Law Commission
Reforming the law

# Wildlife Law Consultation Analysis of Responses

**Consultation Paper No 206 (Analysis of Responses)**
**November 2015**

**WILDLIFE LAW: ANALYSIS OF CONSULTATION RESPONSES**

**CONTENTS**

# CHAPTER 1
# SUMMARY

1.1 This document analyses the responses received to the Law Commission's consultation paper, *Wildlife Law*. It summarises the views of consultees in relation to the 43 provisional proposals and 27 consultation questions put forward.

### THE CONSULTATION PROCESS

1.2 The consultation paper was first published on 14 August 2012. Consultation ran from that date to 30 November 2012, the normal consultation period being extended to take into account the summer and the London Olympics 2012. The deadline was further extended to 21 December 2012 for the benefit of representatives of the sea fishing industry, in the light of a desire from some consultees to extend the marine scope of the project to 200 nautical miles from the baseline.

1.3 During consultation we presented our provisional proposals at meetings of the All-Party Groups on Shooting and Conservation, Animal Welfare, and Game and Wildlife Conservation.

1.4 We were able, within the consultation period, to run all-day seminars with interested parties courtesy of the Wildlife Trusts and the Institute of Ecology and Environmental Management, both of which took place in Birmingham. We also presented and ran two discussion groups at the Wildlife Crime Officers Annual Conference at NPIA Bramshill.

1.5 Within Wales, we took part in meetings on the Natural Environmental Framework, presented at the Wales Biodiversity Partnership annual meeting 2012 and also at regional biodiversity partnership meetings.

1.6 On a one-to-one basis, we undertook extensive consultation with a wide range of public bodies and non-governmental organisations, including the RSPB, RSPCA, Woodland Trusts, WWT, BASC, GWCT, CLA and Countryside Alliance.

1.7 Finally, we received 488 consultation responses:

(1) 297 were generated by campaigns one led by the RSPB[1] and another by the Wildlife News blog;[2]

(2) 114 responses were submitted from organisations, which included charities, trade associations and other interest groups, companies, government agencies, local authorities, enforcement authorities and DEFRA;

(3) the remaining responses were submitted by interested individuals, including academics, enforcement authorities, lawyers, environmental

[1] Members and supporters of the RSPB submitted 278 campaigning responses.

[2] Readers of the Wildlife News blog submitted 19 campaigning responses.

consultants and other practitioners, and individuals with a personal interest in the outcome of the project (falconers, bird breeders, pigeon fanciers, landowners, gamekeepers).

## OUR BASIC APPROACH TO REGULATED ACTIVITY

1.8 In consultation some consultees worried that we were led purely by a deregulatory agenda; others raised counter concerns about our reforms imposing significant costs on businesses or others engaged in activity with an environmental impact. The former focused on provisional proposals such as the creation of civil sanctions; the latter on a possible new "vicarious liability" offence or extending wild birds offences to include reckless commission.

1.9 On that basis, we think it useful to restate our basic approach to regulated activity – which, in part, reiterates that said in our consultation paper.

1.10 There are five features of our basic approach to regulated activity.

### Maintaining the core of current policy

1.11 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

1.12 EU law requires that the transposition of directives is effective and clear. 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.[3] Consequently, we have not focused simply on "copy-out" which is the Government's current preference.

### Improved flexibility

1.13 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.

### Using existing tools where possible

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

1.14 One of our objectives is to use 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 be adopted or by transposing its core provisions into our new regulatory regime.

### Aligning our provisionally proposed regime with other international treaties

1.15 There are a series of relevant international treaties, including the Bern Convention and the Aarhus Convention.[4] 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. Both of these international agreements have influenced the choices we have made.

## SCOPE: HABITATS

1.16 In consultation almost all stakeholders, except public bodies, questioned the exclusion of habitats. The desire to include habitats is not restricted to environmental conservation groups, but also includes those with a proactive approach to population management.

1.17 The argument of many, though not all, was that it is not possible in ecological terms to separate a species from the habitats that support it, Therefore, it is counterintuitive to have a project that focuses solely on species provisions.

1.18 Others wanted habitats included to allow an agenda to be put forward that focused on the maintenance of populations rather than the protection of individuals.

## SCOPE: MARINE EXTENT

1.19 Currently, the scope of our wildlife law reform project extends to the territorial waters of England and Wales, that is out to 12 nautical miles from the baseline.[5] Consequently, the full geographical extent of the Wildlife and Countryside Act 1981, the Conservation of Habitats and Species Regulations 2010[6] and the Conservation of Seals Act 1970 are within the scope of the project. Outside the scope of the project are the Offshore Marine Conservation Regulations 2007.[7] The exact extent of different legal regimes is discussed further below.

1.20 However, we accepted that this was not the only possible approach,[8] and asked the following consultation question:

**Question 1-1:** Do consultees think that the marine extent of the project should be

[4] The Convention on the Conservation of European Wildlife and Natural Habitats 1979 (the Bern Convention) and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus Convention).

[5] Law Commission Consultation Paper No 206, Wildlife Law (2012), paras 1.30.

[6] SI 2010 No 490.

[7] SI 2007 No 1842.

[8] Law Commission Consultation Paper No 206, Wildlife Law (2012), paras 1.30 to 1.32.

limited to territorial waters?

1.21 This question raised difficult issues, as extension would mean that the project would have to take into account more fully the legal regime underpinning the EU's Common Fisheries Policy. Overall, 47 consultees responded to this question: 15 stated that the project should be limited to territorial waters; 27 thought that the project should be extended; four put forwards alternative options; one was unclear.

1.22 The consultation response from DEFRA on marine extent is set out below:

> We believe that the legislative regime for wildlife management is in need of fundamental reform - that is the principal rationale for the project. The primary focus of the project was concerned with the management and conservation of terrestrial and freshwater species. It did include some marine aspects because of the territorial extent of the legislation and the fact that certain marine species required legislation for specific threats (such as the Conservation of Seals Act or species listed in the Schedules to the Wildlife and Countryside Act) or were incorporated into terrestrial legislation implementing the Birds and Habitats Directives. Following Court judgments (both domestic and European) that the Directives applied to areas outside territorial waters, measures were introduced in the form of the Offshore Marine Regulations (OMR) out to 200 [nautical miles]. The species aspects of the Offshore Marine Regulations we consider to be modern and without need for reform. We consider that they adequately transpose the Habitats and Wild Birds Directives through simple copy-out in the main.
>
> We believe that any extension out to 200 [nautical miles] of existing protection for species other than EPS would not address any conservation threat to species not protected under the Habitats Directive and consider that the Review has not provided any convincing evidence to the contrary. This is not surprising as the issues facing species conservation in this area bring different challenges to those facing marine species inshore. There are also different competence issues, especially over the management of fish and fisheries interactions and differing enforcement issues. Such measures would also gold-plate species protection by adding a new regulatory framework not required under the Directives.
>
> […]
>
> As a result we see there being 2 options. Either the new provisions should be subject to the existing territorial limitation (under the Wildlife and Countryside Act 1981 and the 2010 Regulations) of 12 [nautical miles], thus retaining two geographically separated regimes in the marine area, OR the species provisions applicable to EPS that are set out in the OMR should be used as the legislative base for a regime covering the whole marine area, noting that separate species regimes may be needed in relation to species that are not EPS in territorial waters because of differing threats. The issue of how best to

> protect non-EPS marine and migratory (Diadromous) species currently protected under our terrestrial and freshwater legislation out to 12 [nautical miles] would be for separate consideration.

1.23 The response from the Marine Management Organisation stated that:

> The MMO understands the limitations and complexities of amending legislation outside of the 12 [nautical miles] limit, which requires consultation with the EU; however we feel it necessary to identify the disparities between the wildlife statutes that apply at sea inside and outside the 12 [nautical miles] limit.

1.24 Wildlife LINK, the umbrella organisation for many environmental NGOs, stated in its response that it would be simpler and clearer if a single statute covered all relevant (English and/or Welsh) areas subject to UK jurisdiction. Creating several geographically separate pieces of legislation would result in additional complication and bureaucratic burdens. The development of marine plans and licensing of managing marine resources and use occurs out to 200 nautical miles. It would be inconsistent if the wildlife management legislation did not match the extent.

1.25 The Institute of Ecology and Environmental Management noted a licensing problem, that was also raised by other consultants, which is that "development sites may straddle the 12 nautical mile divide and so could potentially have to adhere to two sets of regulations".

1.26 Other consultees addressing the question directly noted that the imposition of a split in the internal legal regime at 12 nautical miles made little or no practical sense given the highly mobile nature of the species being protected (cetaceans, sturgeon, and wild birds). Consultees stating this included Natural England, the Institute of Ecology and Environmental Management, Whale and Dolphin Conservation, Professor Harrop[9] and Professor Reid.[10] The internal, 12 nautical miles, distinction should be contrasted with that enforced on the UK through operation of law (requiring that the exclusive economic zone ends at 200 nautical miles).

1.27 The National Federation of Fishermen's Organisations cautioned against extension, stating that:

> Whilst the remit of the project limited to territorial waters would seem arbitrary, and there are good reasons for a harmonised regime in the marine environment, we are concerned over whether sufficient attention would be given by the project to the complexities of regulating in the marine environment. Given that the project does not consider Common Fisheries Policy it would seem inappropriate to propose any regime that could not be applied to non-domestic marine operators.

[9] University of Kent.

[10] University of Dundee.

## SUMMARY OF VIEWS

### Regulatory structure and general provisions

1.28 A majority of consultees agreed that a single wildlife statute should be introduced to deal with species-specific provisions for wildlife conservation, protection, exploitation and control.

1.29 There was overwhelming support for the basic regulatory approach that we proposed, which would prohibit certain behaviour, permit limited exceptions and otherwise license desirable activity affecting defined lists of species.

1.30 There was consensus that the general welfare offences in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996 should not be included in our new scheme. But problems with our provisional proposal to incorporate provisions of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006 were pointed out.

1.31 There was a range of views about our proposal to introduce a statutory list of factors. A majority of consultees were in favour of the proposal, but there was no agreement on the purpose of a statutory list or its content. Some consultees considered that a single list of factors would be unworkable, especially given the differences between the overarching aims of the Wild Birds and Habitats Directive. There was also concern that the list might be regarded as a breach of EU law.

1.32 There was support for redefining wild bird and its exclusions on the basis that this would make the law simpler and better transpose the Wild Birds Directive. But consultees raised potential areas of uncertainty about the definition that we proposed.

1.33 Consultees were broadly in favour of introducing a power allowing close seasons to be placed on any animal and amending existing close seasons, subject to appropriate safeguards being provided.

### Transposing core EU directive requirements

1.34 A majority of consultees supported the harmonisation of the mental element of species protection offences as those committed “intentionally or recklessly” on the basis that this would enhance the clarity and consistency of the law, and remove an arbitrary distinction between species protected by domestic law and those protected by EU law. Those against the proposal argued that there was no legal reason in favour of changing the current level of protection.

1.35 A majority of consultation responses expressed unconditional support of our proposal to abolish the “incidental results” defence. Nevertheless, a larger number of consultation responses either disagreed or acknowledged the potential negative economic implications the removal of the current defence would have on legitimate economic activities and suggested alternative approaches to transposition, along the lines of Scottish law.

1.36 A majority of consultees were in favour that the term “judicious use of certain birds in small numbers” be one of the licensing purposes. Consultees who opposed this provisional proposal argued that the term “judicious use” would unduly expand the flexibility of the current system and thus reduce protection of wild birds.

**Prohibited activities**

1.37 Consultees expressed overwhelming support for bringing a higher level of consistency on the mental element required to convict a person of a wildlife crime. However, there was no consensus as to what that level of protection should be, in particular whether it should include reckless behaviour.

1.38 Wildlife protection organisations and regulators considered that the level of protection provided under the current law for badgers and their sets should be retained. They were against introducing a disturbance provision on the basis that this would not be enough to protect the physical structure of the sett. And for similar reasons it was argued that the reverse burden in connection with the offence of digging for a badger should be retained. Representatives of land owners, farmers, gamekeepers on the other hand were in favour of making the test one of disturbance and argued that the reverse burden hinders lawful fox control activities and results in unfair private prosecutions.

1.39 Consultees were divided on the question of whether the offence of obstructing access to a place of shelter or protection was gold-plating the requirements of the Habitats Directive. Some argued that a temporary obstruction that causes no actual damage should not amount to “deterioration” for the purposes of the Habitats Directive, but wildlife protection organisations argued that obstruction can have serious repercussions on protected animals.

1.40 A majority of respondents were in favour of leaving the term “disturbance” in the Habitats Directive undefined. Codes of practice were recommended by many in order to clarify what disturbance meant, though a number of others noted that the variety of species and activity that may disturb them could make the issuing of codes covering all situations difficult.

1.41 An overwhelming majority of consultees thought that the offence of selling certain protected wild animals, plants and fish should include offences of offering for sale, exposing for sale and advertising to the public. Though some concerns were raised over the meaning of advertisement and whether it captures internet trading.

1.42 A majority of consultees were in favour of retaining the reverse burden of proof for the offence of possession of wild birds and birds’ eggs, maintaining that it was necessary due to the lack of availability of information to ensure successful prosecutions.

1.43 In general, consultation disclosed considerable support for reform of the offence of poaching. Consultation suggested that the crime of poaching was not primarily for control of species, but exists to protect or safeguard rights to take or kill species present on a particular parcel of land. Consultees were overwhelmingly in favour of creating a power to amend the species covered by the crime of poaching. Though DEFRA argued that there is no reason why the crime should be species-specific and could extend to all animals or birds with financial or amenity value.

1.44 A number of stakeholders argued that there are gaps in the current domestic provisions on the protection of wild plants, fungi and algae. Certain stakeholders suggested that the narrow focus of the legislation on taking and destruction fails to address the threats created by activities, from forestry to mountain biking, that can cause damage generally but are not directly targeted at a particular plant. Some stakeholders argued that the current also law fails to address appropriately the differences between plants and fungi.

1.45 Lastly, there was an overwhelming majority in favour of maintaining the offence of attempting a wildlife offence.

**Permitted activity**

1.46 There was general support for our provisional proposals concerning the transposition of article 7 of the Wild Birds Directive into domestic law, including the principles of "wise use" and "ecologically balanced control". Although there were conflicting interpretations of the relevant EU obligations advanced by consultees. And there was some concern that our proposal to satisfy the requirement of "wise use" by means of codes of practice was unnecessarily burdensome and could run the risk of creating legal uncertainty.

1.47 There was overwhelming support for consolidating the common exceptions to prohibited acts set out in the current law, subject to this not diluting existing levels of protection. Though issues were highlighted concerning the defence of humane killing and the "netsman defence".

1.48 There was some support for introducing a defence of acting in pursuance of an order under sections 21 and 22 of the Animal Health Act 1981. However, some consultees argued against this proposal on the basis that the proposed general defence would lower the existing protection levels and is incompatible with EU law.

1.49 Consultation responses were evenly split on our proposal to define individual, class and general licences in statute. Those arguing against statutory definitions argued that this would create unnecessary complexity. It was also suggested that the use of certain class and general licences may not be in line with the Wild Birds and Habitats Directive which require licensees to make judgements of a preventative nature that the licensing authority should be carrying itself before the licence is granted.

1.50 There was an even split on whether badger licences should be made available to both individuals and classes of persons. The arguments against our provisional proposal were primarily based on a general opposition to the use of class and general licences.

1.51 There was no real consensus as to the appropriate regulation of the length of wildlife licences. On the one hand, Natural England argued that imposing licence length requirements reduces undesirably the flexibility of the regulatory regime. Conversely, others thought that there was a danger that imposing maximum licence lengths would encourage regulators to use the maximum length as the standard length of every licence.

1.52 The views of consultees were also split on the issue of statutory reporting requirements on the taking or killing of a protected animal. One side of the argument generally advanced the point that any new reporting requirement would be an additional burden on business. On the other hand, other consultees made the point that the lack of a reporting requirement reduces the information known to regulators as to the effects of licences granted – particularly regarding general licences.

1.53 A majority of consultees were in favour of rationalising domestic licensing conditions for granting licences around those conditions found in the Bern Convention. Those against raised concerns that the licensing grounds should not reduce the level of protection.

1.54 There was broad support for allowing the full range of licences to be issued for activity prohibited in our scheme related to invasive non-native species. Although there was some discussion about how restrictive the licences should be.

**Compliance**

1.55 There was overwhelming support for making it an offence to breach a licensing condition, as this would bring consistency to the legislation, facilitate enforcement and have a deterrent effect. Concerns were expressed, however, about legal certainty and the proportionality of penalties.

1.56 A majority of consultees were in favour of introducing an offence of “vicarious liability” applicable to the employer or principal of the person who commits a wildlife offence. However, strong arguments were made against the proposal. DEFRA, for example, argued that it would constitute an unjust extension of criminal liability and that it would have the effect of imposing excessive burdens on businesses.

1.57 Consultees overwhelmingly agreed that the current legislative framework is insufficient to tackle the problems with invasive non-native species effectively. There was broad support for powers to make species control orders for invasive non-native species and require notification of their presence, subject to these powers not placing disproportionate burdens on individuals.

1.58 Consultees from all sides of the spectrum agreed that the current sanctions for wildlife offences are insufficient. It was argued that wildlife crimes are very rarely prosecuted and the available penalties often do not provide a sufficient deterrent. Furthermore, it was stated that the current sanctions are inconsistent with the significantly higher penalties available in other areas of environmental law.

1.59 The majority of stakeholders were in favour of harmonising the level of sanctions for wildlife offences, but a majority disagreed with the level of sanctions we proposed, in particular because it would not produce a sufficient deterrent effect. A clear majority of consultation responses argued for retaining the provisions that require a fine for a single offence to be multiplied by the number of instances of that offence.

1.60 In general, consultees favoured the creation of a comprehensive scheme of civil sanctions, accepting that our provisional proposals would form a useful enforcement mechanism within a balanced regulatory regime. However, some consultees raised concerns which essentially equated the creation of a regime for civil sanctions with a lessening of sanctions, a reduction in the powers of police and the possibility of creating confusion between the regime for civil sanctions and criminal prosecution. Certain consultees opposed the use of civil sanctions, not because of a disagreement with the concept itself, but more due to a mistrust of the regulator that would potentially be imposing them: Natural England.

**Appeals and challenges**

1.61 A significant majority emerged in favour of a dedicated appeals process, predominantly based on assertions that the excessive cost of and delays to judicial review make it an inappropriate mechanism for challenging wildlife licensing decisions. A number of consultees also raised concerns as to the legality of judicial review in the light of the UK's international commitments on access to justice in environmental matters.

1.62 There was, however, no consensus as to who should be able to benefit from a new self-standing appeals mechanism and whether the appeals mechanism should be available for all types of wildlife licence. In general, those representing land or development interests favoured "applicant only" appeals, whilst environmental Non-Governmental Organisations strongly argued in favour of an appeals process that would also be open to any member of the public with a sufficient interest to challenge individual, class or general licences.

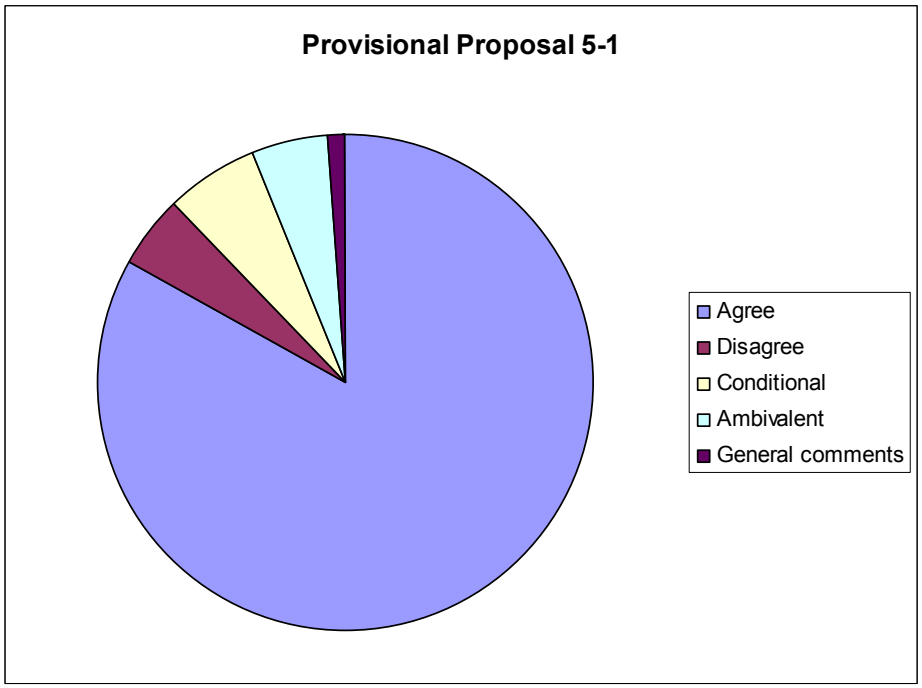
1.63 The majority of consultees suggested that the First-tier Tribunal (Environment) would be a more appropriate appeal body than the Planning Inspectorate. Though concerns were raised on whether the First-tier Tribunal (Environment) has a sufficient track record.

# CHAPTER 2
# REGULATORY STRUCTURE AND GENERAL PROVISIONS

## REGULATORY STRUCTURE

**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.**

2.1 Eighty-two consultation responses were received in relation to Provisional Proposal 5-1: 68 agreed; four disagreed; five gave conditional answers; and one provided general comments.




2.2 Consultees were overwhelmingly in favour of Provisional Proposal 5-1 on the basis that is would make the law clearer and more accessible. However a number of responses expressed specific concerns or made particular suggestions as to what should be included.

2.3 Predictably, a number of wildlife protection organisations, and in particular badger groups, agreed with the proposal to the extent that the new framework will not reduce the protection currently afforded to protected species. Conversely certain representatives of the game industry, farmers and landowners agreed to the extent the new framework would not introduce additional regulatory burdens, such as the introduction of new licensing requirements. This was well summarised in the National Gamekeepers' Organisation's submission:

> A single new Act would have to take account of the different regulatory regimes currently applying to the recreational shooting of game, wildfowl, deer and the management of pests under licence. Land managers will not accept an amalgamation of laws that imposes

> a more onerous legal regime than the status quo, for example game shooting in some way becoming subject to licensing. Protectionists will no doubt be equally resistant to more species management being undertaken in the name of sport. So the task is not easy. A single Act would also need to include existing differences, where desirable, between the laws for different groups of species. To give just one example, the shooting of gamebirds on Sundays is prevented by the 1831 Game Act and few in the shooting community would want that changed. But if the 1831 Game Act were to go, the prohibition on Sunday shooting of game would go with it unless the provision was transferred in some way to the new Act.

2.4 A large number of consultees ranging from wildlife protection organisations to representatives of landowners, while accepting the merits of the provisional proposal, suggested that the framework should also encompass habitats legislation. The Country Land & Business Association, for example, argued that

> the management of species and habitats is closely related both in practice and conceptually it seems odd to have looked at one whilst excluding the other.
>
> Moreover, as we are increasingly being urged to consider the natural environment as a whole by taking an ecosystems approach rather than looking at particular aspects of biodiversity in isolation, it seems all the more inconsistent to be adopting the proposed approach.

2.5 As to specific suggestions, the Wildlife and Countryside LINK and the RSPB, amongst others, suggested that the "biodiversity duty" under sections 41 and 42 of the Natural Environment and Rural Communities Act 2006 should be integrated in the structure of the new statute. The Wildfowl and Wildlife Trust, together with the RSPB, further suggested that the Environmental Protection (Restriction on Use of Lead Shots) Regulations 1999 should also be included in the new framework.[1] The Regulations, they submit, have been broadly ineffective until now, with recent statistics from a DEFRA-funded showing that 70% of ducks sampled had been shot illegally with lead. They argued that as the Regulations make it unlawful to "use" the lead shots, it creates for prosecutors and the police an insurmountable hurdle "since they would have to witness the act of shooting taking place and then retrieve both the shot bird and the ammunition for analysis". The RSPB further argued that the Pests Act 1954 should also be included:

> Since the Pests Act controls use of, sale of, and possession of spring traps, unless of a type authorised by the Spring Traps Approval Order 1995 (and Variations from 2007, 2009 and 2010), its inclusion in this review is important.

2.6 Plantlife also suggested the inclusion, together with a review and update, of the Weeds Act 1959 and the Ragwort Control Act 2003.

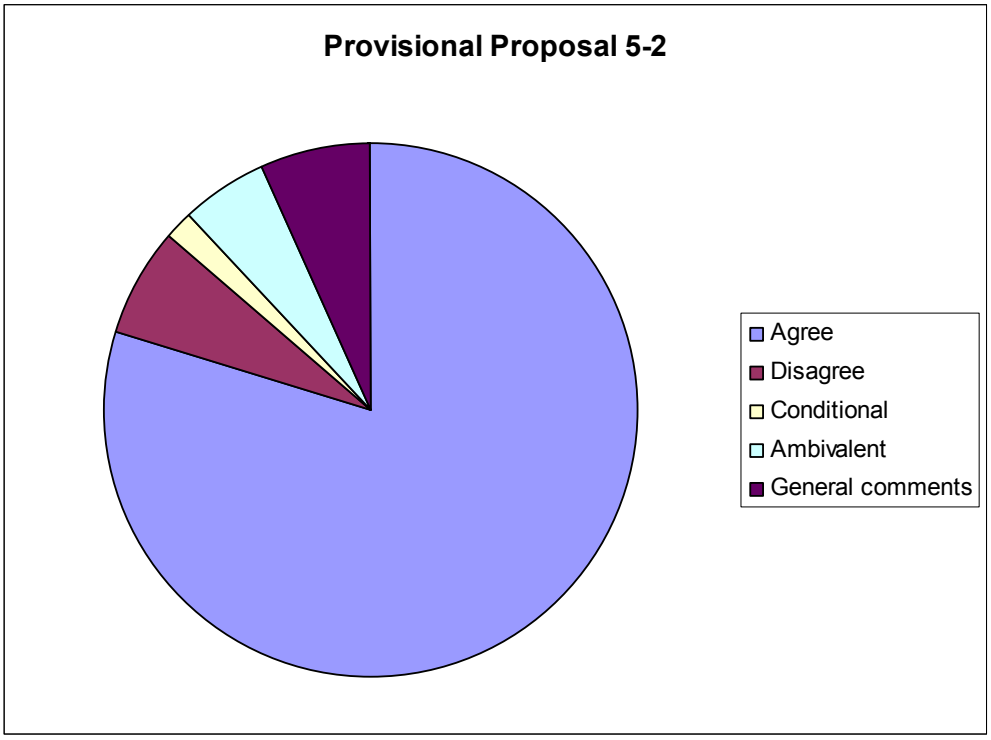
[1] SI 1999 No 2170.

2.7 DEFRA generally agreed with Provisional Proposal 5-1. They argued, however, that

> some of the existing regimes vary greatly in their approaches. For example, much of the freshwater fisheries legislation is already very flexible and effective at dealing with the issues. Care should be taken to therefore build on the most effective provisions across the regimes.

**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.**

2.8 Fifty-nine consultation responses were received in relation to Provisional Proposal 5-2: 47 agreed; four disagreed; one was conditional; three were ambivalent; and four provided general comments.




2.9 Consultees were overwhelmingly in favour of Provisional Proposal 5-2. However animal welfare organisations, such as the League Against Cruel Sports and the International Fund for Animal Welfare, were unenthusiastic about the exclusion of the Animal Welfare Act 2006. Their positions were also supported by Natural England to a certain extent. DEFRA did not express a view in relation to this provisional proposal.

2.10 The International Fund for Animal Welfare for example regarded the present review as an opportunity to expand the protection of the 2006 Act to a larger group of wild animals:

> Despite the intention to incorporate the provisions of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006 expressed in the following question, this alone will not benefit all wild animals, since such a merger would only benefit wild mammals.

> Therefore, we believe that either wild animals that are not mammals should also be incorporated into the AWA, or otherwise we think that the single statute should include general animal welfare offences for wild animals not covered by the amended AWA. Otherwise we are concerned that the consolidation process may lead to animal welfare offences being lost for some of the animals currently protected.

2.11 Natural England took a similar line, arguing that they would only support the exclusion of the two Acts if provisions comparable to those in the Wild Mammals (Protection) Act 1996 were to be extended to relevant wild taxa (particularly birds) as currently it is not an offence to kill a wild bird in an inhumane manner. In their view, the 2006 Act should also be made relevant to wild animals. The National Gamekeepers' Organisation agreed only to the extent that there is no logical reason why the provisions of the 1996 Act should only apply to mammals but not to other sentient beings. Natural England further noted that:

> Natural England has produced an advice note to highlight the potential relevance of the 2006 Act to wild animals, but it would be better for its application to wildlife to be clearly articulated in the statute itself or accompanying legislative explanatory notes. […] The extent to which [the 2006 Act] applies to wild animals is currently limited to formerly domesticated species (e.g. feral pigeons) and animals that are – in effect – under the physical control of man (e.g. in a trap, net or enclosure). This means that "free-living" wild animals are not "protected animals" as defined by the 2006 Act, and thus do not enjoy the welfare protection provided by this statute. For example, it is not currently an offence under the 2006 Act to kill a wild animal using a lawful method which is used in an inhumane or even deliberately cruel manner if that animal is neither under the control of a person nor a feral animal (e.g. an incompetent marksman who shots a fox or deer at an excessive distance, wounding it but with no chance of a second shot to dispatch it, currently commits no offence).

2.12 They further noted that a number of protection provisions are both relevant to conservation and welfare, and some common wild species like the badger are currently afforded protection primarily on welfare grounds. Providing such protection in another statute would add unnecessary complexity to the law. They therefore suggested

> that the new statute is used to provide welfare protection for specific species where the provision is also relevant to species conservation, exploitation or management.

2.13 Finally they submitted that animal welfare should be recognised as "a selection criterion for inclusion of species on the lists" such as Schedule 5 of the Wildlife and Countryside Act 1981.

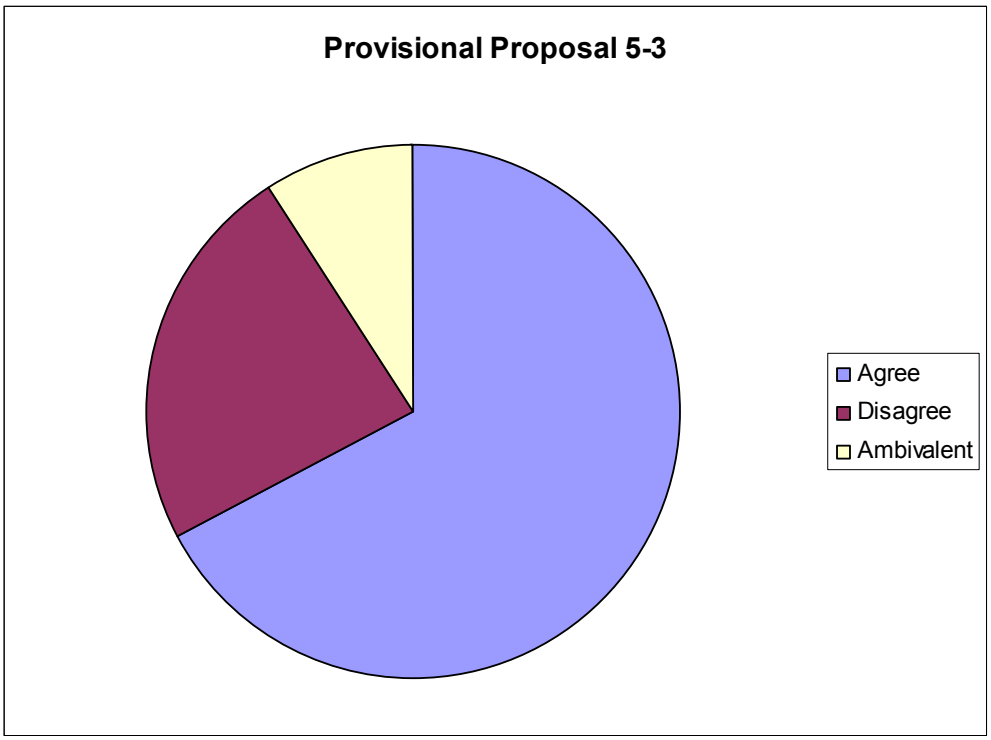
2.14 The Countryside Alliance disagreed, arguing that

> the Animal Welfare Act offences already apply when a wild animal comes under the control of man and as such provides the necessary welfare protection where it is appropriate. To apply the offences more generally would be unworkable as it would require landowners to

make provision for welfare which would be absurd in relation to wild animals. Similarly we do not think that the Wild Mammals (Protection) Act 1996 would work within the proposed new legislation.

**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.**

2.15 Fifty-five consultation responses were received in relation to Provisional Proposal 5-3: 37 agreed; 13 disagreed; and five submitted ambivalent responses.




2.16 A large majority of consultees agreed with Provisional Proposal 5-3. Concern was however expressed by a number of representatives of the shooting industry and farmers. DEFRA also opposed this provisional proposal.

2.17 Natural England fully agreed with the proposal, adding that the proposal should not merely result in the consolidation of the two statutes but should result in the extension of the protection of the Wild Mammals (Protection) Act 1996 to wild birds and the extension of the Animal Welfare Act 2006 to all wild animals. They also recommended to consolidate section 8 ("poisoned grain and flesh") of the Protection of Animals Act 1911 within the proposed new statute.

2.18 The World Society for the Protection of Animals, the Whale and Dolphin Conservation, the Woodland Trust and Wildlife and Countryside LINK, amongst others, also agreed that the proposal should go beyond consolidation.

2.19 The Countryside Alliance, together with the Council of Hunting Associations, the Hawk Board, the National Farmers' Union and NFU Cymru, the Union of Country Sports Workers and the British Veterinary Zoological Society, strongly opposed the provisional proposal on the basis that the two Acts are incompatible:

The Animal Welfare Act creates a legal framework for regulating the

welfare of domestic animals and wild animals that have come under the control of man. Many of the protections within the Act are based around the five freedoms. The five freedoms do not and cannot apply to animals in the wild. The Animal Welfare Act does not concern itself with protecting welfare standards for wild animals; it is concerned with protecting the welfare standards of domestic animals and wild animals under the control of man as well as preventing unnecessary suffering being caused to them.

The Wild Mammals (Protection) Act 1996 prohibits certain defined acts from being carried out in order to intentionally cause unnecessary suffering to wild mammals. The Act does not concern itself with any other wild animal apart from mammals, whereas the Animal Welfare Act can apply to all animals. The Act does not prevent all forms of causing unnecessary suffering to wild mammals.

The Animal Welfare Act and the Wild Mammals (Protection) Act are based on very different legislative principles and would not fit together in the way envisaged by the Law Commission. If a single piece of legislation dealing with the welfare of wild animals was necessary then it should be enacted. The Wild Mammals (Protection) Act could be replaced by such a piece of legislation. Placing the current provisions of the Wild Mammals (Protection) Act within the Animal Welfare Act would not have the effect of creating a single piece of legislation dealing with welfare standards for wild animals. It would have the effect of creating a disjointed piece of legislation that would cause problems in terms of wildlife management and would not improve the position in regard to the welfare of wild animals.

2.20 The British Veterinary Association similarly argued that "it is not clear how easily the requirements to safeguard wildlife welfare could be incorporated into the AWA and how duty of care and welfare needs could be applied to wild mammals, except those that are temporarily under human care as a result of injury requiring treatment and rehabilitation".

2.21 DEFRA submitted that "the 1996 Act should not be incorporated into the 2006 Act because there is a different level of proof between the two Acts".

**Conclusion**

2.22 There was broad support for a single statute. Consultees on the whole accepted that the Animal Welfare Act 2006 represented a self-contained welfare code, and that there was, therefore, little need to recreate its provisions in any new wildlife regime. Problems with our provisional proposal to incorporate provisions of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006 were helpfully pointed out. In particular, there are considerable differences between the intention required to make out the relevant offences in the two Acts.

**STATUTORY FACTORS**

2.23 In our consultation paper we highlighted one potential criticism of the current

domestic law: the lack of transparency, which can lead some to think that priority is given to a particular interest.[2]

2.24 We argued that the introduction of statutory factors could play a role in ensuring transparent decision-making by public authorities and improving the engagement of those representing competing interests. This would be promoted by highlighting specific factors that would need to be considered, and in many cases weighed against each other, before coming to a particular decision.

2.25 The statutory factors we suggested were:

(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 5-4: 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.**

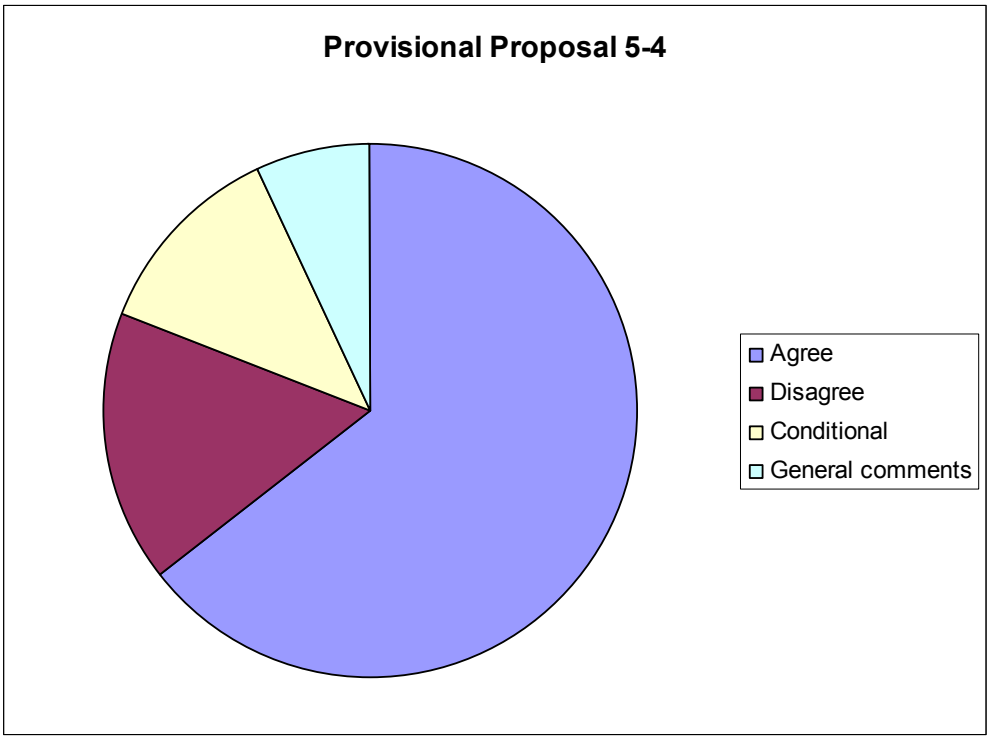
**Question 5-6: [a] Do consultees think that the list of factors we suggest is appropriate? [b] Do consultees think that there are other factors which we have not included that should be?**

**Consultation responses**

2.26 Statutory factors generated considerable debate in consultation. Whilst the headline figures favour their introduction, this belies a considerable amount of disagreement regarding their purpose and content.

