment, Food and Rural Affairs, *The Invasive Non-Native Species Framework Strategy for Great Britain* (2008) para 3.3.

2 Secretariat of the Convention on Biological Diversity, *Considerations for Implementing International Standards and Codes of Conduct in National Invasive non-native species Strategies and Plans* (2011) p 44. This definition is itself taken from International Union for Conservation of Nature, *Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive non-native species* (February 2000). See also the Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 - 19 April 2002 - The Hague, Netherlands, Decision VI/23.

3 F Williams, R Eschen, A Harris, D Djeddour, C Pratt, R S Shaw, S Varia, J Lamontagne-Godwin, S E Thomas and S T Murphy, *The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 11.

8.7 One of the key problems is that it is often difficult to predict which non-native species will become invasive. Some species, particularly terrestrial plants, may take decades or even centuries before they have significant negative impacts. However, it should be remembered that all species which establish themselves in a new area carry the threat of causing harm. The potential dangers in releasing new species can be seen clearly in the case of Japanese Knotweed, which was introduced as an exotic ornamental plant and has now been estimated to cost developers more than £150 million a year to remove.[4]

8.8 Although the process of accidental or deliberate introduction by man has been going on for centuries, in recent decades the number of species being introduced has increased significantly, mainly due to increased global trade and the movement of people. There are now almost 2,000 non-native species established in Britain with most of these (1,734) in England and Wales. Approximately 15% of these have a negative impact. Our established non-natives come from across the taxonomic spectrum and include over 1,300 established plants, over 300 invertebrates and about 50 vertebrate species.[5] Currently, about six new non-native species become established in Britain every year. In Europe, around 10 new invasive non-native species establish themselves every year.[6]

8.9 Several endangered species in Britain are threatened by invasive non-native species. These include the red squirrel in decline due to the introduction of the American grey squirrel; the Tansy beetle threatened by the spread of Himalayan balsam; our water voles seriously threatened by predation by American mink; and some of our tree species threatened by a range of pests and diseases such as Sudden Oak Death and Asian Longhorn beetle.

8.10 The annual cost of invasive non-native species to the economy is estimated at £1.3 billion to England and £125 million to Wales. These costs comprise control and eradication, structural damage to infrastructure, or loss of production due to the presence of an invasive non-native species. The biggest cost is to agriculture, estimated at over £910 million in England and Wales.[7]

CURRENT REGIME FOR THE REGULATION OF INVASIVE NON-NATIVE SPECIES

8.11 Our consideration of the regulation of invasive non-native species falls into two parts. First, we set out the general approach; and secondly, we consider the legislative provisions and tools that seek to implement and enforce this policy.

[4] F Williams, R Eschen, A Harris, D Djeddour, C Pratt, R S Shaw, S Varia, J Lamontagne-Godwin, S E Thomas and S T Murphy, *The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 33.

[5] Information supplied by GB Non-native Species Secretariat (2012).

[6] F Williams, R Eschen, A Harris, D Djeddour, C Pratt, R S Shaw, S Varia, J Lamontagne-Godwin, S E Thomas and S T Murphy, *The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 11.

[7] F Williams, R Eschen, A Harris, D Djeddour, C Pratt, R S Shaw, S Varia, J Lamontagne-Godwin, S E Thomas and S T Murphy, *The Economic Cost of Invasive Non-Native Species on Great Britain* (2010) p 11.

Current policy on invasive non-native species

8.12 There are more than 50 international agreements that address the regulation of invasive non-native species.[8] These include the Convention on Biodiversity and the Berne Convention, as outlined in Chapter 2.[9]

8.13 The Convention on Biological Diversity requires contracting parties to undertake to prevent the introduction of, to control or to eradicate those alien species which threaten ecosystems, habitats or species.[10]

8.14 The Convention advocates a three-stage hierarchical approach to invasive non-native species. The approach highlights that "prevention is generally far more cost-effective and environmentally desirable than measures taken following introduction and establishment of an invasive [non-native] species".[11] Therefore, priority should be given to preventing the introduction of invasive alien species.

8.15 If, however, an invasive non-native species has been introduced, then early detection and rapid action are crucial to prevent its establishment. Consequently, the preferred response by states should be to eradicate the organisms as soon as possible. This is the second stage of invasive non-native species action.

8.16 The third stage comes into play where eradication is not feasible or resources are not available for an invasive non-native's eradication. In such a situation, containment and long-term control measures should be implemented.

8.17 This three-stage hierarchical approach, stressing prevention and early eradication, is the policy approach adopted in England and Wales, and the one which underpins the GB Invasive Non-native Species Framework Strategy.[12]

Current domestic legislation on invasive non-native species

8.18 There are a number of statutes that deal with invasive non-native species, with the principal legal provisions contained in the Wildlife and Countryside Act 1981.

Wildlife and Countryside Act 1981

8.19 Under section 14(1) it is an offence to release, or allow to escape into the wild any animal which:

(1) is of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state; or

8 Secretariat of the Convention on Biological Diversity, *Considerations for Implementing International Standards and Codes of Conduct in National Invasive non-native species Strategies and Plans* (2011) p 11.

9 Chapter 2, paras 2.5 to 2.25.

10 Convention on Biological Diversity 1992, art 8H.

11 See also the Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 - 19 April 2002 - The Hague, Netherlands, Decision VI/23, guiding principle 2.

12 Department for Environment, Food and Rural Affairs, *The Invasive Non-Native Species Framework Strategy for Great Britain* (2008), para 5.1.

(2) is included in part 1 of schedule 9.[13]

8.20 Section 14(2) makes it an offence to plant or cause to grow in the wild any plant listed in part 2 of schedule 9.[14] Section 14(3) provides a defence that the accused took all reasonable steps and exercised due diligence in attempting to avoid committing the offence.

8.21 Section 14ZA allows for the restriction, by order, of the sale of invasive non-native species and section 14ZB allows for the issuing of codes of practice. One code has been issued since the provision was introduced in 2006.[15]

8.22 Activity otherwise prohibited by section 14 can be permitted under a licence issued under section 16(4) of the Wildlife and Countryside Act 1981.Wildlife inspectors, as authorised by the Secretary of State or Welsh Ministers, enforce the provisions.[16]

8.23 A wildlife inspector may, at any reasonable time, enter and inspect any premises for the purpose of ascertaining whether an offence listed above is being or has been committed. A wildlife inspector may also, at any reasonable time, enter and inspect any premises for the purposes of verifying any statement or representation made, or information supplied, by an occupier in connection with an application for, or the holding of, a licence. Finally, an inspector may enter or inspect premises (again, at a reasonable time) in order to verify whether a licence condition in relation to invasive non-native species is being complied with.[17]

8.24 An inspector may require any person who has in their possession or control a specimen that may be in breach of section 14 of the Wildlife and Countryside Act, to make available that specimen for examination by the inspector or a veterinary surgeon.[18] If necessary, the inspector may also take samples from a specimen, in order to ascertain whether an offence under section 14 is being, or has been, committed.[19]

8.25 It is an offence to intentionally obstruct a wildlife inspector acting in the exercise of his or her powers,[20] or to fail to make available a specimen as set out above.

[13] Part 1 of schedule 9 to the Wildlife and Countryside Act 1981 includes sika deer, the fat dormouse, ruddy ducks and the edible frog.

[14] Part 2 of schedule 9 to the Wildlife and Countryside Act 1981 includes Japanese knotweed, giant kelp, water primrose and giant rhubarb.

[15] s 14Za was added by the Natural Environment and Rural Communities Act 2006. The only code of practice issued since then has been the Horticultural Code of Practice 2011, https://secure.fera.defra.gov.uk/nonnativespecies/index.cfm?pageid=299 (last visited 27 July 2012).

[16] Wildlife and Countryside Act 1981, s 18A(1).

[17] Wildlife and Countryside Act 1981, s 18D(1)(c) to (d)(i) and (ii).

[18] A "specimen" for these purposes is defined as any bird, other animal or plant, or any part or thing derived from such: Wildlife and Countryside Act 1981, s 18C(3) and 18E(5)

[19] Wildlife and Countryside Act 1981, s 18E(1) and (2)

[20] As above, s 18B(1) or 18C(2) or (7), 18D(1) or 18E(2).

Conservation of Habitats and Species Regulations 2010

8.26 The Conservation of Habitats and Species Regulations 2010 created a new offence of introducing a new species from a ship. It is an offence for any person on a ship to deliberately introduce into an area a species which does not have Great Britain within its natural range and where the introduction may prejudice natural habitats or native flora and fauna. It is a defence if the introduction resulted from a discharge of ballast that was necessary to protect the safety of a person or ship, and that reasonably practicable steps were taken to avoid or minimise the prejudice that such action may cause to natural habitats or native flora and fauna.[21]

Import of Live Fish (England and Wales) Act 1980

8.27 The Act gives the power to the Minister to prohibit the release of live fish, or live fish eggs, "of a species which is not native to England and Wales" which may harm any freshwater fish, shellfish or salmon in England and Wales, or their habitat. The prohibition may be absolute or with exceptions granted under licence.[22]

8.28 Under such an order, any officer or person authorised by the Minister may enter and inspect any land where he has reason to believe live fish or eggs of the species specified in the order are being kept or may be found. The officer may also enter land occupied by a licence holder granted under the Act for the same purpose.[23]

8.29 There have been five orders made under the Act, which prohibit the unlicensed keeping or release of non-native fish.[24] The most recent order prohibits the keeping or release of 47 species of fish, as listed in its schedule.[25]

Destructive Imported Animals Act 1932

8.30 This Act prohibits or controls the importation and keeping of "destructive non-indigenous animals". While the Act deals primarily with muskrats, orders made under the Act relate to grey squirrels, non-indigenous rabbits, coypus and mink.[26]

[21] SI 2010 No 490, reg 52.

[22] Import of Live Fish (England and Wales) Act 1980, s 1(1).

[23] Import of Live Fish (England and Wales) Act 1980, s 2(1).

[24] Prohibition of Keeping of Live Fish (Crayfish) Order 1996, SI 1996 No. 1104; Prohibition of Keeping of Live Fish (Crayfish) (Amendment) Order 1996, SI 1996 No1374; Prohibition of Keeping or Release of Live Fish (Specified Species) Order 1998, SI 1998 No. 2409; Prohibition of Keeping or Release of Live Fish (Specified Species) (Amendment) (England) Order 2003, SI 2003 No. 25; and Prohibition of Keeping or Release of Live Fish (Specified Species) (Amendment) (Wales) Order 2003, SI 2003 No. 416.

[25] Prohibition of Keeping or Release of Live Fish (Specified Species) (Amendment) (England) Order 2003, SI 2003 No.25.

[26] Grey Squirrels (Prohibition of Importation and Keeping) Order 1937, SI 1937 No. 478; Non-Indigenous Rabbits (Prohibition of Importation) Order 1954, SI 1954 No.927; Coypus (Prohibition on Keeping) Order 1987, SI 1987 No. 2195; Mink Keeping (Prohibition) (England) Order 2004, SI 2004 No.100.

Plant Health Act 1967

8.31 Under this Act, the Minister and the Welsh Minsters, as the competent authorities, may make orders to prevent the introduction of pests into Great Britain. The Forestry Commission is the competent authority for dealing with trees and timber.[27]

8.32 The orders have two principal functions. First, they may direct or authorise the removal or destruction of any crop, seed, or plant. They may also order the removal or destruction of any container, wrapping or other article which is infected with a pest. Second, they permit the entry on any land or elsewhere for the purpose of any removing, destroying, or inspecting.

8.33 Further, the orders may prohibit selling, offering for sale, or keeping living specimens of a pest, or their distribution. A person who breaches the order is liable on summary conviction to a fine not exceeding level 5 on the standard scale. In the last 10 years, there have been more than 70 such orders to control the introduction and spread of pests in England and Wales.[28]

Plant Protection Products Regulations 2011

8.34 The regulations control the release of non-native fungi, viruses and other micro-organisms.[29] They implement the list of prohibited plant protection products in Directive 1999/45/EC.

8.35 The regulations prohibit the use, putting on the market or advertising of plant protection products. Further, they permit the Secretary of State or Welsh Ministers to issue a notice in writing restricting or prohibiting the sale or use of treated seeds, where the Secretary of State or Welsh Ministers consider that the seeds are likely to constitute a serious risk to human or animal health or to the environment.[30]

8.36 The enforcement powers of authorised persons[31] are set out in schedule 1 to the Act. These include entry on to land where that person has reasonable grounds to believe any plant protection product is being, or has been, applied to or stored on it. There are also general powers of entry.[32]

8.37 Failure to comply with a notice is an offence. Punishment on summary conviction is a fine not exceeding the statutory maximum and on conviction on indictment, to a fine. It is a defence for the person charged to prove that they took all

[27] Plant Health Act 1967, ss 1and 2.

[28] The most recent of which are the Plant Health (England) (Amendment) (No 2) Order 2010, SI 2010 No.2962; and the Plant Health (Wales) (Amendment) (No 2) Order 2010, SI 2010 No. 2976.

[29] Implementing Regulation (EC) No 1107/2009.

[30] Plant Protection Products Regulations 2011, SI 2011 No 2131, regs 5 and 9 to19

[31] As defined by Plant Protection Products Regulations 2011, reg 7.

[32] As above, sch 1, para 4(1).

reasonable precautions and exercised all due diligence to avoid the commission of the offence.[33]

EUROPEAN UNION ACTIVITY ON INVASIVE NON-NATIVE SPECIES

8.38 In January 2008, the European Commission commissioned a comprehensive study to examine the evidence regarding the ecological, economic and health impact of invasive non-native species in Europe. Further, it analysed the effectiveness of the existing legal tools for tackling invasive non-native species, and considered the costs, benefits and possible policy options for a future EU invasive non-native species strategy.

8.39 Following extensive public consultation, in May 2008, the European Commission published the following findings.

(1) Some 91% of respondents agreed on the urgent need to bring in new measures to prevent the spread of such organisms, with 85% agreeing on the importance of preventing the introduction of invasive alien species in the wild.

(2) An EU-wide early warning system would be welcomed by 90% of respondents, and 86% thought that member states should be legally obliged to take action against the most harmful invasive alien species.

(3) Most respondents (90%) considered that the lack of public awareness would constitute a barrier to launching more stringent policies, and that it was therefore important to raise the profile of the issue (77%).[34]

8.40 Consequently, in December 2008, the European Commission published a Communication *Towards an EU Strategy on Invasive Species* which provided four possible policy options:

(1) business as usual;

(2) maximising the use of existing legal instruments together with voluntary measures;

(3) adapting existing legislation; or

(4) establishing a comprehensive, dedicated EU legal instrument.[35]

8.41 Although the European Commission identified that option 4 would be the most effective in terms of control of invasive alien species, it drew no conclusion as to which option it intends to pursue.

8.42 The Institute for European Environmental Policy's report,[36] requested by the

[33] Plant Protection Products Regulations 2011, SI 2011 No 2131, regs 23 to 25(1).

[34] Results of consultation *YOUR VOICE "Invasive Alien Species - A European Concern"* (May 2008) http://ec.europa.eu/environment/nature/invasivealien/index_en.htm (last visited 27 July 2012).

European Commission, recommended that new legislation should be developed in the form of a dedicated invasive alien species directive. Subsequently, the Commission established three working groups to examine specific areas (which mirror the three stage approach adopted by the Convention on Biodiversity and as set out above):

(1) prevention – considering priority species; priority pathways; risk analysis; communication and awareness-raising;

(2) early warning and rapid response – considering the establishment of an EU invasive alien species data centre; surveillance, inspection and monitoring; early warning and rapid response; and

(3) eradication, control/management and restoration.

8.43 On 3 May 2011, the Commission published a general environmental communication.[37] One of the specific actions contained in the Communication was that "the Commission will fill policy gaps in combating [invasive alien species] by developing a dedicated legislative instrument by 2012".[38]

8.44 Given the legislative basis, as explored in Chapter 2, and the nature of the subject matter, it is likely that part of the new regime will include a directive. This would be in keeping with the rest of the EU's legislative activity on wildlife and habitats. However, there is also the significant possibility that some of the action required may be put into a regulation, or regulations. That would be the appropriate vehicle for the regulation of intra-member state and international trade, and is the model adopted for the EU's implementation of Convention on International Trade in Endangered Species of Wild Fauna and Flora.

8.45 The three working groups referred to above published their final reports on 22 July 2011. The most important working group reports for our project are the two concerning "prevention" and "early warning and rapid response" and "eradication, containment, management and restoration".

8.46 In the *prevention* report, the working group considered the appropriate regulatory approach. This turns on the extent to which the directive requires white, black or grey lists. The prevention report proposed the following definitions:

(1) black list species are those "assessed as high risk for biodiversity and/or ecosystem services and/or health and or contains species whose introduction is regulated";

[35] European Commission, *Towards an EU Strategy on Invasive Species* COM (2008) 789 final.

[36] C Shine, M Kettunen, P Genovesi, F Essi, S Gollasch, W Rabitsch, R Scalera, U Starfinger, P Brink, *Assessment to support continued development of the EU Strategy to combat invasive alien species* (2010).

[37] European Commission, *Our life insurance, our natural capital: an EU biodiversity strategy to 2020* COM (2011) 244 fin.

[38] As above, p 15.

(2) grey list species would be those not listed on a black or white list for which the data is deficient. The species would be considered on a case-by-case basis. When there was sufficient evidence, the species could be moved to the black list or to white list, as appropriate; and

(3) white list species are those unlikely to threaten biodiversity or ecosystem services, human health or values, or as a low risk that can be managed without moderate or serious harm.[39] Species not on the white list cannot be released and, therefore, have to be controlled.

8.47 Potentially as a subset of the black list, there is also the possibility of having an "alert list" (which could either be EU-wide or regional)[40] and a list of species of EU concern.[41]

8.48 Any mix of these will have benefits and drawbacks. A greater preference for white listing increases considerably the regulatory burdens placed on European citizens and businesses, and is a potential violation of the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures.[42] It also carries the possibility of lawsuits by traders to compensate for a loss of income. [43]

8.49 Conversely, simple reliance on black listing could result in another species with the same sort of economic costs as Japanese Knotweed establishing itself. However, the black list approach is that currently used within the EU regimes for animal and plant health, and is that adopted within the Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures.[44]

8.50 A mixed approach considered in the prevention report is to have a white list for some sets of species and black lists for others. Therefore, a white list could be adopted for animals and aquatic living organisms (reflecting the high risks they pose) and a black list for terrestrial plant species.[45]

8.51 As well as the general regulatory approach to be adopted, the prevention report also considers how any regulatory regime could be implemented, for instance whether a dedicated EU instrument is necessary. The report identifies six regulatory options, but discards action not based around a dedicated EU

[39] IAS Working Group 1, *Prevention* (2011), appendix 3.

[40] AS Working Group 1, *Prevention* (2011), pp 22 to 23. "Alert list" species would be those not established in the EU, or only established in a small territory, whose spread could have severely deleterious effects on EU biodiversity. This is a particular concern in the Mediterranean region.

[41] As above, pp 23 to 24. "Species of EU concern" are those species which could have serious effects on biodiversity, human health etc where it is though that controls on either intra-EU member state or international trade will be effective for the prevention of further introductions or spread.

[42] See http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last visited 27 July 2012).

[43] IAS Working Group 1, *Prevention* (2011) pp 30-32.