2.27 Seventy-three consultation responses were received concerning Provisional Proposal 5-4: 47 consultees agreed; 12 disagreed; nine gave conditional responses; and five offered general comments.

[2] Wildlife Law (2012) Law Commission Consultation Paper No 206, para 5.27.




2.28 On the idea of a non-hierarchical list of factors, we received 36 consultation responses: 25 disagreed with the idea; eight agreed; and three offered alternative suggestions.

2.29 Question 5-6(a) generated 57 consultation responses: 20 agreed that our list of factors was appropriate; 36 thought otherwise; one consultee suggested a different approach. Seventy-five consultees responded to Question 5-6(b): 20 consultees supported the proposed factors, including animal welfare; 16 consultees argued against the inclusion of "animal welfare" in the list of factors, with two further responses (National Farmers Union and NFU Cymru) arguing for a restriction of the definition of animal welfare to methods for taking and killing only; eight consultees proposed the inclusion of "wildlife management"; and others put forward a wide range of factors including "human health and/or safety" and "animal disease control".

2.30 DEFRA was not in favour of introducing statutory factors, stating that they

> already operate under such principles and remain to be convinced that defining them on the face of the legislation would serve any useful purpose including the aim of streamlining decision making. A list of general factors to be taken into account may be difficult to apply in relation to the grounds for granting wildlife licences, since these grounds set out specific purposes to be considered, and a list of general factors superimposed on these would be confusing.

2.31 Natural England and the Countryside Council for Wales were in favour. Natural England stated that they

> fully support this proposal. Balancing factors are already taken into account in decision making through their inclusion in European Directives and government policy, but there would be a clear benefit

> in terms of consistency and transparency for these to be clearly set out in the proposed legislation.

2.32 Wildlife LINK and UKELA had significant concerns with statutory factors, UKELA stating that "the suggested use of statutory factors is inconsistent with the requirements of the Birds and Habitats Directives".[3]

2.33 Animal welfare was the most contentious of the proposed factors. DEFRA urged caution, especially in "how the animal welfare factor was applied to fisheries". Natural England thought that "animal welfare must be included as a relevant factor".

2.34 Many of the conservation bodies supported the inclusion of animal welfare, with the RSPCA welcoming the proposed inclusion.

2.35 The inclusion of animal welfare was opposed by many of those involved in the proactive management of wildlife. The Countryside Alliance objected to animal welfare being a factor, stating that it is

> inconceivable that it would assist a decision maker considering whether to licence the killing of a group of healthy wild animals to consider how that would affect their welfare.

2.36 The Country Land and Business Association objected to welfare being a factor on the basis that it would be a novel addition to the law on wildlife management. They suggested that we had confused the concepts of welfare and cruelty, where prohibition of the latter was already an aspect of the wildlife law, whilst the former was not.

### Conclusion

2.37 Although there was support for our proposals, many consultees thought a single list of factors unworkable, especially given the differences between the Wild Birds and Habitats Directive as to their overarching aims.[4] Some criticism was also made of the list that we put forward. There was also some confusion as to how this list would work.

## GENERAL REGULATORY APPROACH

**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?**

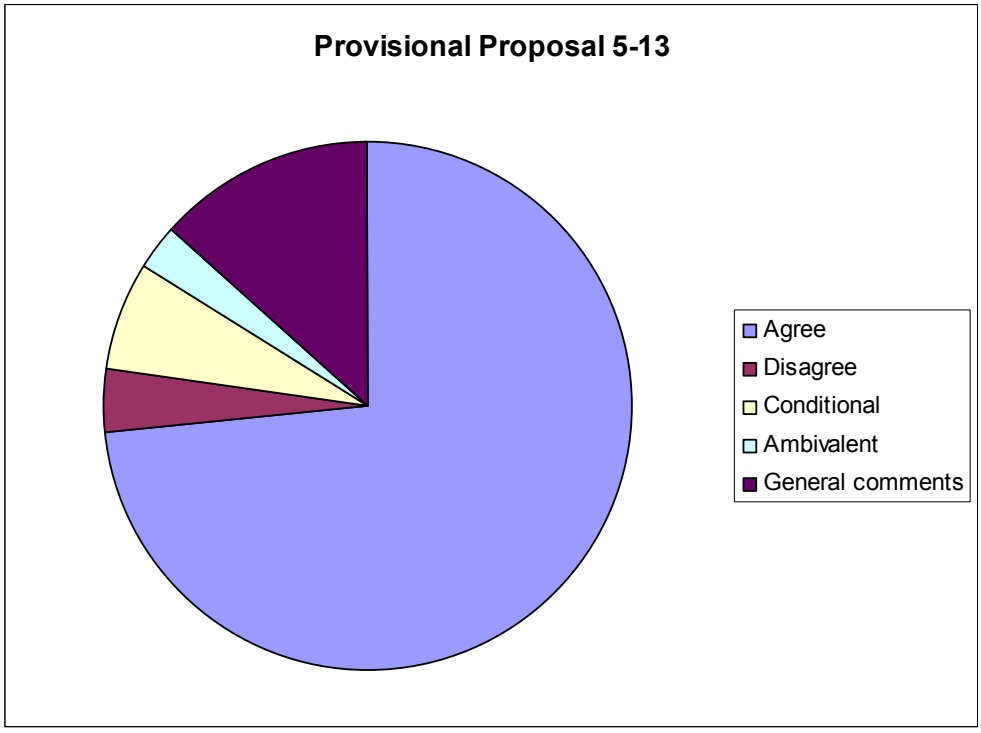
### Consultation responses

2.38 Seventy-five consultation responses were received in relation to Question 5-13: 55 agreed; three disagreed; five were conditional; two were ambivalent; and ten

[3] Directive on the conservation of wild birds 2009/147/EC, Official Journal L 20 of 26.1.2010; and Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC, OJ L 206 of 22.7.1992.

[4] Directive 2009/147/EC; and Directive 92/43/EEC.

provided general comments.




2.39 Whilst the great majority of consultees supported this provisional proposal, responses showed a clear split between wildlife conservation organisations and organisations with a proactive approach towards wildlife management.

2.40 Natural England agreed with the provisional proposal, noting that "this is broadly how the current system operates, which works reasonably well and is understood by the majority".

2.41 The Countryside Alliance submitted that the system should be based upon a general presumption allowing the management of wild animals by any lawful means unless there is a good reason to provide some degree of protection under one of the regimes under the proposed legislation.

2.42 The National Gamekeepers' Organisation agreed with the Countryside Alliance and noted that while management is presumed to be allowed in relation to mammals, this is not the case in relation to birds:

> There is no evidence that the current approach for the mammals and plants does not work and it is certainly easier for the public to understand than is the situation with birds. The latter results in confusions such as: "It's normally a protected species but that one wasn't because of a licence that the shooter didn't have to possess but the Secretary of State had signed", or, "It was a protected bird when he killed it but because of the reason he killed it, it wasn't an offence".
>
> We would strongly urge using the current model for mammals/plants rather than the peculiar system we have for birds but above all, every species should be dealt with in the same way, bird, mammal, fish or

> mollusc. […] Another shortcoming of the present bird protection legislation is that it inhibits the control of alien invasive species. Currently, the moment such new, harmful birds are established here they are automatically protected, whereas if they could be controlled unless and until they were specifically protected there would be a greater chance of eradicating them quickly before it was too late.

2.43 The Forestry Commission suggested the use of alternative approaches in relation to species protection provisions for on-going activities such as forestry. They noted that the European Commission's guidance on article 12 Habitats Directive[5]:

> suggests that preventative approaches eg, prior approval of forest management plans can ensure the protection of species involved. Forest Design Plans are required for forestry receiving grant aid, or applications for a license to fell or plant trees (EIA may also be required). Forest Design Plans also comply with the UK Forestry Standard and general codes of practice for EPS as exist for England, Scotland and Wales at present which have been written by the Forestry Commission, SNCAs and species experts.

2.44 At the other end of the spectrum, the RSPB argued that the basic regulatory approach should recognise and require positive conservation measures for species with an unfavourable conservation status. A number of consultees also criticised the current use of general licences. Dr Angus Nurse, for example, submitted that

> one weakness of the current regime is the lack of monitoring of the general licence system so that the necessity of a pest control operation is rarely established and is not effectively monitored. The presumption should be for protection with permitted exceptions and specified defences that need to apply to the specific circumstances of an operation, rather than general defences and licences that apply irrespective of whether they are needed or justified.

2.45 The Deer Initiative Ltd highlighted the confusion in deer management legislation arising from the concurrent presence of licences and specific defences (such as the "protection of property" defence). In their view this should be resolved by only licensing out of season shooting for the protection of property.

2.46 DEFRA noted that under the freshwater fishing legal framework, fishing activities can only be carried out if they have been firstly licensed or authorised. Those differences, in their view, would need to be accommodated within the new regime.

**Conclusion**

2.47 There was an overwhelming level of support for the basic regulatory approach. An important matter, and one not dealt with explicitly in the consultation paper, was raised frequently in consultation: that species not mentioned are not protected.

[5] Directive 92/43/EEC.

## ORGANISATION OF PROTECTION

**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.**

2.48 Seventy-four consultation responses were received in relation to Provisional Proposal 5-7: 64 agreed; three were conditional; and seven provided general comments.

2.49 This provisional proposal was in principle almost unanimously supported by consultees. A number of relevant comments were however provided by a number of consultees.

2.50 The National Wildlife Crime Unit, supported by the National Gamekeepers' Organisation, argued that the approach towards the protection of birds should be made consistent with the approach in relation to other wild animals:

> Part 1 WCA1981 is a little contradictory in its approach as it initially affords protection against killing and taking to all birds normally found within the EU and then either provides enhanced protection for certain species or licences actions against others. In contrast other wildlife only receives broad legal protection against taking and killing when specifically identified as being protected.
>
> We feel that some thought might be given to a consistent approach to wildlife protection whereby all flora and fauna is legally protected with a licensing process allowing specific actions.

2.51 The Wildfowl and Wetlands Trust disagreed, arguing that "the basic premise that all wild birds as defined are protected should remain as it would be too difficult and unmanageable to transpose the Birds Directive in any other way".

2.52 Plantlife, the Woodland Trust and Wildlife and Countryside LINK argued that the term "wildlife" should be explicitly defined so as to include all taxonomic groups, including all plants (vascular plants, bryophytes, lichens and algae) and fungi.

2.53 Wildlife and Countryside LINK further submitted that higher-level taxonomic restrictions to the application of different measures should be dissolved "so that any measure would in theory be available to any species (albeit there may be some practical limitations to this approach), in particular disturbance measures should be available to plants".

2.54 A number of organisations with a proactive approach to wildlife management, such as the Game and Wildlife Conservation Trust, generally argued that a fundamental tenet of the new framework should be that no species should be "immune from management as should no species be exploited without controls". In other words "there should be no presumption of protection or exploitation".

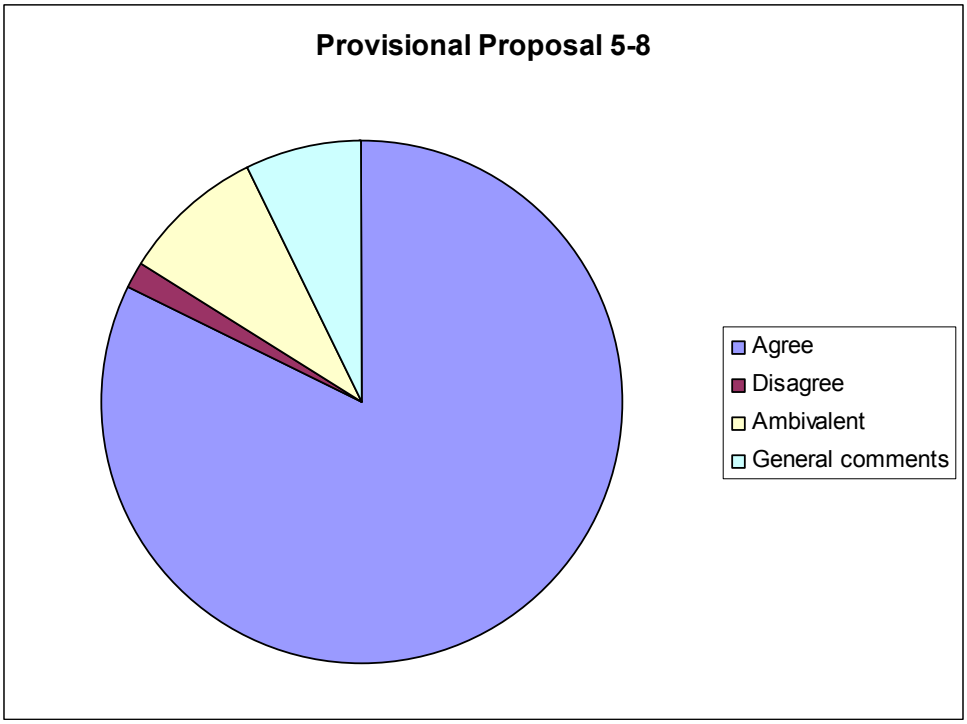
### Conclusion

2.55 Although there was some debate in the responses about the appropriate approach, overall, there was overwhelming support for this proposal.

## REVIEW OF SPECIES LISTING

**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.**

2.56 Fifty-six consultation responses were received in relation to Provisional Proposal 5-8: 46 agreed; one disagreed; five submitted ambivalent responses; and four provided general comments.




2.57 Consultees overwhelmingly agreed with this provisional proposal, with only a handful of submissions expressing concern.

2.58 The RSPCA noted that as the protection of deer and badgers is not based on their conservation status, it is unclear which body might advise the Secretary of State on such matters.

2.59 DEFRA and the Angling Trust and Fish Legal argued that the proposal should not be extended to fisheries' legislation. DEFRA for example submitted that

> the Order-making procedure proposed differs from that currently used for fisheries. The fisheries regime includes Net Limitation Orders (NLOs), bye-law or emergency bye-law making powers or the statutory process for these. We do not think it appropriate to move away from these flexible and effective fisheries measures.

**Provisional Proposal 5-9: We provisionally propose that there should be a requirement to review all listing of species periodically.**

2.60 Sixty-nine consultation responses were received in relation to Provisional Proposal 5-9: 64 agreed; two were conditional; and two suggested alternative approaches.

2.61 Consultees were overwhelmingly in favour of this provisional proposal, but made a number of comments and suggestions.

2.62 Natural England strongly agreed with the proposal, noting that existing schedules that do not have a requirement for periodic reviews under the Wildlife and Countryside Act 1981 are often left unchanged for many years: Schedule 1, for example, has not been revised since the Act was first passed in 1981 and is no longer considered to provide a satisfactory list of bird species that should benefit from special protection. They submitted that the review should be every ten years with provision to make changes in between when urgent need is identified.

2.63 The RSPB, the Amateur Entomologist Society, the Forestry Commission, the Wildfowl and Wetlands Trust and the Deer Initiative Ltd, amongst others, agreed with Natural England that there should be an additional power to revise a schedule at any time in order to deal with unexpected changes in circumstances. The Angling Trust and Fish Legal similarly submitted that there should be more flexibility as some species may need more or less frequent review depending on the circumstances of their inclusion:

> Therefore regulators should have discretion as to when to review certain animals or plants, subject to a long-stop compulsory review to ensure all species are reviewed.

2.64 A number of consultees highlighted the importance of stakeholders' consultation and appropriate consultation of advisory bodies. The RSPB for example submitted that

> in carrying out the review Ministers should seek the formal advice of Natural England and Countryside Council for Wales (or equivalent body) and consult all stakeholders. Advice should also be sought from JNCC in relation to matters that have a pan-Great Britain impact (noting that consultation of JNCC will be obligatory if the marine extent is taken out to 200nm). Indeed, while any duty on Ministers provided by amended legislation can only apply to England and Wales, it would be biologically appropriate – and helpful in terms of enforcement – for such reviews to be conducted in partnership with Ministers from Scotland and Northern Ireland so that an appropriate biogeographic approach can be adopted.

2.65 DEFRA took a more restrictive view on stakeholders' consultation. Whilst they agreed that schedules require "some degree of regular review" they argued that that there is

> no need for a comprehensive review every time and in all cases. The requirement might therefore take the form of a duty for all of the schedules to be periodically reviewed but a more limited duty to only consult where there needs to be a change.

2.66 The RSPCA submitted that "conservation" should not be the only criteria for reviewing schedules and that animal welfare should also be a relevant consideration when reviewing the schedules: "basing the wildlife protection exclusively on 'endangeredness' risks sending the message that the only value of importance to society is scarcity".

**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.**

2.67 Sixty-four consultation responses were received in relation to Provisional Proposal 5-10: 60 agreed; one disagreed; two were conditional; and one provided general comments.

2.68 Apart from DEFRA, consultees almost unanimously agreed with this proposal on the basis it would provide openness and transparency.

2.69 The Bar Council submitted that the proposal reflects an emerging approach of the courts, which have emphasised that expert statutory consultees in the field of nature conservation are to be given considerable weight by decision-makers and that "cogent and compelling reasons are required for departing from such advice".[6] Natural England agreed with the proposal, and highlighted that

> the principle of transparent decision making is already promoted by the Government's Chief Scientific Adviser in his advice to government departments on the use of scientific evidence in policy-making.

2.70 The National Gamekeepers' Organisation suggested introducing a legal requirement on the Secretary of State to explain why the advice of relevant stakeholders has not being followed.

2.71 The Badger Trust suggested the introduction of "any method of appeal if the Secretary of State were to fail to satisfactorily explain his intervention or take a particularly egregious decision". Dr Angus Nurse further suggested introducing a "minimum statutory time limit for the reasons to be published in order to allow interested groups to consider judicial review proceedings where appropriate". The Woodland Trust also proposed

> a duty that the Secretary of State or Welsh Ministers be required to show that the species is currently at sustainable conservation status or, if not, set out a plan to achieve the sustainable conservation status of the species affected by the decision. This would assist in the delivery of commitments under the Convention on Biological Diversity and Aarhus convention.

2.72 DEFRA disagreed with the proposal, arguing that this is already an established practice during the consultation process on updating schedules:

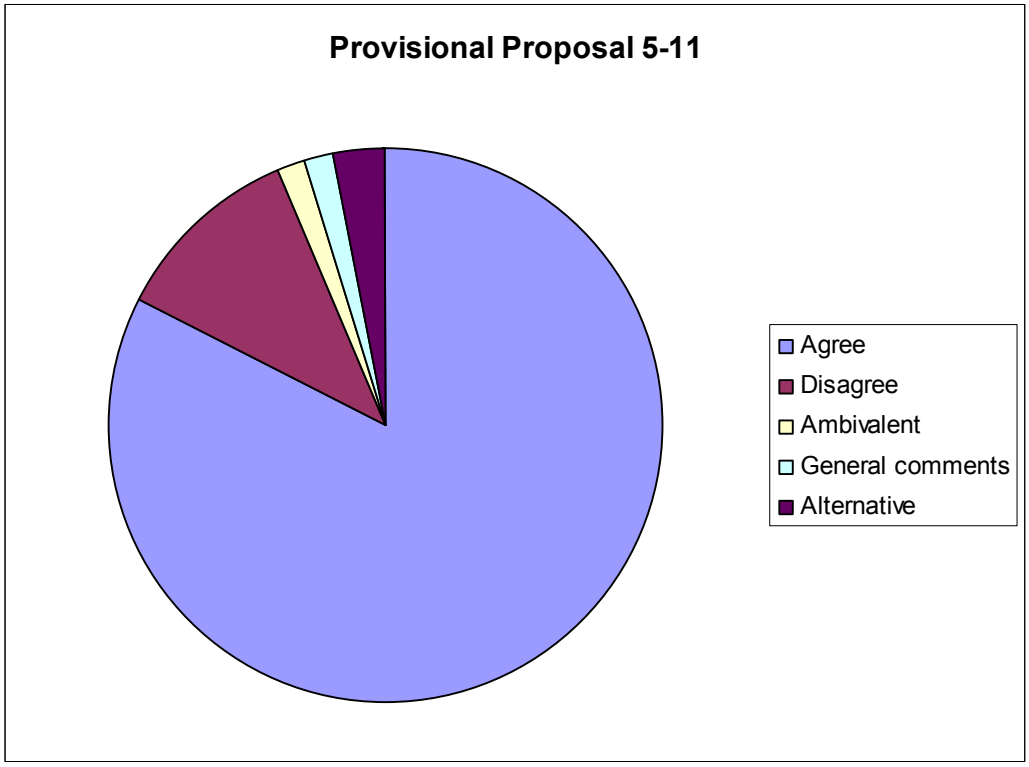
> We already consider our approach to be transparent with reasons for not following advice being made clear through the consultation process on updating schedules. The review does not provide any evidence that this approach is not working and we do not see that adding such a duty would add any value. Were such a duty to be

[6] See *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), (2008) 2 P&CR 16 at [49], by Justice Sullivan, and *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin), [2010] Env LR 33 at [112], by Justice Owen.

introduced we would need to ensure that it did not lead to duplication of obligations under the existing consultation procedures.

**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.**

2.73 Sixty-three consultation responses were received in relation to Provisional Proposal 5-11: 52 agreed; seven disagreed; one was ambivalent; one provided general comments; and two suggested alternative approaches.




2.74 Consultees overwhelmingly supported this provisional proposal. The RSPB, for example, submitted that a five to seven year interval provides the appropriate balance between effective protection and administrative costs.

2.75 Similar to the responses to Provisional proposal 5-9, a number of consultees submitted that the framework should also allow reviews for individual species or population to take place before the five-year period to have more flexibility to respond to rapidly changing conditions.

2.76 A number of consultees, including Natural England, the RSPCA, the Wildfowl and Wetlands Trust and Wildlife and Countryside LINK expressed concern over the possible excessive burden that this proposal would put on public authorities. Natural England, for example, argued that

> it is important that there is a time limit between reviews (see Proposal 5-9), and a five-year maximum is appealing, but it may not be practical in all cases. Reviews typically require significant resources, a factor that needs to be balanced against the imperative of keeping the lists relevant and contemporary.

> Given the resourcing constraints there may need to be more flexibility, with the option of reviewing some lists over a longer time interval; we propose that the maximum interval should be 10 years.

2.77 DEFRA similarly submitted that

> it should be for the [Secretary of State] to decide when and to what extent a list should be reviewed within that maximum period of time to avoid any unnecessary regulatory burden. In the interests of consistency it is worth noting that for fisheries NLOs are subject to a maximum review period of 10 years.

2.78 Lastly, the Wildlife and Countryside LINK, the Wildfow and Wetlands Trust and the Woodland Trust argued that species lists provided under sections 41 and 42 Natural Environment and Rural Communities Act 2006 should also be reviewed in the same way. Dr Angus Nurse submitted that the time limit for review should be reduced to three years to allow for more rigorous scrutiny.

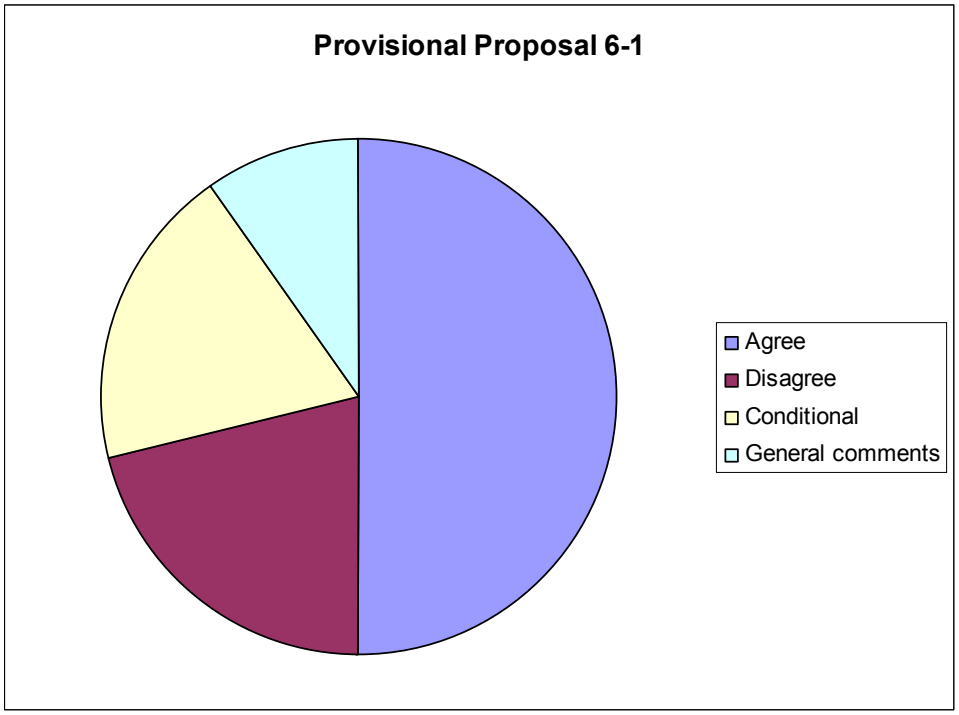
**Conclusion**

2.79 Although concerns about resources were expressed by some consultees, there was generally overwhelming support for proposals.

## SPECIES SPECIFIC ISSUES: PROTECTED WILD 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.**

2.80 We received 52 consultation responses in relation to Provisional Proposal 6-1. Of these, 26 agreed with using the definition taken directly from Article 1 of the Wild Birds Directive; 10 responses were conditional on other action, such as ensuring "visitors" were still protected; 11 disagreed; and five were general comments.




2.81 While the majority of consultation responses either agreed with the proposal or did not oppose it, a number of questions were raised by a number of consultees. DEFRA and Natural England agreed with the provisional proposal. A number of consultees, including the Game and Wildlife Conservation Trust, the Hawk Board, the British Falconers' Club and the International Association for Falconry and Conservation of Birds of Prey suggested an alternative definition.

2.82 A large number of consultation responses wondered what would be the status of captive bread birds that have escaped or have been released into the wild. The International Wildlife Consultants Ltd argued that the proposed definition is misleading as it appears to cover birds which are captive bred as long as their species is naturally occurring in the EU. The Countryside Alliance similarly argued that the definition does not take into account birds that have been bred in captivity which fall under the definition but have never been into the wild. The National Farmers' Union and NFU Cymru added that it is unclear whether game birds that have been bred by the shooing industry should also be considered "wild birds".

2.83 A number of consultees, in particular wildlife protection organisations, also highlighted that species which are non-natives but ordinarily resident in the UK with no negative impact on local wildlife (such as the Mandarin duck) may lose the protection afforded by the current definition.

2.84 In that regard, Natural England, supported by DEFRA, submitted that this does not prevent giving protected status to birds falling outside the definition. The Mandarin duck for example could be protected "as its UK population is important globally even though it is a non-native". Natural England further submitted that

> this definition will, however, establish an important principle about the primary importance of protecting Europe's biodiversity. It will also avoid the current situation whereby an invasive non-native species benefits from full protection under English law as the default legal

> position as soon as it establishes a population in any EU member State, even if it harms the conservation status of species indigenous to Europe.

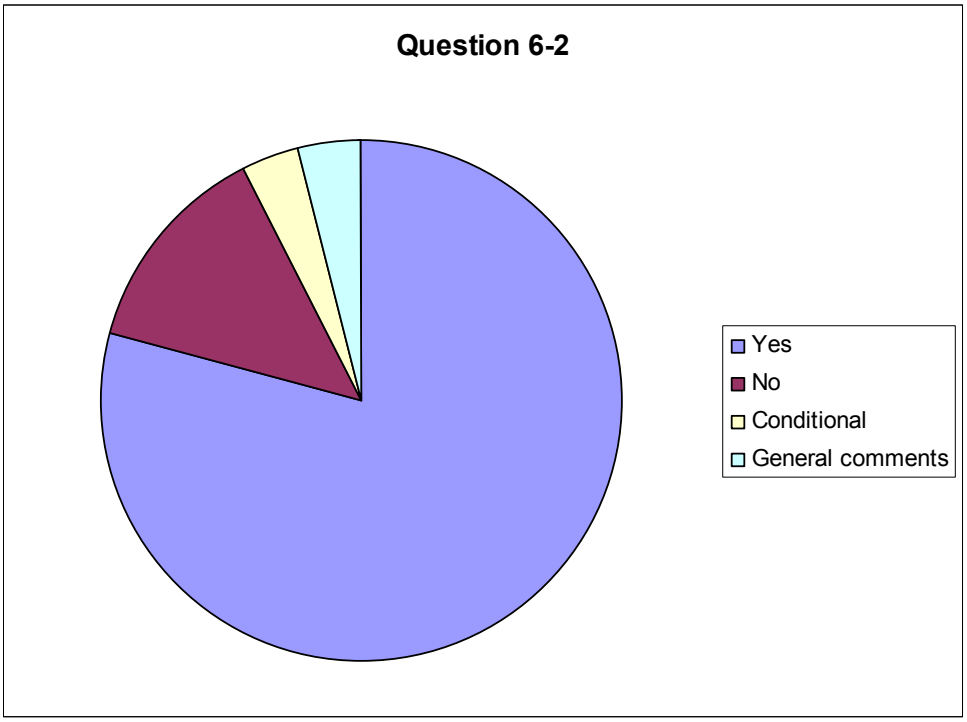
2.85 They argued that in fact the unresolved issue is rather the status of European birds that have become invasives in the United Kingdom. While this could be resolved by the future EU Directive on invasive non-native species, in the interim the licensing system should be used to mitigate their potential harm.

2.86 Natural England and a number of wildlife protection organisations, including the RSPB, the Wildfowl and Wetlands Trust, Wildlife and Countryside LINK and the RSPCA also wondered whether "vagrant birds" would be protected. The RSPCA, for example, noted that

> a wide range of bird species also occur from time, with varying frequency, as "vagrants". Currently, these would be protected under the definition in the 1981 Act. However, we are unclear from the consultation discussion whether such visitors would be legally protected under the proposed definition and it is important that this aspect is clarified.

**Question 6-2: Do consultees think that the general exclusion of poultry from the definition of "wild bird" should be retained?**

2.87 Fifty-three consultation responses were received concerning Question 6-2: 42 responses thought there should be a general exclusion of poultry; seven thought that there should not be; two were conditional on other action; and two responses took the form of general comments.




2.88 There is a wide divergence of views within the "yes" field. A large number of responses to this question, both positive and negative, noted that the real distinction lies in whether the poultry is "domesticated" or not.

2.89 An overwhelming majority of consultees agreed with retaining the exclusion of "poultry" from the definition of "wild bird", although alternatives were also suggested by a large number of consultees, including DEFRA, who felt that the real distinction is whether the animal is "captive bred"/"domesticated" or not.

2.90 The National Farmers' Union and NFU Cymru fully supported the exclusion of poultry, as they are concerned that some species of domestically kept poultry might be deemed to be naturally occurring in the wild state. Without the express exclusion of poultry, "whether or not certain domestic kept poultry are caught under the definition depend greatly on the interpretation of the term 'wild state'".

2.91 A number of consultees argued that "poultry" is a confusing category which does not serve much purpose. The National Gamekeepers' Organisation for example argued that

> the more important issue here is not 'poultry' and whether or not there are naturally occurring populations of the species included in that definition (which there undoubtedly are incidentally: geese, duck, and pigeons, for example), but rather making sure there is a neat exclusion from the wildlife legislation for any animal (note – not just 'bird') that is being kept by man rather than in a wild state. The definition of 'kept' then becomes very important to get right.

2.92 Similarly the RSPB, whilst agreeing in principle with the exclusion of poultry, noted that

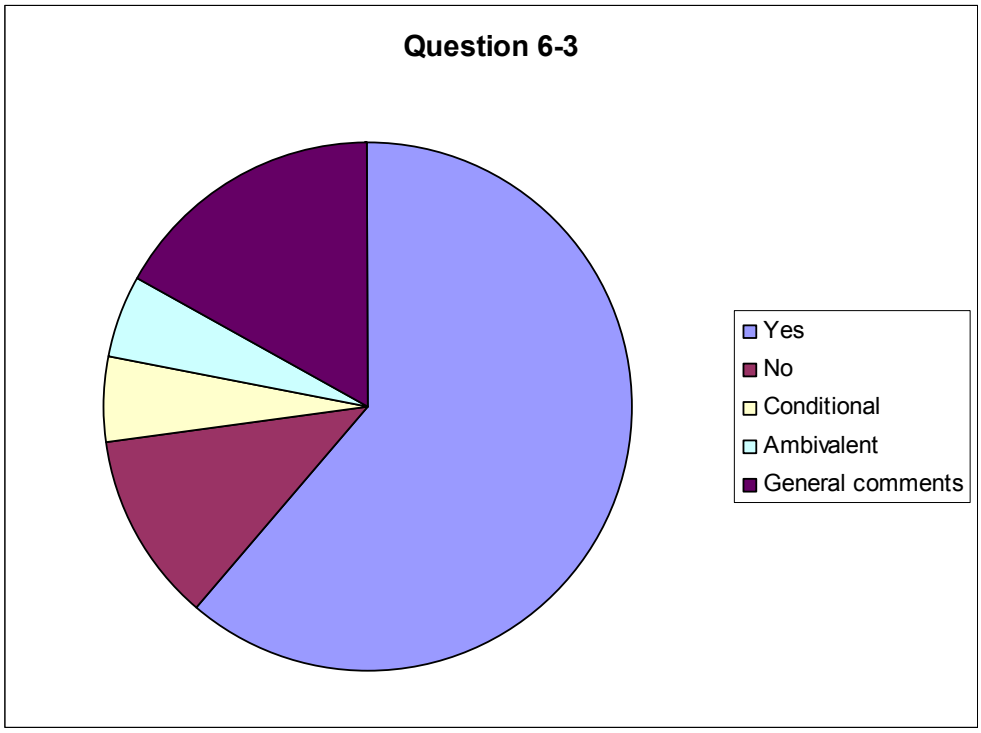
> the definition of 'poultry' should make it clear that it relates to domestic animals (as species of geese, ducks, pigeons and quail – listed in the current WCA definition of poultry – occur naturally in the wild and are therefore wild birds).

2.93 DEFRA also argued that

> it might be worthwhile removing any ambiguity by, as they did in Scotland, replacing "domestic" with "the domestic forms of the following, that is to say". However poultry could simply fall under a definition of "captive bred" in the new framework.

**Question 6-3: Do consultees think it necessary to deem game birds "wild birds"?**

2.94 Fifty-nine consultees responded to Question 6-3: 36 consultees considered it necessary to deem game birds "wild birds"; seven responded that it was not; 10 made general comments; three responses were conditional on other matters; and three were ambivalent to the issue.




2.95 A large majority of consultees, including representatives of the game industry, agreed that game birds should be deemed "wild birds". A number of consultees however pointed out that it is important to clearly determine when a game bird that has been raised in captivity becomes "wild".

2.96 The Moorland Association maintained that defining game birds as "wild birds" would avoid complications in terms of ownership of game which would arise if they were not so treated.

2.97 The National Gamekeepers' Organisation agreed as long as birds that are currently deemed "game" will be made huntable species. They further explained the grey areas of the law that in their view would need to be addressed:

> What is needed is a clear cut off point where the legislation designed for animals kept by man ends and the laws meant to apply to wildlife management begin. Just dividing species into two lists, those that are kept by man and those that are wild is obviously too simplistic because there are 'wild' species such as deer that do also get kept and farmed and domestic species that have become wild […].
>
> The concept of 'captive' is of limited value in defining this desired cut-off point, because a 'kept' animal is not always captive. Problematic for example to work out whether a gamebird in a release pen is captive or not. Criminal law has it that taking a gamebird from a pen is theft whereas taking it from the wild is poaching. The Defra Code of Practice on Gamebird Rearing, on the other hand, determines the cut-off point for responsibility at the point where a bird ceases to be confined in a pen. […]
>
> The word "kept" is problematic. Released gamebirds for example are in the wild but are also being "kept" inasmuch as eg a gamekeeper is

> responsible for them (by feeding them, improving their habitats, treating them from disease, etc). Those animals cannot however come under the "livestock" or "pet" definition, otherwise the shooting industry would collapse. You cannot visit such animals every 24 hours, for example, as required for livestock, nor can you cull a park deer according to captive livestock regulations.

2.98 The Scottish Association for Country Sports suggested that game birds which have been bred in captivity should not be classed as wild birds until they are no longer in the vicinity of the release facility as

> it is not sufficient to class them as truly wild as soon as they are no longer in full containment, as for a further period they are entirely dependent on man for their feeding and medication.

2.99 A number of animal welfare organisations disagreed with deeming game birds "wild birds" and suggested more stringent regimes. Animal Aid for example argued that

> birds are technically "livestock" awhile in breeding pens and cages. They are technically wild once released although when fed and watered to keep them in one place they may be considered under control of man and not truly wild.
>
> A new regime should be created for partridges and pheasants, which offers better protection by making the person releasing them responsible for their welfare and damage they may cause to crops, gardens, vehicles and lives. Each should be ringed to identify the shoot they come from.

2.100 The League Against Cruel Sports also disagreed arguing that

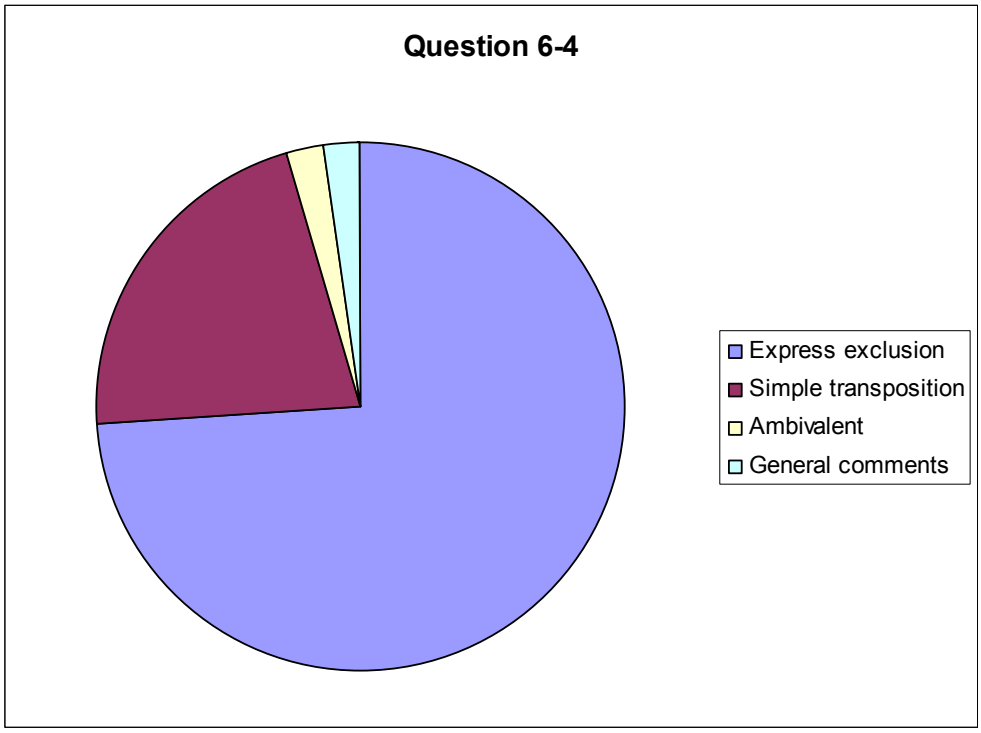
> due to the extensive human intervention involved in the breeding, release, control and management of the birds post release, it is not appropriate for them to be considered 'wild'.

2.101 In their view during their captive period their welfare "should be subject to the more rigorous protection afforded to farmed animals under the Welfare of Farmed Animals (England) Regulations 2007". Consideration should also be given as to when the Animal Welfare Act applies and when responsibility ceases for birds which are placed into open release pens as

> despite no longer being in complete captivity; feed, water and shelter are still provided. There is also a practice called 'dogging in' which describes the process by which the perimeter of the shoot is patrolled by the game keeper and dogs to encourage the birds to remain within the shoot range.

**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?**

2.102 Forty-nine consultation responses were received on Question 6-4: 34 suggested that "express reference to the exclusion" of captive bred birds should be made;[7] 10 thought exclusion of captive bred birds would be best achieved by "simple transposition of the Directive"; three made other comments;[8] one made a general comment; and one consultee was ambivalent on the issue.[9]




2.103 A large majority of consultees supported the express exclusion of captive bred birds from the definition of "wild birds" on the basis that it would make the law more certain and accessible.

2.104 The Wildfowl and Wetland Trust disagreed with the above position, arguing that simple transposition "allows for built in flexibility regarding unforeseen situations". The Wildlife and Countryside LINK similarly argued that express reference to the exclusion of captive bred birds "will leave special cases of captive birds less protected especially in the borderline cases where their definition is key".

2.105 The RSPB further submitted that the new framework should continue to deem as "wild bird" any bird which is native in the EU whether or not it is captive, unless

[7] Six consultation responses emphasised the need to clarify the status of birds released as part of re-introduction programmes. Two consultation responses argued that those birds should be classified as "wild birds".

[8] The National Gamekeepers Organisation argued that the concept of "captive" is of very limited value and proposed (did they? Or did they suggest propose you should consider alternative classifications?) to consider alternative classifications.

[9] The issue of the reverse burden of proof concerning the possession of captive birds will be addressed separately in the report.

shown otherwise. They contended that

> in order to effectively protect birds in the wild it is essential to have some control over the same species of birds in captivity. This is because it is usually impossible to distinguish wild-caught individuals brought into captivity to sell on the black market from captive-bred individuals of the same species.

2.106 A number of consultees suggested that clarification should be provided as to the status of captive bred birds that have been released as part of a sanctioned reintroduction scheme. DEFRA, agreeing that express exclusion would make it clearer to end users when they are excluded or not from the relevant provisions, further submitted that "exceptions for captive breeding programmes for bolstering vulnerable populations or the reintroduction of formerly native species would need to be retained".

2.107 Natural England similarly suggested that the new framework should also clarify the status of

a) racing pigeons;

b) captive-bred birds deliberately released in the wild as part of a reintroduction/population enhancement programme; and

c) captive-bred birds that are deliberately released into the wild for the purposes of game shooting.

Currently, feral pigeons and birds released in relation to b) and c) are protected (in respect to the shooting scenario, protection provisions only apply to birds listed in the Game Act 1831).

We recommend that captive bred birds that are released to enhance wild populations should continue to be protected.

With respect to the shooting scenario, to maintain the status quo, captive reared game birds would also need to be protected under the new statute. We recommend, however, that this status is reviewed.

Captive reared game birds benefit from the same protection as wild game birds because of the 1831 Game Act, unlike the Wildlife and Countryside Act 1981, does not distinguish between wild and captive bred birds. This approach is inconsistent with the Directive, and thus with the treatment of all other wild birds. There needs to be a good justification for maintaining this discrepancy in the new statute.

2.108 Lastly, Pigeon Racing UK and others submitted that pigeons should be defined as "livestock" so as to enable pigeon fanciers to license the protection of pigeon lofts from predators.

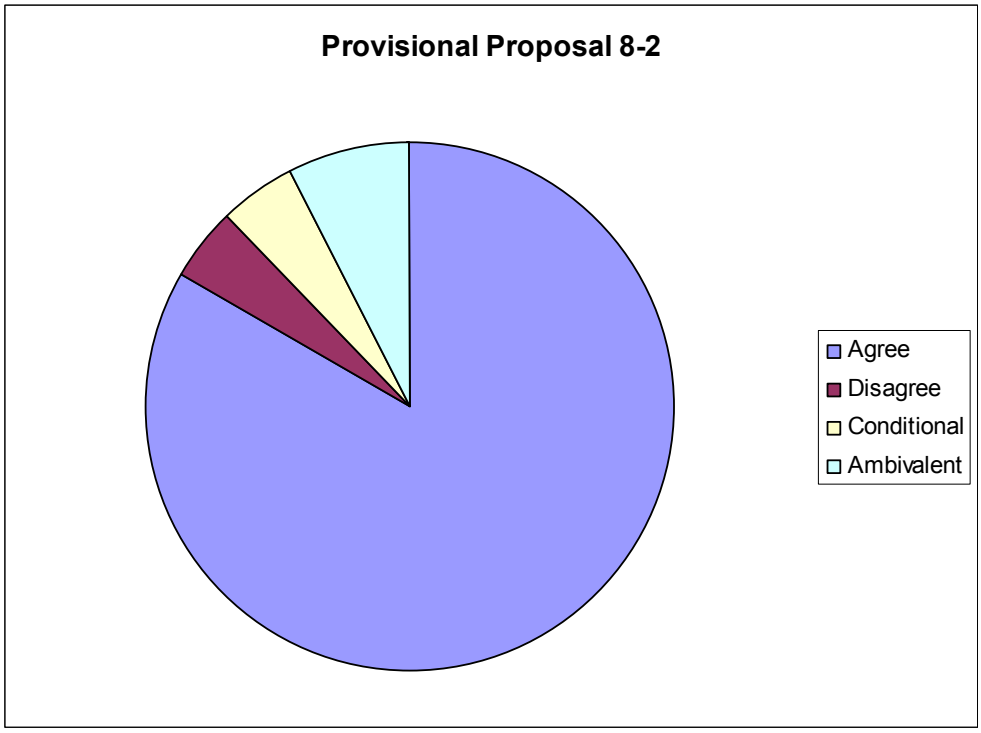
**Conclusion**

2.109 In consultation there was considerable support for the adoption of the definition in the Wild Birds Directive. Support was given under the proviso that this definition would not be the sole way of protecting birds, as otherwise birds currently protected could become totally unprotected. A significant majority were also in support of the expressed exclusion of captive bred birds from the definition of "wild birds".

## INVASIVE SPECIES

**Provisional Proposal 8-2: We provisionally propose that there should be a mechanism allowing for the emergency listing of invasive non-native species.**

2.110 Sixty-six consultation responses were received concerning Provisional Proposal 8-2: 55 consultees agreed with our provisional proposal; three disagreed; three consultees gave conditional responses; and 5 were ambivalent.




2.111 Provisional Proposal 8-2 was overwhelmingly supported by consultees, on the basis that a rapid response to invasive species reduces costs of eradication and is essential for their effective control. A number of responses, however, suggested that safeguards should be introduced to prevent the possible misuse of emergency listing.

2.112 The Amphibian and Reptile Conservation Trust, for example, maintained that "such listing needs unambiguous definitions, with a clear path for action that is funded, monitored and reported". Similarly the Ornamental Aquatic Trade Association Ltd highlighted that emergency listing should only be used in exceptional circumstances and provisions to avoid misuse should be included. The National Gamekeepers' Organisation added that

> the use of such a mechanism should be restricted to listing newly

> arrived species or those not yet here but threatened from abroad. It should not be used to change the legal status of species long-established in the UK.

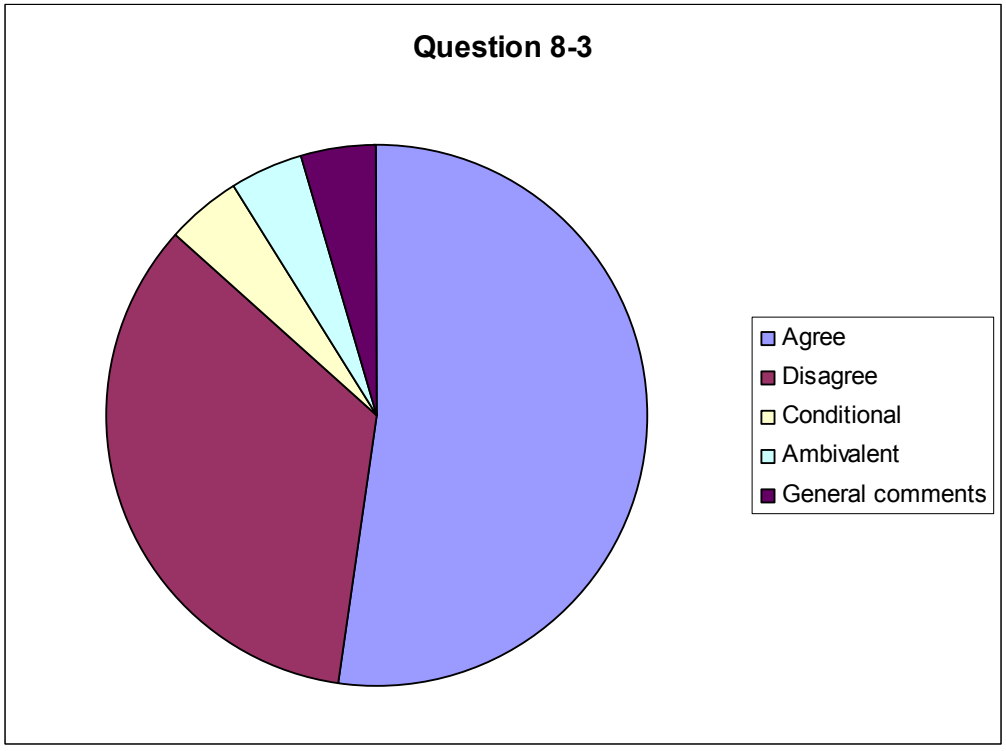
2.113 The British Falconers' Club and the International Association for Falconry and Conservation of Birds of Prey suggested that emergency listing should be subject to a

> full risk assessment being undertaken and published, informed by objective scientific and historic evidence, and also placed in the context of whether the invasive species under consideration is deemed to be harmful.

2.114 The Wildfowl and Wetland Trust suggested that a parallel mechanism should be created to "emergency ban" from sale any invasive non-native species.

**Question 8-3: Do consultees think that such emergency listing should be limited to one year?**

2.115 Sixty-six consultation responses were received concerning Question 8-3: 35 agreed; 23 disagreed outright; three gave conditional responses; three responses were ambivalent; and three consultees gave general comments.




2.116 While a bare majority of consultees agreed in principle with the one year limit, a larger majority took the position that the time limit should be more flexible. Twelve consultees that agreed in principle with the one-year limit argued that nevertheless it should be capable of being renewed in appropriate circumstances. This position was shared by a large number of consultees that either disagreed or provided ambivalent or conditional responses. The majority of consultees, in other words, agreed with a longer or, at least, more flexible timeframe and that the flexibility should be fettered by appropriate safeguards, such as annual reviews or a limit on the number of times the list can be reviewed.

2.117 Wildlife and Countryside LINK, the Wildfowl and Wetlands Trust and the Woodland Trust, for example, argued that

> one year is insufficient for an adequate control. It should be available for longer periods of time to an appropriate assessment after one year. Time limits on emergency listing seem inappropriate due to the unknown details of each invasive non-native species, and varying eradication requirements. There needs to be some flexibility associated with emergency listing in order to adequately deal with the size of the problem, rate of spread of the species, and the establishment of measures to prevent re-contamination. With an appropriate assessment, if the problem has been dealt with the emergency listing could be removed; if the problem remained work could continue. This is vitally important as it may take more than a year for a species to be placed on schedule 9.

2.118 The London Invasive Species Initiatives further pointed out that

> the list should have a longer minimum (2 years) to ensure breeding cycle has been accounted for. It is important to note however that this will vary due to species i.e. dormancy in some seeds will be well in excess of 5 years. Therefore it would also appear beneficial to include a means of defining the removal program a success as part of the emergency listing process.

2.119 Natural England suggested that

> while there should be a sunset clause a species should remain in an emergency list until (i) it has been fully assessed or (ii) until the next formal review, whichever occurs first. Once an invasive non-native becomes established it is usually impractical to eradicate it, so a precautionary approach of this type is justified.

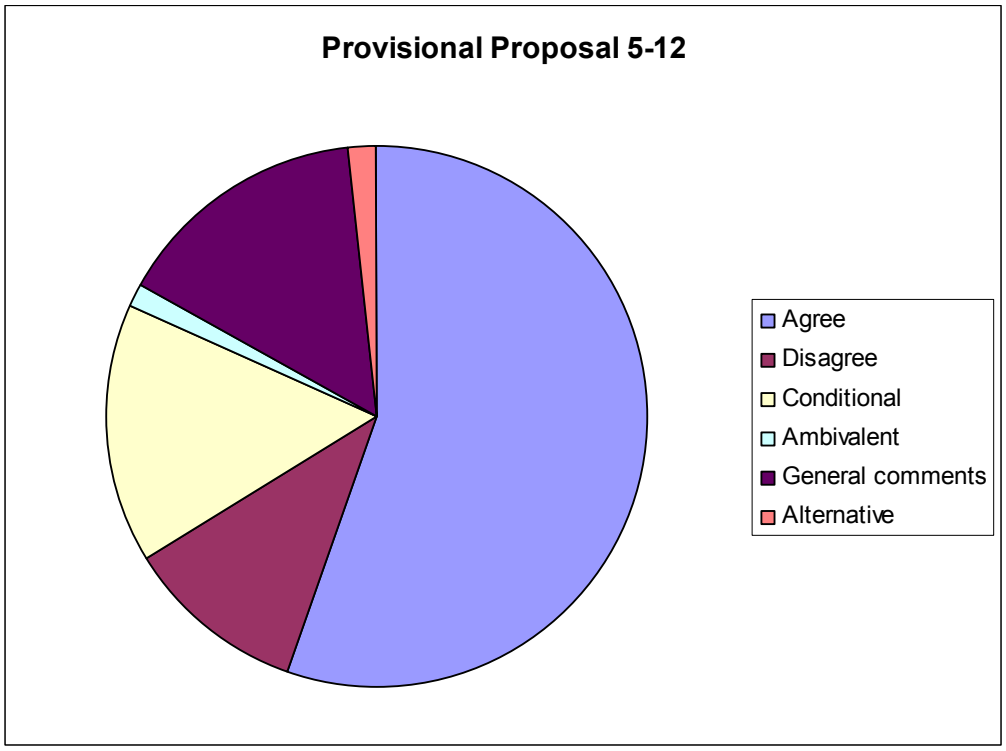
**Conclusion**

2.120 The basic provisional proposal received overwhelming support. The balance in responses to the question on length may in part be attributed to a misconception by some consultees, who thought that there would not be the possibility of renewing the emergency listing of a species. We should have clarified in our consultation paper that emergency listing could be renewed.

## CLOSE SEASONS

**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.**

2.121 Sixty-five consultation responses were received in relation to Provisional Proposal 5-12: 36 agreed; seven disagreed; 11 were conditional; one was ambivalent; ten provided general comments; and one suggested an alternative approach.




2.122 The great majority of consultees agreed in principle with the provisional proposal. However a large number of consultees, ranging from wildlife protection organisations to organisations representing land managers and the shooting industry, submitted that a number of safeguards should be provided. DEFRA and Natural England fully agreed with the proposal.

2.123 Natural England submitted that the proposal would allow more flexibility in the management of species. They further submitted that close seasons should allow for regional variations and licensing provisions should allow derogations from the close seasons. In their view such power should also be extended to extend or remove other protection provisions, such as restrictions on the methods of control.

2.124 DEFRA submitted that

> the lack of a ministerial power to provide close seasons and amend them easily is a weakness in the current system so this would be welcome. Such a power should only be available to the SoS and Welsh Ministers to ensure it is not used to unjustifiably restrict or prohibit management activities.

2.125 As mentioned above a large number of organisations also agreed in principle but expressed concern over the possible abuse of this power and in particular the risk that decisions might be made on the basis of politics rather than sound evidence and scientific opinion.

2.126 The Wildlife Trust for example argued that

> such a power would allow the regulatory regime to respond to scientific advice should the population status of a particular species decline. However, there is a danger that the flexibility could be exploited so the close seasons will need to be defined. The amendments should be based on science for conservation purposes (as opposed to economic reasons such as hunting) and only altered after full consultation.

2.127 The Wildfowl and Wetlands Trust, for example, more specifically argued that

> such approach should be underpinned by scientifically sound monitoring to ensure harvests of quarry waterbirds are sustainable. As this is currently not in place, such flexible approach should follow the introduction of such monitoring.

2.128 They further considered that:

> 'Close seasons' should be carefully defined within the law to cover the breeding season through to the end of rearing. Without this definition there would be the potential for close seasons by order to be inadequate for the species' protection.

2.129 The Badger Trust agreed, adding that "there must be strict criteria which need to be met in order to justify a change to the closed season". Secret World Wildlife Rescue added that the amendment of close seasons should be based "on animal welfare concerns rather than upon species management considerations".

2.130 Representatives of land managers and the shooting industry also highlighted the importance of consultation and the need of clear criteria for the exercise of such power to avoid the politicisation of close seasons. The Countryside Alliance for example argued that

> there is clearly a danger that if seasons can be altered by order then they could become a political football in future. The question of a close season for hares is a current case in point. There is no evidence to suggest that the introduction of a close season would help in conservation terms. Rather it could be harmful both in increasing culling ahead of a close season and in restricting necessary management in areas of high population where damage is done to crops.
>
> Any such power must be only exercisable by the Secretary of State or Welsh Ministers and subject to proper parliamentary scrutiny and requirements to consult. The general power to introduce close seasons could otherwise be used to ban or restrict management activities without justification. There also need to be exemptions for management necessary in connection with farming etc.

2.131 The Country Land & Business Association, highlighted that the power should be exercised exclusively on the basis of conservation considerations. The National Gamekeepers' Organisation also expressed concern over the politicisation of

close seasons and suggested that good practices that could be replicated are the current "severe weather wildfowling suspensions". In their view those orders "work harmoniously […] because they are made automatically by the application of a pre-agreed set of criteria, in this case specified periods of continual frost".

2.132 The National Farmers' Union took a stricter approach, agreeing with the power to amend close seasons but disagreeing with the power to create new close seasons, as "the status quo should remain in terms of the protection of species through close seasons enshrined in primary legislation".

2.133 The British Falconer's Club and the International Association for Falconry and Conservation of Birds of Prey pointed out that due consideration should be given to the "purpose" for which any season is required and suggested that "falconry is unique in its need for hunting seasons and should not be included with the requirements of the shooting industry".

2.134 AMEC Environment & Infrastructure UK Ltd suggested that the "the mechanisms to implement close seasons need to ensure that developers have sufficient time to respond (eg with revised mitigation proposals)".

2.135 Lastly, Christopher Jessel and the Self-Help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA submitted that a compensatory regime should be set up for those whose interests are interfered with by the order. Christopher Jessel explained that

> as it impacts on existing (property) rights to take game, it should be considered carefully in light of Human Rights law. For example shoots are often organised a long time in advance and a sudden ban could upset arrangements which might include fee-paying visitors from overseas. This could be justified in emergency, for instance because of drought or disease, but subject to safeguards. Consideration may need to be given to compensation, as applies to domestic controls such as foot and mouth disease in cattle.

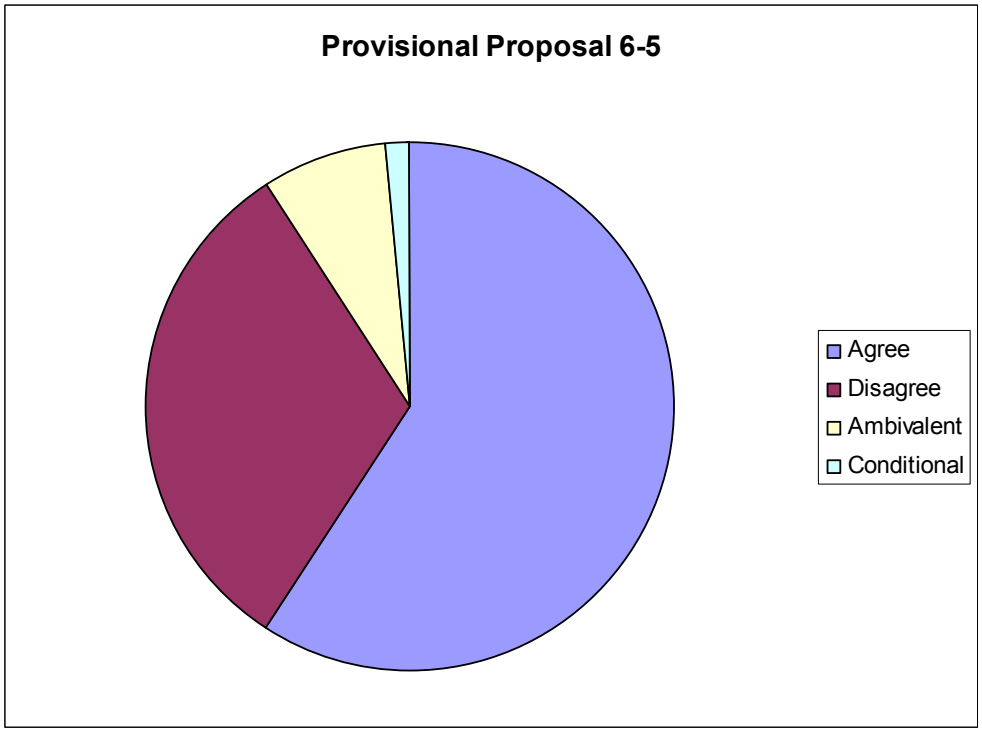
**Conclusion**

2.136 Some consultees were concerned about the extent of the power and the effect the power could have on wildlife management activities. The Countryside Alliance expressed concern that it could be used to "ban or restrict management activities without justification". However, consultees were generally in favour of this proposal.

# CHAPTER 3
# TRANSPOSING CORE EU DIRECTIVE REQUIREMENTS

**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.**

3.1 Seventy-six consultation responses were received in relation to Provisional Proposal 6-5: 45 agreed, 24 disagreed; six were ambivalent; and one was conditional.




3.2 The consultation responses expressing disagreement with our provisional proposal were based around three main arguments.

3.3 One was that the word "deliberate" is narrower than "intentional and reckless". The Countryside Alliance argued that

> a correct reading of the two cases mentioned in the consultation document leads to a safe conclusion that EU interpretation of the word "deliberate" includes intentional or reckless behaviour. The *Commission v Spain* [case] was not concerned with reckless behaviour at all and there is no way of knowing what circumstances the Court had in mind when it considered that someone may have "accepted the possibility of such a capture". It does not follow that any reckless behaviour would cause a breach of the condition requiring "deliberate action".
>
> The *Commission v Greece* [case] also does not provide good authority that reckless behaviour is to be considered deliberate. In

> that case the notices on the beach provided evidence that Greece had known there would be a risk of deliberate disturbance. As the consultation document points out "deliberate" behaviour includes "oblique intention". It was a virtual certainty that the use of mopeds on the beach, pedalos and small boats in the sea during breeding season would cause disturbance to sea turtles so the actions described could not be described as reckless.
>
> In any event both cases were concerned with a State's obligations to prohibit deliberate actions. They were not concerned with defining an individual citizen's actions as deliberate or reckless.

3.4 Another, related argument put forward in opposition to our proposal emphasised the uncertainty as to what would amount to correct transposition. Some consultees thought that the best way to avoid this would be to copy out the word "deliberate" from the Directives and leave UK courts to interpret it in line with evolving jurisprudence of the Court of Justice. The UK Environmental Law Association argued that

> in view of case law from the European Court and from the Supreme Court on the meaning of "deliberate" we believe that the only sensible option is to retain the EU law term "deliberate" in the new legislation and to leave it undefined or to adopt the definition given by the Supreme Court in *Morge v Hampshire County Council* [2011] UKSC 2. Any attempt to pigeonhole it into existing English law concepts is unsatisfactory.

3.5 This position was supported by a number of other stakeholders including the Forestry Commission, the National Gamekeepers Organisation, the National Farmers Union and Pigeon Racing UK. They were concerned in particular that the term "reckless" could have an adverse impact on those in the land management sector that work in close contact with European Protected Species or wild birds.

3.6 Lastly, while not disputing our analysis of EU law, some stakeholders pointed to a number of potential practical problems that the transposition of "deliberate" into "intentional or reckless" could bring about.

3.7 The Institute of Chartered Foresters argued that

> quite simply, the stated position would effectively close down the forestry industry in the UK. It would also make the UK Government liable to challenge in the European Court across a wide range of issues, obviously including economic considerations but also considerations internal to the Wildlife Directives because the cessation of management would demonstrably damage the populations of a range of [European Protected Species].

3.8 They went on to say that

> in going in to fell trees the forestry industry may be 'deliberate' but it is certainly not 'reckless' as it can demonstrate from the wide range of measures, including guidelines and operational planning procedures

> it undertakes to absolutely minimise the risk to protected species: the problem remains with species where nests and resting places are not practicably identifiable, therefore making the elimination of risk impossible.

3.9 Lastly, it was stated that

> up until now forestry has relied on the 'incidental result of a lawful operation' but recognises this has already been eroded by the Conservation of Habitats and Species Regulations 2010. It is essential that a new approach is developed that meets the requirements of both responsible forestry and wildlife protection.

3.10 The majority of consultation responses however agreed with the fact that transposing "deliberate" into "intentional and reckless" would clarify the meaning of a word that would be otherwise generally understood differently by users. Notably even the Country Land and Business Association stated that:

> the proposal is the best way of transposing the requirements in the Directives. The idea of having the one word, 'deliberately' with two different meanings depending on the context will simply result in confusion and uncertainty.

3.11 Natural England also argued that "intentionally or recklessly" more accurately transposes the intended meaning of the Directive and that such transposition would make the law clearer. This position was supported by a number of wildlife protection organisations, including the RSPB, the WWT, Wildlife and Countryside LINK and the Wildlife Trust. DEFRA similarly argued that

> taking account of both the English law meaning of "recklessly" and the European Court of Justice's case law on "deliberately", this would make for a better transposition of the Directives.
>
> Inconsistency in the use of "deliberately" and "intentionally or recklessly" is undesirable in terms of legislative clarity and certainty, and "deliberately" cannot be used consistently, since it can only be given an EU meaning in relation to [European Protected Species].

3.12 Amongst the consultation responses agreeing with our provisional proposal there was a significant portion that suggested the need for a defence to exclude legitimate countryside activity from criminal liability. The National Wildlife Crime Unit stated that further consideration should be given to exemptions and defences as it would be impractical to rely on licensing requirements. The RSPB argued that the existing "incidental results"[1] defence "has proved to be a sufficient and robust defence for those going about their lawful business". The Amphibian and Reptile Conservation Trust urged caution, as while a statutory defence would seem sensible, the Court of Justice of the European Union has often taken a very restrictive approach to transposition. We consider the future of the "incidental results" defence in Chapter 4.

[1] Currently in the Wildlife and Countryside Act 1981, s 4(2)(c).

**Conclusion**

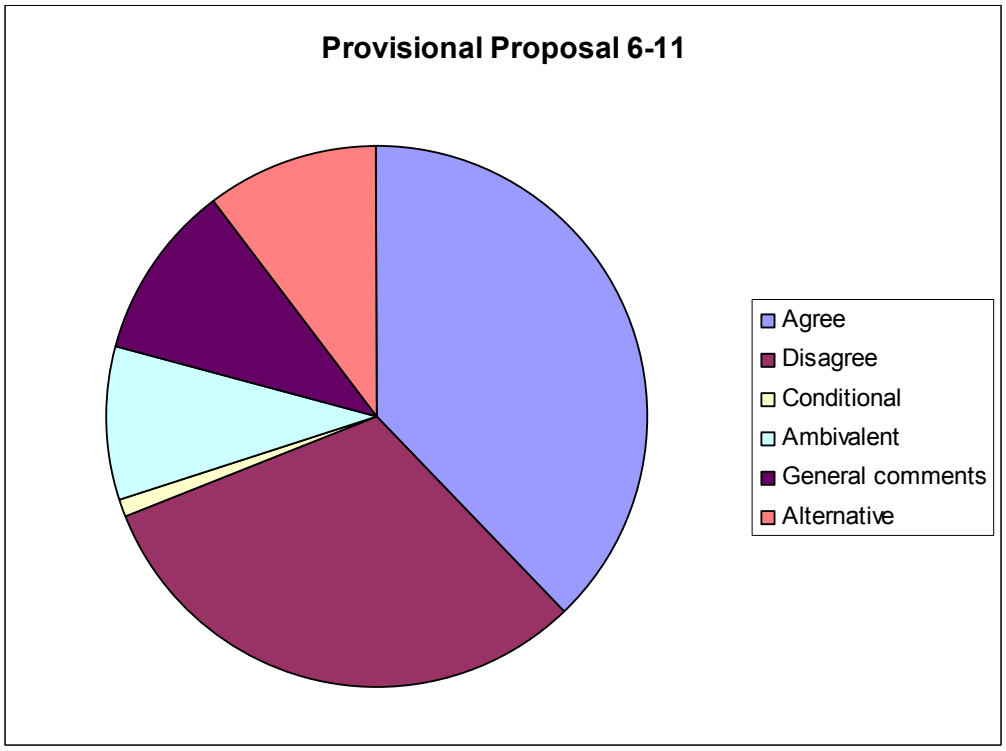
3.13 There was general agreement with our provisional proposal. However, consultees that disagreed broadly focused on three strands of argument; the definition of deliberate was narrower than our proposed mental element, what would amount to the correct transposition was uncertain and the potential for practical problems.

**INCIDENTAL RESULTS DEFENCE**

3.14 We suggested in our consultation paper that the best approach is to remove the defence currently contained 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.**

3.15 Seventy-seven consultation responses were received in relation to provisional proposal 6-11: 29 agreed; 24 disagreed; one was conditional; seven responses were ambivalent; eight provided general comments; and eight suggested alternative approaches.




3.16 A relative majority of consultation responses expressed unconditional support of our proposal to abolish the "incidental results" defence. Nevertheless a larger number of consultation responses either disagreed or acknowledged the potential negative implications the removal of the current defence would have on legitimate economic activities and suggested alternative approaches to transposition.

3.17 The main argument in favour of the removal of the "incidental results" defence was that the current defence is likely to constitute an infringement of EU law on

the basis of the Court of Justice ruling in *Commission v UK*.[2] Bar two, all consultees that addressed this issue were unanimous in recognising that the current defence is likely to be an incorrect transposition of the Wild Birds Directive. The Forestry Commission and the Self-Help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA disagreed, with the latter arguing that the Court of Justice may not apply the same criteria in coming to a decision relating to the Wild Birds Directive as it has in relation to the Habitats Directive. Responses acknowledging that the defence as currently formulated is likely to be in breach of EU law came from a wide range of different stakeholders and interest groups. These included DEFRA, Natural England, the Bar Council, the Institute of Chartered Foresters, the Country Land & Business Association, the Moorland Association, AMEC Environment & Infrastructure UK Ltd and the RSPB.

3.18 The RSPCA also advanced a more substantive reason in favour of the abolition of the current version of the defence, quoting DEFRA's response to the consultation reviewing the Wildlife and Countryside Act 2004:

> Considerable difficulties have been experienced in using section 1 to properly protect bird species, due to the wide application of the defence available in section 4(2)(c).

3.19 Nevertheless, the majority of consultation responses identified significant potential problems that would follow from the outright removal of this defence. The NFU for example argued that the "incidental results" defence:

> is an absolutely crucial defence, particularly in relation to the operation of farming activities. The nature of farming activities means that farming and wildlife interact very closely, and sometimes regrettably wildlife might be inadvertently harmed or killed as a result of lawful farming activities, such as ploughing, silaging or harvesting, and the impact on such wildlife could not have been reasonably avoided.
>
> An example might be the accidental death of a ground nesting bird as a result of grass cutting for silage or hay. The removal of such a defence would render farming operations such as silaging almost impossible, if prior to the cutting of each field (perhaps 40 acres), the farmer was required to walk the entire field to check for signs of such wildlife. Not only would this become a disproportionately onerous task, but the quality and condition of the crop could be jeopardised by the disturbance. It is therefore our view that this defence must absolutely remain.

3.20 Similarly the National Gamekeepers' Organisation argued that in the light of the jurisprudence of the Court of Justice of the European Union on the meaning of "deliberate" (ie conscious acceptance of consequences), "without the 'incidental results' defence every farming, forestry, construction and wildlife management activities simply could not be undertaken safely".

[2] Case C-06/04 *Commission v UK* [2005] ECR I-9017, at [111-113].

3.21 The Institute of Chartered Foresters, the Forestry Commission and Western Power Distribution (SW) Plc highlighted the practical difficulties which the forestry sector would face if the "incidental results" defence were to be removed. The latter explained that:

> for each cutting operation on each span of electricity line (between one supporting structure and the next) a wildlife risk assessment is carried out to minimise the impact, and where necessary or possible work is delayed until – for instance – nests are vacated. However it is simply not possible to completely avoid accidental destruction of nests for the following reasons:
>
> To complete the necessary clearance programme tree cutting teams have to be constantly employed throughout the year. It would not be possible to stop (e.g. for the bird nesting season).
>
> Were we to avoid the dormouse hibernation period, the bat hibernation period and the bird nesting period on some sites we would have no window of opportunity available to carry out essential maintenance at any point in the year! Therefore there is always a residual risk that we will accidentally cause damage to protected species, despite our best efforts to avoid this.
>
> Licensing is not the solution. It is cumbersome and expensive and hence always avoided by the regulator Natural England where possible. There need to be exemptions for Statutory Undertakers as originally set out in the 1981 Wildlife & Countryside Act. This provision needs to be far more widely drawn than is currently proposed.
>
> Most vegetation management operations which we carry out have a long term benefit for many species of birds and mammals (for instance re-coppicing Hazel woodland on a regular basis). But this is often a net effect – short term damage (felling the Hazel stems) is massively outbalanced by long term benefits to the ecology of the site. This general principle seems to be ignored by both the current (protected species provisions) and the proposed legislation.

3.22 The problems that regulatory addressees would face were also fully recognised by regulators. Natural England, while in favour of reforming the defence, conceded that

> if this defence is removed then there is likely to be increase in the perceived risk of prosecution, particularly during the routine conduct of legitimate activities such as farming and forestry. This could lead to an increase in licence applications. Although this did not occur when a similar defence was removed from the legislation protecting European Protected Species in 2007, the legislation protecting wild birds covers a far larger number of species, many of which are very common.

3.23 A number of wildlife protection organisations, including the RSPB, the Wildlife Trust and the Amphibian and Reptile Conservation Trust also agreed that the

removal of the defence without the introduction of an alternative solution would have significant adverse effects upon legitimate users. The Amphibian and Reptile Conservation Trust also pointed to the "considerable problems" that have arisen since the removal of the equivalent defence under the Habitats Regulations in 2007:

> "Ongoing" activities now risk countryside managers and others being caught by the offences, and this has engendered a culture of extreme risk aversion. In turn, this has caused a negative association with [European Protected Species] and less willingness to undertake proactive conservation measures. We think there is a sound case for harmonisation across [European Protected Species] and non-[European Protected Species], but the current situation in respect of a lack of statutory defence for [European Protected Species] is not helping conservation efforts, and we would not wish to see this extended to non-[European Protected Species].

3.24 A number of different possible solutions were suggested to ensure compliance with EU law on the one hand while making sure legitimate economic activities are not negatively affected.

3.25 Natural England considered at length two possible alternatives:

> In our view, the ideal general approach should be along the lines of:
>
> Step 1 People are advised to follow recognised best practice to avoid harm to protected species.
>
> Step 2 If, despite having acted responsibly and following best practice, some harm occurs to protected species, then this should normally be considered „incidental" and not an offence (i.e. it should covered by a defence). If best practice is followed then the level of harm in these cases will typically be trivial for the population.
>
> Step 3 If, however, there are grounds to suspect that harm is unavoidable (even after following best practice) or that the level the level of incidental harm would be significant to the population, then the activity should only be lawful under the authority of a licence.