[44] As above, pp 33 to 36.

[45] As above, pp 36 to 38.

instrument.[46] This leaves white, black, and mixed lists as possibilities for the future directive.

8.52 The preliminary working group report on early warning and rapid response highlights the need for surveillance, and the need for it to be established across the EU. It notes that if a system of surveillance and control had been in place with the completion of the Danube canal in 1992, then this may have had an effect on whether killer shrimp would have appeared in the UK in 2010.[47] It recommends that there should a form of "subsidiarity" within the regime for notification and detection. The EU strategy should focus on that which requires regulation at the EU biogeographic level. Other invasive non-native responses should be left to the member states.[48]

8.53 In January 2012, the European Commission consulted again on the possible need for a dedicated instrument, with the consultation closing on 2 April 2012.[49] The findings of this consultation and its precise timeframe are, at the time of writing, unknown. Consequently, the current shape of the forthcoming instrument proposal in unknown. It is important to understand that the work undertaken by the Commission, including the proposals emanating from the working groups, amounts to preparatory work for the legislative process. It would be wrong to assume that the final legislative outcome would necessarily closely follow the proposals and approaches so far apparent.

CASE FOR REFORM

8.54 Here we discuss whether the current legal regime adopts the appropriate approach and whether the tools available are sufficient.

8.55 The first part of our discussion concerns whether the current approach, as contained in section 14 of the Wildlife and Countryside Act 1981, is appropriate. It may be preferable to adopt an alternative approach, such as white listing, or a more developed form of scheduling.

8.56 The second part of the debate focuses on whether the correct restrictions are in place and regulatory tools available to deliver on the basic approach.[50] It could be the case that the current regime, primarily Part 1 of the Wildlife and Countryside Act 1981, cannot deliver that required of it.

Current approach

8.57 In our current domestic law, there are three core prohibited actions related to invasive non-native species. First, releasing or allowing to escape into the wild an animal of a species not currently ordinarily resident in or a regular visitor to Great

[46] IAS Working Group 1, *Prevention* (2011), pp 39 to 40.

[47] IAS Working Group 2, *Early Warning and Rapid Response* (2011), p 14.

[48] As above, pp 23 to 25.

[49] The consultation documents are available at: http://ec.europa.eu/environment/consultations/invasive_aliens.htm (last visited 27 July 2012).

[50] We set out some of this debate in paras 8.38 to 8.53 above.

Britain in a wild state. Second, releasing, or allowing to escape into the wild an animal listed in Part 1 of Schedule 9. Third, planting or causing to grow in the wild a plant listed in Part 2 of Schedule 9 to the Wildlife and Countryside Act 1981.[51]

8.58 The first of these can be criticised as requiring a degree of knowledge of a species' range by the person planting, releasing or allowing to escape, in order that they do not commit the underlying offence. We can see the biological arguments behind such an approach. All species have the potential to cause damage and therefore, as a precaution, it is best to prohibit all release.

8.59 However, such an approach could be considered unjust and overly burdensome. The current regime fails to draw a distinction between the risk a species may cause to the environment when released, but criminalises all activity equally, regardless of the effect the release may have.

8.60 It may be that a better approach would be to focus not on the non-native nature of a species but rather on the risk that a species may present. Therefore, it could be possible to envisage a system that prioritises action against certain species, due to their invasive and high risk nature, and remains silent as to others, such as where a species is viewed as presenting no, or little, risk to the environment. We can see merits to this approach as it focuses upon regulatory activity and sets out clearly Government priorities.

8.61 Although we can see possible benefits in exploring reform to the current approach, there is likely to be a new EU Directive in the future. Such a Directive is likely to require the adoption of a particular regulatory approach, which could be based around white, black or mixed listing; or another approach.

8.62 Therefore, we think that it is not appropriate to explore wholesale reform of the current approach, given that this may have to change to match that contained in any Directive.

8.63 Despite this, there are other criticisms that can be made of the current approach. The primary prohibition concerns species not currently ordinarily resident or a regular visitor to Great Britain in a wild state. This does not take into account translocations within Great Britain, such as the introduction of a species into an area outside its natural range. The second issue concerns "release into the wild". This does not get to the core of what the regime is seeking to prevent, which to us seems to be release or escape of a species, such that the member of an invasive non-native species is no longer under the control of the individual concerned.

Regulatory tools

8.64 The situation is different in relation to the regulatory or enforcement tools available. These are less susceptible to change based on any future EU Directive. Whatever mechanism used by the Directive to identify the species to be considered as invasive non-natives, and whatever the exact prohibitions it contains, it will still need appropriate mechanisms in domestic law to enforce those prohibitions. It is, therefore, appropriate to consider improvements to those

[51] Wildlife and Countryside Act 1981, s 14(1) and (2).

tools, which will be valuable whether applied to the existing domestic law or to a new Directive. The discussion which follows relates largely to the existing domestic prohibitions, but it is also likely to be relevant to the prohibitions which may feature in any forthcoming directive.

8.65 In the EU discussion above, we noted the perceived need for rapid response.[52] There is currently no provision for statutory bodies or those acting on their behalf to access land to carry out control programmes, without the permission of the land-owner. Clearly, it is desirable that those conducting control programmes for an invasive non-native species should obtain the agreement and co-operation of landowners. However, it is arguable that a control programme should not be jeopardised by a landowner denying access, and thereby allowing an invasive non-native species to become established.

8.66 The current regime also contains no emergency provisions. If a species is not new to Great Britain or listed in schedule 9, part 1, to the Wildlife and Countryside Act 1981, then it cannot be controlled. Therefore, the control of a species already present within Great Britain relies on the updating of schedule 9. However, reacting quickly to an emerging situation is vital to the effective control of invasive species. Consequently, we suggest that the regulatory regime would benefit from having emergency powers.

8.67 The provisions relating to invasive species in England and Wales lack the power to make certain requirements of individuals, such as requiring notification of the presence of an invasive species on their land. In stage two of the Convention on Biodiversity's three-stage hierarchy and in the EU discussion (both noted above), we saw the view that such mechanisms are necessary for the control of invasive non-native species. The collection of data is an important part of any response to invasive species. Requiring notification can be a crucial tool in a control strategy.

Question 8-1: Do consultees think that that there is a sufficient case for the reform of the regulatory and enforcement tools available for the delivery of Government policy.

8.68 There are sophisticated tools available in Scotland, which provide for much of the above, that are not available in England and Wales – such as the "species control orders". We consider such approaches in the next section.

LESSONS FROM RECENT SCOTTISH REFORM OF THE WILDLIFE AND COUNTRYSIDE ACT 1981

8.69 The Wildlife and Natural Environment (Scotland) Act 2011 makes a number of significant amendments to the current provision on invasive non-native species in the Wildlife and Countryside Act 1981. Under the 2011 Act, it is an offence to release, or allow to escape from captivity, any animal to a place outside its native range, or an animal that is of a type specified by the Scottish Ministers, by order. It is also an offence to cause any animal outside the control of any person to be

[52] Paras 8.52 to 8.53 above.

at a place outside its native range.[53] Further, it is an offence to plant, or otherwise cause to grow, any plant in the wild at a place outside its native range.

8.70 The Act also makes it an offence to keep, have possession of or have under control any invasive animal of a type which the Scottish Ministers specify by order, or any specified invasive plant.[54] Further, it sets out the offence of selling, offering for sale or having in a person's possession an invasive non-native species.[55] It is a defence for the person accused to show that they took all reasonable steps and exercised all due diligence to avoid committing the offence.[56]

8.71 An "invasive animal" "or invasive plant" is one specified by the Scottish Ministers as an animal which, if not under the control of any person, would be likely to have a significant adverse impact on biodiversity, other environmental interests, or social or economic interests.[57]

8.72 The orders made by Scottish Ministers may make different provisions for different types of animal or plant, circumstances or purposes, persons, times of the year, and areas.[58] They have the power to specify other types of animal to which the offences do not apply and may disapply the provisions in relation to specified persons, animals, plants or conduct.[59]

8.73 The provisions also give powers to wildlife inspectors. They may enter and inspect any premises for the purpose of ascertaining whether an offence relating to the release of non-native species has been committed on the premises.[60]

8.74 It is an offence to fail to carry out an operation required to be carried out by a species control order or to carry out an operation specified as one which must not be carried out ("an excluded operation").[61]

8.75 A species control order may be made by a relevant body[62] for premises where they are satisfied an invasive animal is on the premises, at a place outside its

[53] Wildlife and Countryside Act 1981, s 14(1) and (2) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(2)(a))

[54] Wildlife and Countryside Act 1981, s 14ZC (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(3)).

[55] As above, s 14A (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(4)).

[56] As above, s 14ZC (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(3)).

[57] As above, s 14P (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16)).

[58] Wildlife and Countryside Act 1981, s 14(1) and (2) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(2)(a)).

[59] As above.

[60] As above, s 19Z(c) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 22(4)).

[61] As above, s 14K(1) and (3) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

native range.[63] The relevant body must give the owner or occupier at least 42 days to enter into a voluntary agreement to control or eradicate the invasive species before it can make a species control order.

8.76 A species control order can be made by statutory notice if the relevant body is unable to ascertain the name or address of any owner or occupier. In an emergency, a species control order can be made without agreement or notice if the relevant body is satisfied that it is urgently necessary. An emergency control notice expires after 49 days.[64] An order may be reviewed and, if appropriate, revoked, by the relevant body.

8.77 The Scottish Ministers may require notification that invasive animals are present at a specified place which is outside that animal's native range. This is triggered where a person is aware, or becomes aware of the presence of such animals.[65]

8.78 An order may require a person to make a notification only if the Scottish Ministers consider that the person "has or should have knowledge of, or is likely to encounter, the invasive animal to which the order relates". A person is guilty of an offence if they fail to make a notification in accordance with the order, without reasonable excuse.[66]

8.79 The Scottish Ministers may create a code of practice to provide practical guidance on the release, keeping, sale and notification offences relating to non-native invasive species.[67] The *Draft Code of Practice* states that it:

> sets out guidance on how you can act responsibly to ensure that non-native species under your ownership, care and management do not cause harm to our environment.[68]

8.80 A code of practice made under the Act may provide guidance on:

(1) how Scottish Natural Heritage, the Scottish Environment Protection Agency, the Forestry Commissioners and the Scottish Ministers should co-ordinate their respective functions relating to animals or plants outside their native range; and

[62] The Scottish Ministers, Scottish Natural Heritage, the Scottish Environment Protection Agency or the Forestry Commissioners.

[63] Wildlife and Countryside Act 1981, s14D (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

[64] Wildlife and Countryside Act 1981, s14B (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

[65] As above.

[66] Wildlife and Countryside Act 1981, s14B (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

[67] As above, s14C (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 15)). *Draft Code of Practice of Non-Native Species 2012* was put before the Scottish Parliament on 2 July 2012.

[68] *Draft Code of Practice of Non-Native Species* 2012*,* para 1.6.

(2) which species of animals or plants are considered to be non-native species.[69]

8.81 The code of practice may be revoked, replaced or revised. To do so, the Scottish Ministers must consult Scottish Natural Heritage and any other person appearing to them to have an interest in the code.[70] The Scottish Parliament must approve any code.

8.82 Failure to comply with a provision of a code of practice does not of itself render the person liable to proceedings. However, it may be taken into account in determining a question in proceedings and, where a person is prosecuted for a relevant offence, the court may have regard to his compliance with the code.[71]

8.83 The reforms in Scotland were tailored to facilitating the delivery of the underlying approach in the Wildlife and Countryside Act 1981. Given the current uncertainty with any potential EU Directive, we think it is better to use the existing framework of the Wildlife and Countryside Act 1981 but to improve its regulatory tools.

8.84 Before setting out our proposals for reform, we discuss the core provisions on invasive non-native species, in light of the reforms in the Wildlife and Natural Environment (Scotland) Act 2011, and raise an issue concerning the selling of plants.

Core provisions on invasive non-native species

8.85 Under the reformed provisions in Scotland, it is an offence to release or allow to escape from captivity any animal "to a place outwith its native range".[72] Similarly, the Scottish model prohibits planting, or causing to grow, any plant in the wild outwith its native range.[73]

8.86 The Scottish model in relation to animals seems to meet the criticisms we outlined in our case for reform. It is not dependent on either the idea of species being introduced into Great Britain or the concept of them being released into the wild. In relation to the former, it focuses on native range, which relates to the locality to which it is indigenous.[74]

8.87 The use of "releases or allows to escape from captivity" covers what we saw as the core requirement, allowing an animal to escape from control, rather than having to focus on release or escape "into the wild".

[69] Wildlife and Countryside Act 1981, s14D (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

[70] Wildlife and Countryside Act 1981, s14B (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

[71] As above.

[72] As above, s 14(1)(a), as in force in Scotland only following amendment by the Wildlife and Natural Environment (Scotland) Act 2011, s 14(2).

[73] As above, s 14P(2), as inserted by the Wildlife and Natural Environment (Scotland) Act 2011, s 16.

[74] As above, s 14(2), as in force in Scotland only following an amendment by the Wildlife and Natural Environment (Scotland) Act 2011, s 14(2).

8.88 We still think that there is a place for scheduling, especially where scheduling may add clarity to the system. An example would be where the native range of a species may not be clear, but there would be a clear threat if that species were to be released. Such prohibited activity could still be licensed, possibly under general or class licences, under the licensing powers we outline below.

8.89 There are, however, problems with the Scottish model, particularly in relation to plants. The Scottish model still turns on the concepts of planting or allowing to grow in the wild: the offence is to plant or allow to grow in the wild a plant outwith its native range.

8.90 The prevention of release outside control is the core function of invasive non-native species regulation. This is the case whether the species is an animal, plant or fungus. In fact, aquatic plants being released (including the removal of methods preventing their escape into the wild) have caused some of the major problems in this area, since once in a watercourse, preventing their spread is difficult.

8.91 Further, the current prohibition on the release or escape of invasive non-native species applies only to wild animals and not to plants or fungi.[75] Given the damage caused by invasive non-native plants, such as Japanese Knotweed, the current provisions are insufficient, and out of step with those provisions for animals.

8.92 It may be the case that the provisions on releasing or allowing to escape should apply to listed plants and fungi (as well as the specific offence of actively planting) as well as to animals. However, it is hard to think of a plant as "captive". Therefore, it is better to use the term "outside a person's control".

8.93 As with animals, we still think there is an important role to be played by the scheduling, or listing, of particular species. Therefore, a species could be scheduled, or listed, such that planting it, allowing it to grow, releasing it or allowing it to escape from control would be a clear offence (irrespective if the species natural range). Such prohibited activity, again as with animals, could still be licensed, possibly under general or class licences, under the licensing powers we outline below.

PROVISIONAL PROPOSALS FOR REFORM

8.94 In this section we consider what additional regulatory or enforcement tools could appropriately be introduced. As we emphasised above, while we proceed on the basis of improving the effectiveness of the existing prohibitions, we consider that these approaches may also be necessary in the context of a new EU Directive. Our approach draws on the recent reforms in Scotland under the Wildlife and Natural Environment (Scotland) Act 2011.

8.95 In Chapter 4 we set out our general approach to reform. This approach applies to the regulation of invasive non-native species as it does elsewhere in this Consultation Paper. We set out the provisional proposals below with a view to ensuring effective regulation without imposing undue burdens on those subject to

[75] Wildlife and Countryside Act 1981, s 14(1).

the regime. Moreover, the full range of regulatory tools – such as the different forms of licence, codes of practice and guidance – would be available, as we set out in Chapter 5.[76]

8.96 This section on reforms is divided into five sub-sections:

(1) Emergency listing;

(2) Notification of invasive non-native species;

(3) Selling invasive non-native species;

(4) Licensing; and

(5) Eradication, control and management.

8.97 Finally, we highlight issues relating to the sale of invasive non-natives and consider the role of guidance, codes of practice and civil sanctions within the regulatory regime for invasive non-native species.

Emergency listing

8.98 It is necessary to be able to react rapidly to any new development, and to ensure that all the necessary powers are available. We still think that there is a role for scheduling, in that there may be problems with a species's natural range. If such a scenario develops, then it may be necessary to emergency list, as the process for amending the replacement for the current Schedule 9 to the Wildlife and Countryside Act 1981 may not be appropriate or swift enough.

8.99 In taking the decision to emergency list, the Secretary of State or Welsh Ministers would still have to take into account the factors (or principles) outlined for decision-making within our general regime, as discussed in Chapter 5.

8.100 Where such emergency listing does take place, then we suggest that it should be of limited duration, given that the normal safeguard and consultation requirements would have been circumvented. We have no determined view as to the appropriate duration of an emergency listing; however, given that eradication action may need to run for some time, we think that the term of one year is appropriate as a basis for consultation. That would allow the normal listing procedure to be completed, so there would be no gap in moving from emergency to normal listing – where this is seen as necessary or desirable.

Provisional Proposal 8-2: We provisionally propose that there should be a mechanism allowing for the emergency listing of invasive non-native species.

Question 8-3: Do consultees think that such emergency listing should be limited to one year?

[76] Chapter 5, paras 5.77 to 5.102. We consider these further when discussing enforcement in Chapter 9 and appeals in Chapter 10.

Notification of invasive non-native species

8.101 The ability to locate invasive non-native species is likely to form a core part of the regime for controlling and managing them. This is central feature of the Convention on Biodiversity approach.

8.102 The way that the law of Scotland has dealt with this is to allow Scottish Ministers to make orders requiring a defined group of people (a person or type of person) to notify invasive non-native species where they are aware or become aware of the presence of invasive non-native species.[77]

8.103 The order can only be made if Scottish Ministers consider that the person (or type of person) has or should have knowledge of, or is likely to encounter, the invasive non-native species to which the order relates.[78]

8.104 We can see advantages to this, in that it allows for tailor-made reporting requirements. We suggest that the Secretary of State or Welsh Ministers should have similar powers for England and Wales.

8.105 This is the creation of a burden, but one which should be easy to discharge, as it is necessary to allow for the early eradication of a species before it becomes established.

Provisional Proposal 8-4: We provisionally propose that the Secretary of State and Welsh Ministers should be able to issue an order requiring specified individuals (whether by type of person or individual identity) to notify the competent authority of the presence of specified invasive non-native species.

Provisional Proposal 8-5: We provisionally propose that there should be a defence of "reasonable excuse" for failing to comply with the requirement.

Licensing

8.106 Licensing forms a key part of our regulatory regime, and is as important here as it is for other areas of the regime. There are good reasons why the keeping of any invasive non-native species (whatever its risk categorisation) may be permitted. It could be that they are required for a zoo or other public exhibition, they may be used in research, or they may simply be resting somewhere until a suitable venue for destruction is found. In all these cases, the above provisions would be breached if a licence were not present. The risk posed by different activities and the invasive non-natives themselves will vary considerably. Therefore, it may be desirable in certain circumstances to issue general licences.

Provisional Proposal 8-6: We provisionally propose that the full range of licences can be issued for activity prohibited in our scheme for invasive non-native species.

[77] See above, at paras 8.72 to 8.78. See also Wildlife and Countryside Act 1981, s 14B(5) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(5)).

[78] Wildlife and Countryside Act 1981, s 14B(3) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(5)).

8.107 Currently, the Wildlife and Countryside Act 1981 does not specify the requirements for issuing licences in relation to invasive non-native species. This is obviously flexible, and reflects the fact that such species are not ones that the legislative regime is seeking to protect for conservation or environmental reasons. We think that the current approach is correct.

Eradication, control and management

8.108 Finally we consider species control orders.[79] These, as we outlined above, are modern tools allowing for the management and control of invasive non-native species. We think that the species control order regime put in place in Scotland is an appropriate way of bundling the powers for the control (need for entry, to require someone to do something) of invasive non-native species.

8.109 Species control orders, unlike the current provision in England and Wales, can require those subject to the order to do something, such as destroy species present on their land.[80]

8.110 Species control orders can, furthermore, permit a person to enter onto land (without the need for permission from those in occupation or ownership) in order to carry out operations (including destruction) required by the order. Normally, 14 days' notice need be given; however, this is not required where an emergency species control order is issued.[81]

8.111 Species control orders allow for an escalation of response, in the same way as we consider appropriate for civil sanctions and as suggested in the regulatory review we conducted in Chapter 4.[82] We therefore suggest that they are a useful and flexible model that could be imported into the law of England and Wales.

Provisional Proposal 8-7: We provisionally propose that the power to make species control orders on the same model as under the Wildlife and Natural Environment (Scotland) Act 2011 should be adopted by our new legal regime.

Selling invasive non-native species

8.112 There is a final issue we wish to consider here, concerning the selling of invasive non-native species. The majority of invasive non-native plants in the wild originate from the horticultural and agricultural trades.

8.113 At present, the law in England and Wales only prohibits the release or escape of invasive non-native species.[83]

[79] The provisions for which are set out above at paras 8.54 to 8.59.

[80] Wildlife and Countryside Act 1981, s 14K(3).

[81] As above, ss 14K(1), 14L, 14M(1)(e), 14M(2)(c) and 14M(3).

[82] Chapter 4, paras 4.21 to 4.28. See further, Chapter 9, below.

[83] Wildlife and Countryside Act 1981, s 14.

8.114 Some of our advisory group members raised concerns about the labelling of plants for sale, stating that some invasive non-native plants are mislabelled or wrongly identified. This has included such plants being labelled as native species.

8.115 These actions may constitute an offence as unfair commercial practices.[84] It is unclear how stringent the enforcement of these provisions has been. However, advisory group members have suggested to us that such misleading or incorrect labelling of invasive non-native plants goes largely unchallenged.

8.116 It is not clear whether the problem is with the law, in that there is a need for appropriate new offences, or whether it is a question of enforcement of existing offences.

8.117 If there were to be a new offence, then the degree of knowledge required to render the sale of invasive non-natives an offence would be vitally important when constructing the offence. The two realistic alternatives are whether it is necessary to prove that the defendant knew that the species was non-native or whether they were reckless as to that fact.

Guidance, codes of practice and civil sanctions

8.118 Guidance forms a part of our proposed regulatory regime. We noted above that in Scotland, "codes of practice" provide guidance on how the various administrative bodies should co-ordinate their respective functions.[85] This follows the general approach we outlined in Chapter 5. Therefore, we do not think that it is necessary to make a specific provisional proposal.

8.119 In addition to this, the full range of sanctions and other means of encouraging compliant behaviour (which we consider in the next Chapter) would be available in relation to invasive species, as would appeals (as considered in Chapter 10).

[84] Consumer Protection from Unfair Trading Regulations 2008, regs 5 and 6.

[85] Paras 8.79 to 8.82.

CHAPTER 9
SANCTIONS AND COMPLIANCE

INTRODUCTION

9.1 An effective regulatory system has two principal elements. The first element sets out desired outcomes. In wildlife law, this normally means protecting species at a particular conservation level and ensuring the welfare of species. The second element seeks to ensure the delivery of those outcomes – ensuring compliance.[1]

9.2 Regimes can be organised to achieve compliance in many ways. These are often called enforcement strategies. Gunningham summarised these strategies into seven models:

(1) advice and persuasion;

(2) rules and deterrence;

(3) criteria strategy;

(4) responsive regulation;

(5) smart regulation;

(6) risk-based regulation; and

(7) meta-regulation.[2]

9.3 The first two of these are obvious, rules and deterrence is the current framework used in wildlife law. Regulations are set out, sanctions are put in place and rule-breaking activity is consequently sanctioned. The success of the model relies on the severity of sanction and the frequency of prosecution to be sufficient to act as a deterrent.

9.4 *Criteria strategies* provide inspectors with a set of factors, against which the appropriate regulatory approach will be determined.

9.5 *Responsive regulation* is reliant on regulation and sanctions modelled in a pyramid structure. This envisages a broad base of information and advice provision, with more severe, but less used sanctions above. These would be used for repeat transgressions or egregious breaches.

9.6 *Smart regulation* expands on responsive regulation to encourage the wider use of potential influences, such as the media. It therefore accepts that a more effective way of achieving compliance for some is the potential for adverse publicity for groups such as public bodies rather than the imposition of a traditional "sanction". Thus, "naming and shaming" may be more appropriate than a fine.

[1] N Gunningham, "Enforcing Environmental Regulation" (2011) 23 *Journal of Environmental Law* 169, 170.

[2] As above, p 174.

9.7 The core concept in *risk-based regulation* is that the potential risk of damage caused by the act should determine the appropriate regulatory response. An example in the current law is the use of general licences for low risk activities, such as the taking and killing of pigeons for the protection of crops.[3]

9.8 Finally, *meta regulation* concerns organisations submitting plans to a regulator for approval. This enables the organisation to demonstrate how it intends to meet its regulatory goals. This approach is reliant upon sufficient capacity within the organisation, which understands and can comply with the regulatory regime. The regulators' core role in this model is to oversee and audit the submitted plans; the regulators themselves would be subject to judicial review concerning their performance within the regulatory regime.

9.9 As we noted in Chapter 4, we do not think that any one strategy or approach will achieve all regulatory aims. We suggested that the regulatory regime should have sufficient in-built flexibility to allow different approaches to be adopted, as required by the Government and regulators.[4]

9.10 The appropriateness of a particular option should bear in mind the Hampton and Macrory reviews, which focused on the enforcement of regulatory regimes and the use of sanctions.[5] The findings of these reviews led to the Regulatory Enforcement and Sanctions Act 2008, [6] and we consider this further below.

9.11 In adopting the responsive and smart regulatory approaches set out above, a regulatory regime should make use of existing enforcement tools.

9.12 We consider below three specific ways of facilitating the achievement of our regulatory regimes aims. First, we explore the regime for civil sanctions, in particular, the regime available under the Regulatory Enforcement and Sanctions Act 2008. Second, we consider criminal sanctions. This is currently the primary regime in place to ensure the achievement of existing regulatory aims. It has, however, been subject to a reasonable amount of debate. Third, we outline the mechanisms to ensure transparency and consistency in implementing enforcement as a whole, over the wildlife area.

CIVIL SANCTIONS

9.13 Civil sanctions are imposed by a regulator and administered through the civil justice system, rather than through the criminal one.

9.14 We have noted previously that criminal sanctions are not the only, nor necessarily the most effective, method to regulate all unlawful activity concerned

[3] Natural England General Licence GL06.

[4] See Chapter 4, paras 4.43 to 4.45. See, also, N Gunningham, "Environment law, regulation and governance: Shifting architectures" (2009) 21 *Journal of Environmental Law* 179.

[5] P Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) p 7; R Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 10.

[6] See Criminal Liability in Regulatory Contexts (2010) Law Com No 195; and http://lawcommission.justice.gov.uk/docs/criminal-offences-gateway-guidance.pdf (last visited 27 July 2012).

with wildlife.[7] In the 2000s, the greater use of civil law sanctions began to be explored, especially in the context of environmental law. The position in the UK was in marked contrast to other systems, particularly that of the United States, where the regulator, the Environmental Protection Agency, makes considerable use of administrative penalties.[8]

9.15 The Hampton and Macrory reviews led to a change in the UK's position. The Hampton review, which reported in 2005, set out certain principles for regulatory inspection and enforcement. These built on the general thrust of the Principles of Good Regulation produced by the Cabinet Office eight years before. The Hampton review made five key recommendations on inspection and enforcement.[9]

(1) Entrenching the principle of risk assessment throughout the regulatory system, so that the burden of enforcement falls most on highest-risk businesses, and least on those with the best records of compliance.

(2) In particular, ensuring that inspection activity is better focused, reduced where possible but, if necessary, enhanced where there is good cause; at present, not only are unnecessary inspections carried out but necessary inspections are not carried out.

(3) Making much more use of advice, again applying the principle of risk assessment.

(4) Substantially reducing the need for form filling – in practice, businesses' most frequent and direct experience of regulatory enforcement – and other regulatory information requirements.

(5) Applying tougher and more consistent penalties where these are deserved.

9.16 The Macrory review set out six penalty principles to be taken into account when designing or administering a regulatory regime. Under these penalty principles, a sanction should:

(1) aim to change the behaviour of the offender;

(2) aim to eliminate any financial gain or benefit from non-compliance;

(3) be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;

(4) be proportionate to the nature of the offence and the harm caused;

7 See Chapter 4, paras 4.15 to 4.18.

8 See R Macrory, "Reforming regulatory sanctions – a personal perspective" (2009) *Environmental Law Review* 69, 69; R W Mushal, "Reflections upon American environmental enforcement experience as it may relate to post-Hampton developments in England and Wales" (2007) 19 *Journal of Environmental Law* 201.

9 P Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) p 7 to 8.

(5) aim to restore the harm caused by regulatory non-compliance, where appropriate; and

(6) aim to deter future non-compliance.[10]

9.17 The two reports let to the Regulatory Enforcement and Sanctions Act 2008.

Regulatory Enforcement and Sanctions Act 2008

9.18 Part 3 of the Regulatory Enforcement and Sanctions Act 2008 established a regime for civil sanctions. Ministers could make provision for civil sanctions to be issued by "regulators" for "relevant offences".[11] In making such provision, Ministers must be satisfied that the regulator will act in a way which is "transparent, accountable, proportionate and consistent", and that their activity will be "targeted only at cases in which action is needed".[12]

9.19 Regulators are either "designated regulators", as listed in schedule 5, or have enforcement functions for enactments listed in schedule 6.[13]

9.20 Relevant offences are either:

(1) those for which a designated regulator has an enforcement function and which were contained in "an Act" immediately before 21st July 2008;[14]

(2) immediately before the day 21st July 2008 contained in an Act listed in schedule 6 and for which the regulator has an enforcement function.[15]

9.21 An enforcement function is defined as a function (whether or not statutory) of taking any action with a view to or in connection with the imposition of any sanction, criminal or otherwise, in a case where the offence is committed".[16]

9.22 Therefore, under the terms of the general provisions, civil sanctions are only available for offences contained in Acts of Parliament immediately before the day on which the Regulatory Enforcement and Sanctions Act 2008 was passed (21 July 2008) or offences set out in schedule 6.

9.23 There is a power to add "regulators" and "relevant offences", but only for Acts listed in schedule 7. Where an order is made under an enactment listed in schedule 7 creating an offence, the relevant enforcement authority for that new

[10] R Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 10.

[11] Regulatory Enforcement and Sanctions Act 2008, ss 36, 37 and 38. The relevant "Ministers" are Minister of the Crown and Welsh Ministers (for Welsh ministerial matters). Under Regulatory Enforcement and Sanctions Act 2008, s 74, a Minister of the Crown has the same meaning as in the Ministers of the Crown Act 1975: "the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council" (s 8(1)).

[12] Regulatory Enforcement and Sanctions Act 2008, ss 5(2) and 66.

[13] As above, ss 37(1) and (2).

[14] The wording of the Regulatory Enforcement and Sanctions Act 2008, s 38(1)(b) and s 38 2(a) says "the day on which this Act is passed".

[15] Regulatory Enforcement and Sanctions Act 2008, s 38.

[16] As above, s 71(1).

offence can be treated as a regulator and the offence as a relevant offence.[17] Therefore, a regime for civil sanctions could be created for the new offence under part 3 of the Regulatory Enforcement and Sanctions Act 2008. Schedule 7 does not include the European Communities Act 1972.

9.24 The civil sanctions available are fixed monetary penalties, discretionary requirements, stop notices, and enforcement undertakings. Where regulators are given the power to issue civil sanctions, they must issue guidance as to their use of the sanctions, including the circumstances in which they are likely to use civil sanctions (and which they will use).[18] We consider the different civil sanctions below.

9.25 The Regulatory Enforcement and Sanctions Act 2008 contains specific provisions for appeals, such that appeals must go to either the First-tier Tribunal[19] or another tribunal created under another enactment.[20] We consider appeals in detail in Chapter 10.

Fixed monetary penalties

9.26 A fixed monetary penalty creates a requirement on an individual to pay the regulator a prescribed amount if the regulator is satisfied beyond reasonable doubt that the relevant offence has been committed. It is available for relevant offences punishable on summary conviction by a fine, whether or not a term of imprisonment is also an option. The fixed monetary penalty cannot exceed the maximum fine available summarily.[21]

9.27 The 2008 Act sets out a detailed procedure for the imposition of a fixed monetary penalty. First, the regulator must issue the individual (or corporate entity) with a notice of intent, setting out, amongst other things, the grounds for the proposal to impose the fixed monetary penalty and the circumstances in which the regulator may not impose the fixed monetary penalty. The notice of intent must also offer the individual the opportunity to discharge the fixed penalty by payment of a prescribed sum less than or equal to the amount of the fixed monetary penalty. If the individual decides not to discharge the liability then they may make written representations. Following that, if the regulator so decides, a final notice can be issued. The individual may then appeal.[22]

Discretionary requirements

9.28 The provisions for discretionary requirements allow a regulator to impose one or more of the following on an individual if they are satisfied beyond reasonable doubt that they have committed a relevant offence:

(1) a requirement to pay a monetary penalty to a regulator of such amount as the regulator may determine;

[17] Regulatory Enforcement and Sanctions Act 2008, s 62.

[18] As above, ss 63 to 64.

[19] As established under the Tribunals, Courts and Enforcement Act 2007, s 3.

[20] Regulatory Enforcement and Sanctions Act 2008, s 54(1).

[21] As above, s 39.

(2) a requirement to take such steps as a regulator may specify, within such period as it may specify, to secure that the offence does not continue or recur; or

(3) a requirement to take such steps as a regulator may specify, within such period as it may specify, to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed.[23]

9.29 The first of these is referred to as a "variable monetary penalty"; a requirement falling into either the second or third categories is referred to as a "non-monetary discretionary requirement".[24]

9.30 As with the scheme for fixed penalty notices, the 2008 Act sets out a detailed procedure for imposing the penalties, starting with a notice of intent before a final notice can be imposed, and includes provisions on appeal. There is provision for including the imposition of a monetary penalty where an individual fails to comply with a non-monetary discretionary requirement (or an undertaking given to the regulator).[25]

Stop notices

9.31 The provisions for stop notices allow a regulator to prohibit an individual from carrying on an activity specified in the notice until the individual has taken certain steps specified in the notice.[26]

9.32 A stop notice can only be issued where:

(1) the activity of an individual is causing, or there is a significant risk that it will cause, serious harm to certain matters, which include the environment, and involve the commission of a relevant offence;[27] or

(2) an individual is likely to carry out an activity that will cause, or will present a significant risk of causing, serious harm to certain matters, which include the environment, and involve the commission of a relevant offence.[28]

9.33 The steps specified in the notice must be steps to remove or reduce the harm of risk of harm that the activity may cause.[29]

[22] Regulatory Enforcement and Sanctions Act 2008, s 40.

[23] As above, ss 42(1)-(3).

[24] As above, s 42(4).

[25] As above, s 43 and s 45.

[26] As above, s 46(2).

[27] As above, ss 46(3), (4) and (6).

[28] Regulatory Enforcement and Sanctions Act 2008, ss 46(3), (5) and (6).

[29] As above, s 46(7).

9.34 The 2008 Act sets out detailed requirements for the issue of stop notices. The notice must contain the grounds for serving the notice, details of the individual's right to appeal and the consequences of non-compliance with the notice.[30] The potential consequences of non compliance are:

(1) on summary conviction, a fine up to £20,000 or imprisonment up to 12 months or both; or

(2) on conviction on indictment, imprisonment up to two years or a fine or both.[31]

9.35 Where the regulator is satisfied that the individual has complied with the notice, then a "completion certificate" must be issued. The individual may also, at any time, apply for a completion certificate, after which application the regulator must make a decision whether to issue a completion certificate within 14 days – against which decision the individual can appeal. The stop notice ceases to have effect on the issue of a completion certificate.[32]

9.36 Given the nature of stop notices, specific provision is made for compensation: there is provision for the regulator to compensate for loss suffered as a result of the service of the notice. There is also the facility for the individual to appeal against both the decision to award compensation and the amount of compensation.[33]

Enforcement undertakings

9.37 The final alternative to be considered here is enforcement undertakings. These work in a slightly different way to the other civil sanctions. The provisions allow the regulator to accept an undertaking from an individual to take such action as is specified in the undertaking where the regulator has reasonable grounds to suspect that the individual has committed a relevant offence.[34]

9.38 The action specified in the undertaking must be to ensure the relevant offence does not continue or recur, and (if possible) to restore the situation to the position it was in before the commission of the relevant offence, for the benefit of those adversely affected and of a prescribed description.[35]

9.39 The effect of an undertaking, unless the individual fails to comply with it, is to protect the individual from conviction of the relevant offence or the imposition of a fixed monetary penalty or discretionary requirement under part 3 of the Regulatory Enforcement of Sanctions Act 2008.[36] A stop notice can still be imposed.

[30] Regulatory Enforcement and Sanctions Act 2008, ss 47(1)(2)(a) and (3).

[31] As above, ss 49(1)(a) and (b).

[32] As above, ss 47(2)(c) to (g).

[33] As above, s 48.

[34] As above, ss 50(1) and (2).

[35] As above, s 50(3).

[36] Natural Environment and Rural Communities Act 2006, s 50(4).

Natural England's current powers

9.40 Two statutory instruments make provision for Natural England to issue civil sanctions.[37] The 2010 Order provides for six types of civil sanction:

(1) fixed monetary penalties;

(2) variable monetary penalties;

(3) compliance notices;

(4) stop notices;

(5) restoration notices; and

(6) enforcement undertakings.

9.41 Variable monetary penalties, compliance notices and restoration notices are examples of the three types of "discretionary requirements" that we explored above.

9.42 Under the Order,[38] variable monetary penalties, compliance notices, stop notices and restoration notices can be issued for the wildlife offences that concern us.[39] All the civil sanctions listed above can be used for the offence of interfering with a badger sett and breaching a licence condition under the Protection of Badger Act 1992 and the Deer Act 1991.[40]

Natural England's approach to civil sanctions

9.43 Natural England classifies incidents as "technical, minor, medium or significant". This is achieved by assessing, predominantly, the environmental impact of the offence. The factors considered include how rare the affected habitat or species is, the scale of the habitat or species affected, the severity of the damage, and the potential for recovery.

9.44 Mitigating and aggravating factors will also be considered when categorising the offence, such as the offender's state of mind and level of culpability, previous relevant offences, good compliance record and/or conduct, and prompt reporting of offence. Each case will be considered on its own facts, on its own merits and in a consistent manner.[41]

9.45 A summary of Natural England's decision-making process is set out below. It offers an indication of the decision they may reach, rather than a definitive guide. Each decision will be made on a case by case basis, assessing individual facts.