3.26 Natural England however recognised the difficulties of the above approach in relation to both European Protected Species and wild birds. The "incidental result" defence in the Habitats Directive was struck down by the Court of Justice in case C-04/06 *Commission v UK*.[3] Moreover, the Wild Birds Directive has no "overriding public interest" derogation equivalent to that found in the Habitats Directive. In the light of those obstacles, they proposed the adoption of a similar approach to the Scottish model of the "incidental results" defence.

3.27 The adoption of a provision similar to the Scottish "incidental results" offence was supported by a number of stakeholders, including the RSPCA, the International

[3] [2005] ECR I-9017.

Fund for Animal Welfare, Scottish National Heritage, the Wildlife Trust and the Woodland Trust. The Wildlife Trust justified this option on the basis that it would "tighten… the defence so that it is less likely to be used inappropriately".

3.28 The Forestry Commission argued that the focus should be on the reliance on best practice guidance:

> In the UK, there are two "layers" for protecting species during ongoing activities: the first is legislative, the second comprises a range of good practice guidance available to farmers, foresters, building professionals, etc. By following good practice guidance, land managers should be able to continue their normal activities and at the same time avoid the deterioration or destruction of the breeding sites / resting places of annex 4 species. Maintaining or restoring optimum habitats for populations is seen as more important than the unintentional loss or disturbance of individuals that might occur as result of ongoing activities. By raising awareness of the possible presence of such species and by giving advice on action that land managers can take, the chances of offences against species are minimised. […] Accidental disturbance or killing of individuals of the species concerned by such practices needs to be accepted in the interest of the population as a whole (applying proportionality to achieve the overall objective).

3.29 A number of suggestions in relation to licensing were also submitted. The Institute of Chartered Foresters argued that if a licensing regime is the only reasonable solution it should be consolidated as a single licence connected to forestry legislation. AMEC Environment and Infrastructure UK Ltd suggested that the "incidental results" defence could be replaced by class licences in relation to certain bodies. Alternatively, a series of general licences to be issued. The viability of using licences to replace the defence was however questioned by some consultees, including the National Wildlife Crime Unit.

3.30 Lastly, Natural England, the RSPCA, and the Wildlife Trust suggested an amendment to the equivalent defence under section 10(3) Wildlife and Countryside Act 1981, which applies to certain wild animals not protected under EU law. The Bat Conservation Trust and Wildlife and Countryside LINK also proposed tightening the "dwelling house" defence under section 10(2) of the 1981 Act by better defining the conditions in which the defence applies

> so that a person who seeks the advice of a statutory nature conservation organisation is obliged to give them time in which to respond […] Further if the defence is then to be relied upon the advice that has been obtained should have been implemented.

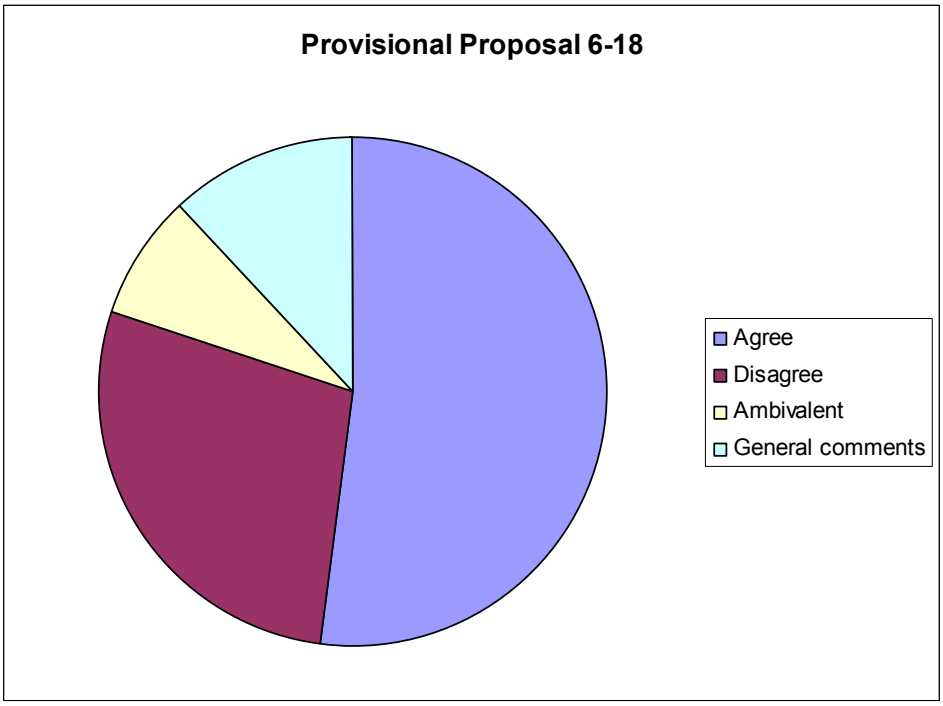
**Judicious use**

3.31 In our consultation paper we considered whether it would be preferable to adopt the term "judicious use" found in the Directive or to retain the more restrictive approach in current domestic legislation. Both approaches comply with the Directive. An obvious advantage is that using the exact terminology in the Directive follows the general preference for "copy out".[4] It therefore avoids any possible "gold-plating" of the Directive, and reduces the chance of the legal regime being overly restrictive.

3.32 Conversely, we accepted that using "judicious use" could be criticised because it gives too much flexibility to the decision-maker and is wider than the current domestic preference. Taken as a whole, "judicious use of certain birds in small numbers" could mitigate concerns regarding flexibility. We accepted that, unfortunately, there is no exhaustive definition of judicious use.

**Provisional Proposal 6-18: We provisionally propose that the term "judicious use of certain birds in small numbers" be one of the licensing purposes.**

3.33 Fifty consultation responses were received in relation to provisional proposal 6-18: 26 agreed; 14 disagreed; four were ambivalent; and six provided general comments.




3.34 Consultees in favour of this proposal included regulators, representatives of the shooting industry, the forestry industry, farmers, landowners and developers. Most wildlife protection organisations generally opposed this provisional proposal. DEFRA agreed subject to further discussion with stakeholders and highlighted that the Wild Birds Directive permits this derogation only "under strictly supervised conditions and on a selective basis".

[4] See chapter 4, paras 4.26 to 4.27.

3.35 Natural England supported the proposal on the basis that "it is vital that the licensing authority has the full range of derogation purposes at its disposal, and including this purpose will help future-proof the legislation".

3.36 Pigeon Racing UK strongly supported the proposal on the ground that the limited list of licensing grounds in domestic law is unduly restrictive. The term "judicious use" would introduce an element of flexibility in accordance with the Wild Birds Directive itself.

3.37 Similar arguments were brought forward by wildlife protection organisations against the introduction of "judicious use". One was that it would unduly expand the flexibility of the current system and thus reduce protection of wild birds (RSPCA, RSPB, International Fund for Animal Welfare, UKELA, Wildfowl and Wetland Trust and Wildlife and Countryside LINK).

3.38 A related argument, highlighted in particular by the RSPB and the RSPCA, was that the provisional proposal would create uncertainty and reduce the transparency of the licensing regime. The RSPCA submitted that

> the proposal would create an area of uncertainty - not only with respect to the term itself but other elements such as "selective basis", "certain birds" and "small numbers". There is also the general proviso regarding "no other satisfactory solution".

3.39 Most of the stakeholders mentioned above also noted that the introduction of this provision had been considered in Scotland and rejected by the Minister. Wildlife and Countryside LINK quoted the response of the Minister to the proposed amendment:

> The intended effect of amendment 103 would be to allow a derogation from the Birds Directive to control some wild predator species for the purpose of maintaining a shootable surplus of other wild birds. The purpose of such a derogation would be to prevent damage to property, but there is already a derogation for that purpose. It is clear from the Directive and supporting guidance from the European Commission that it does not cover shooting rights. Our initial analysis is therefore that to grant such a derogation would raise a high risk of legal challenge.

3.40 Lastly, the RSPB, UKELA, the Wildlife Trust, the Wildfowl and Wetland Trust and Wildlife and Countryside LINK pointed out that if "judicious use" were to be included as a new licensing ground under the new framework, derogations on that basis would have to provide for reporting requirements. The Wildlife Trust argued that

> without a reporting requirement and/or a limit on the number of licences issued, there is a danger that the cumulative impact of multiple licences could have a detrimental effect on the population status of some species. Providing a definition of "judicious use" and clear identification within the licence of the "certain birds" would reduce our concerns.

**Conclusion**

3.41 A relative majority of consultation responses expressed unconditional support of our proposal to abolish the “incidental results” defence. However, there were a larger number of consultation responses that either disagreed or acknowledged the potential negative implications on legitimate economic activities that the removal of the current defence would have. These consultees suggested alternative approaches to transposition.

3.42 A majority of consultees expressed support for our provisional proposal that the term “judicious use of certain birds in small numbers” be one of the licensing purposes. Of those consultees who opposed this provisional proposal, most were wildlife protection agencies.

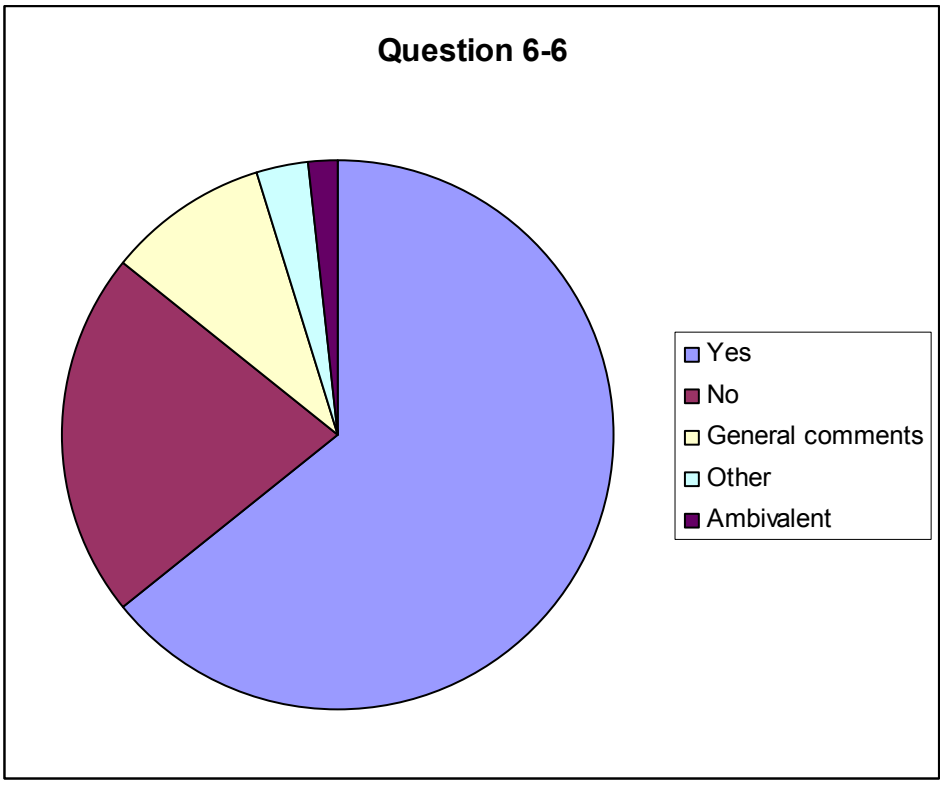
# CHAPTER 4
# PROHIBITED ACTIVITIES

### MENTAL ELEMENT FOR EU AND NON-EU PROTECTED SPECIES

**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?**

4.1 Sixty-four consultation responses were received in relation to Question 6-6: 41 expressed a preference for protecting badgers under the Protection of Badgers Act 1992 and domestic species currently protected under section 9(1) of the Wildlife and Countryside Act 1981 from intentional and reckless behaviour; 14 disagreed; six provided general comments; two proposed alternative solutions and one was ambivalent.

4.2 Respondents generally supported the harmonisation of the mental element of species protection offences as those committed intentionally or recklessly.




4.3 Animal welfare and conservation organisations, consultants, regulators and enforcement authorities generally favoured the option of protecting domestic species from “intentional and reckless” behaviour. Organisations representing the interests of the shooting industry, forestry, farmers, gamekeepers and developers, with some exceptions, argued that the existing protection of species by domestic law should be retained.

4.4 In general terms, stakeholders in favour of a general harmonisation of the mental element in domestic offences argued in favour of this option on the basis that it would enhance the clarity and consistency of the law.[1] DEFRA argued that

> where appropriate there should be consistency of protection from harmful acts. The phrase "intentionally or recklessly" is an approximation of the meaning of "wilfully", the term used in section 1(1) of the Protection of Badgers Act 1992 and section 2(2) of the Conservation of Seals Act 1970. We do recognise, however, that in relation to animals of a species which is not an [European Protected Species], the addition of "recklessly" would increase protection, though it would bring consistency with the position for badgers, seals and [European Protected Species].

4.5 A number of stakeholders also favoured this option on the basis that it would bring the law of England and Wales in line with Scottish legislation, and thus ensure a consistent approach to species protection across Great Britain.[2]

4.6 A second recurring argument in favour of "intentional and reckless" was on the basis that domestic protected species are not necessarily less endangered than European Protected Species; thus a different approach between the two would be arbitrary. Natural England, for example, pointed out that

> some species protected solely through domestic legislation (such as the pine marten and water vole) are, in the UK context, as in need of protecting (if not more so) than some European Protected Species.

4.7 Most of the consultation responses on both sides of the argument were exclusively focused upon badgers. The RSPCA, supported by others, defended the Protection of Badgers Act 1992 by explaining its original purpose:

> During consideration of the Bill the original proposal for a strict liability offence was accepted as being too widely drawn and there was substantive debate about "recklessness" including the test enunciated by Lord Diplock in *Regina v Lawrence*[3]
>
> […]
>
> The legislation was introduced, in part, to seek to overcome the difficulties experienced in taking prosecutions (eg by people claiming that they were after foxes) but also evidence of activities such as the bulldozing of occupied setts by builders, farmers and landowners.

4.8 Plantlife pointed out that the protection from intentional or reckless conduct should also be extended to plants and fungi under section 13 of the Wildlife and Countryside Act 1981.

[1] Those include, amongst others, Natural England, DEFRA, Nottinghamshire City Council, wildlife protection organisations (Animal Aid), consultants (Richard Graves Consultants) and individuals (Christopher Jessel).

[2] Those include Scottish Natural Heritage and OneKind.

4.9 Stakeholders opposed to the introduction of "recklessness" in relation to offences against domestic protected species generally argued that there is no legal or policy reason to change the current level of protection. The NFU and NFU Cymru argued that

> the simplification of the system of wildlife law should not override the intention of Parliament. To include recklessness would be extending the scope of domestic legislation very significantly.

4.10 The Countryside Alliance supported this position, noting that

> as a matter of principle, the exercise at the heart of this consultation which is to simplify and unify the laws relating to wildlife should not involve altering the current protections offered to wildlife.

4.11 The Country Land and Business Association similarly argued that

> the reason that certain species are protected at EU level is because their conservation status warrants it. If the other species are not deemed worthy of protection at that level, it is disproportionate to apply an equivalent level of protection. It is perfectly reasonable and acceptable to have different levels of protection for different species. Any alternative would involve a clear "gold plating" of EU requirements.

4.12 In relation to badgers, a number of consultees pointed out that their conservation status should not warrant any special protection measure, asserting that badgers cause harm to other more vulnerable species and contribute to the spread of bovine tuberculosis.[4]

[3] [1982] AC 510.

[4] Those included the Countryside Alliance, the Union of Country Sport Workers, Greater Exmoor Shoots Association and the Exmoor and District Deer Management Society, the Veterinary Association for Wildlife Management.

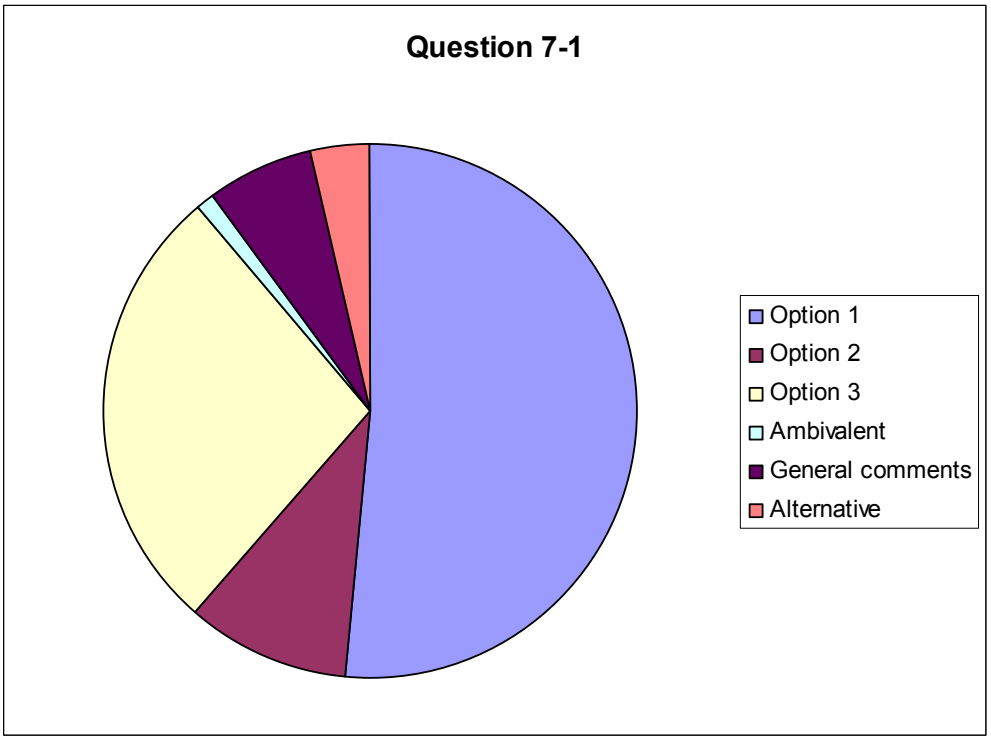
**Question 7-1: In which of the following ways, (1), (2) or (3), do consultees think that domestically protected species not protected from taking, killing or injuring as a matter of EU law should be protected?**

**(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.**

4.13 Eighty consultation responses were received in relation to Question 7-1. Forty-one responses favoured option 1, eight responses favoured option 2 and 22 favoured option 3; five consultation responses provided general comments, three proposed alternative solutions and one was ambivalent as to the preferred option.




4.14 Arguments in favour of option 1 were almost identical to arguments in support of the introduction of "intentional and recklessness" in relation to disturbance of domestic protected species. In short, a number of stakeholders, including Natural England, some ecological consultants and a number of wildlife protection organisations[5] argued that one of the merits of option 1 is consistency across species protection. Three arguments were brought forward in the responses

[5] These included WWT, the World Society for the Protection of Animals, Wildlife and Countryside Link, the Woodland Trust, the League Against Cruel Sports.

mentioned above:

(1) the same approach to domestic protected species and EPS makes ecological sense, as domestic protected species have often similar protection needs to EPS;

(2) consistency in species protection would make the law clearer for regulators and enforcement authorities, and thus make enforcement action more effective; and

(3) option 1 would make the law consistent across Great Britain.

4.15 Natural England favoured option 1, suggesting that such an approach would be "simple and readily understood", and that it "avoids introducing a two-tier protection regime that would create confusion".

4.16 A number of stakeholders also argued that option 1 would make prosecutions easier. Wildlife and Countryside Link, for example, argued that

> an intentional offence is very difficult to prosecute and species need protecting against offenders who can argue against an intentional offence through recklessness (whether or not this is true). In addition, species need protection from negligence and thoughtless behaviour as much as they do against intentional harm.

4.17 Plantlife, while in favour of expanding option 1 to plants and fungi, warned that legislation should account for field mycologists:

> for example, a mycologist may only become aware a schedule 8 fungus has been collected once it has been examined in the lab under a microscope. Therefore sufficient sample size collection of a specimen for identification/confirmation by microscopic characters […] should be permitted for fungi which are granted legal protection.

4.18 Those in favour of option 2 justified their choice primarily on the basis that it is the most balanced option. They thought it would confirm the existing protection of badgers and seals while avoiding the adverse consequences on development that could potentially result from the expansion of species protected by section 9 of the Wildlife and Countryside Act 1981.[6]

4.19 AMEC Environment and Infrastructure UK Ltd further argued that option 2 would also have the benefit of introducing greater flexibility into the framework. It would allow species "to be moved by order from one protection regime to the others" through "formal assessment as part of the quinquennial review".

4.20 The same arguments against the introduction of "intentional and reckless" under Question 6-5 were brought forward in favour of option 3. In addition, the Moorland Association, similarly to AMEC, argued that option 3 would allow "for a graduated approach according to the level of protection required by individual species".

[6] In particular the Forestry Commission, AMEC Environment & Infrastructure UK Ltd and Professor Stuart Harrop.

4.21 The National Federation for Fishermen's Organisations (NFFO) pointed out that

> given that sea fisheries involve the capture of species that cannot be readily seen or detected at the point of capture, and the location of protected species is usually not known, the extension of protection provisions to include reckless action is of concern.

4.22 DEFRA stated that they had not reached a firm view on the issue.

**Conclusion**

4.23 There was a definite majority in favour of protecting badgers and seals from prohibited conduct whether carried out either intentionally or recklessly. There was a bare majority in favour of protecting other species from prohibited conduct whether intentional or reckless. However, significant concerns were raised, particularly by the sporting industry and farmers.

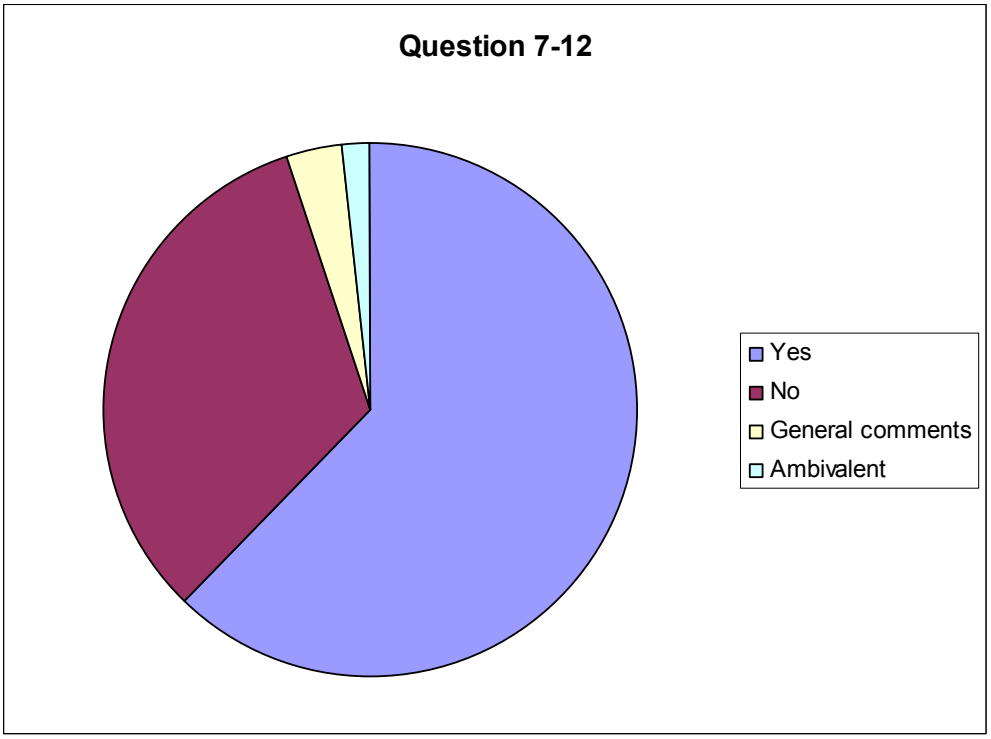
## EXTERNAL ELEMENT FOR WILD ANIMAL OFFENCES

### Digging for a badger

**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?**

CONSULTATION RESPONSES

4.24 Sixty-one consultation responses were received in relation to Question 7-12. Thirty-eight consultation responses argued that the reverse burden on the "digging for badgers" offence should be retained; 20 disagreed; two provided general comments and one was ambivalent.



4.25 Stakeholders' positions were divided. The reverse burden was supported by welfare and conservation organisations (notably the RSPCA, the Badger Trust and the League Against Cruel Sports), regulators (Natural England, the Countryside Council for Wales) and enforcement authorities (National Wildlife Crime Unit). Organisations representing the interests of landowners, farmers, gamekeepers and the shooting industry opposed the current burden. DEFRA did not respond to this question.

4.26 Stakeholders in favour of retaining the reverse burden mainly argued that the burden on the defendant is balanced and, at the same time, necessary for the successful prosecution of those offences.

4.27 The submission from the RSPCA summarises the main points brought forward by stakeholders in favour of retaining the reverse burden. They firstly argued that the reverse burden was balanced:

> A key element is "evidence from which it could reasonably be concluded that at the material time the accused was digging for a badger". Thus, there has to be reasonable evidence (eg that it was a "badger sett", there were signs relating to the presence of badgers at the site, the type of equipment and dogs present) before it falls to the accused to show the contrary.

4.28 The RSPCA further explained that "the reverse burden was introduced by an amendment in 1985 to counter the difficulties posed to prosecutors by excuses such as 'I was digging for a fox'".

4.29 In that regard, the League Against Cruel Sports added that

> the accused rarely admit to offences in such cases and may not answer questions in interview. The explanation often advanced for digging into a badger sett is that it was being done in order to rescue a terrier which has become stuck underground. This explanation is an easy one to claim and may be difficult to disprove.
>
> [Moreover] the act of digging destroys the field signs that are needed to show that the sett is active so without the reverse burden it may be easier for an accused to claim that it was not an active sett at the time.

4.30 The Badger Trust further argued that there are other instances in which it would be almost impossible to prove the accused had committed a crime:

> Specifically, a person in possession of a badger or any part of a badger or anything derived from a badger commits an offence unless they can prove that they came by the item other than through an illegal act. If, for example, a person was found in possession of a badger skin ready for taxidermy all they have to claim is that it was picked up from the side of a road as a result of a road traffic accident.

4.31 The RSPCA also argued that the reverse burden of proof has been considered a very useful tool by law enforcement authorities and referred to a survey carried out in 1990 (five years after the enactment of the amendment) by Dr David Clark MP. He found that police forces overwhelmingly supported the legislative change, particularly on the basis that it helped in the compilation of evidence for prosecutions. The consultation response submitted by the National Wildlife Crime Unit confirmed that "without this measure, many offences that have been heard by the courts could not have been brought".

4.32 The RSPCA concluded that "the pursuit of badgers continues to be a regular feature of RSPCA's investigations and there is no evidence to support a relaxation of this aspect of the law." And removal of the reverse burden "would turn the legislative clock back more than 25 years and facilitate the commission of welfare offences it was introduced to outlaw".

4.33 The response from the Scottish Association for Country Sports provides a comprehensive summary of the main arguments for the abolition of the reverse burden. In their view, wildlife crime is like any other crime and, as a result, the burden of proof should be the same as any other standard criminal offence. They submit that the reverse burden is not only unfair but also hinders lawful fox control:

> … animal rights groups commonly (and frequently) attempt to have individuals convicted of badger offences when in fact they were taking part in perfectly lawful fox control, simply because they do not approve of fox control. This is a very real problem for legitimate land managers throughout the UK, and it would be helpful if the correct balance could be struck between obtaining convictions for deliberate badger digging and these spurious accusations brought by the animal rights groups.

4.34 They went on to state that:

> since a large proportion of such prosecutions in England and Wales are likely to be privately carried out by the extremist animal rights groups, there requires to be a system of proper checks and balances included in the law, and this should include the normal standard of proof and the presumption of innocence until proven guilty.

4.35 Lastly, the Amateur Entomologist Society highlighted the existence of a reverse burden also in section 9(2) and 9(3) of the Wildlife and Countryside Act 1981 and expressed the concern of some of their members that they could be "wrongfully accused and convicted on the grounds of being deemed 'guilty until proven innocent'".

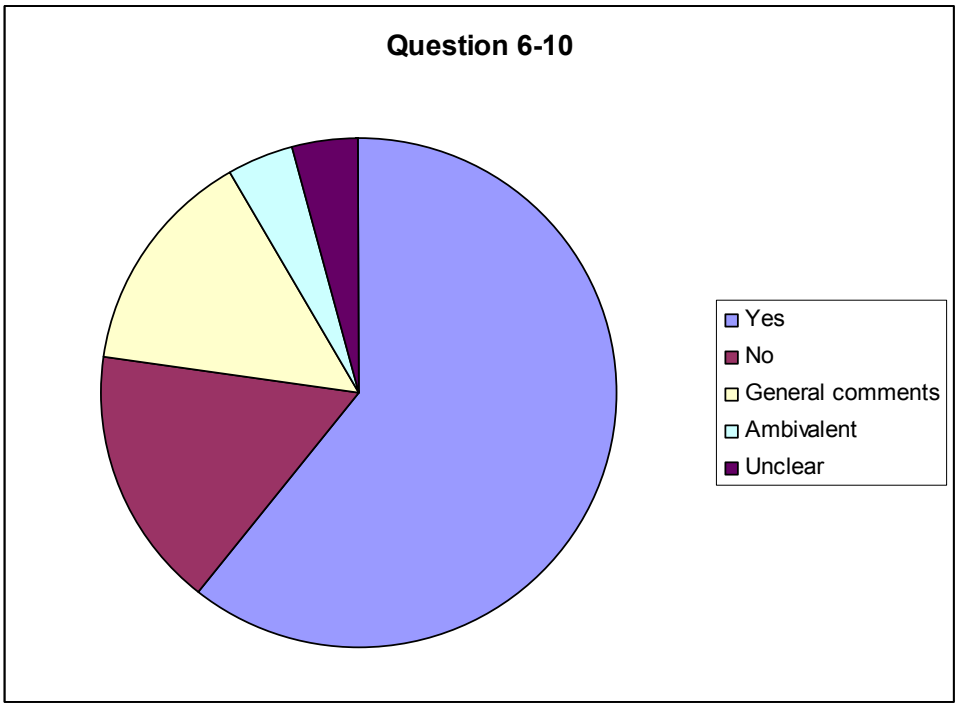
**Conclusion**

4.36 There was a clear division in consultees' responses to this question. Arguments supporting the reverse burden were advanced by welfare and conservation organisations, regulators and enforcement authorities, which essentially centred on the prosecution convenience of the burden. Arguments against the reverse burden made by organisations representing the interests of landowners, farmers, gamekeepers and the shooting industry, instead stressed the unfairness of being presumed guilty until proven innocent for a criminal offence.

**Obstructing a shelter**

**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?**

4.37 Forty-eight consultation responses were received in relation to Question 6-10: 29 agreed that section 9(4)(c) WCA does not amount to "gold-plating"; eight disagreed; seven provided general comments; two were ambivalent and two unclear as to their preference.




4.38 Responses to this question were split between wildlife protection organisations and regulators on the one hand and representatives of landowners, farmers, gamekeepers and forestry on the other.

4.39 Natural England and the Countryside Council for Wales considered that section 9(4)(c) does not constitute gold-plating. CCW argued, for example, that obstructing access to a place of shelter or protection

> has serious repercussions on the ability of an animal to breed, rear its young and survive in relation to factors such as weather and predators. We are therefore of the opinion that this section of the act

is not “gold plating” but a requirement to enable adequate protection of protected species and ensure continued ecological functionality.

4.40 Similarly the RSPCA argued that

> examination of the Guidance from the European Commission would suggest to us that obstructing entry to a place of shelter would comprise a loss of functionality of that habitat feature which is what the Directive seeks to address. We would therefore agree with the view expressed in paragraph 6.60 that it does not amount to “gold-plating”.

4.41 The Bat Conservation Trust went further, arguing that

> the act provides protection against deterioration of sites required by the directive, but not adequately transposed by the Habitat Regulations. Obstruction of access to breeding or resting places might not, in some circumstances amount to damaging or destroying them. For example if screening is put up in front of an entrance of a bat roost in order to prevent access it might be argued that the screening in itself does not damage or destroy the roost.

4.42 DEFRA agreed with the above arguments, stating that the “obstruction of a shelter or resting place would seem to amount to deterioration of a breeding site or resting place within article 12(1)(d)”.

4.43 The Countryside Alliance disagreed with the above analysis. It submitted that temporary obstruction that causes no actual damage should not amount to “deterioration”:

> We do not agree that a temporary obstruction to a resting place that causes no damage can be said to cause deterioration to the shelter. If the directive had intended to prohibit obstruction it would have done so. There would appear to be gold plating in these circumstances. We are concerned that there is a real danger here of seeking to justify gold plating on its perceived merits rather than strictly avoiding gold plating.

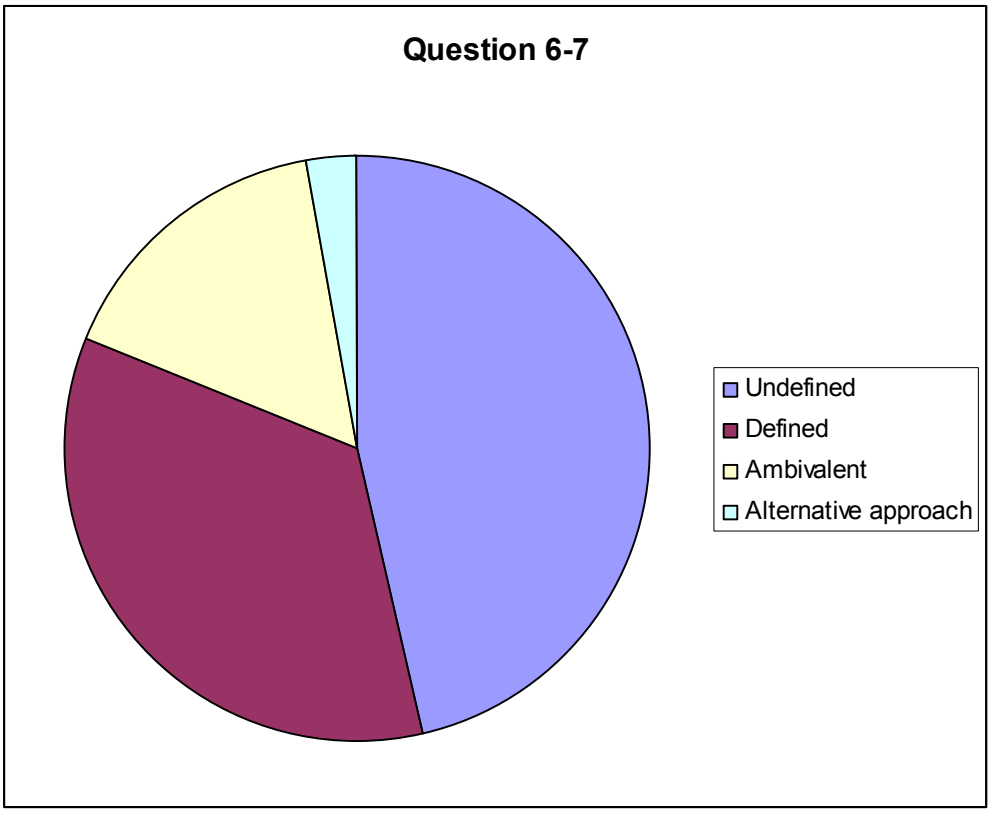
**Conclusion**

4.44 Again, this question divided consultees. Representatives of landowners, farmers, gamekeepers and forestry argued that obstruction that causes no damage should amount to deterioration. However, wildlife protection organisations and regulators advanced the point that obstruction in the offence clarifies usefully the way in which places of breeding and rest can be detrimentally affected, and section 9(4)(c) of the Wildlife and Countryside Act 1981 does not amount to “gold-plating” the requirements of the Habitats Directive.

**Disturbance**

**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?**

4.45 Sixty-nine consultation responses were received to Question 6-7: 32 stated that disturbance does not need to be defined; 24 suggested that it did; 11 were ambivalent; and 2 offered alternative approaches. DEFRA and Natural England fell into the ambivalent category.




4.46 Stakeholders' responses in relation to Question 6-7 do not show any clear majority view on the issue. They contain a large number of intermediate positions and different proposed solutions.

4.47 The Countryside Council for Wales, for example, expressed concern that any domestic statutory definition of "disturbance" could be subject to challenge as it is not defined in the Habitats Directive.[7] CCW argued that it would be useful to include a requirement that statutory guidance is produced on how to avoid disturbance against protected animals. Statutory codes could be useful as

> breach of the guidance or failure to demonstrate that reasonable steps had been taken to follow the guidance would assist in proving the offence whilst reassuring those abiding by the guidance.

[7] This position was supported in a number of consultation responses: Animal Aid, The Bar Council, Professor Colin Reid, Christopher Jessel.

4.48 This approach was supported by the National Wildlife Crime Unit:

> If animals were to be effectively protected against disturbance then NWCU would favour a series of statutory codes of practice aimed at minimizing the risk of disturbance. Whilst a breach of the code would not in itself amount to a criminal offence it would provide evidence that disturbance had occurred. The Highway Code is a good example of how such an approach works well.

4.49 Natural England also agreed that it would be difficult to "provide a satisfactory definition applicable to all taxa, all situations and that properly transposes the two Directives"[8] and pointed out that

> whatever definition is used, to ensure that it is relevant to each species and is applied consistently and transparently we recommend the provision of taxa-specific statutory guidance or codes where a need is identified. Such a provision is currently available under the Conservation of Habitats and Species Regulation 2010.

4.50 Provision for species specific statutory codes of practice was also supported by a number of wildlife protection organisations, including the RSPB, the Woodland Trust and Whale and Dolphin Conservation.

4.51 Whale and Dolphin Conservation also, along with the International Fund for Animal Welfare, expressed support for a broad statutory definition of disturbance with illustrative factors. IFAW, for example, argued that

> this definition should include social, ethological, physiological and psychological factors, and should include disturbance of a population's social structure, an animal's natural communication or navigation processes, an animal's reproduction potential, disturbance of nesting, feeding and resting grounds, etc

4.52 DEFRA took an ambivalent approach in relation to this question, arguing that

> the current illustrative provision in the 2010 Regs (art 41), enables the disturbance offence to be interpreted in a proportionate way and has been accepted by the European Commission, but other options should also be considered.