[37] The Environmental Civil Sanctions (England) Order 2010, SI 2010 No 1157; The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010, SI 2010 No 1159.

[38] SI 2010 No 1147, regs 3 and 4, and sch 5.

[39] Wildlife and Countryside Act 1981, ss 1 to14.

[40] The offences are contained in the Protection of Badgers Act 1992, ss 3 and 10(8) and in the Deer Act 1991, s 8(5).

[41] Natural England, *Enforcement Guidance* (December 2011), para 5.5.

FIGURE 4 NATURAL ENGLAND'S DECISION-MAKING PROCESS[42]

<table>
<tr><td></td><td>Technical</td><td>Minor</td><td>Medium</td><td>Significant</td></tr>
<tr><td>Restoration</td><td colspan="2" rowspan="3">Advice and Guidance
Warning Letters</td><td colspan="2">Restoration Notice</td></tr>
<tr><td>Prevention</td><td colspan="2">Compliance Notice or Stop Notice</td></tr>
<tr><td>Deterrence</td><td>Variable Monetary Penalty</td><td>Prosecution</td></tr>
<tr><td>Financial benefit removal</td><td colspan="4">Withholding Financial Incentives / Variable Monetary Penalty</td></tr>
</table>

The current availability of civil sanctions for wildlife law

9.46 Natural England and the Countryside Council for Wales are "designated regulators" listed in schedule 5 of the Regulatory Enforcement and Sanctions Act 2008. The regulator for the marine environment is the Marine Management Organisation, which was created by the Marine and Coastal Access Act 2009. Consequently, it is not listed in schedule 5.

9.47 For a Minister to be able to create a civil sanction regime for a regulator, an "enforcement function" in relation to a relevant offence is needed. As we stated above, an enforcement function is defined as

> a function (whether or not statutory) of taking any action with a view to or in connection with the imposition of any sanction, criminal or otherwise, in a case where the offence is committed.[43]

9.48 The statutory functions of Natural England and the Countryside Council for Wales include the power to advise or assist in connection with the enforcement of the provisions of part 1 of the Wildlife and Countryside Act 1981.[44] They conduct joint enquiries pursuant to that power with the police, and assist in the prosecution of offences under part 1 of the Wildlife and Countryside Act 1981. Therefore, we suggest that both Natural England and the Countryside Council for Wales could potentially have an "enforcement function" in relation to all of part 1 of the Wildlife and Countryside Act 1981.

9.49 Consequently, either Ministers of the Crown or Welsh Ministers can provide for Natural England and the Countryside Council for Wales to have the power to issue the civil sanctions listed in the preceding section in relation to all of part 1 of the Wildlife and Countryside Act 1981.

9.50 The situation in connection with the species-specific legislative regimes, such as the Deer Act 1991, is more complicated. Under the Deer Act 1991, Natural

[42] Natural England, *Enforcement Guidance* (December 2011), p 13.

[43] Regulatory Enforcement and Sanctions Act 2008, s 71(1).

[44] Wildlife and Countryside Act 1981, s 24(4).

England issues all licences and the Countryside Council for Wales issue most.[45] The Countryside Council for Wales can issue licences for moving deer or for the scientific and educational taking of deer.[46] Neither Natural England nor the Countryside Council for Wales has a specified role in enforcement in the same way as they do under the Wildlife and Countryside Act 1981.

9.51 Similarly, under the Protection of Badgers Act 1992, both the Countryside Council for Wales and Natural England can issue licences.[47] Again, they have no specific enforcement functions listed in the 1992 Act. Under the Conservation of Seal Act 1970, it is the Marine Management Organisation that issues licences, the Secretary of State's powers having been "transferred" to them by the Marine and Coastal Access Act 2009.[48] The Marine Management Organisation, (as an organisation in itself) does not have enforcement powers under the 2009 Act in relation to seals. However, Marine Enforcement Officers (appointed by the Marine Management Organisation do have "common enforcement powers" to enforce certain nature conservation provisions, including provisions in the Conservation of Seals Act 1970 and part 1 of the Wildlife and Countryside Act 1981.[49]

9.52 In considering whether Natural England and the Countryside Council for Wales have "enforcement functions"[50] for the species-specific wildlife, it is worth considering their general purposes, and how they seek to achieve these.

9.53 The Natural Environment and Rural Communities Act 2006 states that

> Natural England's general purpose is to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.[51]

9.54 The 2006 Act then gives Natural England a general power to institute criminal proceedings.[52]

9.55 In pursuit of its general purpose, Natural England employs wildlife inspectors. Wildlife inspectors, as we explain in Chapter 3,[53] are appointed under the Wildlife and Countryside Act 1981, and have specific powers relating to the investigation

[45] Deer Act 1991, ss 8(1) and 8(3A) to (3H). Under s 8(2), the Countryside Council for Wales may issue licences for the purpose of removing deer from one area to another or of taking deer alive for scientific or educational purposes.

[46] As above, s 8(2).

[47] Protection of Badgers Act 1992, s 10(1).

[48] Marine and Coastal Access Act 2009, s 9.

[49] As above, s 237. Marine Enforcement Officers are appointed under Marine and Coastal Access Act 2009, s 235. Common enforcement powers are defined in Marine and Coastal Access Act 2009, ss 245 to 262 and include powers of entry, search and seizure.

[50] Within the terms of part 3 of the Regulatory Enforcement and Sanctions Act 2008, s 71(1).

[51] Natural Environment and Rural Communities Act 2006, s 2(1).

[52] As above, s 12(1). There is no similar provision for the Countryside Council for Wales, created under the Environmental Protection Act 1990, s 128.

[53] Chapter 3, paras 3.61 to 3.66.

of wildlife offences contained in part 1 of the 1981 Act.[54] These powers are extended in relation to wildlife offences contained in the Conservation of Seals Act 1970, the Deer Act 1991 and the Protection of Badgers Act 1992.[55]

9.56 On that basis, we suggest that Natural England could be given the power to issue civil sanctions for offences committed under the Conservation of Seals Act 1970, the Deer Act 1991 and the Protection of Badgers Act 1992. This would be an extension of investigative powers which wildlife inspectors already have under these statutes.

9.57 The Countryside Council for Wales was established by the Environmental Protection Act 1990. This gave it specific advisory functions,[56] which should be discharged

> for the conservation and enhancement of natural beauty in Wales and of the natural beauty and amenity of the countryside in Wales", which includes the "the conservation of its flora, fauna and geological and physiographical features.[57]

9.58 Part 2 of the Natural Environment and Countryside Act 2006 also gave functions to the Countryside Council for Wales. These, too, are advisory for nature conservation, such as assisting in the listing of species in the schedules to the Wildlife and Countryside Act 1981, and to "foster the understanding of nature conservation".[58]

9.59 The Countryside Council for Wales's role is far more purely advisory than Natural England's. Therefore, we do not think that it currently has an enforcement function in relation to the species-specific statutes. This may change with the creation of a single environmental body in Wales and the development of the National Environmental Framework.[59]

9.60 Schedule 6 includes the sections relevant to this project of all the wildlife Acts considered, such as the Wildlife and Countryside Act 1981 and the Deer Act 1991. Schedule 6 does not, and cannot, contain the Conservation of Habitats and Species Regulations 2010 – it is not an "enactment" and the Regulations were made after the passing of the Regulatory Enforcement and Sanctions Act 2008. There is, consequently, no possibility of having civil sanctions for the offences contained in the Conservation of Habitats and Species Regulations 2010, under the current form of the Regulatory Enforcement and Sanctions Act 2008.

9.61 We have set out above what powers the regulator could be given. However, there still needs to be specific provision made by the Minister to give the regulator specific powers to issue designated civil sanctions for particular offences. This

[54] Wildlife and Countryside Act 1981, ss 18a to 18F.

[55] Natural Environment and Rural Communities Act 2006, ss 7, 9(b), 9(c), 10(a), 10(b), 11(a) and 11(b).

[56] Environmental Protection Act 1990, sch 8.

[57] As above, s 128, ss 130(1), (2) and (3).

[58] Natural Environment and Rural Conservation Act 2006, s 33(1).

[59] See Chapter 1, paras 1.33 to 1.37.

may be limited to one or two of the civil sanctions available. For example, a regulator may only have the power to issue stop notices.

Analysis of existing provisions on sanctions

9.62 Firstly, the current regime in unduly complicated. The regime is meant to be, under the Regulatory Enforcement and Sanctions Act 2008, "transparent, accountable, proportionate and consistent".

9.63 The current regime is neither "transparent" nor "consistent". Under the two relevant orders, fixed monetary notices and environmental undertakings are not available for the species provisions in the Wildlife and Countryside Act. Civil sanctions are not available at all for species offences under the Conservation of Habitats and Species Regulations 2010,[60] including breach of a licence condition. The full range of civil sanctions is not available for offences under the Protection of Badgers Act 1992 or the Deer Act 1991.

9.64 It is hard to see why these choices have been made. Some species offences have civil sanctions available, while others do not. Sanctions under the current wildlife regime as a whole are not proportionate. There is considerable variation in the civil sanctions that are available for many species. What is especially difficult to justify in the abstract is the complete lack of civil sanctions for those species protected under the Conservation of Habitats and Species Regulations 2010.

Reform proposals using sanctions available under Regulatory Enforcement and Sanctions Act 2008

9.65 The system contained in the Regulatory Enforcement and Sanctions Act 2008 provides a viable model for the "transparent, accountable, proportionate and consistent" creation of a regime of regulatory sanctions. Part 3 was used in the 2010 Order for environmental civil sanctions. It was also the model adopted with the creation of the Marine Management Organisation for the civil sanctions it is able to issue in relation to marine licences.[61]

9.66 However, it is not possible for our new regime to use the civil sanctions in the Regulatory Enforcement and Sanctions Act 2008 directly. That regime, as we set out above, was designed (with limited exceptions) for offences in place at the time that the 2008 Act was passed. Subsequent Acts, such as the Marine and Coastal Access Act 2009, have used part 3 of the Act as a model to recreate its provisions within new statutes.

9.67 We think that using part 3 of the 2008 Act as a model is also the best policy here for five reasons. First, it fulfils our aim of having a single statute for wildlife law. Second, it reflects the regulatory aims we outlined in Chapter 4 of applying sanctions that are well-targeted and proportionate. Third, the model offers the flexibility and transparency recommended by the Macrory and Hampton reports. Fourth, the model encourages smart and responsive regulation. A regulatory

[60] The exception here is the issue of a warning letter, which does not need a special power.

[61] Marine and Coastal Access Act 2009, part 4. Marine licences are required for activity such as depositing any substance or object in the sea or on the sea bed. See, for example, Marine and Coastal Access Act 2009, s 66(1).

pyramid approach, as we noted, earlier affords proportionate use of sanctions of varying degrees of severity. These sanctions can be tailored effectively dependent on the offence, its regularity and the effectiveness of previous enforcement. Fifth, the model has already been used by the Marine Management Organisation in its granting of marine licences.

9.68 We suggest that the full range of civil sanctions[62] should be available for the wildlife offences contained in the reforms set out in Chapters 5 to 9 of this Consultation Paper. This allows our regime to be flexible, which, as we stated in Chapter 4, is one of our primary regulatory aims.

9.69 If we adopt the model used in part 3, then it would be necessary for the relevant regulator,[63] to issue guidance on the use of their civil sanctions. Finally, it is also necessary to have an appeals process, which we consider in Chapter 10.

Provisional Proposal 9-1: We provisionally propose that part 3 of the Regulatory Enforcement and Sanctions Act 2008 should be used as the model for a new regime of civil sanctions for wildlife law.

Provisional Proposal 9-2: We provisionally propose that the full range of civil sanctions (so far as is practicable) should be available for the wildlife offences contained in the reforms set out in Chapters 5 to 8 of this Consultation Paper.

Provisional Proposal 9-3: We provisionally propose that the relevant regulator, currently Natural England and the relevant body in Wales (either the Countryside Council for Wales or the proposed new single Welsh Environmental Agency), issues guidance as to how they will use their civil sanctions.

CRIMINAL SANCTIONS

9.70 Here we outline the regime for criminal sanctions. The use of criminal sanctions forms the predominant enforcement approach in current wildlife law. Even if civil sanctions, as explored above, were expanded, they still need to be attached to an underlying offence for which criminal sanctions can be used. We consider, first, the extent of wildlife crime and the bodies that enforce the sanctions. Then we set out the features of criminal sanctions and outline the current sanctions. We then outline another approach to compliance through the criminal law that has developed in Scotland. Next, we highlight some of the criticism of the current regime for criminal sanctions, before making certain provisional proposals for reform.

[62] Restoration orders are not a possible option in relation to all eventualities.

[63] Currently, Natural England and either the Countryside Council for Wales or the proposed new single Environmental Agency.

The extent of wildlife crime

9.71 It had been noted that the police service were not well informed about the scale and impact of wildlife crime.[64] In 2004, the Joint Nature Conservation Committee assisted the police in identifying which species' conservation status was being affected by criminal activity. This led to the National Wildlife Crime Unit annual review of wildlife crime priorities.[65] This takes into account conservation concerns and trends in incidents of wildlife crime reported to enforcement agencies. Since 2007, the National Standards of Incident Recording has allowed for wildlife crime statistics to be collected.

9.72 There is now far greater understanding amongst enforcement authorities as to the impact of wildlife crime than in previous years. For example, the Government has accepted that criminal activity impacts on the conservation status of bats and hen harriers and there is evidence that such behaviour also impacts on the status of some other birds of prey. Poaching has substantial economic and commercial impacts on communities.[66]

9.73 The identification of wildlife crime priorities has been very useful in allowing the police service to direct a limited capacity to target specific criminal activities. Examples of such activity include multi-force operations aimed at disrupting poaching activities and prosecuting those involved in such activities.

9.74 In 2009, the National Wildlife Crime Unit seized over £400,000 of assets from criminal activity and secured 115 convictions. This included offences relating to birds of prey, and going equipped for the theft of birds eggs.[67]

Partnership for Action Against Wildlife Crime UK

9.75 The Partnership for Action Against Wildlife Crime is a multi-agency body comprising representatives of the organisations involved in wildlife law enforcement in the UK. It seeks to bring together organisations involved in wildlife law enforcement in the UK. Its mission statement is "working in partnership to reduce wildlife crime through effective and targeted enforcement, better regulation and improved awareness".[68]

9.76 Its overarching objectives are to facilitate effective enforcement to ensure that wildlife crime is tackled professionally, to influence the improvement of wildlife enforcement legislation, and to raise awareness of wildlife legislation and the implications of wildlife crime.

[64] Wildlife Crime Twelfth Report of Session 2003–04, Report of the House of Commons Environmental Audit Committee, Environmental Crime (7 October 2004) HC 605.

[65] See National Wildlife Crime Unit, *Wildlife Crime Priorities 2009 – 2011*, available at http://www.defra.gov.uk/paw/files/priorities-oct2010.pdf (last visited 27 July 2012).

[66] House of Commons Environmental Audit Committee, *Wildlife Crime – Written evidence submitted by the Association of Chief Police Officers (ACPO)* (January 2012).

[67] National Wildlife Crime Unit, *Annual Report 2010*, pp 1 to 3.

[68] http://www.defra.gov.uk/paw/about/ (last visited 27 July 2012).

National Wildlife Crime Unit

9.77 The UK National Wildlife Crime Unit was established in 2006. It is

> a multi-agency, police-led unit established to prevent wildlife crime, gather intelligence on those involved in wildlife crime and support those agencies involved in its enforcement.[69]

9.78 Under the management of Police Information, the Unit shares information with agencies including the Countryside Council for Wales, the International Fund for Animal Welfare and the RSPB.[70]

9.79 The Unit targets specific criminal activities. For example, Operation Charm concerned the illegal trade in wildlife crime within the Metropolitan Police area, and Operation Meles provided a national approach to the prevention and investigation of offences relating to badger persecution.[71]

9.80 All of the UK's wildlife crime enforcement organisations contribute intelligence and statistics to the National Wildlife Crime Unit. A memorandum of understanding between Natural England, the Countryside Council for Wales, the Crown Prosecution Service and Association of Chief Police Officers has been agreed, which sets out areas of responsibility.[72]

Features of criminal sanctions

9.81 The criminal law is distinctive in its scope and operation. It has a condemnatory function that civil sanctions do not necessarily have, and can lead to the punishment of the offender.[73]

9.82 There is a difference between the investigation of an offence by a regulator and the equivalent process through the criminal justice system. The latter comprises investigation by the police, a trial and sentencing by either the magistrates' court or the Crown Court. Importantly, a guilty verdict ends with a criminal record for the offender.

9.83 The difference, in part, is a moral one. The transgression of a rule or rules in the criminal case is one which society wishes to admonish or punish. The action may also have a preventative aim to stop an ongoing or future regulatory infringement, and to deter others. Thus, the action has a dual purpose and differs from civil sanctions, where the aim is solely regulatory.

9.84 Criminal sanctions have safeguards, which protect the process by which those accused are investigated and tried. Rights to a fair trial by an impartial tribunal,

[69] House of Commons Environmental Audit Committee, *Wildlife Crime – Written evidence submitted by the Association of Chief Police Officers (ACPO)* (January 2012).

[70] National Wildlife Crime Unit, *Annual Report 2010*, p 10.

[71] House of Commons Environmental Audit Committee, *Wildlife Crime – Written evidence submitted by the Association of Chief Police Officers (ACPO)* (January 2012).

[72] As above.

for example are guaranteed in international treaties such as the European Convention on Human Rights and Fundamental Freedoms 1950.

Current regime

9.85 The level of criminal sanctions for offences in the Wildlife and Countryside Act 1981 was substantially reviewed by the Countryside and Rights of Way Act 2000, such that the possibility of imprisonment was made available for such offences.

9.86 Offences under the Wildlife and Countryside Act are triable summarily in the magistrates' court with maximum penalties of either six months' imprisonment or a fine up to level 5 on the standard scale (currently £5,000), or both.[74] The exception is in relation to invasive species offences. Section 14 offences can also be tried summarily to a maximum term of imprisonment of six months or the statutory maximum fine, or both,[75] or tried on indictment in the Crown Court for a sentence up to two years or a fine, or both.[76]

9.87 The species offences under the Conservation of Habitats and Species Regulations 2010 are also to be tried summarily in the magistrates' court with maximum penalties of six months or a level 5 (£5,000) fine, or both, with one relevant exception. Again, the relevant exception concerns the introduction of invasive non-native species. The introduction of such from ships carries either the statutory maximum when tried summarily (again £5,000), or a fine when on indictment.[77]

9.88 Protection of Badger Act 1992 offences, except keeping a dead badger,[78] are triable summarily (only in the magistrates' court), with the maximum penalties variously set so as to include 6 months imprisonment, a level 5 fine (£5,000), or both; or only a level 5 fine.[79]

9.89 Three months' imprisonment or a level 4 fine (£2,500), or both, is the maximum for the offences, which are triable summarily in the magistrates' court, under the Deer Act 1991 (which includes the poaching offence in section 1).[80] The

[73] See for example N Lacey, "The Role of Criminal Law" in C Parker and others (eds), *Regulating Law* (1st ed 2004); R A Duff, *Answering For Crime* (1st ed 2007); D Husak *Overcriminalization: The Limits of the Criminal Law* (1st ed 2008); R A Duff et al. (eds), *The Boundaries of the Criminal Law* (1st ed 2010).