4.53 In favour of keeping the current illustrative provisions of the 2010 Regulations were, amongst others, the Country Land and Business Association, The Wildlife trust, the British Veterinary Association, AMEC Environment & Infrastructure UK Ltd and the Scottish Association for Country Sports.

4.54 Some further specific issues have been highlighted by stakeholders:

(1) disturbance should continue to apply to animals of a species as

[8] The practical barriers to drafting a satisfactory statutory definition that could apply to all animal species, plants were also highlighted, amongst others, by WWT, UKELA, the RSPB, the Forestry Commission.

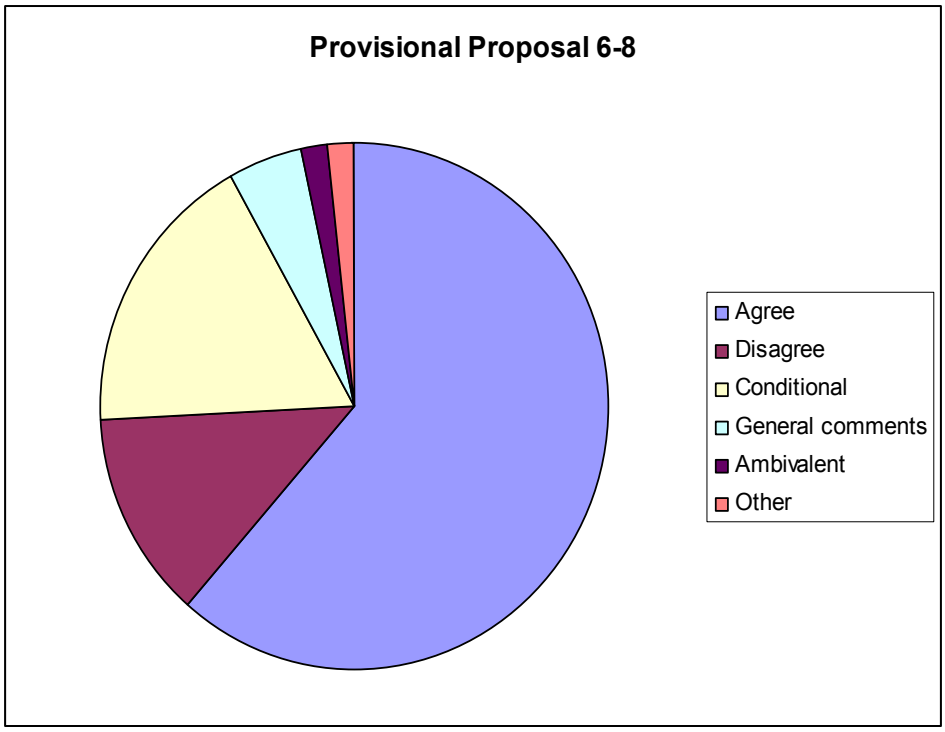
disturbance of a species is too indeterminate (DEFRA, Wildlife and Countryside Link, UKELA);

(2) the importance of taking account of the cumulative effects of disturbance (WDC, Cornwall Seal Group); and

(3) the need to define circumstances in which disturbance is necessary to limit by-catch (NFFO).

**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.**

4.55 Sixty-two consultation responses were received in relation to Provisional Proposal 6-8: 38 agreed with harmonising the various disturbance provisions; eight disagreed; 11 were conditional; three provided general comments; one was ambivalent; and one offered an alternative approach.




4.56 While the majority of consultation respondents, including Natural England, agreed with this provisional proposal, most wildlife protection organisations only agreed to the extent that the harmonisation of the different disturbance provisions will not reduce the current level of protection afforded to animals.[9]

[9] Most concerns related to the potential repeal of s 3 Protection of Badgers Act 1992. Those will be discussed in the section below.

4.57 Whale and Dolphin Conservation wondered how the current discrepancies between the Wildlife and Countryside Act 1981 and the 2010 Regulations in relation to the "protection extended to the places and structures that are essential for the survival of the species in question" could be resolved:

> The Wildlife and Countryside Act protects the structure or place used for shelter or protection while the Conservation Regulations protect the breeding site or resting place. This would need to be addressed in a consolidated statute ensuring that obstruction of, damage to and disturbance of any site, structure or place used by the animal for essential activities or life cycle stages is an offence, as is disturbing the animal while in such a feature or causing the animal to be disturbed. This might be more complex when it comes to cetaceans. As European Protected Species under the Habitats Directive, all cetaceans require strict protection wherever they are, but it might be possible to identify critical habitats such as important breeding, feeding or migrating ground (which may be enshrined within MPAs, MCZs and SACs) where additional protection may be required, as these areas might be essential for certain life cycle stages.

4.58 The Wildlife and Countryside Link agreed with WDC and stressed that a similar offence should also be available for plants.

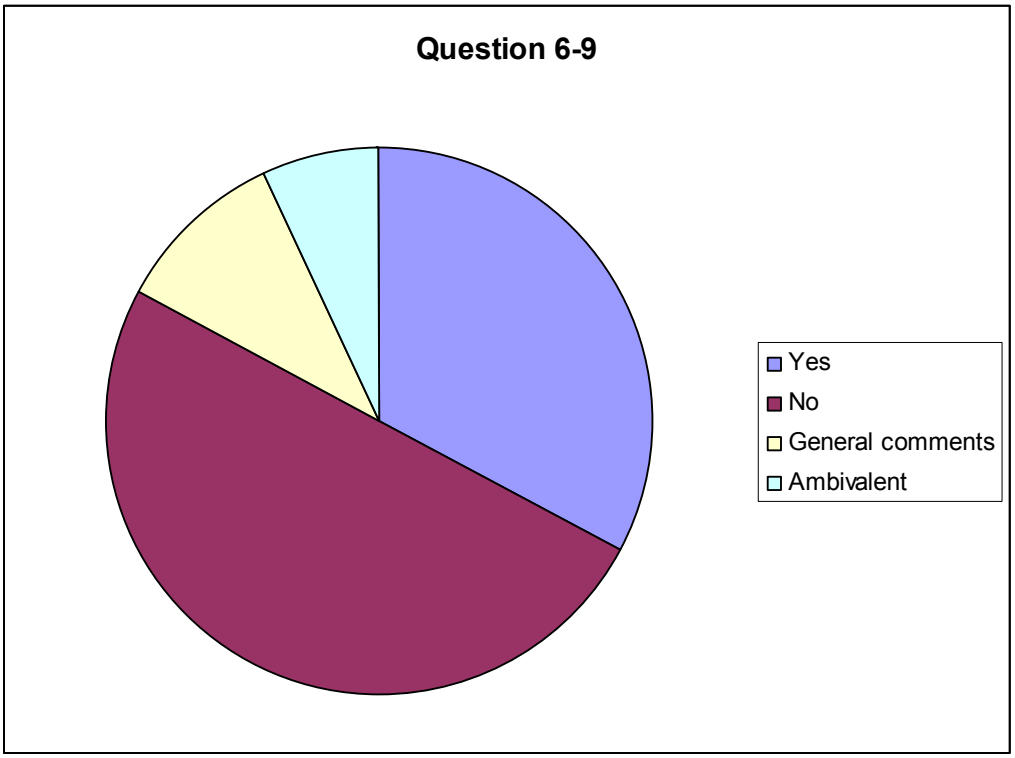
4.59 The Forestry Commission, on the other hand, expressed concern in relation to the potential for "gold plating":

> The Habitats Regulations (2010) currently refer to individuals (section 41(1)) as does the Wildlife and Countryside Act (section 9(4) (b)) as described on page 2 of our response, whereas article 12(1) (b) does not. With regards to the Birds Directive article 5(d) specifies "significant" disturbance, whereas sections 1(1) (aa) and 1(5) (a) and (b) of the Act indicate protection to the level of the individual that does not need to be significant. This gold-plating of the directives would need addressing in any new transposition of the directives and disturbance would still need to reflect "significant" for birds.

4.60 Finally, Bridget Martin, senior lecturer at Lancashire Law School, argued that attention should be given to the problems of evidence gathering in order to bring prosecutions in this context. The "harassment" offence, for example, "is a term that is clearly understood, and failure to include it could result in cetaceans once again being subjected to this behaviour".

**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?**

4.61 Fifty-eight consultation responses were received in relation to Question 6-9: 29 were not convinced that the badger and its sett would be adequately protected if only covered by a disturbance provision; 19 argued the badger would be adequately protected; six provided general comments; and four were ambivalent.




4.62 Responses to Question 6-9 show a predictable split between wildlife protection organisations and regulators (Natural England, Countryside Council for Wales) on one side, and representatives of land owners, farmers, gamekeepers on the other.

4.63 The former group of stakeholders, which included DEFRA, argued that disturbance by itself would not be enough to protect the physical structure of the sett, and would reduce the current protection afforded to badgers.

4.64 The RSPCA, for example, argued that

> the offence of "causing a dog to enter a sett" is used by the RSPCA and the police in prosecution cases. The outcome regarding the badger is not determined. The option of charges such as this is therefore very relevant. It may be argued in defence that the dog entered and came out but did not damage or destroy the sett. Currently, the offence of "causing a dog to enter a badger sett" is more straightforward evidentially. The prosecution does not have to prove that damage had occurred or that badgers were disturbed - points which, in practice, may be difficult.
>
> We believe it important to retain section 3(d) of the Protection of Badgers Act 1992. Badger digging/baiting remains a regular country pursuit involving extreme levels of cruelty. When catching a suspect on the scene with his dog down a sett it would not be possible to prove that a badger was occupying the sett at that point and, contrary to the argument in paragraph 6.58, it is entirely possible for a small terrier to enter a sett and not damage or destroy the sett structure.
>
> In their guidance as to what constitutes "disturbance" to a badger occupying a badger sett, Natural England comment that "Disturbance

> is therefore something less than what might otherwise be considered damage to a sett". They also comment that "The offence of disturbing a badger whilst it is occupying a sett has given rise to considerable debate over the years. The issue presents problems, not only in determining what might constitute disturbance, but also in proving that any badger had actually been disturbed".

4.65 The Badger Trust similarly argued that

> if "disturbance" was the only offence, a badger would always have to be resident for the sett to be protected. Disturbance relates to occupation, damage relates to the sett at any time as long as it is still considered a badger sett (eg showing signs of current use). Therefore, if the badgers left the sett for a couple of days, and there were no signs of activity, it would be easy for someone to interfere with the sett because they could justify that they were not "disturbing" anything

4.66 The above position was supported by, amongst others, Natural England, the Countryside Council for Wales, DEFRA, the National Wildlife Crime Unit and a number of wildlife protection organisations including the Wildlife Trust, World Society for the Protection of Animals, the League Against Cruel Sports, Wildlife and Countryside Link and the Wildfowl and Wetland Trust.

4.67 Amongst stakeholders who agreed with replacing section 3 of the Protection of Badgers Act 1992 with "disturbance", the National Gamekeepers' Organisation argued that

> if the definition of disturbance used in the 2010 Regulation is used, as suggested above, the badger would be protected from any meaningful disturbance, whilst the current absurdity that one cannot in any way safely "disturb" (undefined) any badger run (being a "place frequented by a badger"), would go.

4.68 The Scottish Association for Country Sports suggested that it would be

> sensible and useful to specify the law in relation to disturbance of an occupied badger sett rather than simply a badger sett. Badgers will abandon setts for various reasons, and the abandoned sett would in fact be a 'former badger sett' rather than a badger sett. We recommend that the term 'occupied' be defined as 'showing signs of recent occupation'. This has been used in Scottish legislation and is serving as a useful and practical definition.

4.69 The Forestry Commission suggested, as an alternative solution, including a reference to dogs entering a badger sett for baiting in the statutory guidance on disturbance.

### Conclusion

4.70 The first question asked on consultation, concerned whether it was necessary to define "disturbance" for the purpose of transposing the Wild Birds and Habitats Directives. A majority of respondents were in favour of leaving this term undefined. Codes of practice were recommended by many in order to clarify what disturbance meant, though a number of others (including Natural England) noted that the variety of species and activity that may disturb them could make the issuing of codes covering all situations difficult.

4.71 Many (including DEFRA) brought to our attention that the entry of a dog into a badger sett may well not lead to the disturbance offence being made out. The second badger sett issue that arose in consultation concerned unoccupied setts, and the need (if relying on disturbance solely) for a badger to be in occupation in order to make our disturbance.

### Methods

4.72 No consultation questions were asked on the specific prohibited methods and means.

4.73 One particular issue did come up in consultation – which was the banning of the use of lead shot.[10] The regime prohibiting the use of lead shot in certain places and for specified species (including all ducks, geese and swans) is contained in a series of statutory instruments made under the Environmental Protection Act 1990. It was argued by the Wildfowl and Wetland Trust that this regime should be combined with the general regime prohibiting methods and means, including other means that may be associated with the proscribed behaviour in the Lead Shot Regulations, which is located currently in the Wildlife and Countryside Act 1981.

### Possession offences

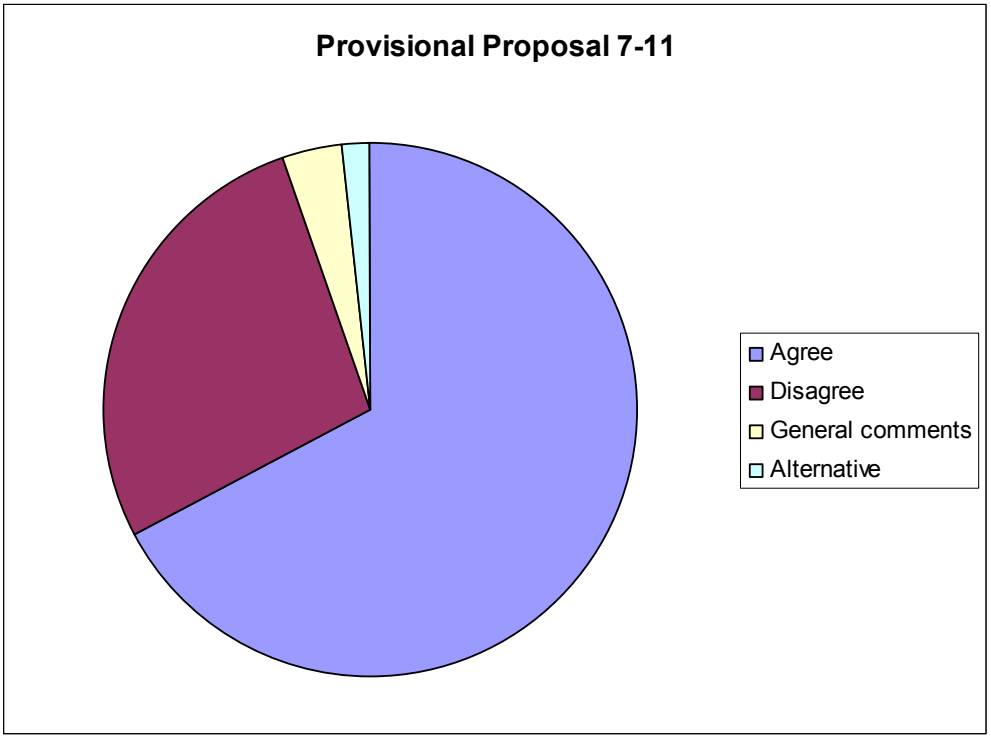
**Provisional Proposal 7-11: We provisionally propose that the current burden of proof on a person accused of being in possession of wild birds or birds' eggs should be retained.**

4.74 Provisional Proposal 7-11 was the subject of campaigns from the RSPB. If repeat responses generated by campaigns are taken into account, 122 responses were received, of which 103 agreed with the provisional proposal to retain the current burden of proof; 16 disagreed; two provided general comments and one suggested an alternative approach.

4.75 If the repeat consultation responses from campaigning are counted as one, we received 58 consultation responses concerning Provisional Proposal 7-11. Thirty-nine agreed; 16 disagreed; two provided general comments and one suggested

[10] See for England: Environmental Protection (Restriction on Use of Lead Shot) (England) Regulations SI 1999 No 2170; Environmental Protection (Restriction on Use of Lead Shot) (England) (Amendment) Regulations SI 2002 No 2102; Environmental Protection (Restriction on Use of Lead Shot) (England) (Amendment) Regulations SI 2003 No 2512. See, for Wales: Environmental Protection (Restriction on Use of Lead Shot) (Wales) Regulations WSI 2001 No 4003; Environmental Protection (Restriction on Use of Lead Shot) (Wales) Regulations WSI 2002 No 1730.

an alternative approach.




4.76 Compared to Question 7-12, responses to this provisional proposal showed a less clear-cut split across the different interest groups. Amongst representatives of the shooting industry and landowners, for example, the British Association for Shooting and Conservation, the Moorland Association and the Country Land & Business Association agreed with the provisional proposal. Regulators (Natural England, the Countryside Council for Wales and the Marine Management Organisation) and animal welfare and conservation organisations unanimously argued in favour of retaining the reverse burden for the possession of wild birds and birds' eggs. Regulatory respondents, including the British Bird Council, the International Ornithological Association, the Hawk Board, the National Council for Aviculture, the British Falconers' Club and Mr Derek Canning, strongly opposed the provisional proposal. DEFRA did not make any submission in relation to this section.

4.77 In favour of retaining the reverse burden on the possession of wild birds and birds' eggs, Natural England simply argued that

> without the current "reverse burden of proof" it would be difficult to gather evidence sufficient to demonstrate that an offence has been committed. People legitimately in possession of eggs should be able to demonstrate how the eggs were legally obtained.

4.78 The RSPB added that

> "strict liability" offences form an extremely important part of the toolkit available to tackle crimes against wild birds. Detecting offences of illegally killing and taking birds and eggs is usually extremely difficult. Offences often take place in remote and private places by individuals taking care to ensure their actions are not seen. Consequently, there

> have been relatively few convictions for offences of individuals being 'caught in the act' for these types of offences under the WCA.

4.79 The RSPCA supported the above positions submitting that the law would be "inoperable" without the reverse burden as "in most situations where someone has 'wild birds' in their possession only they can prove how they obtained those birds".

4.80 At the other end of the spectrum, a number of stakeholders argued that the reverse burden is unfair, open to abuse, and no longer justifiable in light of the development of DNA testing that would allow the prosecutor to prove the provenance of the birds and eggs.

4.81 Derek Canning, for example, argued that

> it is insulting to say that the reversed burden of proof is fair as clearly it is not and it is open to abuse which has occurred in many cases. How can it be said to be fair when the prosecution control the case, the evidence and what evidence is to be released to the defence, what will be investigated and more importantly what evidence will not be investigated.

4.82 The Hawk Board added that

> most prosecutions are NGO led against private individuals and the availability of DNA testing provides plenty of scientific evidence for the prosecution. Bird crime is small and has minimal impact on wildlife and the community. Laying a reverse burden is exceptionally onerous for those accused. It cannot be compared to alcohol, knives and trademark abuse, which are examples given.

4.83 The Scottish Association for Country Sports described the provision as "arguably the biggest single injustice in the current legislation". While accepting that, in the absence of the reverse burden, it would be difficult to prosecute unless the prosecution had evidence of actual taking from the wild. However, they argued that

> the great majority of cases which have been prosecuted in recent years (generally by the RSPCA) relate not to the genuine taking of birds from the wild or attempts to do so, but what amounts to harassment of individual birdkeepers for what would be at worst technical infringements of the domestic legislation, almost invariably for not being able to prove that a particular bird or birds were not taken from the wild.

### Conclusion

4.84 Even if the repeat consultation responses from campaigning are counted as one, there was still a majority in favour of retaining the reverse burden of proof. Responses to this provisional proposal showed a less clear-cut split across the different interest groups. Those that argued against the reverse burden cited the advances in DNA testing and the unfairness of the presumption. Consultees that argued for maintaining the reverse burden maintained that it was necessary due to the lack of availability of information to ensure successful prosectuions.

### Commercial offences

4.85 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"[11] 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".[12] The latter is broader, as it includes a willingness to sell, as well offering to sell.[13]

4.86 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.[14]

4.87 "Advertisement" is defined in the 1981 Act as including a catalogue, a circular and a price list.[15] 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.

4.88 However, there are legal provisions using "exposure for sale", which are clearly intended to encompass advertising.[16] Further, it seems inconceivable that in statutes after the Wildlife and Countryside Act 1981, such as the Deer Act 1991,

[11] 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).

[12] Protection of Badgers Act 1992, s 4.

[13] 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.

[14] Wildlife and Countryside Act 1981, s 9(5)(b). This is repeated at s 13(2)(b) for plants.

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

[16] For example, the Knives Act 1997, s 4(b) states that a person markets a knife if he offers it for sale.

an offence of exposing for sale would not include advertising.

4.89 However, in order to clarify the law, we suggested that the commercial offences should prohibit offering for sale, exposing for sale and advertising to the public.

**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?**

4.90 Sixty-five consultation responses were received in relation to Question 7-2: sixty-three agreed; two disagreed.

4.91 The Countryside Council for Wales, for example, expressed full support for the proposal, explaining that:

> offering for sale, exposing for sale, and advertising to the public demonstrates a clear intention to profit from trade in protected species and all aspects should be addressed to deter this illegal trade and associated offences.

4.92 Scottish Natural Heritage also expressed full support for this measure on the basis that it would harmonise the prohibition throughout Great Britain and therefore close the possible loopholes that might otherwise exist with inconsistent provisions across the border.

4.93 A number of consultees, including Natural England, the Countryside Council for Wales, the National Wildlife Crime Unit and the RSPB, argued that the prohibition should go further and include purchasers of wild animals or plants. The NWCU, for example, explained that

> Whilst in the majority of cases purchasers are the innocent party, we can evidence occasions when purchasers instigate the illegal sale of protected species. In such circumstances we feel that those responsible should face sanction.
>
> The suggestion outlined above is similar to the provisions contained within the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (as amended). Trade in some species listed in the schedules of the Wildlife and Countryside Act is also regulated by the provisions of the 1997 regulations but the available sanctions differ considerably (six months imprisonment/level 5 fine provided by the act compared to 5 years imprisonment/unlimited fines provided by the regulations). The new statute should we think recognize that illegal trading may offend under both pieces of legislation and provide harmonisation of available sanctions.

4.94 The RSPB added that:

> In line with recent amendments to COTES, we believe it should be an offence to purchase a wild bird contrary to the relevant provisions of the general licence controlling the sale of wild birds. This would make people more aware of the origin of the specimens and ensure that the seller provides the appropriate documentary evidence to show the

> bird originates from a lawful source. A similar clause may be merited for Schedule 5 animals and Section 8 plants.

4.95 Northumbria's Student Law Think Tank wondered whether the offence would extend to third parties such as publishers of advertisements in breach of the provision.

4.96 The RSPB and RSPCA highlighted some issues in relation to the definition of "advertisement". The RSPCA, for example, submitted that:

> The definition of "advertisement" in the 1981 Act is not an exhaustive one and relies on interpretation together with the specific examples included in the definition for the avoidance of doubt and the context of section 9(5)(b). However, in the light of the developments such as internet trading the Commission may wish to consider whether the current definition is still adequate.

4.97 The RSPB also pointed out the potential problems arising from the discrepancy between the definition of "wild bird" and "wild animals" under schedule 5 of the Wildlife and Countryside Act 1981:

> Whilst the taking and keeping of schedule 5 species may be unlawful, the subsequent sale of any offspring would not be. This differs to the situation for wild birds, which cannot be considered captive-bred and therefore able to be sold unless both parents were lawfully in captivity when the egg was laid. This issue has arisen with the taking of protected butterflies. The legislation needs to cover this loophole.

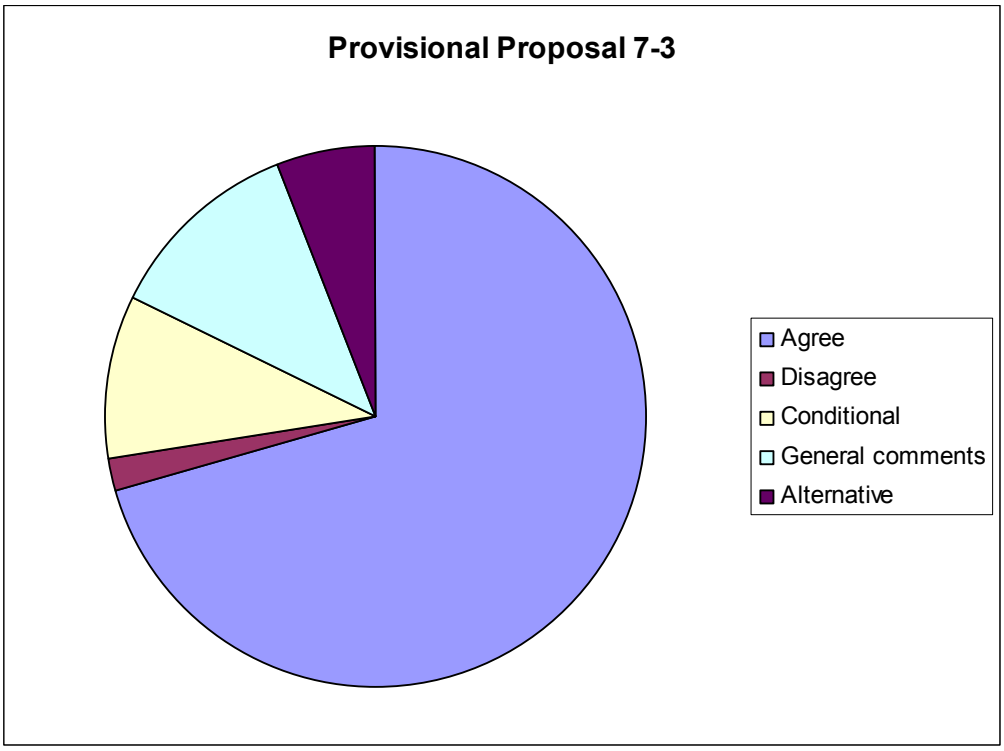
**Conclusion**

4.98 There was overwhelming support for this provision proposal. Two further issues were raised by consultees. Firstly, Northumbria's Student Law Think Tank query regarding whether the offence would extend to third parties such as publishers. Secondly, RSPB and RSPCA expressed concern about the definition of "advertisement".

**Poaching**

**Provisional Proposal 7-3: We provisionally propose that there should be a power to amend the species covered by the crime of poaching.**

4.99 Fifty-one consultation responses were received in relation to Provisional Proposal 7-3: 36 agreed; one disagreed; five submitted conditional responses; six provided general comments and three suggested alternative approaches.




4.100 Provisional Proposal 7-3 was overwhelmingly supported by consultees. A few comments are nevertheless worth mentioning.

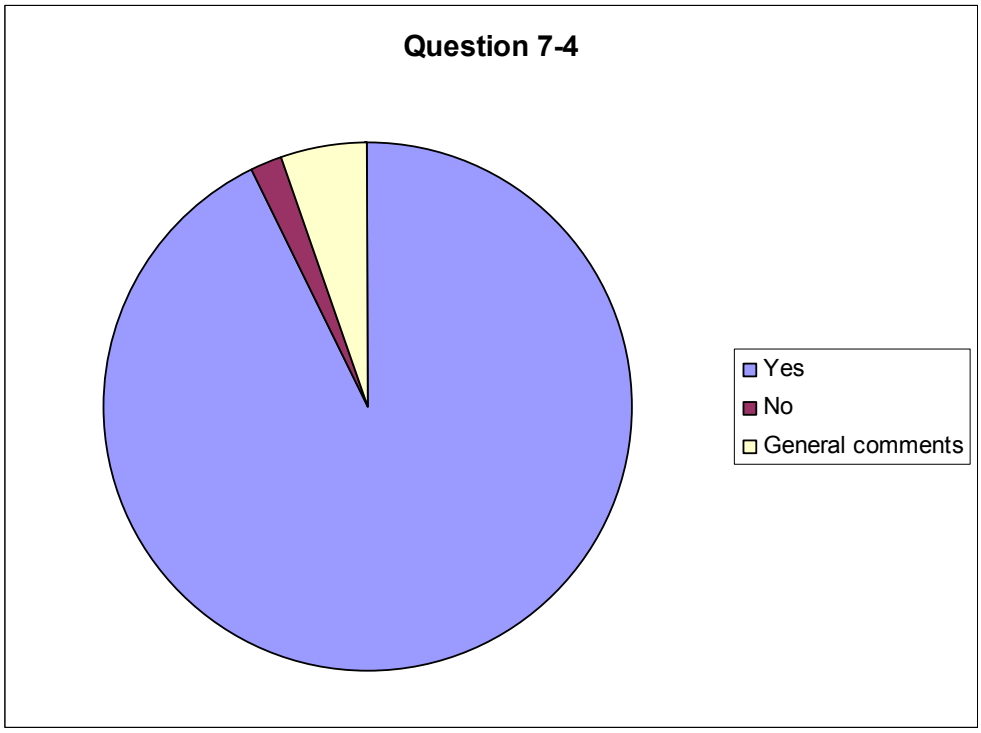
4.101 The Wildfowl and Wetlands Trust, Wildlife and Countryside LINK and the Self-help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA (SHG) agreed with our proposal in principle, but argued that the power should only allow for the addition of species. The SHG thought that removal of species from the list should only be possible through primary legislation and that there should be a duty on the competent authority to consult before any amendment.

4.102 DEFRA, Natural England and the Wildlife Trust went further, and argued that there is no reason why the crime of poaching should be species-specific. DEFRA, for example, submitted:

> We do not see why the crime of poaching needs to be species specific. Poaching, by its nature is a crime, regardless of the species being targeted (assuming the species has a financial or amenity value). But clarity is required by way of a meaningful definition that makes it clear that poaching is taking or killing an animal or bird that is present on another person's land, where the animal or bird has financial or amenity value.

**Question 7-4: Do consultees think that the offence of poaching concerns matters beyond simply the control of species?**

4.103 Fifty-five consultation responses were received in relation to Question 7-4: fifty-one agreed that poaching concerns matters beyond the control of species; one disagreed; and three provided general comments.




4.104 Consultees overwhelmingly agreed that the offence of poaching concerns matters beyond the control or protection of species.

4.105 The majority suggested that poaching is primarily an interference with the rights of landowners or people with sporting rights. Christopher Jessel, former property lawyer, described the different sources of rights to take game in other people's land. He concluded that:

> As indicated the purpose of the Game Acts against poaching is really to protect property, specifically sporting rights. It is not about conservation or control of wildlife which was hardly a major issue in the nineteenth century. The offence of taking game from a highway illustrates this as on the face of it no trespass was involved (but see *Harrison v. Duke of Rutland*) but there was still a need to prevent taking of game.

4.106 A number of representatives of landowners and the shooting industry, including the British Association for Shooting and Conservation, the Moorland Association, the Country Land & Business Association and the SHG agreed with this approach. BASC for example noted that "the offence of poaching is prejudicial to a profit-à-prendre and private enjoyment of property".

4.107 DEFRA similarly noted that "poaching is an offence that is intended to protect the right of a landowner in relation to wildlife on that land".

4.108 The Scottish Association for Country Sports suggested:

> In our view, poaching is simply theft – it has nothing to do with species management except perhaps incidentally if the poaching was so severe that the species concerned was put at risk locally.
>
> We understand that the term "poaching" was required in the past

> because of the question of the ownership of the species being poached, and this should no longer be the case.
>
> Since this legislation also covers plants and animals, it would seem more practical to create a specific offence of removing a bird, animal or plant from land without the consent of the landowner or other person able to give consent.

4.109 Some organisations, such as the National Gamekeepers' Organisation (NGO) and the Woodland Trust, argued that poaching generally goes further than a simple interference with property. The NGO, for example, argued that beyond the illegal taking of species:

> poaching usually also involves breach of a landowner's privacy rights, damage to land and crops by vehicles, serious disturbance of wildlife and causing alarm and fear to landowners, their residents and employees.

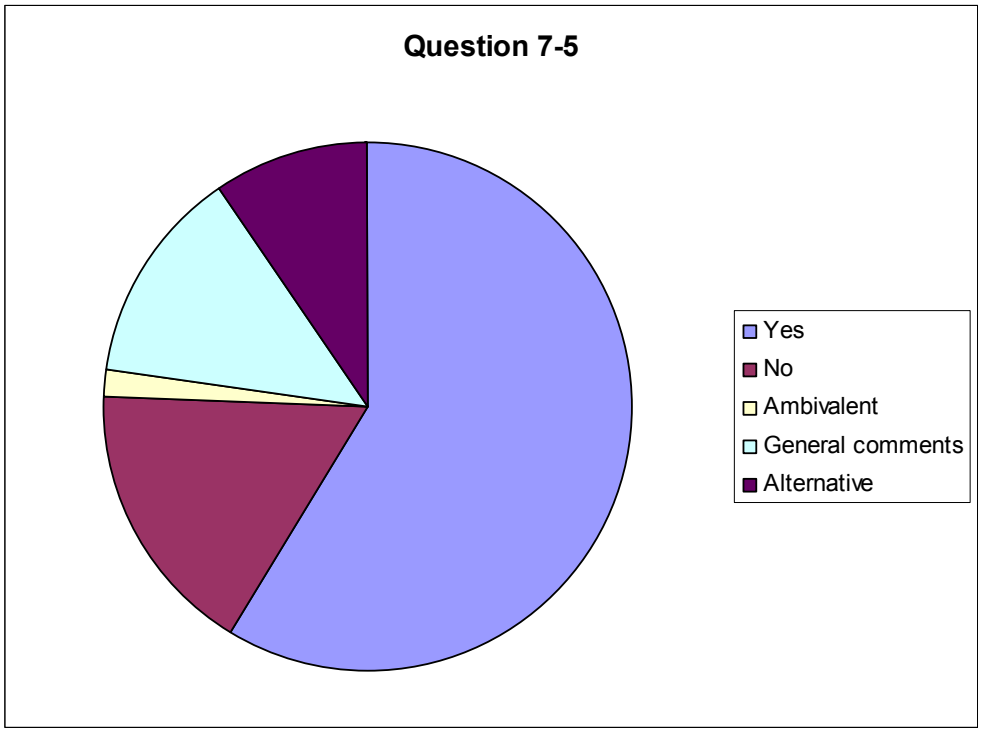
4.110 The Woodland Trust added that "poaching can lead to threats, violence and intimidation of landowners and therefore it has serious public order ramifications beyond the control of the species".

4.111 A number of wildlife protection organisations such as Wildlife and Countryside LINK, the RSPB and the Wildfowl and Wetlands Trust suggested that currently the crime of poaching is biased in favour of those with a "hunting or shooting interest on their land". As a result, the RSPB submitted that the offence:

> should also protect the interests of landowners who wish to protect the wildlife on their land for other reasons, such as conservation, tourism, simple enjoyment, or ethical reasons.

**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?**

4.112 Fifty-three consultation responses were received in relation to Question 7-5: 31 agreed that poaching should require proof of acting without the landowner's consent rather than proof of trespass; ten disagreed; seven provided general comments; and five suggested alternative approaches.




4.113 Regulators were split on this issue, with the Countryside Council for Wales arguing in favour and Natural England arguing against requiring proof of acting without the landowner's consent rather than proof of trespass. A number of individuals and organisations submitted general considerations.

4.114 In favour of requiring proof of acting without the landowner's consent, the Countryside Council for Wales suggested that:

> it would be a clearer definition and easier to prove rather than relying on the civil trespassing definition. Acting without the landowner's consent is a phrase that is commonly utilised in our licensing role and is easily understood by the public.

4.115 The National Farmers' Union and NFU Cymru agreed that the consent of the landowner is key to the offence of poaching, which, in essence, is a "wrongdoing committed against the particular rights of a landowner". The Scottish Association for Country Sports further argued that the act of trespass in itself is irrelevant for the offence of poaching as "a person could be on land quite legitimately for other purposes and therefore not trespassing, and still unlawfully remove a bird animal or plant".

4.116 DEFRA, on the other hand, submitted that while the offence of poaching should cover the killing or taking of an animal on another person's land "without the consent of the owner of that land authorising him to enter the land":

> It should not cover the case where a person is on another person's land with the permission of that person but kills or takes an animal without his permission. It is for the owner of the land to ensure that persons he invites onto his land comply with any restrictions he requires as to killing or taking on his land. If he invites them onto his land, he should take the risk that they may kill or take animals without

> his consent. Moreover clandestine action has always been of the essence of poaching, and that should be regarded as absent where the person killing or taking the animal has been invited onto the land. (In other words the owner should be regarded as having constructive notice of what his guests on the land are doing on it.)

4.117 The Country Land and Business Association wondered what difference this legal change would make in practice:

> Trespass means acting without the consent of the landowner/occupier. It does not have to involve physical entry on the land. Trespass can be committed by firing a gun onto someone's land, (*Pickering v Rudd* 1815) or by sending a dog onto someone's land (*R V Pratt* 1855). As such we do not understand the premise behind the question.

4.118 Natural England simply argued that "a person caught in an act of trespass may be more transparent at the outset for the regulatory authorities".

4.119 The National Gamekeepers' Organisation and the Countryside Alliance highlighted the importance of sporting rights. The Countryside Alliance, for example, submitted:

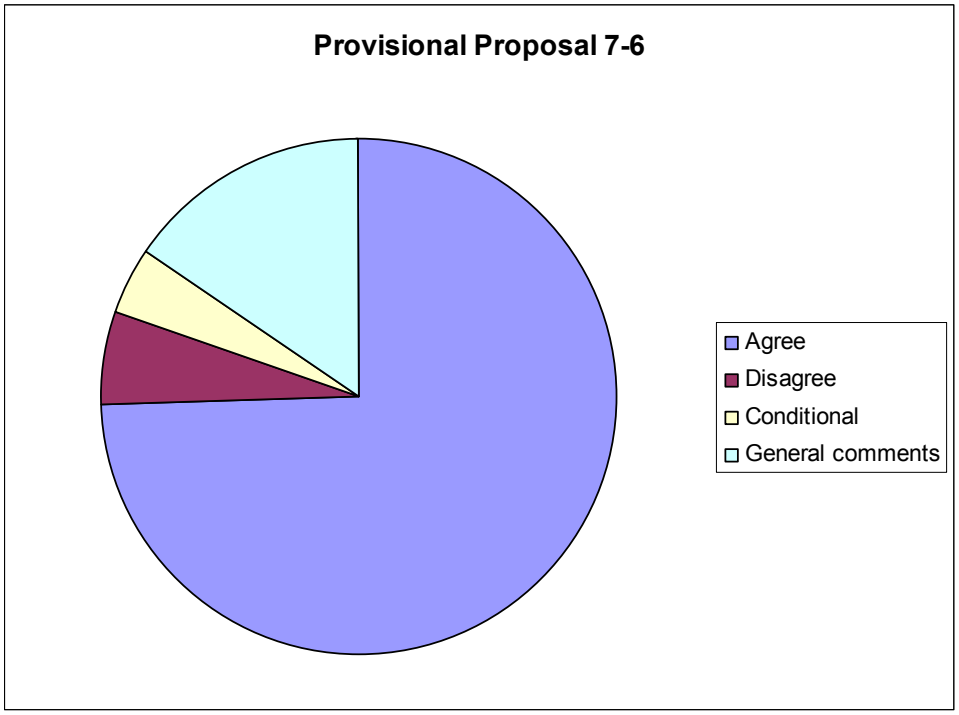
> Sometimes the owner of land has the sporting rights over the land, but on other occasions the sporting rights are held by the occupier of land who is not a land owner. The sporting rights can also be held by those who neither own nor occupy the land. Poaching is an offence against those with rights to take wild animals from a piece of land, not necessarily landowners. As such, a requirement to obtain a landowner's permission is not necessarily relevant to the offence. The current arrangements at least mean that a person entering land as a trespasser does not have the permission of anyone who could allow them to enter land to take wild animals, including the landowner, occupier or owner of sporting rights. If it is necessary to change the elements of the offence of poaching then it would be advisable in our view to include a requirement to have the permission of the person with the right to take wild animals from a piece of land.

4.120 Lastly, Northumbria's Student Law Think Tank wondered how "consent" would be defined in the new framework, suggesting a "reasonable belief" test. In addition, it noted that the definition would not encompass "baiting" activities:

> Baited poaching would take effect where a wild animal, typically resident on land belonging to another, is lured or baited onto land which the baiter or poacher either owns or has permission to be on for the purposes of killing the animal. The proposal (7-6) put forward in this consultation paper does not deal with this issue. Therefore students propose a separate offence of baiting to solve this issue and that this offence would sufficiently protect animals against people who wish to bait or entrap them.

**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.**

4.121 Fifty-one consultation responses were received in relation to Provisional Proposal 7-6: 38 agreed; three disagreed; two submitted conditional responses; and eight provided general comments.




4.122 While the overwhelming majority of consultation responses expressed general agreement with Provisional Proposal 7-6, a number of comments were made in particular in relation to the mental element required to convict a poacher.

4.123 In relation to the mental element of the offence, the Game and Wildlife Conservation Trust (GWCT) argued that "species" should not be specified, otherwise "this would give rise to a defence of 'I was not chasing that, I was chasing this'". Similarly, Christopher Jessel pointed out that:

> the poacher may not have a specified species in mind but may be taking (literally) pot luck in pursuit of anything edible to take back to his kitchen, whether of a protected species or not.

4.124 The SHG also maintained that such formulation of the offence would create a "nightmare in terms of trying to second guess what was in someone's mind when they committed the act".

4.125 DEFRA agreed with GWCT, highlighting that:

> Poaching, by its nature, is a crime, regardless of the species being targeted (assuming the species has a financial or amenity value).
>
> However, there may be circumstances where a person may have a

> genuine acceptable defence. For example entering upon land to euthanize or recover for urgent medical attention or to prevent injury to the animal, other animals or persons.

4.126 The Deer Initiative Ltd suggested that poaching should be turned into a strict liability offence by inserting the words "or actually taking, killing or injuring them regardless of previous intent".

4.127 Turning to the wrongful act, the National Wildlife Crime Unit welcomed the attempt to introduce a clear and simple offence of poaching but felt that the proposed definition failed to address a number of practical problems:

> A person who shoots game on his own land which then (either dead or injured) lands on neighbouring property where the hunter does not have permission to enter. If the hunter then enters that land to retrieve the game (or sends a dog to retrieve that game) would an offence of poaching be made out?
>
> A person who enters land without lawful permission and then flushes game to another person who is standing on land where there they have permission to take game?
>
> […] In addition consideration needs to be given as to whether poaching offences should include the element of taking. In the majority of cases Police officers on arrival at an incident will not have evidence of searching for or being in pursuit of game. They might however be presented with evidence of game having been taken. It is we feel, important that any future poaching provisions cover search, pursuit and taking.

4.128 Lastly, the National Gamekeepers' Organisation suggested that the rights of arrest by landowners and gamekeepers currently present in the poaching Acts should be retained under the new legislative framework:

> There may be occasions when a gamekeeper or landowner may need, in the absence of a constable, to detain a person involved in an unlawful act when found upon ground for which the gamekeeper or landowner is responsible (eg poaching). With reducing police budgets, this existing provision may well become a more important means of enforcement in the future. (A citizen's power of arrest is denied for wildlife or poaching offences as these are tried in magistrates courts […]).

**Conclusion**

4.129 In general, consultation disclosed considerable support for reform. The content of reform, however, was slightly contentious – especially given the rights present in poaching.

4.130 The proposal to reform the offence to ensure flexibility as to the species affected was supported overwhelmingly. However, some (DEFRA, Natural England and the Wildlife Trusts) suggested we could go further and extend the offence to "an animal or bird that is present on another person's land, where the animal or bird has financial or amenity value".

4.131 Conversely, the proposal by the Wildfowl and Wetlands Trust, Wildlife and Countryside LINK and SHG, that the power to amend species should only allow for the addition of species, goes against our general regulatory objectives – which include increasing the flexibility of the wildlife regime. For the SHG, removal of species from the list should only be possible through primary legislation and that there should be a duty on the competent authority to consult before any amendment.

4.132 Consultation suggested that the crime of poaching was not primarily for control of species, or in fact anything to do with conservation, but exists to protect or safeguard the rights of those to take or kill species present on a particular parcel of land. We accept that those rights may not necessarily be held by either the landowner or the occupier of the land.

4.133 Consultees noted that the crime of poaching goes beyond the protection of the specific rights over wild animals, which are not necessarily "sporting rights" but could be for tourism, and protects the settled enjoyment of land. Many highlighted this in the context of the changing form of poaching, including the greater use of vehicles.

**PLANTS AND FUNGI OFFENCES**

4.134 We asked no specific questions on plant and fungi offences. However, several important issues were raised in consultation.

4.135 Several interested groups submitted consultation responses on plant and fungi specific issues.

4.136 Plantlife suggested that:

> The protection for plants against "intentional damage or destruction" leaves populations vulnerable to destruction via indirect impacts such as inappropriate land management. Introducing an offence of reckless disturbance of schedule 8 plants would reverse this inequality.

4.137 Having highlighted perceived problems with the existing law, including difficulties in prosecuting the intentional offence, Dr Martyn Ainsworth submitted that he would:

> strongly support any amendment that includes "reckless commission" - specifically damage to substrata (wood, litter, soil etc) which is below and in the immediate vicinity of the protected species' fruit bodies and therefore highly likely to contain its mycelium.

4.138 The Association of British Fungus Groups made the point that the current theft offence does not work well for fungi:

> The point is appreciated that from a theft point of view it is necessary to substantiate removal of the whole organism. This ruling has arisen in the context of the law regarding removal of green plants, but would be extremely difficult to prove with fungi because of their unique construction, so theft would be a problematic route to travel.

### Conclusion

4.139 Consultation responses stated that plant and fungi protection has lagged behind that for protected animals. Sometimes this is because the underlying offences may not take into account properly intrinsic biological difference between plants and it is, for instance, impossible to uproot fungi.

## INVASIVE NON-NATIVE SPECIES OFFENCES

4.140 Without any new Directive, as discussed in Chapter 1, the prohibitions relating to these offences would be those contained currently in Wildlife and Countryside Act 1981, the Conservation of Habitats and Species Regulations 2010 (including discharge from boat) and the Import of Live Fish (England and Wales) Act 1980.

4.141 We envisage transferring the current provisions into any new statute.

## ATTEMPTS

4.142 The statutes containing wildlife offences include provisions making it an offence to attempt the basic offences, such as those in section 1 of the Wildlife and Countryside Act 1981.[17] We provisionally proposed that this should be the case for all wildlife crimes in our regulatory regime.

**Provisional Proposal 7-7: We provisionally propose that it should remain an offence to attempt the offences in the new provisionally proposed regime.**

### *Consultation responses*

4.143 We received 49 responses to provisional proposal 7-7: 47 of these agreed with our provisional proposal; 1 offered general comments; and one gave conditional support.

4.144 Several consultees highlighted the utility of including attempt in the offence. The RSPCA, for instance, uses section 18 of the Wildlife and Countryside Act 1981 (which makes it an offence to attempt other offences within that Act) when traps are set in a garden but no wild birds have become entrapped.

4.145 The Self Help Group for Farmers, Pet Owners and Others Experiencing Difficulties with the RSPCA suggested restricting the attempt offence to "serious attempts". They stated that:

> Poaching covers a wide range of offenders, from youngsters out for a day to commercial enterprises. The SHG can see a danger that lesser offenders will be treated in the same way as large scale

[17] 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.

offenders. We [the SHG] do not have any faith in the objectivity of prosecutors or that the courts will prevent this from happening.

**Conclusion**

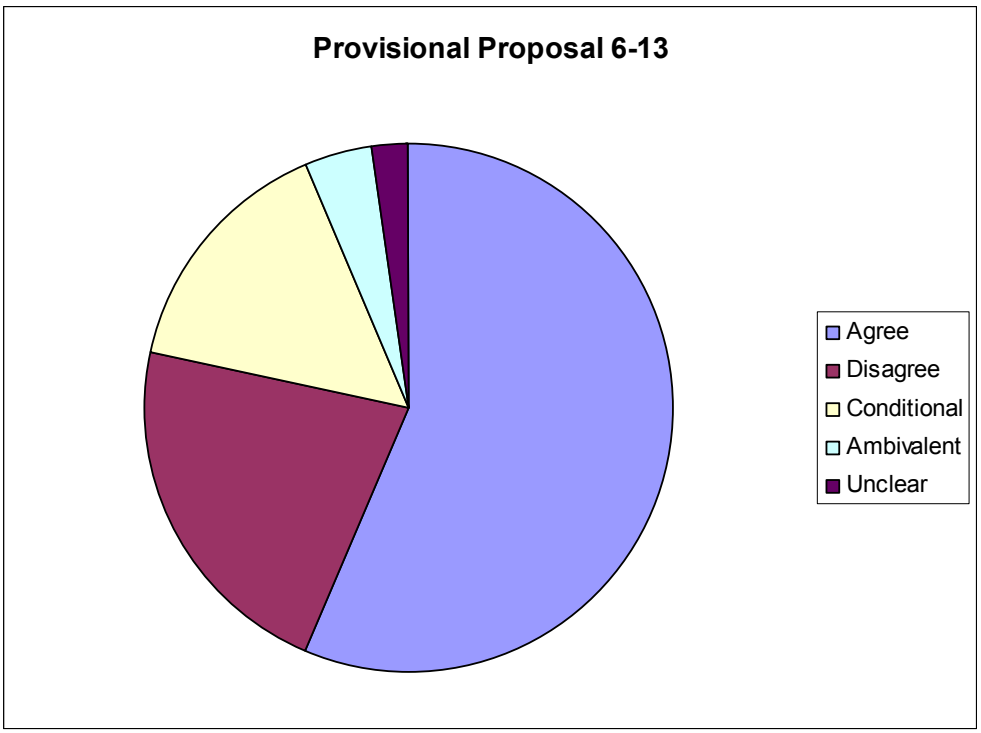
4.146 There was overwhelming support for this provisional proposal.

# CHAPTER 5
# PERMITTED ACTIVITY

## HUNTING OF WILD BIRDS UNDER ARTICLE 7 OF THE WILD BIRDS DIRECTIVE

**Provisional Proposal 6-13: We provisionally propose that article 7 of Wild Bird Directive be transposed into the law of England and Wales.**

5.1 Forty-six consultation responses were received concerning Provisional Proposal 6-13: 26 agreed with our suggestion; 10 disagreed; seven responses were conditional on other factors; two ambivalent; and one unclear.




5.2 Provisional proposal 6-13 received full support from the recreational shooting industry and consultant ecologists. A number of representatives of gamekeepers and other land managers expressed concern as to the scope of application of article 7 of the Wild Birds Directive. Conservation organisations responded both in favour and against the provisional proposal, with some agreeing in principle as long as annual reporting requirements were in place and others disagreeing outright. Natural England and the Countryside Council for Wales agreed with our provisional proposal. DEFRA disagreed on the basis that the current situation is "sufficient".

5.3 The Country Land and Business Association expressed full support of the provisional proposal on the basis that it "recognises that hunting is a fundamental part of wildlife management throughout the EU and that accordingly modern laws are required to regulate it". The Bar Council suggested that the "proposed model would better reflect the balance that the Directive seeks to achieve between competing interests than do the pre-Victorian Game Acts".

5.4 On the other hand, the National Gamekeepers' Organisation (NGO) and the

Game and Wildlife Conservation Trust expressed concern as to the extent of application of article 7. The NGO strongly opposed the application of article 7 to pest control, pointing out the overlap in certain cases between pest control activities and recreational hunting. They pointed out that the safeguards against overexploitation such as close seasons and "wise use" under article 7 were written with recreational hunting in mind and sit very uneasily with necessary pest control. The extension of article 7 principles to activities such as the killing of predators during the breeding season of game birds would add a substantial burden: the requirement to provide "bag records" and a new "reverse burden of proof". This puts the onus on the pest controller to show in what way he was not breaking the law by taking a species normally protected during their breeding season. They further submitted that:

> Until [the] 1990s gamekeepers could kill without restrictions any animal in the pest list of the [Wildlife and Countryside Act 1981]. The list was then removed in light of a threat from the European Commission to bring an infraction and thus was replaced with general licenses. Those have been since then filled with conditions without adequate consultation resulting in 2002 in a farce whereby someone would have to attempt to scare a pigeon unsuccessfully before they were allowed to shoot at it (reversed after an NGO campaign). Most add work to the necessary job of pest control. As a result NGO are against any new proposal to further tighten the law on pest control.
>
> Under the Deer Act, a landowner is allowed to depart from the normal protection offered to deer if his crops, property etc are suffering serious damage. In these circumstances he is allowed, without the need for a licence, to control the deer causing serious damage at the place where they are causing it. Why does this perfectly rational exemption not apply to other animals, including birds? It almost makes its way into the [Wildlife and Countryside Act 1981] where, under [section] 4, if someone needs urgently to control a non sch 1 protected bird, and is unable for some reason to apply for a licence, he has a defence if he kills the bird but can then show he had no other satisfactory solution. These two similar provisions should be considered further and a suitable wording, equally applicable to the exceptional emergency control of all species, should be proposed.

5.5 As mentioned above, the provisional proposal was strongly rejected by certain conservation groups for a variety of reasons. Animal Aid argued that recreational hunting and protection of birds are incompatible and pointed to a 2011 poll showing that 61% of UK citizens think shooting animals for sport is unacceptable. The National Anti Snaring Campaign submitted that article 7 promotes the hunting of wild birds depending on their population level and that this is a criteria the UK should not adopt. The International Fund for Animal Welfare favoured the current system and argued that it correctly transposes the spirit of the directives.

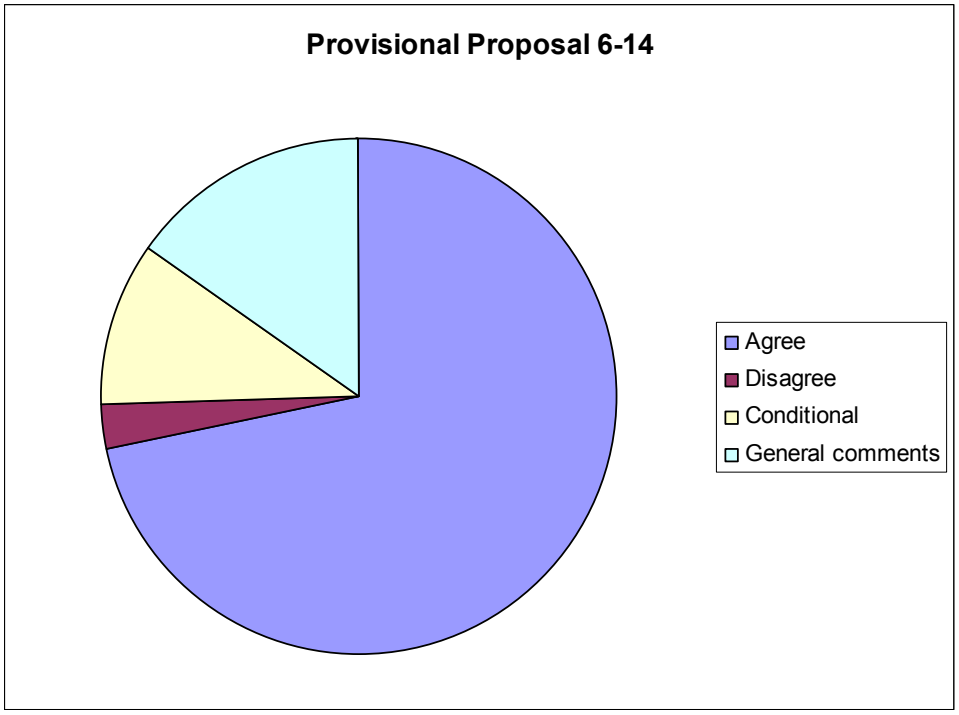
5.6 Groups such as the RSPB, the Wildfowl and Wetlands Trust, the Wildlife and Countryside Link and the Wildlife Trust argued to the contrary that "the protection afforded to native game birds by the Game Acts does not fulfil the requirements of the Birds Directive". They further took the position that reporting requirements should be a necessary element of the transposition of article 7:

> Article 7 requires that hunting "complies with the principles of wise use and ecologically balanced control", and "does not jeopardise conservation efforts". We therefore object strongly to the assertions made within the consultation paper that transposition of article 7 has the advantage of "reducing" the risk of returns being required for huntable species. The provision cannot be adequately fulfilled without a reporting requirement.

5.7 Lastly, Natural England pointed out that there should be a process of evaluation to ensure the suitability of including each individual species in the new statute.

**Provisional Proposal 6-14: We provisionally propose that the transposition be accompanied by the establishment of species specific close seasons.**

5.8 Thirty-nine consultation responses were received concerning Provisional Proposal 6-14: 28 agreed with the proposal; one disagreed; four gave responses conditional on other factors; and six made general comments.




5.9 While Provisional Proposal 6-14 was strongly supported by stakeholders across the board, it is worth mentioning the comments from a number of consultees.

5.10 The Countryside Alliance, the British Veterinary Zoological Society, and the Chichester Wildfowlers Association for example, expressed concern over the possibility of closed seasons becoming overly complicated in the new regime. The Countryside Alliance argued that:

> The establishment of close seasons for classes of species, such as 'wildfowl' 'waders' and 'game birds' as is broadly the case at present, but differing close seasons for, say, gadwall, mallard, widgeon and teal would make proper observance of the law very difficult indeed and almost impossible in practice. We would thus oppose a regime which allowed the creation of a wide diversity of different hunting

seasons relative to different species.

5.11 The Game and Wildlife Conservation Trust reiterated that:

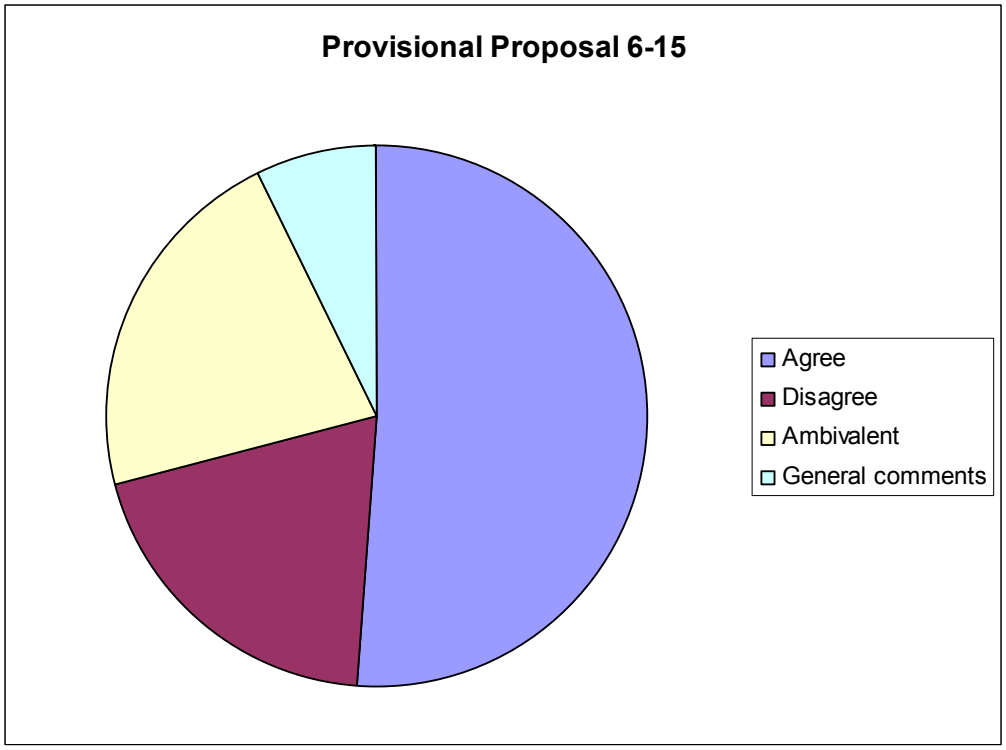
> There should be no closed seasons for pest species and the transposition of Aaticle 7 should clearly distinguish between species which are recreationally shot and those which are defined as pests. Where the species falls into both categories, e.g. wood pigeon the species should appear on both lists.

5.12 Conservation organisations including the RSPB, the International Fund for Animal Welfare, the Wildfowl and Wetland Trust and the Wildlife and Countryside LINK submitted that the term "close season" should be carefully defined to cover the breeding season through the end of rearing. The RSPB argued that:

> Without this definition, the ability to alter close seasons by order introduces the risk of close seasons being amended such that they are not long enough to adequately protect the species. In particular, serious consideration will need to be given to defining the start of the breeding season, as the most biologically sensible definition will vary significantly between taxa.

**Provisional Proposal 6-15: We provisionally propose that the transposition be accompanied by codes of practice explaining "wise use".**

5.13 Forty-one consultees responded to Provisional Proposal 6-15: 21 agreed with the proposal; eight disagreed; 9 were ambivalent to the proposal; and three responses made general comments.




5.14 While the great majority of stakeholders agreed in principle with the provisional proposal, a large number of consultation responses expressed certain

reservations.

5.15 Organisations from across the spectrum fully agreed with our provisional proposal including the Wildlife Trust, the Country Land and Business Association, the Countryside Council for Wales and the Institute of Ecology and Environmental Management. The Wildlife Trust noted that the European Commission has already issued guidance on the principle of "wise use" and guidance in England and Wales should reflect this. Consultees in agreement with the proposal also highlighted the importance of stakeholder consultation in drawing up the codes of practice, and the need for such codes to be accessible to non-lawyers.

5.16 A number of organisations including the Countryside Alliance, the Chichester Wildfowlers Association and the British Veterinary Zoological Society argued against the issuing of codes of practice on the ground that the hunting community already organises its activities in compliance with the principle of "wise use". The Chichester Wildfowlers Association explained that they have strict entry requirements "which include various tests and mentoring on good practice", they produce appropriate assessments, and BASC already issues codes of conduct.

5.17 The Scottish Association for Country Sports commented that it would be:

> entirely onerous and disproportionate, to extend the responsibility to [ensure wise use] to individuals, as the government has the ability to produce legislation which makes it an offence to do any act which it thinks would not comply with the "wise use" principles. … The legislation, if properly framed, should be sufficient sanction to obtain the result government wishes to achieve.

5.18 A number of conservation organisations argued that codes of practice should go further than our provisional proposal. The RSPCA pointed to the detailed guidance on hunting produced by the European Commission, which shows that wise use need not be limited to consumptive use. Paragraph 2.4.16, for example, states that:

> It is generally accepted that the value of environmental resources includes both use values and existence values. The principle of wise use should thus cover the provision of access to and enjoyment of wildlife for the non-hunter users in the countryside, which should be managed in a sustainable way and should also aim to provide benefits to local communities.

5.19 The Wildfowl and Wetland Trust agreed that domestic codes on "wise use" should reflect the European Commission guidance, which includes the consideration of a number of concepts including population impact, habitat use, game management, conservation status of huntable species, and education, training and awareness, environmental pollution and welfare considerations. The RSPB and WWT argued that such codes should also encompass the use of non-toxic lead ammunitions.

5.20 The RSPB further pointed out that:

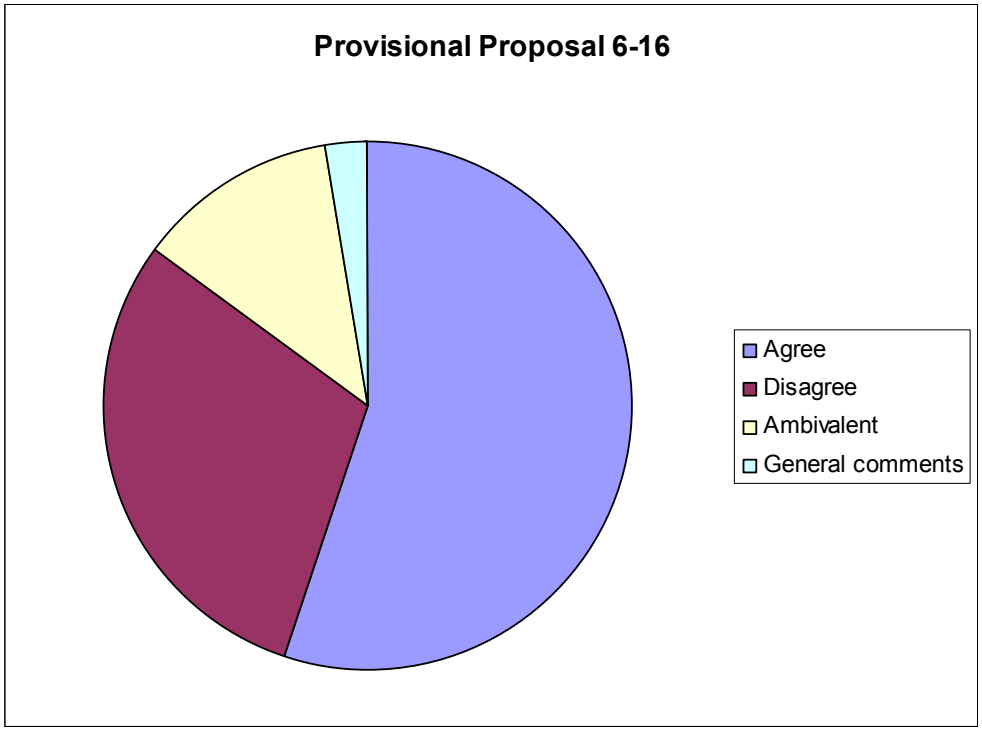
> Shooting in the UK is largely – and uniquely – unregulated compared to the situation elsewhere in Europe and North America. This leaves

open the potential for significant environmental harm occurring to populations of quarry species, with no effective legal recourse available.

5.21 As a result they suggested "the introduction of a form of licensing of shooting practice to ensure delivery of 'wise use' principles", although this approach should be light touch to minimise regulatory burden. It would impose legal requirements to provide "bag statistics", and non-compliance would preclude the individual from obtaining a license in the subsequent year. They submitted that there is a precedent for such system in relation to angling and rod licenses. The revenues generated by this (£24 million in 2009/10) are invested in work to protect, improve and develop fisheries and associated wetland environments.

**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.**

5.22 Forty consultation responses were received concerning Provisional Proposal 6-16: 22 agreed with the proposal; 12 disagreed; five were ambivalent to the proposal; and one gave general comments.




5.23 Consultant ecologists and a number of conservation organisations agreed in principle with Provisional Proposal 6-16. Natural England, the Countryside Council for Wales and the National Wildlife Crime Unit also supported the provisional proposal. Organisations opposing it included gamekeepers, falconers and representatives of the shooting industry. The Game and Wildlife Conservation Trust and the Country Land and Business Association on the other hand agreed with the provisional proposal. DEFRA did not provide any comment on this matter.

5.24 The Countryside Alliance and the British Veterinary Zoological Society criticised

the provisional proposal on the basis that it would introduce a reverse burden on the defendant:

> There will need to be a decision as to whether hunting non-compliant with wise use is a criminal offence. If such hunting is criminalised we believe a court will be able to determine whether an offence has been committed by interpreting the principle of wise use based on the evidence provided by the Prosecution. We do not think there is a case for creating offences based on breaches of codes of practice which we believe are themselves unnecessary.

5.25 The Scottish Association for Country Sports similarly argued that:

> To make it an offence to depart from what are merely guidelines would be unnecessary, unhelpful and would cause immense difficulties for not only land managers but also the courts.

5.26 The Hawk Board requested that falconry should be defined in the statute as being included in the concept of "wise use", but noted that it would be unacceptable if it were to "be included on the basis of a reverse burden of proof".

5.27 The National Wildlife Crime Unit on the other hand argued that whilst the breach of a code should not amount to a criminal offence, it can provide evidence that the offence has been committed.

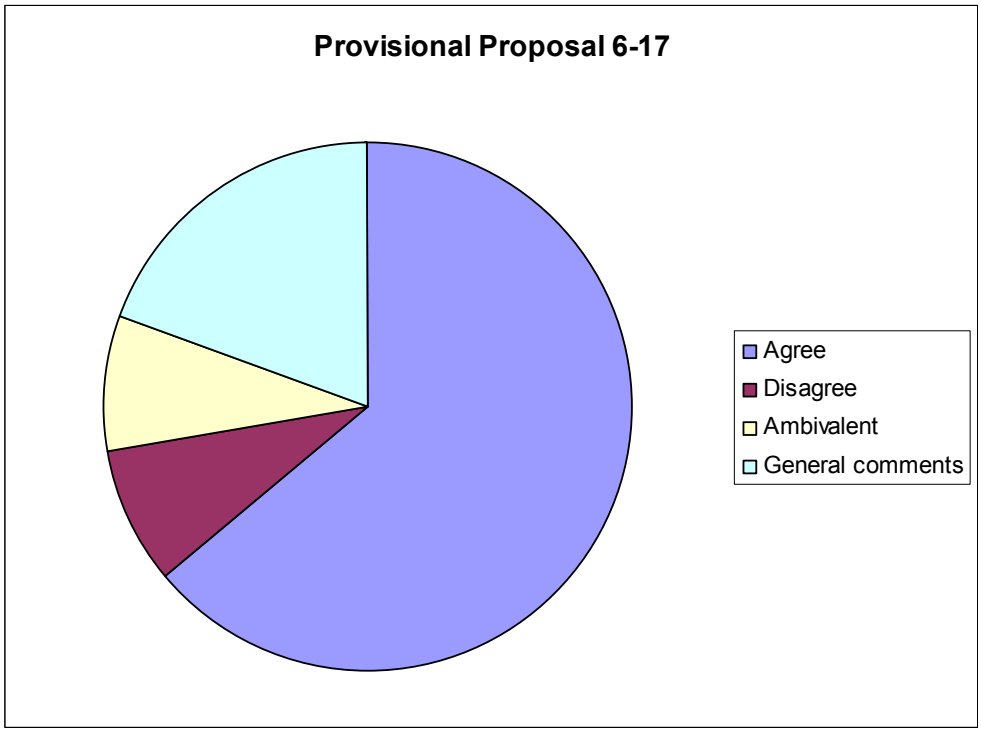
5.28 The RSPB, supported by the Wildfowl and Wetland Trust and the Wildlife and Countryside LINK, welcomed the proposal in principle. However, they questioned how it would operate in practice without a reporting requirement and a licensing mechanism:

> In the absence of a system of adaptive quarry management, underpinned by annual bag reporting, it would be (a) very difficult for a defendant to demonstrate how they did or did not comply with the principle of wise use, and (b) almost impossible to enforce these codes of practice. Such proposal should be developed alongside a system of individual licensing and bag reporting.

5.29 The Wildfowl and Wetlands Trust added that the full range of criminal and civil sanctions should be applied to this offence. They considered that stop notices particularly relevant here; the removal of hunting rights for a fixed period or indefinitely (the latter only in cases of very serious and/or repeated offences) being probably the most dissuasive sanction available for those regulatory breaches.

**Provisional Proposal 6-17: We provisionally propose that such codes of practice be issued by either the Secretary of State or Welsh Ministers.**

5.30 Thirty-six consultation responses were received concerning Provisional Proposal 6-17: 23 agreed with the proposal; three disagreed; three were ambivalent and seven made general comments.




5.31 Regarding the responses, the following should be noted:

(1) 13 consultation responses stressed the importance of stakeholder involvement when codes of practices are drawn-up;

(2) four responses (Wildlife and Countryside LINK, the RSPB, the WWT and Whale and Dolphin Conservation) argued that the Secretary of State should also be entrusted with the responsibility to monitor the activity and record "wise use";

(3) three responses pointed out that it would be problematic to have different codes of conduct in England and Wales; and

(4) two favoured voluntary codes of practice (BASC, Game and Wildlife Conservation Trust).

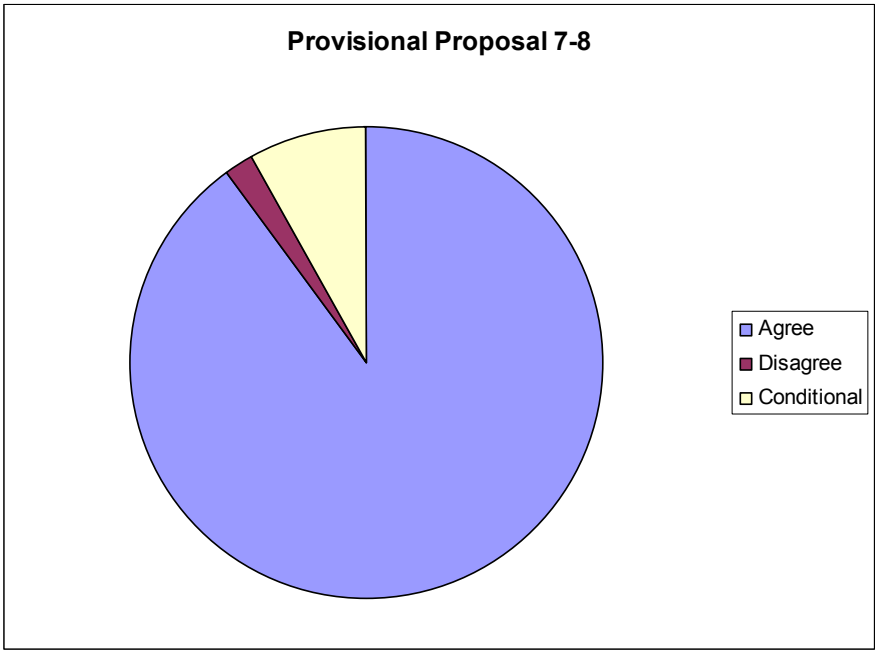
**Conclusion**

5.32 There was generally support for our provisional proposals concerning the hunting of wild birds under Article 7 of the Wild Birds Directive. Although it is notable that there were conflicting interpretations of the relevant EU obligations advanced by consultees.

**DEFENCES**

**Provisional Proposal 7-8: We provisionally propose to consolidate the common exceptions to prohibited acts set out in existing wildlife legislation.**

5.33 Fifty consultation responses were received in relation to Provisional Proposal 7-8: 45 agreed; one disagreed; and four were conditional on other factors.




5.34 Provisional proposal 7-8 received overwhelming support from consultees across the board, including regulators. Favourable responses thought that it would bring clarity and consistency to the law. Some wildlife protection organisations, in particular badger protection groups, agreed with the caveat that consolidation should not increase the current exceptions and dilute existing protection. Other consultees (National Gamekeepers' Organisation, Game and Wildlife Conservation Trust, Countryside Alliance) agreed in principle but reserved further comments until it becomes clearer how the provisions will be consolidated. DEFRA did not respond to this provisional proposal.

5.35 A few consultees engaged with the merits of the consolidation, making practical suggestions. Wildlife and Countryside LINK, together with the Wildlife Trust and the International fund for Animal Welfare agreed with that the common exceptions of "tending animals" or "mercy killing" should be consolidated. On the other hand, the "incidental result" defence should only be consolidated if qualified by a requirement of reckless behaviour.

5.36 The Marine Management Organisation submitted that consolidation provides the opportunity to clarify or reword the "netsman defence" in the Conservation of Seals Act 1970.[1] They suggested that this defence should be removed and the activity covered by a general or class license for the industry as it is currently done for cormorants. In their view:

> Having a general or class licence would not increase the protection for the species or restrict the industries capability to control the animals, but would increase the recording and enforceability of the activity.

5.37 It would also bring the control of seals in line with that of other "pest" species, and fit with the consolidation exercise as the "netsman defence" only applies to seals.

[1] Conservation of Seals Act 1970, s 9(1)(c).