[74] Wildlife and Countryside Act 1981, s 21(1). Level 5 is set in the Criminal Justice Act 1982, s 37(2).

[75] As above, s 21(4)(a). The statutory maximum is £5,000 or such an amount is substituted by order: Interpretation Act 1978, sch 1 and Magistrates' Courts Act 1980, s 32(9).

[76] As above, s 21(4)(b).

[77] SI 2010 No 490, reg 52(7).

[78] Where offences under the Protection of Badgers Act 1992, s 1(5), can result in a maximum level 3 (£1,000) fine: Protection of Badgers Act 1992, s 12(3).

[79] Protection of Badgers Act 1992, s 12(1).

[80] Deer Act 1991, s 9(1).

Conservation of Seals Act 1970,[81] for relevant offences, can only result in a level 4 fine (£2,500) on summary conviction in the magistrates' court.

9.90 Poaching offences under the Game Act 1831 have the lowest penalties, level 1 on the standard scale (£200).[82]

9.91 The Wildlife and Countryside Act 1981 also provides that where an offence was committed in respect of more than one bird, egg, animal or thing, then the fine is to be determined as if separate offences had been committed against each bird, egg, animal or thing.[83] A similar provision exists in the Protection of Badgers Act 1992 and the Deer Act 1991.[84] Similar provisions do not exist in the Conservation of Habitats and Species Regulations 2010[85] or the Conservation of Seals Act 1970.

9.92 Consequently, under these provisions the final fine imposed on an individual is the amount for each offence multiplied by the number of individual members of the species against which the offence was committed. This could be a significant sum.

9.93 However, under current magistrates' court sentencing guidelines issued by the Sentencing Guidelines Council, the principle of totality applies, such that:

> It is usually impossible to arrive at a just and proportionate sentence for multiple offending by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.[86]

9.94 The guidelines go on to state that a fine should be of an amount that is capable of being paid within 12 months.[87]

9.95 By way of comparison, it is worth considering the fines for other environmental offences. The maximum possible fine on summary conviction for depositing waste without a licence (which includes fly tipping) is £50,000.[88] For polluting controlled water, the maximum amount on summary conviction is £20,000.[89]

[81] Conservation of Seals Act 1970, s 5(2).

[82] Game Act 1981, s 3.

[83] Wildlife and Countryside Act 1981, s 21(5).

[84] Protection of Badgers Act 1992, s 12(2); Deer Act 1991, s 9(2).

[85] SI 2010 No 490.

[86] Sentencing Guidelines Council, *Magistrates' Court Sentencing Guidelines* (11 June 2012) p 18.

[87] As above, p 148.

[88] Environmental Protection Act 1990, s 33.

[89] Water Resources Act 1991, s 85.

9.96 An additional power that the courts have used is an anti-social behaviour order.[90]

"Vicarious liability" or the liability of a principal in Scotland

9.97 Here we consider a particular development that has taken place recently in Scotland, as it is referred to in the criticisms of, or opportunities for, the law in England and Wales, that we discuss in the next section.

9.98 It is frequently referred to as "vicarious liability" by stakeholders. It is better described as "liability in relation to certain offences by others". We consider it in this chapter as a possible addition to the enforcement regime, in order to ensure overall compliance with the underlying wildlife offences, such as the prohibition on the taking and killing of wild birds in section 1(1) of the Wildlife and Countryside Act 1981.

9.99 Section 24 of the Wildlife and Natural Environment (Scotland) Act 2011 adds a new provision to the Wildlife and Countryside Act 1981. The provision divides into two. The first concerns employees or agents; and the second concerns service providers (section 18B).[91] So, where an individual (A) commits certain offences while acting as employee or agent of another (B), B is liable to the same punishment as if it committed the crime. B must be someone who either has a legal right to kill or take a wild bird on or over that land, or someone who manages or controls the exercise of such a right. Proceedings may be brought against B whether or not they are brought against the perpetrator.

9.100 B is liable also for the unlawful acts of the service provider under section 18B of the Act, where the latter is "providing relevant services"[92] at the time the offence was committed. This applies whether the arrangement to provide services is between A and B, or by arrangement with or as employee or agent of any other person who is providing or securing the provision of relevant services for B.

9.101 The offences for which B can be liable are in relation to:

(1) killing, injuring or taking wild birds;[93]

(2) taking, damaging or destroying the nests of wild birds;[94]

(3) disturbing the young of a wild bird in a nest;[95]

(4) harassing a wild bird;[96]

[90] A ten year anti-social behaviour order was imposed alongside a six month prison sentence for egg stealing in March 2012, http://www.cps.gov.uk/news/successes_of_the_month/successes_of_the_month_-_march_2012/#p01 (last visited 27 July 2012). Anti-social behaviour orders are likely to be replaced with Crime Prevention Orders and Crime Prevention Injunctions, currently being piloted.

[91] Wildlife and Countryside Act 1981, s 18A to 18B (as amended).

[92] As above, s 18B(5) (as amended).

[93] As above, s 1(1).

[94] As above, s 1(1)(b)

[95] As above, s 1 (5).

(5) killing or taking a wild bird using prohibited methods;[97]

(6) possessing pesticides containing proscribed ingredients;[98] and

(7) attempting any of the above offences.[99]

9.102 B has a defence if they can show that first, they did not know that the offence was being committed by their employee, agent or service provider, and second, that they took all reasonable steps and "exercised all due diligence to prevent the offence being committed".[100]

Discussion of current regime

9.103 The current regime has been criticised on two grounds. First, that it is too reliant on criminalisation, and second, that the level of criminal sanctions are insufficient.

9.104 The first, with which we agree, we discussed earlier in this Consultation Paper.[101] We address this with the use of civil sanctions outlined above, as well as the wider range of regulatory tools considered in Chapters 5 to 8. Here we turn to discussion of the sanctions themselves.

9.105 Wildlife crime, including the sentencing structure, is currently being considered by the House of Commons Environmental Audit Committee, which is expected to report on the matter in early Autumn 2012. It was suggested by some that the current sanctions were not sufficiently dissuasive.[102]

9.106 The Association of Chief Police Officers, in written evidence, noted that wildlife crime was unusual in that it cannot generally be heard in the Crown Court. The Association went on to state that there was "room for discussion as to the role of the police in enforcing wildlife crime legislation" and that "it is possible that many less serious conservation offences are best dealt with by those agencies that have in recent years been provided with powers relating to civil sanctions".[103]

9.107 The Royal Society for the Protection of Birds was worried about whether custodial sentences were being given in the correct situations: that they may be given for species not at a high conservation risk, rather than for those that are.[104]

[96] Wildlife and Countryside Act 1981, s 1(5B).

[97] As above, s 5 (1) (a) to (b).

[98] As above, s 15A.

[99] As above, s 18.

[100] As above, s 18A(3) and 18B(3).

[101] Chapter 4, paras 4.15. to 4.18

[102] These views were put by the Bat Conservation Trust: House of Commons Environmental Audit Committee, *Wildlife Crime* (Session 2011-12) written evidence, p 12, para 3.9 (Bat Conservation Trust).

[103] House of Commons Environmental Audit Committee, *Wildlife Crime* (Session 2011-12) written evidence, p 56 (Association of Chief Police Officers).

[104] As above, para 54 (Royal Society for the Protection of Birds).

9.108 Some bodies giving evidence to the House of Commons Environmental Audit Committee thought that the introduction of the "vicarious liability" crime would have significant benefits; some kept an open mind, though urged caution.[105] There are those amongst our stakeholder advisory group who are opposed to the idea, though.

9.109 As with much of wildlife law, the major problem is a lack of clarity and confusion. There does not seem to be particular criticism of the level of offences. Much more of the evidence in the House of Commons Environmental Audit Committee's pointed out confusion, or problems with enforcement.

9.110 That said, we think that the importance of the issue and the fact that the wildlife crimes are out of step with other potentially similarly damaging environmental crimes, such as pollution or fly tipping, and even with themselves – such as those concerning invasive non-natives – means that a consultation question should be asked.

Question 9-4: Do consultees think that that the current sanctions for wildlife crime are sufficient?

9.111 However, there are inconsistencies which we suggest it would be sensible to address, such as inconsistencies in the maximum sentences available for similar offences. The different sentences possible for seals and deer (level 4 fine), compared with other wildlife (level 5), look to be inconsistent. Even more inconsistent, especially as we are considering consolidating and simplifying the poaching offence, is the difference between the sanction in the Deer Act 1991 (level 4 fine) and that in the Game Act 1831 (level 1 fine). We therefore make the following provisional proposals.

Provisional Proposal 9-5: We provisionally propose that offences for wildlife, excluding those for invasive non-native species and poaching, should have their sanctions harmonised at 6 months or a level 5 fine (or both) on summary conviction.

Provisional Proposal 9-6: We provisionally propose that the poaching offences for wildlife should have their sanctions harmonised at four months or a level 4 fine (or both) on summary conviction.

9.112 The next issue concerns the multiple instances provisions, such that the fine can be imposed on the basis of several examples of the same offence, depending on the number of members of a particular species affected. This, too, seems anomalous in its application. We can see benefit in it, in that it provides a clear way of showing that multiple infractions warrant more severe penalties. However, it also carries potential dangers. As we highlighted above, following the principle of "totality" in sentencing, the appropriate sentence does not necessarily mean multiplying the award for a single crime by the number of instances of that crime. The guidance is clear that "it is usually impossible to arrive at a just and

[105] House of Commons Environmental Audit Committee, *Wildlife Crime* (Session 2011-12) written evidence, para 3.9 (National Gamekeepers Organisation).

proportionate sentence for multiple offending by adding together notional single sentences".[106]

9.113 Moreover, it contains a potential absurdity, since it could easily value the taking and killing of a number of a particularly numerous species over the potential harm caused by killing the last breeding pair of a seriously endangered species.

Question 9-7: Do consultees think that the provisions that mean that the fine for a single offence should be multiplied by the number of instances of that offence (such as killing a number of individual birds) should be kept?

Question 9-8: Do consultees think that the provisions for such offences should be extended to cover all species?

9.114 There is an issue that has been raised by stakeholders in our advisory group and by others outside it, including before the House of Common Environmental Audit Committee. That concerns the "vicarious liability" offence, properly the offence of being liable for certain offences, contained in section 24 of the Wildlife and Natural Environment (Scotland) Act 2011.

9.115 We can see advantages to it: it fits with the sort of economic regulatory approach that we are considering. It seeks to ensure the responsibility of those who directed the regulatory transgressions or could have prevented them. It fits with the sort of regulatory regime in place for areas such as health and safety.

9.116 We highlight that it is not an absolute measure, it has in-built defences, so those having the equivalent of a safe system of work would not become liable for the unsanctioned activity of one in their employ or under their control. However, it is also a considerable step from the current regulation of wildlife and could impose significant burdens on business, as well as considerably increase anxiety. It will, therefore, be contentious. Unfortunately, it is too soon to see what effect the change in the law in Scotland has had, or will have.

Question 9-9: Do consultees think that there should be a wildlife offence extending liability to a principal, such that an employer or someone exercising control over an individual could be liable to the same extent as the individual committing the underlying wildlife offence?

[106] Sentencing Guidelines Council, *Magistrates' Court Sentencing Guidelines* (11 June 2012) p 18.

CHAPTER 10
APPEALS AND CHALLENGES AGAINST REGULATORY DECISIONS

INTRODUCTION

10.1 In this Chapter we consider whether there should be new provision for appeals and challenges against decisions made by regulatory bodies.

10.2 By an "appeal" we mean the reconsideration of the original decision by a higher decision maker. This includes full consideration of the merits of the original decision. By "challenge" we mean an examination of the legal validity of the original decision, which has always been the function of judicial review to the High Court.

10.3 In the context of wildlife law, there are three potential types of appeal or challenge. First, there could be an appeal against or challenge to a decision granting (or not granting) a licence, or the conditions contained in a licence. Second, it could be possible to appeal or challenge an order made by a regulator which requires an individual or company to do something. For example, a species control order in relation to invasive non-native species, as we provisionally proposed in Chapter 8. Third, there is a possible appeal against, or challenge to, a civil sanction imposed on an individual or company for breaching the requirements of our provisionally proposed regulatory regime in Chapter 9. Such breaches could be the failure to operate within the terms of a wildlife licence or code of practice, or the sale of a prohibited good. All three types of appeal or challenge will be considered in this Chapter.

10.4 This remainder of this Chapter is divided into five sections. The first outlines the current law on appeals in wildlife and similar appeal procedures in other areas. The second section considers external influences on our domestic law, primarily the Aarhus Convention (which we outlined in Chapter 2).[1] The third section outlines our provisional proposals for an appeals process for prescriptive orders and civil sanctions. In the fourth section, we put forward three options in relation to appeals concerning wildlife licences:

(1) that the existing system is retained without alteration;

(2) that there is an appeal process but for applicants only; or

(3) that there is a more general appeals process, which includes applicants and third parties (where the latter have a sufficient interest).

10.5 Finally, we outline the potential elements of the process, if either of options 2 or 3 is taken. This includes consideration of the appropriate forum.

10.6 We are not discussing here appeals against criminal convictions. There is an existing system of appeals from magistrates' court or Crown Court convictions, and we do not suggest altering this for wildlife law.

[1] Chapter 2, paras 2.27 to 2.30.

THE CURRENT SYSTEM

Challenges to licensing decisions

10.7 Before developing our provisional proposals, it is important to first consider how challenges to the licensing decisions of Natural England and the Marine Management Organisation currently operate.

Objections to Natural England licensing decisions

10.8 There is currently no formal appeal against species licensing decisions by Natural England, whether they concern individual, class or general licences.

10.9 Most disagreements about licensing applications are resolved through negotiations during the application assessment process. For example, a high percentage of initial licence applications concerning European Protected Species do not pass the licensing tests (that there be no other satisfactory solution, for example) and are therefore amended during the licensing process.[2]

10.10 Where an applicant or a third party (such as a neighbour or an interest group) wishes to complain about the way a licence application has been handled or a decision reached, they are able to submit their concerns in writing (by letter or e-mail) or via an online feedback form on the Natural England website.[3]

10.11 Species licensing decisions can also be subject to legal challenge by way of judicial review.[4] These are relatively rare – typically, there is only one judicial review challenge per year, although this can vary.[5]

Objections to Marine Management Organisation licensing decisions

10.12 The Marine Management Organisation issues two types of licence: wildlife licences and marine licences. A marine licence is required for many activities involving a deposit or removal of a substance or object below the mean high water springs mark or in any tidal river to the extent of the tidal influence, For example, the construction of a port or wind farm, the dredging of a channel, or the use of munitions.[6] Wildlife licences are similar to those granted by Natural England in substance,[7] although those issued by the Marine Management Organisation relate only to activities carried out in the "restricted English inshore region".[8] Objections to Marine Management Organisation licensing decisions are

2 Information supplied by Natural England.

3 Natural England aims to provide a full response to complaints within 20 working days. See http://www.naturalengland.org.uk/Images/wml-g12_tcm6-4116.pdf (last visited 27 July 2012).

4 Judicial review is considered in more detail below at paras 10.32-10.33.

5 Information supplied by Natural England.

6 See Marine and Coastal Access Act 2009, part 4, s 66.

7 See the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007, reg 49.

8 Marine and Coastal Access Act 2009, ss 10(2) and (12); Wildlife and Countryside Act 1981, s 16(8A). The "restricted English inshore region" means so much of the English inshore region as lies to seaward of mean low water mark; the "English inshore region" means the area of sea within the seaward limits of the territorial sea adjacent to England.

treated differently depending on the type of licence being challenged, to which we now turn.

10.13 There is no formal mechanism for the appeal of decisions taken in respect of Marine Management Organisation wildlife licences. However, once a wildlife licence has been issued or refused, objections can be directed through the Marine Management Organisation's internal complaints procedure.[9] Equally, wildlife licensing decisions can be challenged by way of judicial review.

10.14 In contrast, an applicant for a marine licence is able to appeal against a decision made by the Marine Management Organisation on their application by submitting a notice of appeal to the Secretary of State. This is determined by the Planning Inspectorate[10] as appointed by the Secretary of State, within 6 months – beginning with the date of the decision to which the appeal relates.[11] Appeals to the Planning Inspectorate can be based on the merits or on a point of law, or both.

Planning appeals

10.15 As marine licences are appealable to the Planning Inspectorate, it is worth considering the planning appeals process for two reasons:

(1) the existing appeals process for planning could be utilised and adapted to accommodate new appeals; or

(2) a new appeals mechanism could be modelled on the planning appeals process.

Appeals to the Planning Inspectorate

10.16 Appeals are to the Secretary of State. In fact, there is an established system by which appeals are determined by the Planning Inspectorate. Appeals can take two forms. The first is appeals against planning decisions,[12] such as decisions to refuse planning permission or to attach conditions to planning permission. The second is appeals against enforcement decisions.[13] It is the former which is relevant to species licensing.[14] Such an appeal can be on the merits or on a point of law, or both.

[9] The details of how the MMO's internal complaints procedure operates can be found here: http://marinemanagement.org.uk/about/customer_complaints.htm (last visited 27 July 2012).

[10] As appointed pursuant to the Marine Licensing (Licence Application Appeals) Regulations 2011, SI 2011 No 934, reg 5(1). See also Marine and Coastal Access Act 2009, s 73.

[11] Marine Licensing (Licence Application Appeals) Regulations 2011, SI 2011 No 934, reg 6(1).

[12] Town and Country Planning Act 1990, ss 78(1) and (2). The grounds for appeals are set out in Town and Country Planning Act 1990, s 174(2).

[13] As above, s 174(1). The grounds for appeals are set out as above.

[14] As we explain below, there is already an existing procedure for enforcement notices that we consider appropriate.

10.17 Appeals are usually heard by an inspector acting for the Secretary of State.[15] In a limited number of cases, the inspector will write a report and the decision will be taken by the Secretary of State.[16] Typically, this occurs in relation to very large or contentious proposals.

10.18 Only the person who made the original application can appeal the decision to the Planning Inspectorate.[17] Appeals are made by way of an online or paper application. There are three possible procedures for the determination of an appeal: written representations, a hearing, or an inquiry. The appropriate route depends upon the importance and complexity of the matter.

Further challenges

10.19 The decision of the Planning Inspectorate cannot normally be challenged except by way of statutory appeal to the High Court.[18] Unlike appeals to the Planning Inspectorate in the first instance, where only the person who made the original application can raise a challenge, a statutory appeal to the High Court can be brought by a "person aggrieved".[19] The High Court does not, however, adjudicate on the merits of the claim. The court may allow the challenge only where an appellant is able to demonstrate an error of law on the part of the decision-maker.[20]

10.20 The powers of the High Court are limited to quashing the decision and remitting it to the Planning Inspectorate. The decision is then reconsidered, normally by a different inspector, by way of a fresh determination made in accordance with the opinion or direction of the court.[21]

10.21 In cases where a statutory appeal to the High Court is not available for challenging the validity of an order or decision, an application may be made for judicial review.[22]

[15] As an "appointed person" pursuant to Town and Country Planning Act 1990, sch 6, para 1(1); Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997, SI 1997/420.

[16] Pursuant to Town and Country Planning Act 1990, sch 6, para 3(1).

[17] Town and Country Planning Act 1990, ss 78(1) and (2). Or, if a company is wound up, the administrator, liquidator or receiver may also appeal to the Planning Inspectorate.

[18] Planning appeal decisions are challenged by way of the Town and Country Planning Act, s 288; enforcement appeal decisions are challenged by way of the Town and Country Planning Act, s 289.

[19] What constitutes a "person aggrieved" is considered below at para 10.70

[20] See *South Cambridgeshire District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 1010 at [15], [2009] PTSR 37 at [15], [2008] All ER (D) 24 (Sep) per Scott Baker LJ and the authorities there cited; and see Sullivan J in *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin), [2001] All ER (D) 19 (Feb) and in *Blackburn v First Secretary of State* [2003] All ER (D) 193 (Mar).

[21] Town and Country Planning Act 1990, ss 288(5) and 289(5).

[22] Halsbury's Laws of England (2010) vol 81, para 846. As to applications for judicial review generally see the Senior Courts Act 1981, s 31.

Nationally significant infrastructure projects

10.22 Nationally significant infrastructure projects are usually large scale developments such as new harbours, power generating stations (including wind farms), and electricity transmission lines, which require a type of consent known as "development consent" under procedures governed by the Planning Act 2008. Any developer wishing to construct a nationally significant infrastructure project must apply to the Planning Inspectorate to obtain development consent.

10.23 The Planning Inspectorate prepares a report on the application to the relevant Secretary of State, including a recommendation. The, Secretary of State then makes the decision on whether to grant or refuse development consent.

10.24 Once the Secretary of State's decision has been made, it can be challenged by way of judicial review only.[23]

Challenges to prescriptive orders and civil sanctions

10.25 Unlike wildlife licences, a formal appeals mechanism already exists in respect of challenges to prescriptive orders and civil sanctions imposed by Natural England and the Marine Management Organisation. This is the First-tier Tribunal (Environment).[24]

10.26 Normally, the First-tier Tribunal (Environment) will comprise a tribunal judge and two lay members. The judges are lawyers, either solicitors or barristers of at least seven years standing. The lay members have no legal qualification but will usually have some environmental background or knowledge. Occasionally in a high profile or complex case, two judges will sit with a tribunal member or, in an urgent case, a judge may sit alone.

[23] Planning Act 2008, s 118. The application for judicial review must, under section 118, be brought within six weeks.

[24] The Tribunal forms a section of the General Regulatory Chamber. Appeals are assigned to the General Regulatory Chamber of the First-tier Tribunal by virtue of article 3 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655). The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976, amended by SI 2010/2653) sets out procedural rules relating to such appeals.

The appeal process

10.27 Anyone having a sanction or measure[25] imposed upon them by a relevant regulator[26] may appeal to the First-tier Tribunal[27] within 28 days of the date of the regulator's notice.[28] An appeal can be on the merits or on a point of law. The Tribunal can choose either to deal with the appeal on paper or to hold an oral hearing.[29]

10.28 If the case is dealt with on paper, this means that the members of the Tribunal will meet in a private place to consider all the papers. They will then make a decision, which they will send to the parties in writing in due course.

10.29 If the case is dealt with at an oral hearing, the parties will attend a Tribunal on a hearing date fixed by the Tribunal. They may call witnesses, who will be questioned both by the parties and by the Tribunal. The general rule is that the oral hearings take place in public and that all the parties and anyone else can be present throughout. However, it might be necessary to hold part of the hearing in private with the public, and possibly one of the parties, excluded if matters of a particularly confidential nature are to be discussed. At the end of the hearing, the Tribunal may be able to give the parties a decision on the day, with written reasons to follow.[30]

10.30 In the case of its environmental jurisdiction, the orders available to the Tribunal are set by the statutory instrument giving jurisdiction to the Tribunal. For example, under the 2010 order giving the Tribunal jurisdiction to hear appeals in relation to civil sanctions issued by Natural England, the Tribunal can:

(1) suspend or vary a stop notice.

(2) withdraw a requirement or notice;

(3) confirm a requirement or notice;

(4) vary a requirement or notice;

[25] An overview of the appealable sanctions and measures are listed here: http://www.justice.gov.uk/tribunals/environment/appeals/decide (last visited 27 July 2012).

[26] Natural England, the Environment Agency, the Countryside Council for Wales, Department for Environment, Food and Rural Affairs, the Welsh Local Government Association, the Marine Management Organisation, the Department of Energy and Climate Change.

[27] Under the Waste (England and Wales) Regulation 2011, reg 41(3); the Regulatory Enforcement and Sanctions Act 2008, s 54(1)(a); the Environment Civil Sanctions (England) Order 2010, art 10(1); the Environment Civil Sanctions (Wales) Order 2010, art 10(1); the Ecodesign for Energy-Related Products Regulations 2010, reg 10(1); the Energy Information Regulations 2011, reg 7(1); the Single Use Carrier Bags Charge (Wales) Regulations 2010, reg 21(1); the Marine Licensing (Notices Appeals) Regulations 2011, regs 3(1) and 4(1); the Marine Licensing (Notices Appeals) (Wales) Regulations 2011, regs 3(1) and 4(1); the Marine Licensing (Civil Sanctions) (Wales) Order 2011, art 28(1); the Flood and Coastal Erosion Risk Management Information Appeal (Wales) Regulations 2011, reg 3.

[28] Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, SI 2009 No 1976, rule 22(1)(b).

[29] As above, rule 5(1).

[30] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules, SI 2009 No 1976.

(5) take such steps as the regulator could take in relation to the act or omission giving rise to a requirement or notice; and

(6) remit the decision whether to confirm a requirement or notice, or any matter relating to that decision, to the regulator.[31]

Further challenges

10.31 There is a right to appeal against the First-tier Tribunal (Environment)'s decision to the Administrative Appeals Chamber of the Upper Tribunal, but only on a point of law. The Upper Tribunal on appeal may (but need not) set aside the decision of the First-tier Tribunal. If it does set the decision aside, then the Upper Tribunal must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision. Finally, it is possible to appeal a decision of the Upper Tribunal on a point of law to the Court of Appeal.[32]

EXTERNAL INFLUENCES ON DOMESTIC LAW

10.32 This section considers in greater depth the Aarhus Convention, introduced in Chapter 2.

10.33 The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in Aarhus, Denmark. It is commonly referred to as the "Aarhus Convention". As of 20 June 2012, there were 46 parties to the Convention.

10.34 The Convention is an environmental agreement, which seeks to connect environmental rights and human rights. It aims to link government accountability and environmental protection by focussing on the interactions between the public and public authorities in a democratic context.

10.35 The Convention contains three broad pillars. These are access to information, public participation and access to justice. There are also a number of general features. These are as follows.

10.36 The adoption of a rights-based approach under Article 1: Parties to the Convention are required to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters.

10.37 Establishing a "floor", not a "ceiling": The Convention establishes minimum standards to be achieved but does not prevent any Party from adopting measures which go further.

10.38 Non-discrimination: The Convention prohibits discrimination on the basis of citizenship, nationality or domicile against persons seeking to exercise their rights under the Convention.

[31] The Environmental Civil Sanctions (England) Order 2010, SI 2010 No 1157, reg 10(5) and (6).

[32] Tribunals, Courts and Enforcement Act 2007, ss 11 to 13.

10.39 Non-compliance mechanism: The Meeting of the Parties to the Convention is required to establish, on a consensus basis, optional arrangements for reviewing compliance with the provisions of the Convention. Such arrangements are to allow for "appropriate public involvement".

Content of the Aarhus Convention

10.40 The principal obligations in the Convention fall upon public authorities. These authorities are defined in article 2[33] and comprise governmental bodies at national, regional and local level; bodies performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and other bodies performing similar duties relating to the environment under the control of one of the bodies mentioned above. This includes privatised bodies. Bodies acting in a judicial or legislative capacity are excluded.

10.41 The first of the two pillars on access to information and public participation, although vitally important, are not pertinent to the discussion in this chapter. Below we set out the appropriate provisions on access to justice.

The Third Pillar: Access to Justice

10.42 There are three aspects of the public's access to justice, dealt with by the Convention, which are set out in article 9. These are review procedures for information requests; review procedures for specific decisions which are subject to public participation requirements; and challenges to breaches of environmental law in general.

10.43 The Convention provides for a right of access to challenge the substantive and procedural legality of any decision concerning projects or activities under article 6. These projects or activities are listed in annex 1 to the Convention, and are divided into 18 groups of processes. They include the energy sector, such as mineral oil and gas refineries; the production and processing of metals; the mineral and chemical industry; and waste management. This challenge procedure should be before a court of law and/or another independent and impartial body established by law.[34]

10.44 To bring a challenge, members of the public must demonstrate "sufficient interest" or "impairment of a right", where the law of that party requires that as a precondition. The Convention states that both "sufficient interest" and "impairment of a right" are to be determined in two ways. First, in accordance with the requirements of national law, and second, they should be interpreted "with the objective of giving the public concerned wide access to justice within the scope of this Convention".[35]

10.45 Article 9(2) is also explicit regarding the interest of non-governmental organisations promoting environmental protection. It states that such groups shall be deemed to have a "sufficient interest" and be capable of having rights

[33] Aarhus Convention , art 2(a) to (d).

[34] As above, art 9 (2).

[35] As above.

impaired, for the purposes of bringing a challenge under article 9(2). Importantly, article 9(2) does not exclude the possibility of "a preliminary review procedure before an administrative authority". However, it does not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

10.46 Thirdly, under article 9(3), parties to the Convention must ensure that members of the public have access to administrative or judicial procedures to challenge acts or omissions by private person and public authorities, which contravene environmental law provisions. Members of the public must satisfy any criteria laid down by a party's national law. This right is in addition to those set out in articles 9(1) and (2) above. The procedures in articles 9(1) to (3) of the Convention should provide adequate and effective remedies, be fair, equitable, timely and not prohibitively expensive.[36]

UK and the Compliance Committee

10.47 Article 15 of the Convention requires the parties to establish arrangements for reviewing compliance with the Convention. The Compliance Committee was elected in 2002.[37]

10.48 The Committee can prepare, at the request of the meeting of the parties, reports on compliance with, or implementation of, the provisions of the Convention. Further it can monitor, assess and facilitate the implementation of and compliance with the reporting requirements under Article 10(2) of the Convention.[38]

10.49 In its implementation report to the Aarhus Convention Compliance Committee,[39] the UK explained that the requirement under English law that an applicant for judicial review has a "sufficient interest" in the matter to which the application relates, and the "expansive interpretation" of that criterion, "puts the UK among those member states that take an 'extensive approach' to legal standing before the administrative courts".

[36] Aarhus Convention, art 9 (4).

[37] Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Report of the First Meeting of the Parties, Decision i/7 Review of Compliance*, 21-23 October 2002.

[38] As above, para 13.

[39] The Aarhus Convention Compliance Committee was established to fulfill the requirement of article 15 of the Aarhus Convention to establish arrangements for reviewing compliance with the Convention. It was set up by the Economic Commission for Europe, *Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, Decision I/7 Review of Compliance* (21-23 October 2002) para 15. Available at: http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf (last visited 19 June 2012). For more detail about its role and functions, see the United Nations Economic Commission for Europe, *Guidance Document on the Aarhus Convention Compliance Mechanism*, available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf (last visited 27 July 2012).

10.50 However, the Aarhus Convention Compliance Committee has criticised the system of judicial review because of its inadequacies in the requirements of public participation and access to justice in environmental matters.

10.51 The key issue is the cost of applying and pursuing judicial review proceedings. In its Aarhus Convention implementation report, the UK explained that "a significant number of stakeholders have highlighted that financial difficulties remain in bringing environmental cases".

10.52 The Compliance Committee has stated,

> … despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention … the considerable discretion of the courts of [England and Wales] in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest … In light of the above, the Committee concludes that the [UK] has not adequately implemented its obligation in article 9 …[40]

10.53 In response, DEFRA has made clear that the Ministry of Justice is working to make rules regarding protective costs orders.[41] Further, it is consulting publicly on cross undertakings in damages in environmental judicial review cases.[42]

APPEALS AGAINST PRESCRIPTIVE ORDERS AND CIVIL SANCTIONS

10.54 As discussed in Chapter 9, each of the civil sanctions contained in part 3 to the Regulatory Enforcement and Sanctions Act 2008 requires an appropriate appeals mechanism for challenging decisions of the regulator on the basis that it was wrong in law, unreasonable or based on an error of fact. Such appeals can only be made to the First-tier Tribunal or another tribunal created under an enactment.[43]

10.55 The Government considers the First-tier Tribunal (Environment) to be the appropriate mechanism for such appeals. It offers a dedicated, inexpensive and quick appeals system, which permits an expert consideration of the merits and legality of orders and civil sanctions.

[40] England and Wales Case 2008/33, http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf at paras 135-136 (last visited 27 July 2012).

[41] Following Lord Justice Jackson's 2010 review of costs in civil litigation in which he recommended, subject to consultation, that there should be qualified one-way costs shifting in all judicial review cases, including environmental cases. The practical effect of this would be that individual claimants of modest means would be unlikely to have to pay any adverse costs if they lost a claim.

[42] *Implementation report submitted by the United Kingdom*, paras 125-126. Available at: http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/UK_NIR_2011.pdf (last visited 27 July 2012).

[43] Regulatory Enforcement and Sanctions Act 2008, s 54(1).

10.56 Equally, in Chapter 8 we suggested that it would be possible for the regulator to order that an individual destroy a species on its land. It is logical for appeals of such orders to be made to the First-tier Tribunal (Environment) in the same way as other, similar, prescriptive orders currently are.

10.57 Accordingly, we do not think that there is a case for reforming challenges to prescriptive orders and civil sanctions. There is no evidence that structures only recently put into place need changing, although admittedly the First-tier Tribunal (Environment) is still very new and is, at the time of writing, yet to hear a case.

Provisional Proposal 10-1: We provisionally propose that the appropriate appeals forum for appeals against Species Control Orders and civil sanctions under our new regime is the First-tier Tribunal (Environment)?

10.58 By sending the appeals against prescriptive orders and civil sanctions to the First-tier Tribunal (Environment), any further appeal should be to the Upper Tribunal.[44]

APPEALS CONCERNING WILDLIFE LICENCES

10.59 Here we outline possible reform options relating to wildlife licences. In summary, the three options that we consider are as follows.

(1) That judicial review is sufficient to meet our international obligations and internal drivers for an appeal process – such as developers' desire to challenge wildlife licensing decisions.

(2) That there is an appeal process only for applicants.

(3) That there is the option of a more general appeals system, which includes the public, where they have a "sufficient interest".

Option 1: No new appeal process

10.60 In this section we consider whether there needs to be a new appeals system, or whether the current regime – which is dependent on judicial review – is sufficient.

10.61 At present, no species licensing decisions, whether taken by Natural England or the Marine Management Organisation, can be formally challenged other than by way of judicial review.

10.62 In the recent review of the implementation of the Habitats and Wild Birds Directives, the lack of an appeal process was highlighted as a weakness in the current system, with the view of some stakeholders being that the lack of an appeals process led to licences not being granted when they should, or granted with unreasonable conditions.[45] If such were the case, then this would have deleterious economic effects and unnecessarily block development, which would go against the spirit and the letter of the Directives themselves – which acknowledge the possibility of development.

[44] Part 3, Tribunal Procedure (Upper Tribunal) Rules 2008, S.I. 2008 No. 2698

[45] HM Government, *Report of the Habitats and Wild Birds Directives Implementation Review* (2012), para 55.

10.63 To have unnecessary curtailment of potentially permitted economic activity would also go against core Government policies. Reducing the burden on businesses, and thereby facilitating economic growth, is a fundamental part of the current Government's agenda.[46]

10.64 The potential problem with the current system lies in the nature of judicial review. Unlike statutory appeals, where any aspect of the licensing authority's decision can be challenged, judicial review can only be brought on specified grounds. These are illegality, irrationality or procedural impropriety. Judicial review is not directly concerned with challenging the merits of the decision. Instead, it focuses on the legality of the decision-taking. The Court cannot, therefore, substitute its own decision on a specific issue for that of the decision-taker.

10.65 The key grounds for complaint include that there was an error of law or that the procedure that a licensing authority took in reaching the decision was not fair. A decision can also be challenged on the basis that it was not within the authority's power to make it; that it breached a legitimate expectation;[47] or that it was unreasonable.[48] These grounds for review are not as comprehensive as challenging the correctness of a decision through a statutory appeal.

10.66 Given the flexibility and discretionary nature of the current regime, it is rare for Natural England and the Marine Management Organisation to have acted outside of their very broad licensing powers. In respect of refusals to grant, refuse, or attach conditions to a licence, therefore, illegality, irrationality and procedural impropriety are very high bars for an individual to overcome. Equally, third parties, such as non-governmental organisations, who wish to challenge the grant of a licence face similar hurdles.

10.67 However, licence applications are, by their very nature, fact-sensitive. Each application will be based on individual facts and the specific circumstances confronting the applicant. Since only part of the licensing decision-making process is subject to any form of challenge – that is, the legality of the decision itself, rather than the merits on which the decision is based – there is a potential gap in the current regime. The result is that, as long as the licensing decision was taken within the proper legal parameters, a regulator can potentially halt or at the very least significantly delay action important for economic growth and business.

10.68 Furthermore, as we discussed above, the Aarhus Convention requires contracting states to guarantee rights of access to justice in environmental

[46] HM Government, *Reducing Regulation Made Simple: Less regulation, better regulation and regulation as a last resort* (2010). See also http://www.bis.gov.uk/policies/growth (last visited 27 July 2012).

[47] A person may have a legitimate expectation of being treated in a certain way by an administrative authority. This expectation may arise either from a representation or promise made by the authority, or from consistent past practice. The expectation arises by reason of the conduct of the decision-maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

[48] Based on the notion of "Wednesbury unreasonableness": a decision which is so perverse that no reasonable body, properly directing itself as to the law to be applied, could have reached such a decision, will be quashed.

matters.[49] The Government has repeatedly expressed its commitment to the access to justice provisions of the Aarhus Convention and its belief that, generally, judicial review complies with its requirements. However, there are issues relating to cost, which we noted in the discussion above.

10.69 What is clear from Aarhus is that if any new process were created, it must not be expensive (or it would not improve on the current position with regard to Aarhus Convention compliance) and must operate within clearly defined, fixed time limits.

10.70 Against granting a new appeals process are the potential concerns that any new appeals system may lead to excessive legalism, and create a more adversarial system than that in place at present. The current process is an iterative one, with the relevant regulators working closely with developers (and other licence applicants) in an ongoing process. The creation of a right of appeal carries with it the danger of altering the nature of the current process.

10.71 Interestingly, the recent review of the implementation of the Habitats and Wild Birds Directive noted that (in fact) few licence applications are refused outright.[50]

Options 2 and 3: applicant only appeals (option 2) or a general appeals process (option 3)

10.72 Here we consider the identity of the user of any first instance appeals process, if option 1 is rejected and it is decided to establish a new process.

10.73 A new process could be modelled on that currently available for marine licences issued by the Marine Management Organisation and for most planning decisions, which is the model in the Town and Country Planning Act 1990.