**Conclusion**

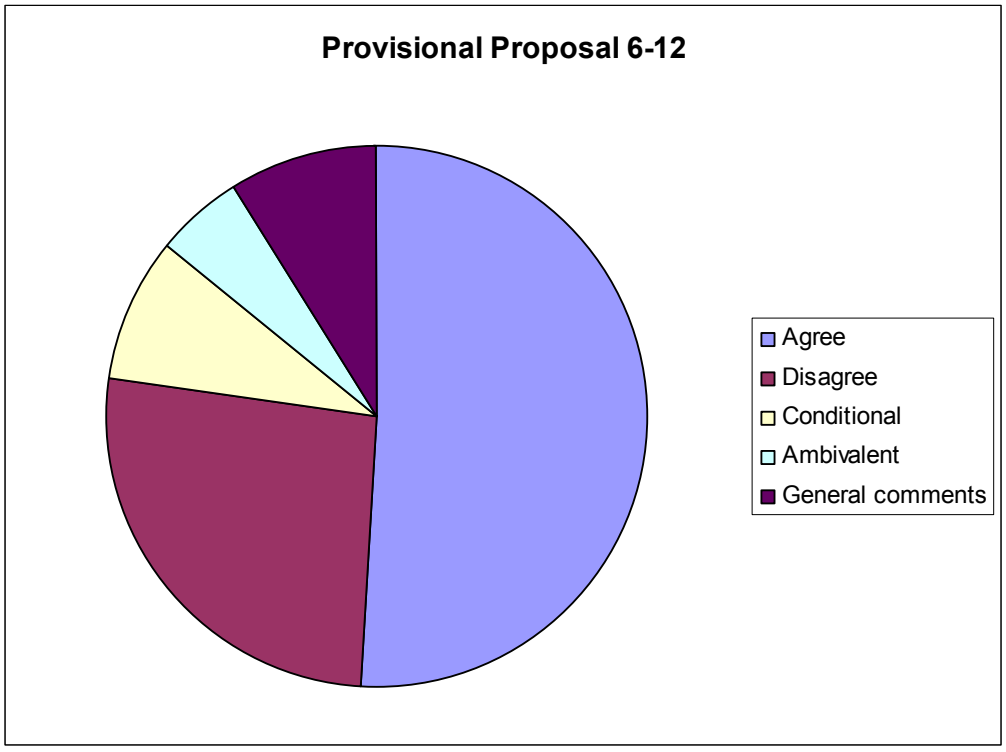
5.38 In general, consultees supported our original provisional proposal, with the proviso that existing defences should not be altered. However, two points in particular arose over the course of consultation.

5.39 The first relates to how defences such as humane killing relate to EU protected species. The other is a reconsideration of the "netsman defence" on the basis of the MMO's consultation submission, putting forward a possible alternative.

**Animal Health Orders**

**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.**

5.40 Fifty-seven consultation responses were received in relation to Provisional Proposal 6-11: 29 agreed with the provisional proposal; 15 disagreed; five provided conditional answers, three were ambivalent and five provided general comments.




5.41 This provisional proposal received support from a number of organisations representing farmers, the shooting industry, the forestry industry, landowners and other stakeholders with a proactive approach towards wildlife management. Wildlife protection organisations took a range of different positions, with the RSPCA and the Badger Trust supporting the provisional proposal, the Woodland Trust and the Wildlife Trust agreeing subject to further restrictions and Wildlife and Countryside LINK, The Wildfowl and Wetland Trust, the RSPB, the International Fund for Animal Welfare and a number of smaller animal welfare badger protection groups opposing the provisional proposal. Regulators (Natural

England, Countryside Council for Wales) and veterinary organisations suggested a number of further restrictions. DEFRA explicitly opposed the proposed general defence.

5.42 Very few arguments were submitted in support of the proposed general defence. The NFU and NFU CYMRU argued that:

> The current position in law is that whilst Government may create an order to legally destroy wildlife for the purposes of the control of a disease, there is no defence available to Government to the commission of offences under the relevant legislation. In our view it is sensible for such a defence to exist.

5.43 The RSPCA and the Badger Trust pointed out that the relevant sections of the Animal Health Act are subject to a number of strict safeguards and conditions. Nottinghamshire County Council favoured the provisional proposal on the ground that it would reduce administrative burdens.

5.44 The Wildlife Trust agreed on the conditions that the defence should be limited to those species or members of a species already infected, be based on sound scientific evidence and make clear which parts of an order may be relied upon by the defendant so as "to avoid very broad orders being made which effectively license obvious breaches of protection". The Woodland Trust and the British Veterinary Association added that the measure should include welfare provisions to ensure orders are carried out humanely, and that the defence should not cover welfare-related offences.

5.45 Generally speaking, other wildlife protection organisations argued that the proposed general defence would lower the existing protection levels, would be open to abuse and would violate EU law if applied to wild birds and European Protected Species. The lengthy response to the proposal by Wildlife and Countryside LINK argued the following:

> We find this proposal confusing and we are concerned about the implications for European Protected Species. [Paragraph] 6.81 suggests that the introduction of this defence would obviate the requirement to obtain a licence regarding the killing of [European Protected Species] (because an order granted under conditions in [section 21 Animal Health Act 1981] would fulfil the conditions for granting a licence under the Conservation Regulations 2010). It is also stated that it would fulfil the conditions for granting a licence under the Protection of Badgers Act 1992. We have the following concerns:
>
> In relation to the 2010 Regulations, we can see that the "imperative reasons" and "satisfactory alternatives" tests of [regulation] 53 of the 2010 Regulations may be covered by the 1981 [Act]. However, it is unclear how the "maintenance of the population at a favourable conservation status" test under [regulation] 53 is met by the [Animal Health Act] 1981. Therefore, we do not see how the full requirements of article 16 Habitats Directive can be met without either maintaining the requirement for a licence or through modification of the 1981 [Act] so as to impose this further consideration when considering an order;

> The Law Commission makes no comment as to whether an order under [section] 22 [Animal Health Act] 1981 would fulfil the conditions for granting a [European Protected Species] or Badgers Act licence (it only comments on section 21 [Animal Health Act 1981]). This needs to be considered. Since Badger Act licences are not driven by European law we have less concern about [Animal Health Act] 1981 orders being issued without the need also for a licence, and would be more content for the proposed defence to apply to badgers.
>
> With regard to wild birds, we agree that the [Animal Health Act] 1981 order process is likely to have the effect of satisfying the "no other satisfactory solution" test under [article] 9 Wild Birds Directive and so we would accept the defence as applying to wild birds as it does at present under [section 4(1)(b) of the Wildlife and Countryside Act 1981].

5.46 The International Fund for Animal Welfare added that “there cannot be a situation where an accused that could use such defence would not have a licence. Having a defence and a licence would be against the LC goal of simplification”.

5.47 The response from Natural England partially agreed with those of the above organisations. They argued that the provision:

> should include conditions relating to the “no other satisfactory alternative” and “favourable conservation status” test, at least for species protected by EU directives.

5.48 DEFRA added that:

> the proposed general defence would be unlawful in relation to [European Protected Species]. There was such a defence within the 1994 Habitats Regulations, however … *Commission v United Kingdom* ruled (amongst other things) that the defence was not compatible with the strict species protection regime required by articles 12 and 13 of the Habitats Directive. Following that case, the defence (previously in [regulation] 40(1)(b) of the 1994 Regulations) was removed.
>
> Whilst we recognise the need to react quickly and simply to severe disease outbreaks, requiring a licence for the purpose of “preventing serious damage to livestock” or “preventing the spread of disease” also has the effect of requiring the licensing authority to consider on a case by case basis whether the conditions in [article] 9 of the Bern Convention (that there is no alternative satisfactory solution and that the activity will not be detrimental to the survival of the population concerned) are satisfied in cases where they apply, so that in practice this ensures consideration of whether these conditions are satisfied before any Animal Health Order can be made.

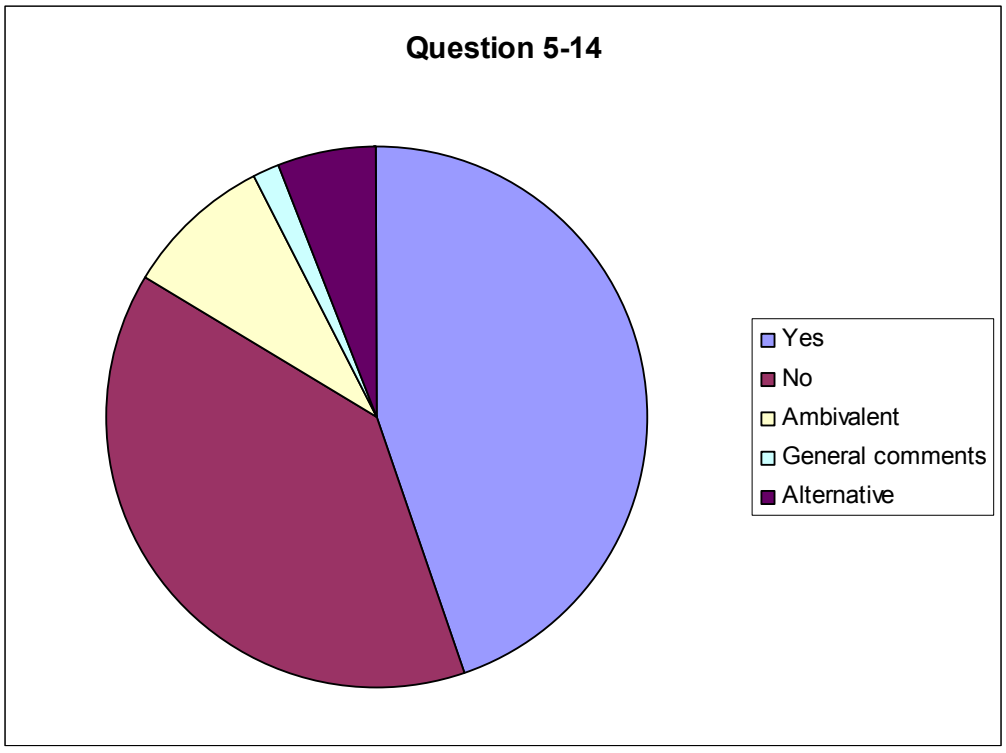
**Conclusion**

5.49 Consultation largely favoured Provisional Proposal 6-12, though with some severe reservations, including from DEFRA. In particular, consultees adverted to the fact that the granting of an order under section 21 of the Animal Health Act 1981 does not require the relevant Minister to have regard to whether there is "no other satisfactory solution" to the activity to be permitted.

**LICENSING: COMMON PROVISIONS**

**Question 5-14: Do consultees think that it is undesirable to define in statute individual, class or general licences?**

5.50 Sixty-seven consultation responses were received in relation to Question 5-14; 30 agreed that individual, class or general licenses should not be defined; 26 disagreed; six consultees were ambivalent; one provided general comments; and four suggested alternative approaches.




5.51 Consideration of consultation responses to question 5-14 reveals an almost even split. Regulators and DEFRA argued against a legal definition of the different types of licenses, as in their view it would make the system inflexible. Within other "groups" of stakeholders, positions were different and often conflicting. Amongst the wildlife protection group in particular, a number of organisations argued in favour of legal definition on the basis of their general opposition to general licenses.

5.52 Natural England, alongside the Countryside Council for Wales and the Marine Management Organisation, strongly agreed with retaining the existing situation, arguing that:

> The benefits of maintaining a flexible approach significantly outweigh the potential benefits in terms of improved clarity in defining the use

> of the different types of licence in the new statute. Licences are used in a very wide variety of situations and flexibility is important; seeking to cover all options within the statute risks adding unnecessary complexity or constraints on the ability of the licensing authority to select the appropriate licence type for a given set of circumstances. The licensing authority should explain how it decides which type of licence is used for each situation and consult on major changes to licensing. This is already current practice.

5.53 DEFRA agreed, arguing that nevertheless the various licenses should be defined in associated guidance.

5.54 Organisations supporting a flexible system included a number of representatives of the forestry industry, consultant ecologists, developers, falconers, the NFU and NFU CYMRU, the Country Land and Business Association, the Canal and River Trust, the Nottinghamshire County Council, and a number of wildlife protection organisations including the Wildlife Trust, the Wildfowl and Wetlands Trust, the Amphibians and Reptile Conservation Trust and the Whale and Dolphin Conservation.

5.55 The NFU and NFU CYMRU argued that "authorities need to have the flexibility to react to specific circumstances and have a suite of licences available at their discretion to make use of". The Wildfowl and Wetlands Trust submitted along similar lines that:

> If licences are defined then this means that if it is then found necessary to licence for a non-defined purpose then this would require legislative change and adds additional legislative burden to the regime. Instead we recommend guidance around which licences are appropriate in different situations.

5.56 Bridget Martin (Senior Lecturer at Lancashire Law School) added that:

> this is an area that requires maximum flexibility [as a] number of cases have demonstrated gaps or flaws in licenses and it has been possible to amend them without too much difficulty.

5.57 Consultees' main argument in favour of a statutory definition of individual, class and general licenses is the potential for increased clarity and transparency. The National Gamekeepers' Organisation for example pointed out that

> Clarity is essential and if definitions can help towards that, then we are in favour. For example, there has been talk of issuing "class licences" for gamekeepers to control certain species but even Natural England seem uncertain whether gamekeepers as a whole could be considered as a "class" for this purpose.

5.58 The Institute of Ecology and Environmental Management suggested an intermediate approach:

> IEEM recommends that a broad definition for licences be included in statute, which should allow for some flexibility. There should however be an emphasis on the regulator determining the details.

5.59 At the other side of the stakeholder spectrum a number of organisations, including the RSPB, UKELA and the Woodland Trust, argued for the definition of the circumstances in which general licenses in particular may be used by the regulator. The main contention is that the current use of certain class and general licenses by Natural England may be in violation of EU law. UKELA, for example, submitted the following:

> We would question the legality of general or class licences where the regulator seeks to discharge legally required licensing tests through the imposition of conditions on the licensee. For example under [section 16(1A)(a) Wildlife and Countryside Act the licensing authority is required to make a judgement, based on evidence before it, that the section 16(1A)(a) no satisfactory alternative test is met at the time it grants a licence. It is therefore in our view unlawful for the licensing authority to seek to discharge that duty through the use of a condition which instead makes the potential licensee responsible for making that judgement. It is not a valid argument that compliance is nevertheless achieved because such a licensee may be prosecuted if he or she makes that judgment incorrectly. The Court of Justice in *Commission v France* (383/09) has made clear that in relation to [article] 12 Habitats Directive the [article] 12 system of strict protection requires "coherent and coordinated measures of a preventative nature" ([paragraphs 19 to 21]), indicating that the criminal law, which bites only retrospectively, is inadequate. We would suggest in the light of this case that reliance on criminal law enforcement as a means of securing the "no satisfactory alternative" test is inadequate.
>
> If class and general licences are to be retained it must be made clear that the licensing authority must itself be satisfied that the licensing tests are met before they issue the licence.

5.60 The International Fund for Animal Welfare went further, arguing that while individual licenses do not need to be defined, class and general licenses should not be allowed. In their view the latter group lack transparency, make enforcement ineffective, remove responsibility from individuals, blur the distinction between exemptions, defences and licenses and reduce control over the killing of wild animals incurring the risk of local extinction.

5.61 Professor Colin Reid suggested that:

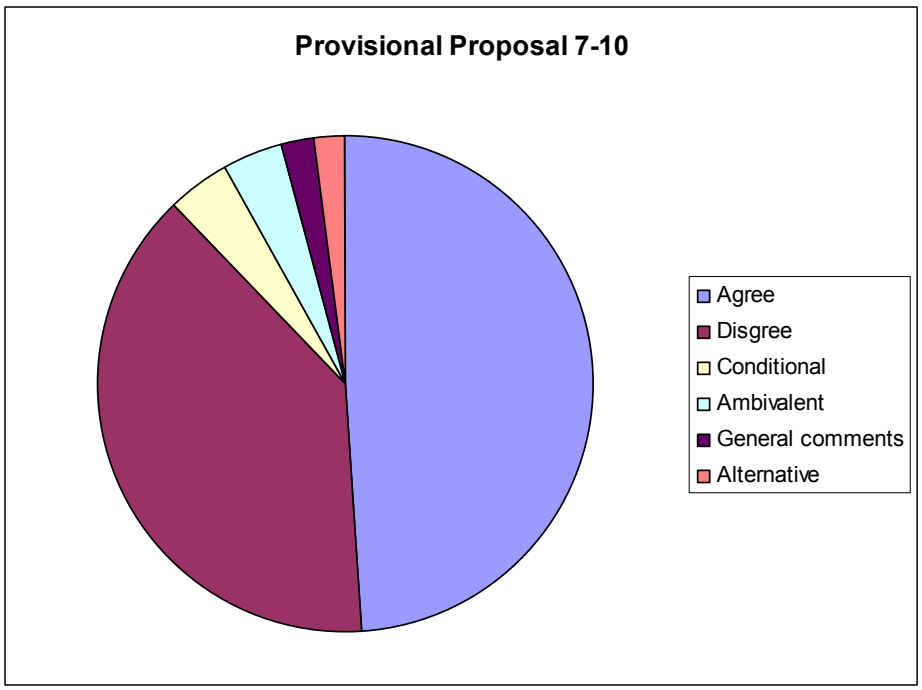
> At the very least, there should be provisions on the publication of the licences and preferably some guarantee of consultation and scrutiny, perhaps extending to laying the licences before Parliament (albeit without being subject to affirmative or negative procedure) so that there is an opportunity for some scrutiny and accountability.

**Conclusion**

5.62 Consultation responses were evenly split on this issue. Whilst regulators and DEFRA took a similar stance, other groups of stakeholders advanced different, and sometimes incompatible, perspectives and arguments.

5.63 Forty-nine consultation responses were received in relation to Provisional

Proposal 7-10: 24 agreed with the proposal; 19 disagreed, two were ambivalent; two were conditional on other factors; one provided general comments; and one suggested an alternative solution.




5.64 Consultation submissions on this provisional proposal were split. Wildlife protection organisations consistently argued against the extension of badger licenses to classes of persons and regulators whereas consultants and other consultees with an active approach to wildlife management were in favour of the proposal. DEFRA did not respond to this question. Interestingly, the Badger Trust took an intermediate position.

5.65 The main argument from consultees in favour of this proposal was that it would bring consistency to the legislation. In their view badgers are not a particularly endangered species; therefore there is no reason why they should be treated differently from other species protected in domestic law.

5.66 Wildlife protection organisations opposing this provisional proposal generally argued that expanding licenses to classes of persons will be open to abuse and hinder enforcement efforts.

5.67 The Badger Trust for example argued that:

> The current difficulty encountered is assessing who is a suitably qualified person. In the case of the proposed cull for England, Natural England mandatory training course requirements for shooting badgers in the wild. If a class licence were issued, it would be difficult for Natural England to be sure, before granting the licence, that each individual allowed to operate under the class licence had completed the requisite training. Given the emphasis on timing and coordination for a full 4 years in that example, this would undermine the purpose of the licence.
>
> There are moves in Scotland to issue licences for some agricultural

> and forestry operations where suitable advice has been sought by the applicant to allow them to carry out operations themselves and not bring in a consultant who may be considered a suitably qualified person. It is a very complex issue and whilst we do not want to restrict the lawful activities of an individual, it may be a step too far to change the system so that any person or a class or a particular person can be issued with a licence.

5.68 The RSPCA argued that the "digger driver" argument in the consultation paper is flawed as those involved could plan for the digger driver becoming unavailable by having more than one person named on the license.

5.69 The Wildlife and Countryside LINK, the Woodland Trust, the International Fund for Animal Welfare, the Wildfowl and Wetland Trust and the League Against Cruel Sports also strongly opposed the provisional proposal in very similar submissions. The League Against Cruel Sports for example argued that:

> Breach of a licence can be more simply and effectively enforced if the licence has been issued to a named individual. There can often be a delay between the offence occurring and questioning those involved over the damage caused to the sett. Changing the licence to a class could result in no one taking responsibility, with claims of no one recalling who drove the bulldozer or tractor into the site. The named individual must take responsibility and face prosecution should the licence not be complied with. Any proposed change solely for the sake of administrative convenience should be avoided.

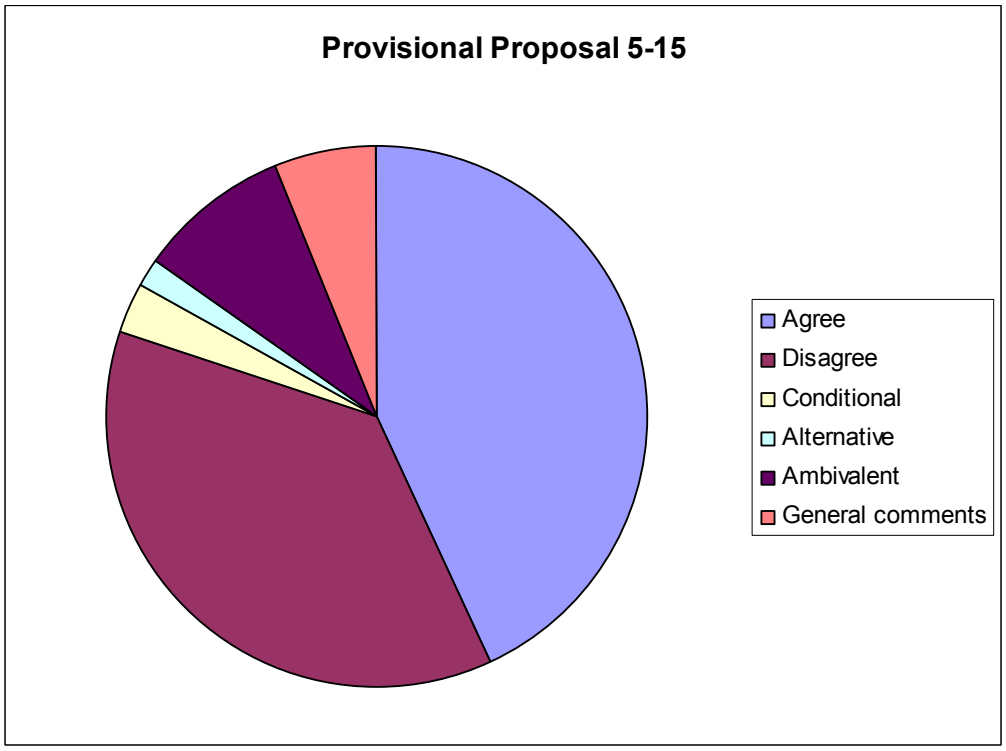
5.70 Lastly, the British Veterinary Zoological Society and the British Veterinary Association also expressed concern in relation to this provisional proposal. The British Veterinary Association argued that "if the license is not issued to an individual, clear accountability must be maintained in any case where the licence conditions are not complied with".

**Conclusion**

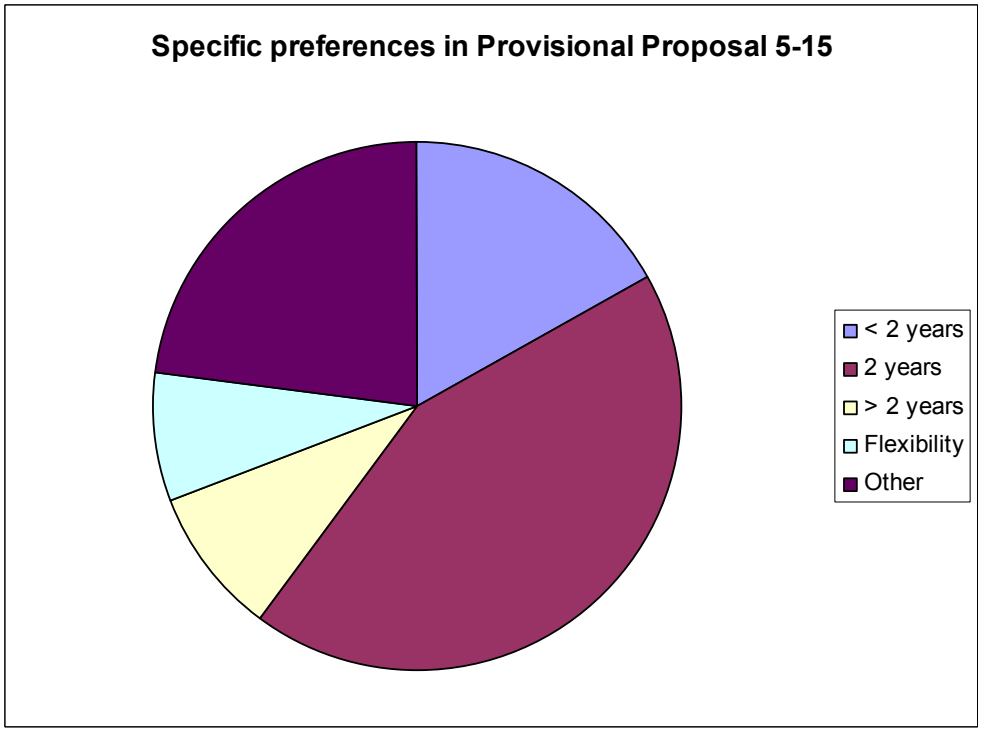
5.71 We can see there is no definitive view on the issue, with consultation responses almost evenly split. Many of consultees on the environmental side put forward an argument based on accountability. Although other consultees stressed the benefits of simplifying the regime.

**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.**

5.72 Sixty-five consultation responses were received in relation to Provisional Proposal 5-15: 28 agreed with the proposal; 24 disagreed; two were conditional on other factors; one suggested an alternative approach; six were ambivalent; and four provided general comments.




5.73 Within the consultation responses mentioned above: 11 suggested that maximum period of a license should be less than two years; 28 agreed with the two-year period provisionally proposed; six argued that the maximum licensing period should be extended above the two-year limit provisionally proposed; five were against the idea of a maximum period and in favour of leaving flexibility to the regulators; while 15 did not comment on this point.




5.74 A number of wildlife protection and animal welfare organisations, including the RSPB, Animal Aid, Whale and Dolphin Conservation, OneKind, Cornwall Seal

Group and UKELA, together with some individual consultees, argued that the maximum period of a license to kill a protected species should be less than two years. The main argument provided in favour of a shorter maximum time for licenses was on the basis that sudden variations in climatic conditions (such as a harsh winter) may have significant and sudden effects on the population of certain species.

5.75 The RSPB further noted that:

> it has been necessary to amend the general licences permitting the use of cage traps several times as their usage to capture non-target protected species has become apparent and as concern over welfare conditions for decoy birds and trapped birds has grown. Being able to alter the terms and conditions of the general licences on an annual basis is necessary to adequately reduce the risk of unlawful capture or continued welfare abuse.

5.76 Consultation responses in favour of our provisional proposal were submitted by a variety of stakeholders. These included representatives of the shooting industry (BASC, Scottish Association for Country Sports, the Countryside Alliance), landowners (Country Land and Business Association), the forestry industry, farmers, falconers, consultants, as well as a number of wildlife protection and animal welfare groups including the International Fund for Animal Welfare, the Wildfowl and Wetland Trust, the Bat Conservation Trust and the Amphibian and Reptile Conservation Trust.

5.77 The Countryside Council for Wales also agreed with our provisional proposal, arguing that the two-year maximum duration of a license

> ensures that licensees are obliged to provide data on their activities annually prior to renewal of their licences. It also allows the licensing authorities to review conditions periodically ensuring licensees are adhering to best practice and methodologies.

5.78 The Scottish Association for Country Sports argued that two years

> is an acceptable balance, giving some continuity for the license users, saving in administrative time and costs, while allowing the licenses to broadly reflect changes in populations of listed species.

5.79 The Institute of Ecology and Environmental Management also agreed with the two-year limit, but thought this should be coupled with a list of specific exceptions, such as “controlling bird strikes at airports”.

5.80 The Bat Conservation Trust, together with the RSPCA, the WWT, Wildlife and Countryside LINK and other conservation groups, stressed the importance of annual reporting:

> Such reporting will provide opportunity to review the manner in which such licences have been used. End of licence reporting, because of statutory time limits for commencing prosecutions could result in an inability to prosecute offences.

5.81 In that regard, the National Wildlife Crime Unit added:

> From time to time we are aware that licence returns contain information that identifies criminal offences. It is important that enforcers have time to act upon such information and given that there is a statutory two-year limit on prosecutions we would suggest that no matter how long a licence may be valid it should be subject to a condition requiring annual returns.

5.82 A number of organisations, including in particular the Forestry Commission, the National Gamekeepers' Organisation and the Union of Country Sports Workers submitted that licenses should be able to extend beyond the proposed two-year period. The Forestry Commission, while in principle in favour of standardisation, pointed to the European Commission guidance on article 12 in relation to forestry and suggested that licenses should run together with other existing sector-specific licensing provisions:

> Paragraph 28 of the guidance notes that for on-going activities such as forestry measures should "offer flexibility, ie while recognising that absolute protection for all individuals of a species cannot be guaranteed, ensure that any harmful action takes full account of the conservation needs of the species/population concerned.
>
> With this in mind, a mechanism for granting licenses may be based on UK Forestry Standard compliant Forest Design/Management Plans. These and the associated licensing (eg, felling licenses) and in many cases, Woodland Grant Schemes are current for five to ten years. So, to avoid further burden on forest managers any additional licensing required would have to reflect these cycles.

5.83 The NFU and NFU CYMRU, Natural England, DEFRA and the Scottish Natural Heritage argued strongly against our provisional proposal on the basis that regulators should be left with a large margin of flexibility to deal with different situations appropriately.

5.84 The NFU and NFU CYMRU for example considered the establishment of a general time limit as "draconian" and argued that the current review is not an appropriate forum for consulting on those questions as "although licenses are legal in nature, the background to the decision-making surrounding time periods for licensed control is one of policy". A regulator should "consider the ecology of the species and all available scientific information before arriving at a decision regarding the appropriate length of a licence". They further argued that

> the creation of a stringent maximum length for licences might in some cases be contrary to policy outcomes, and also the conservation and welfare of certain species of wildlife and potentially farmed animals too. An example of this situation would be licences issued under section 10(2)(a) of the Protection of Badgers Act 1992. The scientific evidence base drawn from the Randomised Badger Culling Trials demonstrates that the culling of badgers, for the purposes of preventing the spread of bovine TB, must be carried out for a period of no less than 4 years in order for the disease reduction benefits to be achieved. If licences were limited to a maximum of two years,

> applicants would be tasked with re-applying at the year two stage. This seems an illogical situation and … could create additional unnecessary risks to the continuation of the licensed activity.
>
> It would be inappropriate and overly burdensome to expect licence holders to re-apply for licences after a fixed period where it is intended at the outset that the specific control is carried out for a much longer period of time. In addition, if the re-application and subsequent issue of licences was required after a specific two year period, then this could potentially expose subsequent licences to potential legal challenge because the grant of the subsequent licence could be deemed to be a decision trigger for the purposes of judicial review.

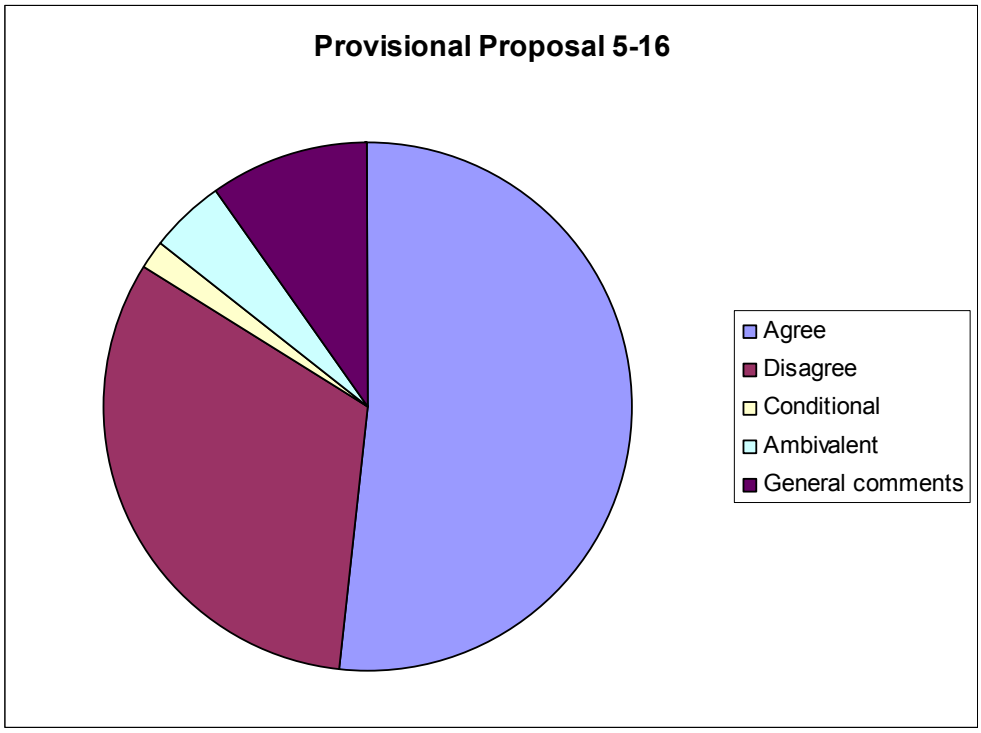
5.85 Natural England argued along similar lines that:

> The proposal appears to be contrary to the risk-based approach set out in the Principles of Better Regulation advocated by the Hampton Review.
>
> The regulator should be able to decide on the term of the licence on a case by case basis in accordance with government policy and the advice of the relevant Statutory Nature Conservation Body (SNCB).
>
> If it is, however, decided to implement a maximum duration for licences permitting the killing of protected animals then this should 10 years.
>
> Only a minority of licences are issued for periods in excess of one year, and many are for shorter periods. The consequences of proposals 5-15 and 5-16 for licensing are therefore likely to be modest. Nevertheless, these proposals would constrain flexibility to tailor licences to the particular circumstances of a case or a situation.
>
> One area where this might be an issue is the licensing of large, multi-phased development proposals. Although these typically involved non-lethal impacts, the duration of projects can exceed 10 years.

5.86 DEFRA followed the position taken by Natural England, adding that imposing arbitrary maximum durations causes extra burdens on licensing authorities, which should be able to judge themselves the appropriate length of licenses granted.

**Provisional Proposal 5-16: We provisionally propose that there should be formal limits of ten years for all other licences provisions.**

5.87 Sixty-two consultation responses were received in relation to provisional proposal 5-16: 32 agreed with the proposal; 20 disagreed; one response was conditional; three were ambivalent; and 6 provided general comments.




5.88 By contrast with Provisional Proposal 5-15, an absolute majority of consultees agreed with Provisional Proposal 5-16. The arguments brought forward in relation to this provisional proposal were however very similar to the submissions referred to above.

5.89 In favour of our provisional proposal the Marine Management Organisation noted that

> This would be useful for long term research projects such as the Cetacean Stranding Investigation Programme, and for those institutions holding examples or specimens of protected species, the possession of which requires a licence, so that they were not having to renew these licences too often.

5.90 A number of wildlife protection organisations, including Wildlife and Countryside LINK, the International Fund for Animal Welfare, the Wildlife Trust and the Woodland Trust, argued against our provisional proposal on the basis that activities involving disturbance should have a maximum of two to five years. The International Fund for Animal Welfare considered that in those circumstances the

> bureaucratic and economic burden of re-applying for a licence is outweighed by the need to re-assess the validity of a licence, and the imperative to stop a licence when it is no longer necessary … . Disturbed animals that cannot breed as a consequence of the disturbance could equally lead to local extinction, so we consider that conservation and animal welfare implications of cases of "disturbance" are not less important or critical than the cases of "killing", and therefore there is no reason for having separate time limits for them.

5.91 The RSPB argued that:

> It is unclear on what basis a ten-year period has been selected but when considering, for example, schedule 1 licences, sales or taxidermy licences, ten years is far too long. We are sympathetic to the concerns of museums and other institutions holding collections of specimens quite legitimately, but licences such as these should be viewed separately from licences involving disturbance of schedule 1 species, taking, sales or taxidermy, i.e. where the risk of criminal activity persists. Consequently, we strongly support a limit of two years on licences for these types of activities.

5.92 Natural England, the NFU and NFU CYMRU also criticised the provisional proposal on the basis that it had not provided any rational explanation as to why the ten-year period has been proposed. Natural England, for example, submitted that:

> It is not automatically the case that killing specimens of a species is necessarily more harmful to a population that other activities permitted under licence, such as collecting specimens, disturbance or the damage or destruction of breeding sites; all of which can have impacts on the size and distribution of populations and the survival of individual animals. There is, thus, no logic to having a different maximum duration for lethal and putatively non-lethal activities, and in the event a maximum limit is recommended, then it should be the same for all activities.

5.93 A number of wildlife protection organisations also stressed the importance of monitoring compliance with licensing conditions. Whale and Dolphin Conservation, for example, argued that "all licenses should have appropriate and enforceable monitoring provisions attached to them and be subject to review within this period if evidence that a licence is not being used appropriately".

5.94 As with Provisional Proposal 5-15, Natural England, DEFRA, and Scottish Natural Heritage strongly argued for leaving more flexibility to the regulator to decide on the term of the license on a case by case basis. The Wildfowl and Wetland Trust suggested that "the length of a license should relate to the activity, this allows for increased flexibility and individual circumstances to be taken into account and allows for and more accurate and relevant licence conditions to be set".

5.95 Natural England further pointed out that:

> Where licences are issued for periods in excess of one year it is normal practice to require an annual report of activities conducted under licence (or a periodic report that coincides with periods of use of the licence if use is less frequent). This approach ensures that the licensing authority has necessary information for compliance checking and ensures that information is not receive too late to take enforcement action (ie there is normally a time limit for prosecuting offences after the offence has been committed).