10.74 The decisions we are considering concern an individual's application for permission to do something otherwise prohibited. The current eligibility rule in the Town and Country Planning Act 1990 is that only the applicant can appeal to the Planning Inspectorate.[51] A "person aggrieved" can then challenge the legal validity of the Planning Inspectorate's decision in the High Court.[52]

10.75 However, it must be remembered that wildlife licensing decisions do have a wider component, relating to proper administration and the rule of law. In environmental matters particularly, the role of third parties has expanded considerably since the early 1990s. Therefore, in the context of judicial review, those with a "sufficient interest" have standing, which has been taken to include non-governmental

[49] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art 1.

[50] HM Government, *Report of the Habitats and Wild Birds Directives Implementation Review* (2012), para 55.

[51] Town and Country Planning Act 1990, s 78(1).

[52] As above, s 288(1).

organisations[53] and even individuals "with a sincere concern for constitutional issues".[54]

10.76 As we outlined in Chapter 2 and also above, the Aarhus Convention also seeks to widen access to environmental justice. In particular, article 9(2) requires that "members of the public … having a sufficient interest … or maintaining the impairment of a right … have access to a review procedure before a court of law". The article then goes on to say that a non-governmental organisation shall "be deemed to have rights capable of being impaired", and further states that a "sufficient interest" and "impairment of a right" shall be determined according to national law and consistently with the objective of giving the public concerned wide access to justice.

10.77 In the case of the UK, given our current understanding of sufficient interest for judicial review, this would include both non-governmental organisations and individuals with a sufficient interest.

10.78 The Aarhus Convention is an international agreement, creating obligations on signatory states as a matter of international law. It is not binding in domestic law in the UK. The British Government is however a signatory of the Convention, and so it constitutes a reliable guide to the development of policy in this area.

10.79 There is an argument, however, that, at least as regards some species, compliance with Aarhus Convention principles might be required as a matter of EU law.

10.80 The EU is itself a party to the Aarhus Convention, and the effect of Aarhus in EU law, and hence potentially on member states, has recently been the subject of jurisprudence from the Court of Justice in the *Slovak Brown Bear* case.[55]

10.81 The case is noteworthy for two reasons. First, the Court of Justice treated the Aarhus Convention in a manner similar to a directive which the Court has competence to interpret. In other words, it held that the Aarhus Convention effectively forms part of EU law. Second, the Court of Justice's judgment requires national courts to grant wide access to justice in order to challenge decisions allegedly infringing environmental law, an approach which has its origin in EU law,

> so as to enable an environmental protection organisation…to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.[56]

[53] *R v HM Inspectorate of Pollution ex parte Greenpeace (no 2)* [1994] 4 All ER 329; *R v Secretary of State for Foreign Affairs ex parte World Development Movement* [1995] 1 WLR 386.

[54] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* [1994] QB, at 562.

[55] Case C-240/09 *Lesoochranarske zoskupenie VLK v Ministerstvo Zivotneho prostredia Slovenskej republiky* (unreported) para 28.

[56] Case C-240/09 *Lesoochranarske zoskupenie VLK v Ministerstvo Zivotneho prostredia Slovenskej republiky* (unreported) para 51.

10.82 As the Court has determined that article 9(3) of the Aarhus Convention forms part of EU environmental law in general, such an obligation, it can be argued, goes wider than the interpretation issue that formed the subject matter of the *Slovak Brown Bear* case. It could be seen as a duty on member states as a whole (of which courts are just one institution) to give the fullest effect to article 9(3) of the Aarhus Convention.

10.83 It would then follow that when taking action within the field of EU environmental law, such as transposing the requirements of the Habitats and Wild Birds Directives, member states should abide by the requirements in article 9(3) of the Aarhus Convention. If that were so, if an appeal process were to be created, then the general public (with sufficient interest) should not be excluded from it.

10.84 However, this argument is a difficult one, in the context of a difficult area of EU law with little guidance from the Court of Justice. Both sides of the question remain arguable, given the current state of the jurisprudence.

10.85 It should also be noted that, if the argument from this interpretation were to be seen as the principle driver for reform in this area, it would apply only to appeals in relation to species covered by the Wild Birds Directive and the Habitats Directive. We have a developed system of protection for other species, such as badgers and deer, and it would be unfortunate if a new appeals system were to be based on what might appear an arbitrary distinction between species protected at the European level and those protected domestically.

10.86 We suggest that there are advantages to restricting the possible appellants to the applicant. If the primary driver for an appeal process is to encourage development, then allowing wider access to the process could have exactly the opposite effect, through the creation of a regime allowing third parties to delay and potentially block outright development which would otherwise go ahead.

10.87 We also accept that any decision to widen access to the appeals process beyond the applicant solely could be seen as problematic. It could lead to delays in the planning process; create unnecessary burdens; and is out of step with other similar processes, such as that for planning in general.

10.88 On the other side, it is clear that the general trend in environmental law, especially given the impetus caused by the Aarhus Convention, is to grant wide access to justice rights – which would mean including the possibility of third party challenges to wild life licensing decisions.

10.89 We seek the views of consultees on which of the three options should be adopted.

Question 10-2: Do consultees think that it is unnecessary to create a new appeals process for wildlife licences (option 1)?

Question 10-3: If consultees think that there should be a dedicated appeals process for wildlife licences, should it be restricted to the initial applicant for the wildlife licence (option 2), or be open additionally to the public with a "sufficient interest" (option 3)?

FEATURES OF A POTENTIAL APPEALS SYSTEM

10.90 If either option 2 or 3 were to be adopted, it would be necessary to consider how a right of appeal should be configured. In this section we look at two features of a possible appeals system. First, what can be appealed? For, instance, should all wildlife licensing decisions be capable of appeal? Second, which body should hear the appeals?

What can be appealed?

10.91 The first question is whether all wildlife licences could be subject to any new appeals process. As we stated in Chapter 3, prohibited activity can be licensed currently by way of individual, class and general licences.

10.92 Whilst there is no applicant for class and general licences, all of them have the same legal effect: the licences allow an individual to conduct activity that would otherwise be criminal. Consequently, since the licences also have the same interest for third parties, there is no real difference in the wider rights affected whether the action be conducted under an individual, class or general licence. If we granted wide appeal rights, which we consult on below, then to exclude class and general licences would deprive members of the public with a "sufficient interest" of rights to appeal solely on the basis of the legal tool adopted.

10.93 In Chapter 5, we stated that we did not think it beneficial to define these licences in statute. It would, therefore, seem impractical to exclude any of the existing types of licence.

10.94 However, against that, the collective nature of class and general licences means they look remarkably like general administrative decisions – of the sort it is normal to challenge by way of judicial review. There is a complex interplay within class and general licences between policy and factual scientific evidence.

Question 10-4: Do consultees think that the appeal process should be available for all types of wildlife licence (general, class and individual)?

Which body should hear the appeals?

10.95 Here we consider the appropriate mechanism for appeals against wildlife licensing decisions. This includes an exception to the regime.

10.96 There are two existing structures that are available for wildlife licence appeals: the Planning Inspectorate and the First-tier Tribunal (Environment). On the face of it, both would be competent bodies.

10.97 The Planning Inspectorate has extensive experience of decisions that have a wildlife element to them, even if the granting of a wildlife licence would not have been the central part of the dispute. In our view, it is likely that in a large number of cases, developers will be the driving force behind appeals of wildlife licensing decisions. As discussed above, marine licences issued by the Marine Management Organisation are already appealed to the Planning Inspectorate, and it appears that this system has worked well. It would be consistent, then, to allow appeals of wildlife licences to also be made to the Planning Inspectorate.

10.98 However, there are also arguments in favour of the First-tier Tribunal (Environment). There are many situations where the subject matter may not be related to a planning issue but rather an individual application to manage wildlife in the normal course of business, such as wishing to move a badger sett. In such situations, the First-tier Tribunal (Environment) could be seen as an appropriate forum. It would also have the potential practical advantage over the Planning Inspectorate that it potentially has the capacity to take new appeals without becoming overburdened.

10.99 Currently, the First-tier Tribunal (Environment) only handles orders and civil sanctions. Therefore, its competence would have to be widened to include wildlife species licensing decisions.

Question 10-5: Do consultees think that it would be more appropriate for appeals concerning wildlife licences to go to the Planning Inspectorate or the First-tier Tribunal (Environment)?

APPENDIX A
EU LAW – GENERAL PRINCIPLES

INTRODUCTION

A.1 European Union (EU) provisions on wildlife, and how the Court of Justice has interpreted them, are one of the core considerations in our project. However, the nature of EU law and the obligations it imposes on the UK are very different to domestic law. This appendix outlines, for the general reader, the aim and role of the EU institutions and the operation of EU law, in order for the discussions in the Consultation Paper to be understood clearly and in context.

Terminology and treaty provisions

A.2 The current EU is merely the most recent expression of an institutional regime founded soon after the end of the Second World War. Except when talking about a particular iteration, and where it is strictly necessary to contextualise a point, we use the term "European Union" as the generic term, although not accurate in the strictest sense.

A.3 As the EU has developed, so have the Treaties that underpin it. These have been renumbered, superseded or have simply expired. The resulting numbering and naming changes add to the confusion that many feel when faced with questions of EU law. Except where it is necessary to refer to former numbering, or former provisions, we have sought to rely on the provisions currently in force.

The Treaties

A.4 The Treaties that founded the EU provide for the basic institutional structure of the EU. They tie member states, such as the UK, to the EU and to each other. The Treaties outline some, but not all, of the relationships between EU institutions themselves, the institutions of the EU and member states, and between the institutions of the EU and the citizens of member states.

A.5 The current treaties are the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These two treaties are the result of the Treaty of Lisbon[1] and replace earlier treaties for the European Union, the European Communities, the European Economic Community, the European Coal and Steel Community, and Euratom (the European Atomic Energy Community).

THE DEVELOPMENT OF THE EU

A.6 The EU resulted directly from Europe's experience of the Second World War and the 1950s escalation of the Cold War. However, inherent in its development was the idea that the original European Coal and Steel Community of 1952 and the European Economic Community of 1957 were just the start of an ongoing

[1] The Treaty of Lisbon, which entered into force on 1 December 2009, amended the Treaties in force at that time which provided the constitutional foundations for the EU.

process.[2]

A.7 It is equally clear that, from its creation, the role of the EU and its institutions should vary depending on the area of human activity. The EU has always had a primary role in the regulation of agriculture and of competition. In other areas, the role of the EU was to be more far limited, for instance in the areas of social policy, arts, education or the environment. Finally, in some areas there was originally no EU involvement, such as immigration or criminal justice.

A.8 Over time, the competences of the European Economic Community (EEC) and the EU have expanded. The first was with the Single European Act in 1987, which was designed to facilitate the completion of the internal market. It was under the Single European Act that the environmental competence was added.[3] This was followed by the Maastricht Treaty in 1992[4] founding the European Union. The Maastricht Treaty added a significant social dimension to the competences of the EU. Since 1992, the development of the EU has continued apace, with the Treaties of Amsterdam, Nice and Lisbon.

A.9 The system that resulted from these piecemeal reforms was complicated, even for those who worked within the system. The last major treaty, the Treaty of Lisbon of 2007, sought, amongst other things, to simplify the Treaties and the EU's internal legislative procedures. After a tortuous ratification process in many member states, the Treaty of Lisbon entered into force on 1 December 2009.

A.10 Essentially, the Treaty of Lisbon repealed the existing treaties and replaced them with two new treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The first established the EU and its institutions enshrining certain rights, such as citizenship, and set out broad objectives for the EU. The second provided detailed rules for the operation of the EU, including delineating the EU's legislative procedures and competences.

THE INSTITUTIONS OF THE EU

A.11 There are four primary institutions within the EU: the European Commission; the Council of the European Union; the Court of Justice; and the European Parliament.

European Commission

A.12 The European Commission is the primary institution administering the activities of the EU. It is under a duty to ensure and oversee the application of EU law.[5] The European Commission is, consequently, central to the enforcement of EU law, along with the Court of Justice. The European Commission also plays the primary role in developing policies and formulating opinions that may lead to future

[2] J Monnet, "A Ferment of Change" (1962) 1 Journal of Common Market Studies 203 in E Ellis and T Tridimas, *Public Law of the European Community: Text, Materials and Commentary* (1995).

[3] By "competence" we mean a part of the Treaties permitting the EU to take action on a given subject. The EU has no inherent jurisdiction, it can only do that which is permitted by the Treaties.

[4] Also known as the first Treaty on the European Union.

[5] Treaty on the Functioning of the European Union, art 17(1).

legislation. Finally, it has the sole right to propose legislation.

Council of the European Union

A.13 The Council of the European Union, or simply "the Council" as it is referred to in the Treaties, is traditionally regarded as the most international of the EU's institutions.[6] This is because the principal members in the Council are member states, though the Commission also has a considerable role to play in its business. The continued predominance of member states within this forum means that it is closer in makeup to traditional international institutions than any of the other EU institutions. This is despite the development of qualified majority voting, which has challenged the core "classical" ideal that all states are legally equal.

A.14 The purpose of the Council within the Treaties' structure is to ensure an effective voice for the member states, allowing them to assert their national interests. Within the framework of the EU system, the Council is in many ways the counter-balancing institution to the European Commission.

European Court of Justice

A.15 The Court of Justice has three major roles. First, judicial review of the institutions of the EU.[7] Second, enforcing the application of EU law within member states, through infraction (or infringement) actions.[8] Thirdly, courts (or tribunals) of member states can refer questions relating to the proper interpretation of EU law to the Court of Justice.[9] These are considered as separate sections later in this appendix.

European Parliament

A.16 The European Parliament's role has developed from its original creation[10] to its present position, where it has six principle roles. It approves (or not) the EU budget; forms a key part of the legislative procedure outlined below; has standing to bring judicial review actions; questions the work of the European Commission; approves and can dismiss the European Commission and its members; and supports the work of the European Ombudsman.

The "institutional balance"

A.17 Apart from the Court of Justice, the EU's institutions do not mirror those typically found within nation states. There is no real separation of powers and the European Parliament is not supreme. Further, there is no hierarchy of the EU's

6 The Council in its present form descended from the Council of Ministers. It is institutionally different to the European Council, also an EU body established by the Treaty on the European Union, art 13, which meets twice every six months and consists of the Heads of State or Government of the member states. The Council of the European Union should not be confused with the Council of Europe, which is an entirely separate international organisation. Hereafter, we use the term "the Council".

7 Treaty on the Functioning of the European Union, arts 263 and 265.

8 As above, arts 258 to 260.

9 As above, art 267.

10 M Westlake, *A Modern Guide to The European Parliament* (1994) p 10. Westlake also notes general lack of references to the Assembly in J Monnet, *Memoires* (1976).

institutions but rather an "institutional balance" between the different institutions.[11] The precise nature of this balance depends upon the subject matter under consideration and the relevant provisions of the Treaties.

A.18 The Council, composed of representatives of member state administrations, has significant legislative powers, as does the European Commission. The European Commission also has a quasi-judicial role. The European Parliament, unlike the UK Parliament, does not have the capacity to propose legislation, but is rather one of the actors in the EU's legislative procedures.

EU LEGISLATION

A.19 Like its institutions, EU legislation differs in several aspects from its domestic counterpart. There are significant differences in the way in which EU legislation is made and the manner in which its obligations are imposed. This is particularly true of directives, as explained below.

A.20 Unlike the UK Parliament, the EU has no residual jurisdiction. Therefore it can only act where it has a specific power allowing it to do so. However, unlike some international organisations where the ability to act is strictly circumscribed by the founding treaties,[12] the Treaties give broad powers for the EU to enact delegated legislation that is binding on the member states to which it is addressed.

A.21 The EU has three basic legislative options: regulations, directives and decisions. These instruments allow the EU to "exercise the Union's competences". Article 288 TFEU defines them as follows:

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states.
>
> A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

A.22 Article 288 also sets out the hierarchy of legislative instruments. Regulations are directly applicable,[13] which means they do not need transposition into the legal regimes of member states in order to create rights between individuals or between individuals and the member state. However, regulations do not necessarily contain enforcement mechanisms. Enforcement is left normally to member states which means additional member state rules are necessary in order to make them work as envisaged by the EU legislature. Regulations have

[11] Case 10/56 *Meroni v High Authority of the European Coal and Steel Authority* [1957-58] ECR 133.

[12] Such as the original European Coal and Steel Community.

[13] Direct applicability means that the instrument is intended to be part of the legal system of a Member State without the necessity of further measures. This is different to "direct effect", which is considered later in this appendix. See further: Winter, "Direct applicability and direct effect: Two distinct and different concepts in Community Law" (1972) *Common Market Law Review* 425.

been used in the context of wildlife law to implement the obligations contained in the Convention on the International Trade in Endangered Species 1973 (CITES).

A.23 Directives have been the most contentious of the EU's legislative instruments. These place obligations on member states to transpose them into their legal regime. Directives are binding on member states as to the effect to be achieved. The desired legislative outcome is to be established by reference to the directive as a whole, including the preamble. Transposition, however, has to be enshrined in law. It will not be a defence to an infringement action if the law does not fulfil the obligations imposed on the member state.[14]

A.24 A member state may go beyond the requirements of a directive when enshrining it in law. However, the stricter regime must not be detrimental to the working of the internal market, by creating unjustified barriers to trade for instance.

A.25 The EU requirements on transposition were simplified with the Lisbon Treaty. Member states must "adopt all measures of national law necessary to implement legally binding Union acts".[15] Further, member states shall ensure the effective implementation of EU law.[16] These provisions codify earlier treaty provisions and Court of Justice case law, making the obligations placed on member states clearer. These provisions form the backdrop to the infringement action considered below.

EU legislative procedure

A.26 Simply put, the European Commission submits a proposal to the European Parliament and the Council. The European Parliament and Council act together, as joint legislature, with both having to approve the proposed legislation before it can become law. Therefore, unlike the UK, it is not simply Parliament that is the legislature. Where disagreements arise, there is the possibility of going to a Conciliation Committee, which has up to seven weeks to adopt a solution. If it fails, the measure is deemed not to have been adopted.

A.27 The process is very formal. As there is potential for irreconcilable disagreement between the Council and Parliament, the Commission tends to ensure there is broad agreement with its proposals before submitting them to the joint legislature. This is also because the Commission has little control over the legislative process once a proposal has been submitted. Consequently, the producing and consulting on draft legislative instruments is vitally important. This pre-legislative process can be very lengthy indeed

A.28 The legislative procedure outlined above is the default mechanism for environmental legislation, which includes wildlife provisions.

[14] Case C-6/04 *Commission v UK (Habitats)* [2005] ECR I-9017.

[15] Treaty on the Functioning of the European Union, art 191(1).

[16] As above, art 197(1).

EU LEGAL PROCEEDINGS

A.29 There are three principal actions before the Court of Justice: judicial review; infringement actions; and preliminary references. There is no hierarchy between them and, therefore, the jurisprudence of each is relevant when interpreting EU legislative provisions and their implementation.

Judicial review

A.30 The Court of Justice has the power to review the legality of legislative acts, acts of the Council, acts of the European Commission and of acts of the European Parliament which are intended to produce legal effects affecting third parties.[17] This allows member states, institutions and, under very restrictive conditions, individuals to challenge the legality of the work of the EU institutions. The restrictive nature of individual access reflects the preferences of the original drafters. The EU mechanism for judicial review is there to protect the "institutional balance" of the EU, as opposed to being a source or guarantor of individual rights. The development of individual rights has developed though the use of the preliminary reference procedure, considered below.

Infringement

A.31 The action for infringement is set out in articles 258 and 260 TFEU. It was intended by the original drafters to be the principal mechanism by which the consistent application of EU law would be ensured. Article 258 provides that:

> If the European Commission considers that a member state has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its obligations.
>
> If the state concerned does not comply with the opinion within the period laid down by the European Commission, the latter may bring the matter before the Court of Justice of the European Union.

A.32 Article 260 TFEU allows the Court of Justice to impose financial sanctions on non-compliant member states.

A.33 A bare reading of article 258 does not explain the process fully. The European Commission has a wide discretion to discuss matters with member states before formal proceedings are embarked on. If the European Commission does decide to proceed with infringement proceedings, it will issue a letter formally notifying the member state of the specific infringement and seeking observations from the member state on the matter.[18] The European Commission will specify a time period in which the state must reply,[19] which will usually be two months, although the European Commission may reduce this if it considers the situation to be urgent.[20] Following the member state's reply, the European Commission will

[17] Treaty on the Functioning of the European Union, art 263.

[18] As above, art 258.

[19] European Commission, *Exercise your rights: stages of infringement proceedings* http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm (last accessed 27 July 2012).

[20] P Craig and G de Búrca, *EU Law Texts, Cases and Materials* (4th ed 2007) p 432.

decide whether or not to proceed with enforcement procedures. It will usually do so within one year.[21]

A.34 If it chooses to proceed, the European Commission will issue a reasoned opinion.[22] This will set out in detail the grounds for finding an infringement. Issuing the opinion triggers a time period in which the member state must comply if it wishes to avoid referral to the Court of Justice. The length of this period is at the European Commission's discretion, but is usually two months.[23]

A.35 If the member state fails to comply with the reasoned opinion, the European Commission can refer the case to the Court of Justice.[24] Under the Treaties, the Court of Justice is the final arbiter on questions of EU law. The Court usually takes around two years to rule.[25]

A.36 It should be noted that the European Commission can still refer the case to the Court of Justice where the member state has complied with the reasoned opinion after the time period set down.

Preliminary references

A.37 Article 267 TFEU, and its predecessors in earlier treaties, creates a system whereby national courts can, or in the case of supreme courts must, refer questions of law to the Court of Justice.[26] The intention of the preliminary reference mechanism was to ensure that the interpretation of EU norms was consistent across the EU. It would have been problematic for the development of a common market if important terms contained in EU laws intended to be relied on by individuals were given differing interpretations in different member states.

A.38 Ensuring consistent interpretation has been, and always will be, a part of the preliminary reference mechanism. However, the Court of Justice has used the mechanism to develop EU law further for the benefit of individuals, through the creation of general principles of EU law – specifically, by ruling on the supremacy of EU law over domestic law,[27] developing the concept of direct effect[28] and creating a domestic action for state liability.[29] This latter mechanism permits an individual to bring an action when affected adversely by a member state's failure to implement EU law or simply by a member state's active breach of EU law. These general principles are considered below.

[21] P Craig and G de Búrca, *EU Law Texts, Cases and Materials* (4th ed, 2007) p 432.

[22] Treaty on the Functioning of the European Union, art 258.

[23] European Commission, *Exercise your rights: stages of infringement proceedings* http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm (last accessed 27 July 2012).

[24] Treaty on the Functioning of the European Union, art 258.

[25] European Commission, *Exercise your rights: stages of infringement proceedings* http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm (last accessed 27 July 2012).

[26] There is a very limited exception on the obligation placed on supreme courts to refer contained in the CILFIT judgment: Case 283/81 *CILFIT* [1982] ECR 3415.

[27] Case 4/64 *Costa v ENEL* [1964] ECR 585.See G.F. Mancini, "The Making of a Constitution for Europe" (1989) 26 Common Market Law Review 595.

[28] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1.

[29] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

A.39 The Court of Justice does not, however, act as an appeal court. Actions by individuals against member states must be commenced in a member state and, ultimately, resolved there. What the Court of Justice will rule on is the validity of a member state's action. The ruling in relation to individual parties, though, is solely for the domestic court, even where the Court of Justice has determined much of the applicable law.

GENERAL PRINCIPLES OF EU LAW

A.40 There are three general principles of EU law which concern us: the supremacy of EU law, direct effect, and state liability. These, with the infringement actions, as explained above, form the backdrop to the transposition of EU law.

Supremacy of EU law

A.41 The EU was founded on the idea of the creation of a common market. Early on in its life, questions arose concerning potential conflicts between treaty provisions (meant to be directly applicable) and a member state's domestic law.

A.42 The response by the Court of Justice was forthright, and expressed the vision of the founding fathers:

> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves … [30]

Direct effect

A.43 The supremacy of EU law is contentious even when taken in isolation, as it established EU law as above that of member states – though only within the competences of the EU. The contentiousness is evident also in the development of what is termed "direct effect". Direct effect refers to the idea that a provision of EU law can be relied on by individuals within a domestic legal system. There would be little use in something forming part of a domestic legal system, and being of benefit to individuals, were individuals not able to rely on its provisions. This is linked, but is not the same as, the concept of direct applicability, which applies to the Treaties and regulations. As the Court of Justice put it in *Van Gend en Loos*:

> The conclusion to be drawn … is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also to confer on them rights which become part of their legal

[30] Case 4/64 *Costa v ENEL* [1964] ECR 585.

heritage.[31]

A.44 However, the Treaties and regulations form only a part of the body of EU law, and many, if not most, of the important provisions passed to benefit individuals have been contained in directives. Consequently, the Court of Justice began to permit individuals to rely on the provisions of directives that member states have failed to implement fully within the time limit, as well as those in the Treaties and regulations.[32]

A.45 For an EU legal provision to be directly effective it must be sufficiently precise and unconditional.[33] Essentially, this means that it should of itself be capable of being read as a legal provision similar to any other within a domestic legal system. Therefore, not all provisions of EU law are directly effective. Even where they are not however, failure to fulfil the obligation will be a breach of EU law for the purposes of a potential infringement action. Therefore, the ability of an individual to rely on a measure in the courts of a member state should only be seen as complementary to state infringement proceedings.

State liability

A.46 The concept of state liability is the third part of the scheme by which the Court of Justice has sought to ensure the effective implementation of EU law. It is the last one we deal with as it is the final resort of an aggrieved litigant.

A.47 Sometimes, the concept of supremacy linked with direct effect will not protect an individual. This is because a provision in question aimed at protecting an individual is insufficiently clear and precise to be capable of having direct effect. The Court of Justice in *Francovich* held that:

> The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a member state can be held responsible.[34]

A.48 Therefore, according to the jurisprudence of the Court of Justice, aggrieved individuals can recover losses suffered as a result of a "sufficiently serious" breach of an EU legal norm intended to confer rights on individuals. This will be the case where there is a causal link between the breach and the harm suffered.[35] Failure to transpose a directive intended to benefit the aggrieved individual will almost always be a sufficiently serious breach.

A.49 As with direct effect, the criteria for state liability are far more restrictive than for a possible infringement action, as many obligations placed on member states are

[31] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1.

[32] Case 41/74 Van Duyn [1974] ECR 1337.

[33] Case 8/81 *Becker* [1982] ECR 53.

[34] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, para 33.

[35] Joined Cases C-46/93 and C-48/93 *Brasserie du Pécheur* [1996] ECR I-1029, paras 50 to 51.

not intended to create individual rights. Therefore state liability action can only be seen as complementary to infringement actions. It should also be noted that, given the requirement that a breach be sufficiently serious, successful actions are rare.

APPENDIX B
PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

CHAPTER 1: INTRODUCTION

Question 1-1: Do consultees think that the marine extent of the project should be limited to territorial waters?

CHAPTER 5: THE NEW FRAMEWORK FOR WILDLIFE REGULATION

Provisional Proposal 5-1: We provisionally propose that there should be a single wildlife statute dealing with species-specific provisions for wildlife conservation, protection, exploitation and control.

Provisional Proposal 5-2: We provisionally propose that our proposed single statute should not include the general welfare offences in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996.

Provisional Proposal 5-3: We provisionally propose that the provisions in the Wild Mammals (Protection) Act 1996 be incorporated into the Animal Welfare Act 2006.

Provisional Proposal 5-4: We provisionally propose that the new regulatory regime should contain a series of statutory factors to be taken into account by decision makers taking decisions within that regulatory regime.

Provisional Proposal 5-5: We provisionally propose that the factors listed in paragraph 5.49 above should be formally listed, to be taken into account by public bodies in all decisions within our provisionally proposed wildlife regime.

Question 5-6: Do consultees think that the list of factors we suggest is appropriate? Do consultees think that there are other factors which we have not included that should be?

Provisional Proposal 5-7: We provisionally propose that wildlife law continue to be organised by reference to individual species or groups of species, so as to allow different provisions to be applied to individual species or groups of species.

Provisional Proposal 5-8: We provisionally propose that the new regime for wildlife use section 26 of the Wildlife and Countryside Act 1981 as the model for its order-making procedures.

Provisional Proposal 5-9: We provisionally propose that there should be a requirement to review all listing of species periodically.

Provisional Proposal 5-10: We provisionally propose that where the Secretary of State decides not to follow advice made by a regulator (such as Natural England) on updating a list there should be a duty on the Secretary of State to explain why the advice is not being followed.

Provisional Proposal 5-11: We provisionally propose that five years should be maintained as the maximum period between reviews of the listing of species within the regulatory regime.

Provisional Proposal 5-12: We provisionally propose that the regulatory regime should have a general power allowing close seasons to be placed on any animal, and to allow for the amendment of close seasons by order.

Question 5-13: Do consultees think that the appropriate regulatory technique for the management of listed species is to prohibit certain activity, permit certain exceptions, provide specified defences and allow for the licensing of prohibited activity?

Question 5-14: Do consultees think that it is undesirable to define in statute individual, class or general licences?

Provisional Proposal 5-15: We provisionally propose that the maximum length of a licence provision permitting the killing of member of a species, including licensing a particular method, should be standardised at two years for all species that require licensing.

Provisional Proposal 5-16: We provisionally propose that there should be formal limits of ten years for all other licences provisions.

Provisional Proposal 5-17: We provisionally propose that there should be a general offence of breaching a licence condition.

CHAPTER 6: SPECIES PROTECTED UNDER EU LAW

Provisional Proposal 6-1: We provisionally propose that the definition for "wild bird" in Article 1 of the Wild Birds Directive (birds of a species naturally occurring in the wild state in the European territory of EU member states) be adopted in transposing the Directive's requirements.

Question 6-2: Do consultees think that the general exclusion of poultry from the definition of "wild bird" should be retained?

Question 6-3: Do consultees think it necessary to deem game birds "wild birds"?

Question 6-4: Do consultees think that the exclusion of captive bred birds in EU law is best transposed by solely transposing the provisions of the Wild Birds Directive, or by express reference to the exclusion?

Provisional Proposal 6-5: We provisionally propose using the term "intentionally or recklessly" to transpose the term "deliberately" in the Wild Birds and Habitats Directives.

Question 6-6: Do consultees think that badgers protected under the Protection of Badgers Act 1992 or those protected currently by section 9(1) of the Wildlife and Countryside Act 1981 (from damage, destruction or the obstruction of access to a shelter or place of protection, or the disturbance of an animal whilst using such a shelter or place of protection) should be protected from intentional and reckless behaviour?

Question 6-7: Do consultees think that the term "disturbance" does not need to be defined or qualified within the provisionally proposed legal regime, when transposing the requirements of the Wild Birds and Habitats Directives?

Provisional Proposal 6-8: We provisionally propose that the disturbance provisions contained in sections 1(1)(aa), 1(1)(b), 1(5), 9(4) and 9(4A) of the Wildlife and Countryside Act 1981, regulation 41(1)(b) of the Conservation of Habitats and Species Regulations 2010 and section 3(1) of the Protection of Badgers Act 1992 can be brought together and simplified.

Question 6-9: Do consultees think that the badger would be adequately protected from disturbance, and its sett protected if covered only by the disturbance provision?

Question 6-10: Do consultees think that the protection afforded European Protected Species (except the pool frog and the lesser whirlpool ram's horn snail) under section 9(4)(c) of the Wildlife and Countryside Act 1981 does not amount to "gold-plating" the requirements of the Habitats Directive?

Provisional Proposal 6-11: We provisionally propose the removal of the defence of action being the "incidental result of a lawful operation and could not reasonably have been avoided" located currently in section 4(2)(c) of the Wildlife and Countryside Act 1981.

Provisional Proposal 6-12: We provisionally propose that there should be a general defence of acting in pursuance of an order for the destruction of wildlife for the control of an infection other than rabies, made under either section 21 or entry onto land for that purpose under section 22 of the Animal Health Act 1981.

Provisional Proposal 6-13: We provisionally propose that Article 7 of Wild Bird Directive be transposed into the law of England and Wales.

Provisional Proposal 6-14: We provisionally propose that the transposition be accompanied by the establishment of species specific close seasons.

Provisional Proposal 6-15: We provisionally propose that the transposition be accompanied by codes of practice explaining "wise use".

Provisional Proposal 6-16: We provisionally propose that breach of the codes of practice would mean that the defendant would have to show how they had complied with "wise use", otherwise the underlying offence of taking or killing a wild bird would have been committed.

Provisional Proposal 6-17: We provisionally propose that such codes of practice be issued by either the Secretary of State or Welsh Ministers.

Provisional Proposal 6-18: We provisionally propose that the term "judicious use of certain birds in small numbers" be one of the licensing purposes.

Question 6-19: Do consultees think that it is not necessary to require the reporting of all members of a species taken or killed as a matter of law for our provisionally proposed regime?

CHAPTER 7: REGULATION OF SPECIES PROTECTED SOLELY BY DOMESTIC LEGISLATION

Question 7-1: In which of the following ways, (1), (2) or (3), do consultees think that domestically protected species not protected from taking, killing or injuring as a matter of EU law should be protected?

(1) All domestically protected species not protected as a matter of EU law should be protected from being intentionally and recklessly taken, killed or injured.

(2) Badgers and seals should be protected from being intentionally and recklessly killed, taken and injured; all other domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured. It would be possible subsequently to move species between the two groups by order.

(3) All domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured.

Question 7-2: Do consultees think that the offences of selling certain wild animals, plants and fish, should include the offences of offering for sale, exposing for sale, and advertising to the public?

Provisional Proposal 7-3: We provisionally propose that there should be a power to amend the species covered by the crime of poaching.

Question 7-4: Do consultees think that the offence of poaching concerns matters beyond simply the control of species?

Question 7-5: Do consultees think that the offence of poaching should require proof of acting without the landowner's consent in relation to the animal rather than proof of trespass?

Provisional Proposal 7-6: We provisionally propose that a reformed offence of “poaching” should be defined by reference to whether the person was searching for or in pursuit of specified species of animals present on another’s land, with the intention of taking, killing or injuring them, without the landowner or occupier’s consent, or lawful excuse, to do so.

Provisional Proposal 7-7: We provisionally propose that it should remain an offence to attempt the offences in the new provisionally proposed regime.

Provisional Proposal 7-8: We provisionally propose to consolidate the common exceptions to prohibited acts set out in existing wildlife legislation.

Question 7-9: Do consultees think that purely domestic licensing conditions should be rationalised using the conditions contained in the Berne Convention?

Provisional Proposal 7-10: We provisionally propose that both individuals and classes of persons be able to benefit from a badger licence.

Provisional Proposal 7-11: We provisionally propose that the current burden of proof on a person accused of being in possession of wild birds or birds' eggs should be retained.

Question 7-12: Do consultees think that, as under the present law, a person charged with digging for badgers should have to prove, on the balance of probabilities, that he or she was not digging for badgers?

CHAPTER 8: INVASIVE NON-NATIVE SPECIES

Provisional Proposal 8-1: We provisionally propose that there is a sufficient case for the reform of the regulatory and enforcement tools available for the delivery of Government policy.

Provisional Proposal 8-2: We provisionally propose that there should be a mechanism allowing for the emergency listing of invasive non-native species.

Question 8-3: Do consultees think that such emergency listing should be limited to one year?

Provisional Proposal 8-4: We provisionally propose that the Secretary of State and Welsh Ministers should be able to issue an order requiring specified individuals (whether by type of person or individual identity) to notify the competent authority of the presence of specified invasive non-native species.

Provisional Proposal 8-5: We provisionally propose that there should be a defence of "reasonable excuse" for failing to comply with the requirement.

Provisional Proposal 8-6: We provisionally propose that the full range of licences can be issued for activity prohibited in our scheme for invasive non-native species.

Provisional Proposal 8-7: We provisionally propose that the power to make species control orders on the same model as under the Wildlife and Natural Environment (Scotland) Act 2011 should be adopted by our new legal regime.

CHAPTER 9: SANCTIONS AND COMPLIANCE

Provisional Proposal 9-1: We provisionally propose that part 3 of the Regulatory Enforcement and Sanctions Act 2008 should be used as the model for a new regime of civil sanctions for wildlife law.

Provisional Proposal 9-2: We provisionally propose that the full range of civil sanctions (so far as is practicable) should be available for the wildlife offences contained in the reforms set out in Chapters 5 to 8 of this Consultation Paper.

Provisional Proposal 9-3: We provisionally propose that the relevant regulator, currently Natural England and the relevant body in Wales (either the Countryside Council for Wales or the proposed new single Welsh Environmental Agency), issues guidance as to how they will use their civil sanctions.

Question 9-4: Do consultees think that that the current sanctions for wildlife crime are sufficient?

Provisional Proposal 9-5: We provisionally propose that offences for wildlife, excluding those for invasive non-native species and poaching, should have their sanctions harmonised at 6 months or a level 5 fine (or both) on summary conviction.

Provisional Proposal 9-6: We provisionally propose that the poaching offences for wildlife should have their sanctions harmonised at four months or a level 4 fine (or both) on summary conviction.

Question 9-7: Do consultees think that the provisions that mean that the fine for a single offence should be multiplied by the number of instances of that offence (such as killing a number of individual birds) should be kept?

Question 9-8: Do consultees think that the provisions for such offences should be extended to cover all species?

Question 9-9: Do consultees think that there should be a wildlife offence extending liability to a principal, such that an employer or someone exercising control over an individual could be liable to the same extent as the individual committing the underlying wildlife offence?

CHAPTER 10: APPEALS AND CHALLENGES AGAINST REGULATORY DECISIONS

Provisional Proposal 10-1: We provisionally propose that the appropriate appeals forum for appeals against Species Control Orders and civil sanctions under our new regime is the First-tier Tribunal (Environment)?

Question 10-2: Do consultees think that it is unnecessary to create a new appeals process for wildlife licences (option 1)?

Question 10-3: If consultees think that there should be a dedicated appeals process for wildlife licences, should it be restricted to the initial applicant for the wildlife licence (option 2), or be open additionally to the public with a “sufficient interest” (option 3)?

Question 10-4: Do consultees think that the appeal process should be available for all types of wildlife licence (general, class and individual)?

Question 10-5: Do consultees think that it would be more appropriate for appeals concerning wildlife licences to go to the Planning Inspectorate or the First-tier Tribunal (Environment)?