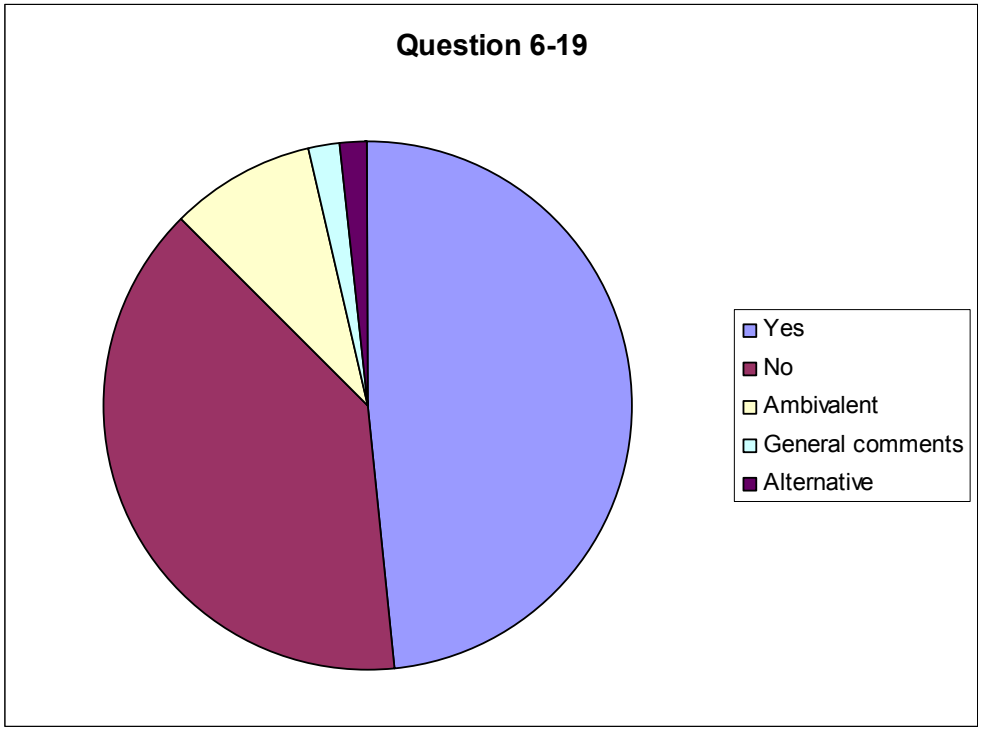
**Conclusion**

5.96 Consultation responses suggested that there was no real consensus as to the appropriate legal regulation of licence length. On the one hand, some consultees, for instance Natural England, thought that licence length requirements reduced undesirably the flexibility in a regime. Conversely, others thought that there was a danger that licence lengths would increase to the two-year maximum length as a standard length.

5.97 Some consultees married their response to these questions with consideration of internal monitoring requirements as a licence condition, which was outside the question asked but relevant to our response.

**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?

5.98 Fifty-six consultation responses were received in relation to question 6-19: 27 agreed with the proposal; 22 disagreed; five were ambivalent; one submitted general comments; and one proposed an alternative approach.




5.99 The views of consultees were clearly split. Representatives of the shooting industry, gamekeepers, landowners and other users agreed that reporting requirements should be unnecessary whereas conservation organisations were almost unanimously in favour of the introduction of statutory reporting requirements. The views expressed by the regulators were also varied: the Marine Management Organisation strongly arguing for the introduction of compulsory reporting requirements on the killing of seals and the Countryside Council for Wales and Natural England taking more ambivalent positions. DEFRA did not provide an answer to this question.

5.100 The main arguments submitted in favour of our proposal revolved around the fact that reporting requirements would increase costs and bureaucracy and are not expressly required by EU law. BASC argued that:

> Bag returns are best organised and collated by relevant stakeholder organisations in response to clear conservation and management needs. The creation of a statutory bag returns system would impose significant costs and bureaucracy.

5.101 The Country Land and Business Association similarly supported voluntary recording mechanisms "through NGC and BASC 'game book' systems as JNCC have already done for the tracking mammal's partnership". The Moorland Association further submitted that the work involved "would considerably outweigh any benefit, particularly in respect of game birds and pest species".

5.102 Conservation organisations on the other hand argued that reporting requirements are necessary for monitoring compliance with licence conditions and the sustainability of certain licenses or closed seasons. They further maintained that monitoring requirements are the only way to ensure appropriate compliance with "wise use" requirements and reporting requirements under article 9(3) Wild Birds Directive. Wildlife and Countryside LINK, supported by Wildfowl and Wetlands Trust, the RSPB, the RSPCA, the Wildlife Trust and the International Fund for Animal Welfare argued the following:

> A reporting requirement is crucial, for species killed both under the derogation mechanism and through hunting. In terms of the former, we do not see how the Government can meet its obligation under article 9(3) of the Birds Directive without a reporting requirement (and we do not agree that the absence of legal action by the European Commission on this front thus far, is a wise or justifiable reason not to do so!).
>
> We reject the assertions made within the consultation paper that transposition of article 7 "reduces the risk of returns being required for huntable species". Collecting statistics on the number of individuals harvested for each quarry species is fundamentally important to any system purporting to ensure wise use. This is recommended by the European Commission in its guidance for sustainable hunting, which states:
>
> "there is a need for sound, scientifically based monitoring mechanisms to ensure that any use is maintained at levels which can be sustained by the wild populations without adversely affecting the species' role in the ecosystem or the ecosystem itself. This should include information on bag statistics" (Paragraph 2.4.16)
>
> We think it is necessary to require reporting of all hunting of quarry species as a matter of law in order to ensure wise use. We would be looking for a requirement to report game taken (game bags) annually at the very least. This is necessary to generate an evidence base sufficient to enable Government to meet its obligations under articles 7(1) and 7(4) of the Birds Directive. This should not constitute an additional burden on shooting businesses, which traditionally record

> such information for their own uses. It is the norm in many other countries – we are almost unique in Europe and North America in having no form of, or potential for, the mandatory reporting of game bags. How the proposed lack of disclosure/recording will help to regulate hunting is not clear. Target bag sizes would need to be set annually in order for any viable adaptive harvest management system to work.
>
> Sustainable development is a core responsibility of the Welsh Government (One Wales, One Planet); the UK government is also mainstreaming sustainability to a core strategic approach and reporting of game taken must be required in order to monitor and ensure that hunting is sustainable.

5.103 The Marine Management Organisation (MMO) submitted that a statutory obligation to report the number of seals killed under the "netsman" defence is necessary to evaluate the impacts of the activity on the population of seals. Currently the MMO is unable to do so, given that wildlife licenses are not required for such activities. A reporting requirement would also assist their enforcement activities under the Conservation of Seals Act as it would be an important source of information feeding into their risk-based and intelligence led enforcement activities.

5.104 Natural England agreed that reporting requirements would be necessary to fill knowledge gaps in relation to certain species. However, they submitted that reporting requirements should not be compulsory across the board, but should be added in the form of a power that can be exercised by the Secretary of State or Welsh Ministers:

> There are significant gaps in our knowledge of the impact of human activity on many species. We do not know, for example,
>
> • how many birds are hunted or
>
> • how many birds are killed under general licences, or
>
> • how many seals are killed under the "fisherman's defence".
>
> The need for information will, however, vary for different species. In the case of most birds, the standard of bird monitoring is exceptionally good so we are not dependent on bag records or licence reports to be able to monitor the status of most species.
>
> We recommend that the new statute includes provisions to allow the Secretary of State / Welsh Minister to require that records are provided as a future proofing measure so that if a need for this information is identified, then there is the provision to make it a requirement for specified taxa.

5.105 The Countryside Council for Wales expressed support to the introduction of reporting requirements but argued that those should exclude species taken or killed under a general license or during the open season as "it would be impractical to request or collate this data".

**Conclusion**

5.106 Consultation on this question yielded no firm answer. One side of the argument generally advanced the point that any new reporting requirement would be an additional burden on business. On the other hand, other consultees made the point that the lack of a reporting requirement reduces the information known to regulators as to the effects of licences granted – particularly regarding general licences.

## LICENSING: LICENSING REASONS

**Provisional Proposal 6-18: We provisionally propose that the term "judicious use of certain birds in small numbers" be one of the licensing purposes.**

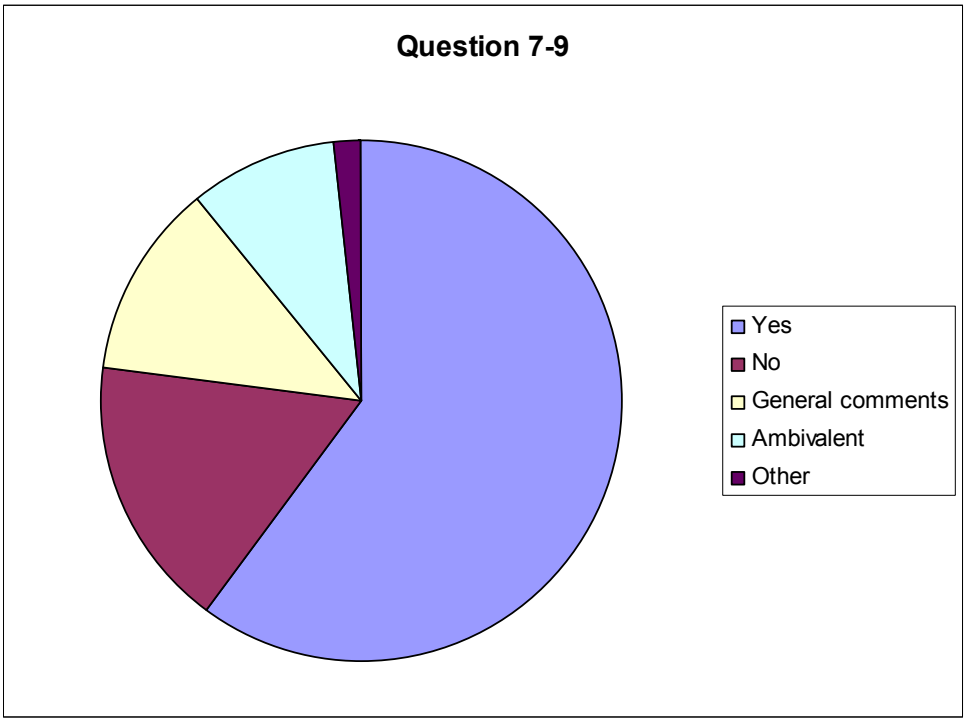
5.107 In consultation, Pigeon Racing UK and other groups and individuals associated with their response argued that:

> The varying definitions of "Livestock" across the legislation (some of which include pigeons and others which do not) have the potential to cause confusion. … the definition of "Livestock" in the Wildlife and Countryside Act 1981 (and any successor Act) should be amended as set out above in order to include animals used for the purposes of pigeon fancying (ie domestic homing and racing pigeons). This would accord with the wider definitions of "Livestock" in the Animal Health and Welfare Act 1984 where 'livestock' includes any animal or bird not in a wild state (section 10) and in the Animals Act 1971 where "livestock" means, inter alia, "poultry" and "poultry" in turn means, inter alia, the domestic varieties of pigeons (section 16). We note however that the Conservation of Species and Habitats Regulations 2010 has the same definition of "Livestock" as is currently found in section 27 of the [Wildlife and Countryside Act] 1981 (see regulation 53(14). For consistency, we would therefore propose that the Habitats Regulations definition would also need to be amended; however, we do not foresee that this could cause any harm to the strict protection afforded by the regulations (in particular, raptors e.g. sparrow hawks and peregrines are not European Protected Species).

5.108 The submission from Pigeon Racing UK was based on the potential problem that there is no licensing reason available to control sparrow hawks, so no consideration can be given as to the merits as to whether a particular licence should be given.

**Question 7-9:** Do consultees think that purely domestic licensing conditions should be rationalised using the conditions contained in the Berne Convention?

5.109 Sixty-five consultation responses were received in relation to question 7-9: 39 agreed; 11 disagreed; eight provided general comments; six were ambivalent and one proposed an alternative approach.




5.110 While a clear majority of consultation responses were in favour of rationalising domestic licensing conditions using those contained in the Bern Convention, consultees from opposite ends of the spectrum disagreed for varied reasons.

5.111 Interest groups in favour of rationalising domestic licensing conditions by transposing the Bern Convention provisions included representatives of the shooting industry, the forestry industry, developers, consultants and some wildlife protection organisations including the RSPCA and the World Society for the Protection of Animals.

5.112 Natural England, the Marine Management Organisation and DEFRA strongly agreed with the proposed rationalisation, while the Countryside Council for Wales expressed some doubts.

5.113 The NFU and NFU CYMRU strongly disagreed, and for similar reasons the National Gamekeepers' Association took an ambivalent approach. A number of major wildlife protection organisations also disagreed. Those included the International Fund for Animal Welfare, Whale and Dolphin Conservation, the Wildlife Trust, the Wildfowl and Wetland Trust, the Wildlife and Countryside LINK and the Woodland Trust.

5.114 Natural England expressed strong support for the introduction of the Bern Convention licensing conditions, on the ground that they currently incur significant problems authorising some legitimate activities affecting species listed in schedule 5 to Wildlife and Countryside Act. Users therefore are obliged to rely on the "incidental results" defence. Natural England further explained that:

> In certain circumstances, Natural England can issue a conservation purpose licence to "save" the protected animals that would otherwise be harmed by the person acting under the defence. This approach is considered unsatisfactory for a number of reasons, including:

> The developer does not have the regulatory certainty associated with a licence issued for the development activity itself, and the public does not have the confidence that the activity has been properly scrutinised.
>
> Were these provisions applied to a species protected under EU law then it is possible that they would be deemed to inadequately transpose the relevant directive, at least as currently drafted … .
>
> Adopting the derogation provisions in the Bern Convention would provide a wider and more flexible range of options for licensing and would provide a more consistent approach when dealing with species protected under EU Directives and species protected solely under domestic legislation. For example, the Bern Convention includes the "overriding public interests" and "judicious use" purpose, both of which are currently absent from the Wildlife and Countryside Act 1981 (in England).

5.115 The Forestry Commission fully agreed with such an approach. The Bedford Group of Drainage Board added that:

> A similar provision to the Protection of Badgers Act "for the purpose of any operation (whether by virtue of the Land Drainage Act 1991 or otherwise) to maintain or improve any existing watercourse or drainage works, or to construct new works required for the drainage of any land, including works for the purpose of defence against sea water or tidal water" should be introduced to the licensing provisions. It is undesirable that a management authority should be dependent on a defence which is subjective and may be tested in court. It is not considered that this modification would reduce the protection given to the species, as the act of applying for a licence would allow mitigation and/ or compensation to be built into the application rather than relying on the "incidental result" defence.

5.116 The Deer Initiative also agreed but suggested that the "protection of flora includes the licensing for culling or removal of species which impact on that flora" from, for example, deer damage. As a result it would be easier to include a specific licensing ground for "the protection of the natural heritage". They also suggested replacing "small numbers" with "limited extent" unless both phrases are enshrined in the Bern Convention wording.

5.117 DEFRA agreed with Natural England to the extent that it would be sensible to introduce the "overriding public interest" licensing ground for domestic protected species as this would help clarify the rules that apply to developers. DEFRA submitted that it would nevertheless be "useful to retain as a license purpose the prevention of the spread of disease which appears in the Protection of Badgers Act", which applies whether or not the disease is one which affects public health. DEFRA also highlighted that it would be "useful to import the conditions in article 9 of the Bern Convention about absence of alternative solution and absence of detriment to the survival of the population concerned".

5.118 By contrast, the Countryside Council for Wales, while accepting the advantages of adopting certain aspects of the Bern Convention licensing purposes, highlighted the importance of applicants being able to establish which licensing ground encompasses their proposed activity. They conceded that a certain amount of rationalisation could be taken forward, and made a concrete proposal on the licensing grounds that should be applied to domestic protected species:

> a. for scientific, research, educational or conservation purposes;
>
> b. for the purpose of ringing or marking, or examining any ring or mark;
>
> c. for the purposes of the re-population of an area with, or the re-introduction into an area of any wild animal or plant, including any breeding necessary for those purposes;
>
> d. for the purpose of protecting any zoological or botanical collection;
>
> e. 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;
>
> f. in relation to European protected species - 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;
>
> g. in relation to other protected species preserving public health or public safety or other reasons of a social or economic nature and beneficial consequences of importance for the environment;
>
> h. prevent the spread of disease and serious damage to crops, livestock, forests, fisheries, water and other forms of property.

5.119 The NFU and NFU CYMRU, together with the National Gamekeepers' Organisation, opposed the application of the Bern Convention principles on the basis that it would limit the licensing reasons for domestic species. While the NFU accepted that the UK had ratified the Bern Convention they submitted that the current licensing grounds are not necessarily in breach of the Convention:

> Bern does not have direct effect in the legal sense and the Government has a degree of flexibility and autonomy in the way in which it ensures that the Bern conditions are complied with. Bern sets a minimum standard; however it does not take away the autonomy of the sovereign state to implement its own further licensing conditions.
>
> The Berne Convention conditions are not appropriate for direct transposition into wildlife law in England and Wales. They fall short of the current range circumstances in which licences may be granted under domestic law, for example the Convention does not include a condition in respect of licences for the prevention of the spread of disease, as currently appears in the Protection of Badgers Act 1992. In our view, this condition is extremely important, particularly in a

farming context given the potential risk to livestock, and it should be retained.

5.120 Wildlife protection organisations opposed the proposed rationalisation on the ground that it would have the potential to wash down the current protection afforded to domestic protected species.

5.121 The Badger Trust conceded that activities that impact heavily on badger setts such as development, agricultural or forestry operations should remain licensable as a large proportion of reported incidents relate to unlicensed operations. While they accepted that the Bern licensing grounds could afford the same protection to badgers, they expressed concern that the removal of any reference to the existing licensing grounds under the Protection of Badgers Act would reduce the protection currently afforded to badgers.

5.122 The Wildfowl and Wetlands Trust, Wildlife and Countryside LINK, the Woodland Trust, the Wildlife Trust and the International Fund for Animal Welfare argued that domestic licensing conditions better reflect the circumstances involving wildlife issues in the UK. In their view the will of Parliament, which has decided not to include some of the Bern Convention exemptions, should be respected. Exemptions based on terms such as “judicious exploitation” or “education”

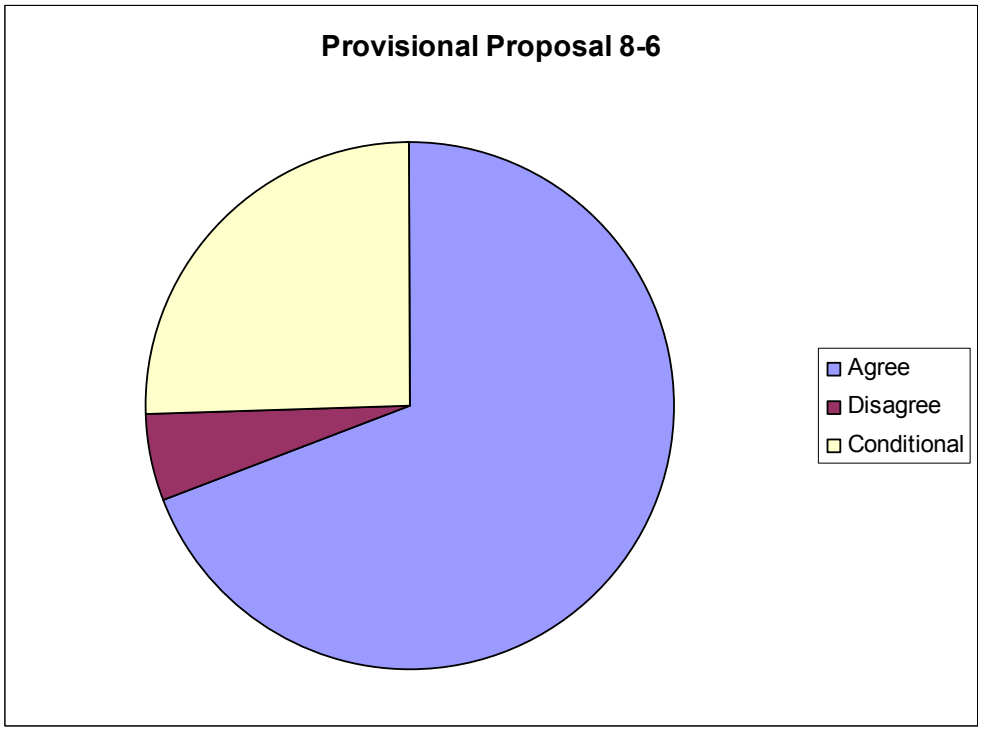
**Conclusion**

5.123 Consultation was in favour of simplifying the law for granting licences around those conditions found in the Bern Convention. There were, however, certain significant reservations from some consultees. In relation to responses from NFU and NFU Cymru, we do not agree that the Bern licensing reasons could not be used to prevent the spread of disease. Second, the Countryside Council for Wales raised the valid point that by setting out permitted activity expressly, this allowed those subject to the regime to understand clearly what they could, or could not, get a licence for.

**Invasive non native species**

**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.**

5.124 Fifty-five consultation responses were received concerning Provisional Proposal 8-6: 38 agreed; three disagreed; and 14 gave conditional responses.




5.125 Provisional Proposal 8-6 was supported by organisations across the board. Natural England argued in favour of the provisional proposal on the basis that there "should be maximum flexibility to ensure legislation is future-proofed". DEFRA also agreed in principle, submitting that licensing the keeping, control or release of non-native species "seems like the best option for providing preventative rather than reactionary provisions". They argued nevertheless that further clarity would be helpful on how licensing provisions might apply in practice. The Amphibian and Reptile Conservation Trust also supported the provisional proposal arguing that a "licensing regime would be essential to allow a coherent approach to INNS management and awareness, for example in allowing transport and display of specimens to help with identification. However, it would need judicious application to ensure that licensing did not result in increasing the threat posed by INNS".

5.126 A number of consultees suggested that the licensing regime for invasive or non-native species should be more restrictive. The British Falconers' Club, the International Association for Falconry and Conservation of Birds of Prey and the Wildfowl and Wetland Trust argued that a sufficient risk assessment should be undertaken by the regulator in all circumstances.

5.127 The Canal and River Trust, the Ribble Rivers Trust (on behalf of the Lancashire Invasive Species Project) argued that licenses allowing the escape into the wild or release from control should not be issued and measures to avoid the accidental release should be included in the license.

5.128 The RSPB, the International Fund for Animal Welfare, the Wildfowl and Wetlands Trust and the Wildlife and Countryside LINK argued that the regulator should generally be unable to issue general or class licenses, as licenses should be granted on a case by case basis, should be limited to specific circumstances and subject to monitoring. The Wildlife and Countryside LINK for example argued that:

> There is a case where individual licences would be applicable, in specific circumstances and only with corresponding guidance on good practice and on condition that this code of practice is adhered to (see BIAZA voluntary code of practice). Licences would need to include certain conditions especially around steps taken to prevent escape/release into the wild and adequate monitoring.

5.129 The Woodland Trust further submitted that “licenses should not be issued on the grounds of gardening, keeping of pets, public entertainment (including zoos), etc. These are frivolous and unnecessary pursuits that risk further invasions”.

5.130 The Wildlife Trust disagreed with our proposed approach arguing that it would just add unnecessary burden: “it is already a defence if all practical attempts were made to prevent the release and/or allowing to escape offence; growing in the wild of invasive species; or a ban of sale by order. It is also not illegal for zoos and aquaria to keep non-native species so, again, no licence is required”.

**Conclusion**

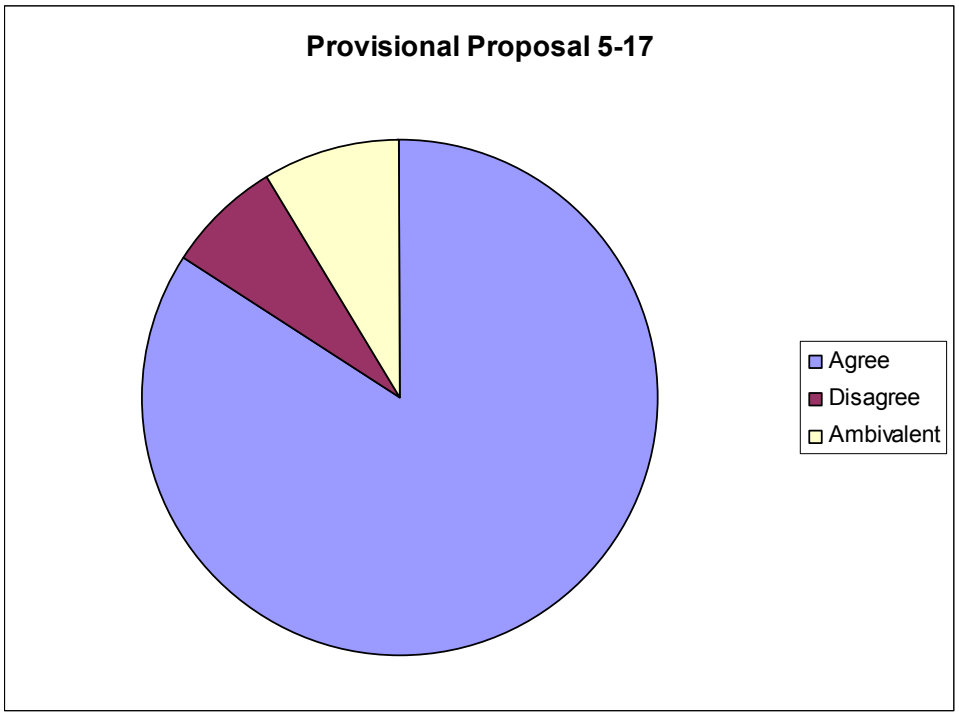
5.131 This proposal was broadly supported. Although, there were some discussion about how restrictive the licences should be.

# CHAPTER 6
# COMPLIANCE

## BREACH OF A LICENSING CONDITION

**Provisional Proposal 5-17: We provisionally propose that there should be a general offence of breaching a licence condition.**

6.1 Sixty-nine consultation responses were received in relation to Provisional Proposal 5-17: 58 agreed; five disagreed; and six were ambivalent.




6.2 Consultation responses demonstrated overwhelming support for Provisional Proposal 5-17. However, they also raised a number of important issues.

6.3 Regulators and enforcement authorities strongly agreed with the proposal on the basis that it would bring consistency to the legislation, facilitate enforcement and have a deterrent effect.

6.4 The Countryside Council for Wales, the Wildfowl and Wetlands Trust and Nottinghamshire County Council supported the provisional proposal as improving consistency in the law, and ensuring that "license holders comply with conditions and understand that failing to do so may have a detrimental impact on the species". They added that there is a "need to clarify in law the exact relationship between the licensed activity and related conditions. The Act needs to clarify that conditions can be enforced after expiry of the licence".

6.5 Natural England noted that:

> the inclusion of this offence is considered to have a strong deterrent effect, for example, there is anecdotal evidence that when this offence was added to the Conservation of Habitats and Species

> Regulations in 2007, there was a significant decline in reported instances of breaches of licence conditions for European Protected Species.

6.6 Concerns were expressed, however, about legal certainty and the proportionality of penalties. The Country Land and Business Association argued that "there is a clear need to improve the quality of the drafting of the licences so that licensees can be in no doubt as to what they may or may not do". Moreover they submitted that there is a need to address the issue of general licenses as they:

> can be issued at very short notice and with minimal consultation or publicity. In view of the fact that compliance with licence requirements is, in most cases currently and if the proposals go through across the board, a criminal matter, we do urge that this point is addressed.

6.7 The Scottish Association for Country Sports, supported by the NFU and NFU Cymru, further submitted that on the basis of their experience a lot of people acting under a general licence are not even aware of its existence. A survey of their members in Scotland found that only half had actually read the general licence. They also reiterated that the terms "are currently so badly set out that only a good legal mind could be confident that they understand the terms of the licence in full". They concluded that, on the basis that they are only issued for species of no conservation concern, general licences should be exempt from this provision.

6.8 The National Anti-Snaring Campaign (and others) were concerned about the enforceability of general licences:

> No one can check those covered by a general licence as no one knows who may be carrying out the activities, and those covered by a general licence know this. So the offence would be breached on a wide basis and that makes for bad law.

6.9 In relation to the proportionality of the penalties, the National Gamekeepers' Organisation highlighted the risks of unfairness of this measure:

> Some of the current conditions on wildlife management licences are fairly trivial, for example condition 10 on the General Licence WML/GL06 (the one that allows the trapping of corvids to conserve wildlife). This states that "At each inspection any dead animal, including any dead bird, caught in the trap should be removed from it." Whilst removing any dead bird is clearly good practice, it is hardly a welfare issue nor of great public import. Yet if breach of a licence condition were to become a general wildlife offence, we could be looking at such a happening resulting in a potential 6-month prison sentence and a level 5 fine.
>
> […]
>
> If a gamekeeper were to be found guilty of such an offence he would, in addition to prison and a fine, get a criminal record. That would mean losing his Firearms Certificate and in turn his job (no keeper without firearms can do his job). He might well lose his family home

> as well, which will often be a cottage tied to the job in which he has no security of tenure. Thus, an apparently minor proposal relating to licence conditions could have a massive effect on a gamekeeper's entire life, just because he inadvertently left a dead crow in a trap for 24 hours.

6.10 The RSPB, on the other hand, whilst accepting that a lower range of penalties should be imposed for minor technical breaches, noted that they would be extremely concerned if:

> a person operating a cage trap illegally under general licence (eg to trap birds of prey) was charged with (or negotiated through a plea bargain the charge of) a breach of licence offence rather than the substantive offence under Section 5 of the WCA. A mechanism is needed to ensure that the seriousness of offences is assessed properly, by the police, and that the most appropriate course of action, in terms of charging and potential sanctions, is taken.

6.11 Lastly, the Wildlife and Countryside LINK, together with the Wildfowl and Wetlands Trust, submitted that time limits for prosecuting offences under this proposed provision should be extended:

> The practice of end of licence reporting could, for licences over two years, result in an inability to prosecute offences. This could be resolved by extending the time limits for allowing prosecutions for these offences. We also consider that there are cases where the two year period as an extension from the standard six months limitation period for offences triable summarily is insufficient. The statutory agencies only monitor the conservation status of SACs and SPAs on a six year cycle and only report on the status of Habitats Directive species every six years. This means that offences can sometimes be detected only years after they have occurred – a poignant example is the Freshwater pearl mussel in Scotland where a population was destroyed by unauthorised channel maintenance but this was not identified until years later.

**Conclusion**

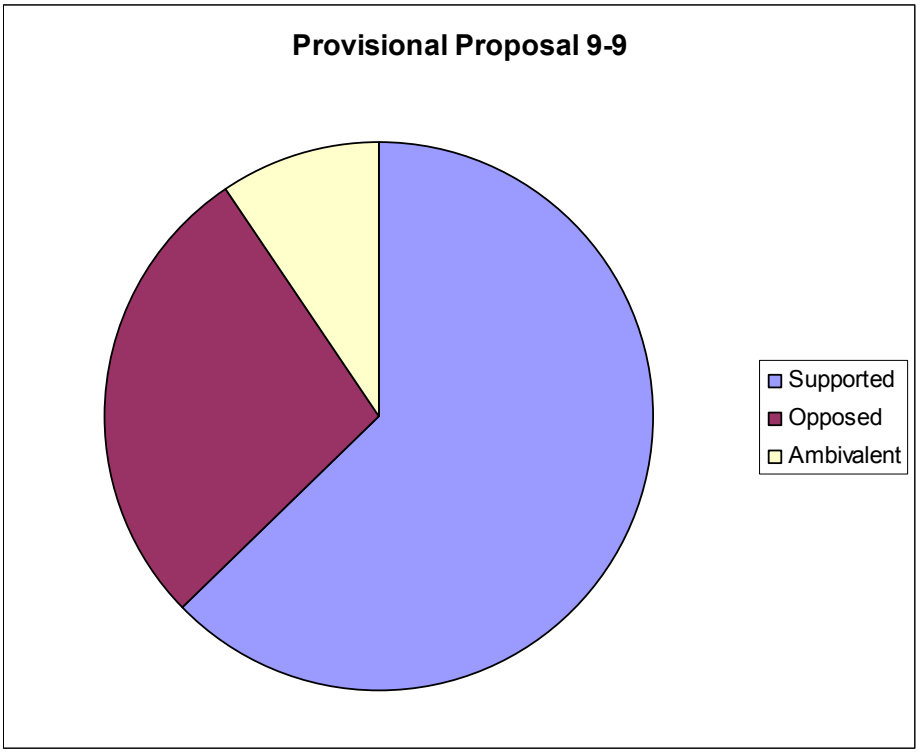
6.12 Consultees overwhelmingly supported this proposal. However, several consultees worried about the effects that the creation of such an offence would have on the wildlife regime as a whole.

## EXTENDED, OR VICARIOUS, LIABILITY

**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?**

6.13 Provisional Proposal 9-9 was the subject of campaigns by the RSPB and on the Wildlife News blog. If repeat responses generated by those campaigns are taken into account, 400 responses were received, of which 361 supported the extension in liability, 29 did not and 10 were ambivalent.

6.14 If the repeat consultation responses resulting from campaigning are taken out then we received 105 consultation responses concerning Provisional Proposal 9-9: 66 thought that there should be an extended liability offence; 29 thought not; 10 were ambivalent. The pie-chart below represents the position without campaigning responses.




6.15 This provisional proposal received unanimous support from wildlife conservation organisations and was also strongly supported by numerous members of the public who were particularly concerned with the persecution of birds of prey. Some environmental consultants (Institute for Ecology and Environmental Management) also agreed with the proposal. Regulators (Natural England, the Countryside Council for Wales and the Marine Management Organisation) expressed full support for the introduction of vicarious liability, while the National Wildlife Crime Unit took an ambivalent position.

6.16 Most representatives of the shooting industry, farmers and landowners opposed this provisional proposal, with some notable exceptions and intermediate positions. The British Association for Shooting and Conservation agreed with the provisional proposal; the National Farmers Union and NFU Cymru, while disagreeing in principle, expressed conditional support for a more limited form of vicarious liability; the Game and Wildlife Conservation Trust noted the potential benefits for gamekeepers and suggested a close eye is kept on the implementation of the vicarious liability offence in Scotland. Conversely, the National Gamekeepers' Organisation disagreed in principle with the provisional proposal, arguing that a convincing case had not yet been made out. DEFRA took a similar position, stressing the lack of evidence that such system would be effective in practice.

6.17 Several arguments were put forward in favour of Provisional Proposal 9-9. The main line of argument was based on the idea that vicarious liability would relieve employees (for instance gamekeepers) from undue pressure from their

employers to commit wildlife offences. According to this argument, the introduction of vicarious liability would have the likely effect of reducing wildlife crimes. It would also introduce a key element of justice, as it would hold to account those who are ultimately responsible for the crimes.

6.18 The RSPB argued that:

> Analysis of court convictions show that the vast majority (c 70%) of bird of prey persecution incidents are committed by gamekeepers.[1] Many gamekeepers' jobs come with a house tied to the position and choosing to defy orders from managers or landowners to kill birds of prey risks not only losing employment but also a home. Numerous gamekeepers have assured the RSPB that they are under tremendous pressure from their employers and managers to carry out acts of predator control with the explicit understanding that this includes illegal killing of birds of prey.
>
> Section 5 of the Wildlife and Countryside Act 1981 currently provides for an element of employers liability for certain offences, namely the use of prohibited methods of killing of taking wild birds such as illegal traps and poisons. However, the prosecution have to prove that the employer "knowingly caused or permitted" the illegal act and since employees are unlikely to "bite the hand that feeds them" by implicating their bosses it is perhaps not surprising that an employer has never been convicted using these provisions.

6.19 Therefore, as Nicholas Crampton (former prosecutor) added, vicarious liability would reduce the "likelihood of employees being under pressure by unscrupulous employers to break the law and supports law abiding gamekeepers".

6.20 Another line of argument was based on the possible merits of vicarious liability in terms of deterrence and effectiveness. The RSPCA referred to the House of Commons Environmental Audit Committee's finding that the law was insufficiently deterrent and their recommendation to evaluate the effects of the introduction of vicarious liability in Scotland to consider introducing a similar offence in England and Wales. The Badger Trust argued that such provision has:

> certainly made a difference in Scotland where even people like planners and developers are now very aware that they have a responsibility under the Act not to allow anything where it could be construed that they had caused or permitted an offence.

6.21 A number of consultees proposed several options for further extending liability to other regulatory addressees or activities.

6.22 Natural England, for example, argued that a "cause and permit" offence should also be introduced as in Scottish law. This would be particularly beneficial in two scenarios:

[1] Birdcrime 2009 p36 http://www.rspb.org.uk/Images/birdcrime_tcm9-260567.pdf [footnote in original].

(1) A developer commits an offence having acted under the professional advice of a consultant ecologist who has wrongly come to the conclusion that the activity could be carried out without a licence.

(2) An employer instructs an employee to do works despite having been advised by a professional consultant or regulatory authority that the works would lead to offences being committed.

6.23 Natural England submitted that in the two scenarios described above:

> the police are usually reluctant to prosecute the person who carried out the activity but are constrained from prosecuting the person who either gave the bad advice or who instructed another person to carry out works in the knowledge that an offence would be committed.

6.24 The Bat Conservation Trust and Wildlife and Countryside LINK similarly argued that liability should be extended to those providing advice. The Bat Conservation Trust submitted, for example, that:

> the involvement of [professional consultants] does not generally amount to aiding, abetting counselling or procuring offences and as such there is no criminal liability for those providing incorrect advice that leads to the commission of criminal offences.

6.25 Lastly, the RSPB also noted that article 6 of the Environmental Crime Directive[2]:

> requires that Member States ensure that limited companies or partnerships or other organisations (ie "legal persons") can be prosecuted for offences committed by an employee for the benefit of that organisation.

6.26 As mentioned above, a range of arguments against the introduction of vicarious liability have also been submitted.

6.27 Amongst others, DEFRA, the Countryside Alliance, the National Gamekeepers' Organisation, the Moorland Association and the British Falconer's Club argued that the introduction of vicarious liability would be premature. It has not yet been assessed whether it has delivered real enforcement or deterrent benefits since it has been introduced in Scotland. Some of those responses supported this argument by referring to the House of Commons Environmental Audit Committee's recommendation to evaluate the effects of the introduction of vicarious liability in Scotland, and consider a similar offence in England and Wales.

6.28 A fundamental challenge to our provisional proposal was that vicarious liability is not recognised in English Law (Countryside Alliance, Scottish Association for Country Sports) and which "runs against the principles of natural justice" (NFU and NFU Cymru). The Countryside Alliance argued that:

[2] Directive 2008/99/EC on the protection of the environment though criminal law OJ L 328 p 28 (6 December 2008).

> English law does not criminalise people for failing to prevent other people from committing offences. It is our view that where an employer actively engages in a criminal offence or aids and abets a criminal offence, then they should face the full force of the law. In situations where there is no evidence of an employer actively engaging in an offence, or aiding and abetting it, then it should not be assumed that they had anything to do with the offence whatsoever.

6.29 The Country Land and Business Association and the Moorland Association, amongst others, added that although wildlife crime is serious, it is not so serious as to justify a departure from the normal principles of liability.

6.30 The Moorland Association further doubted whether this proposed measure would produce any practical conservation benefits:

> Employers would avoid liability by a demonstrably clearly documented instruction to their employees to refrain from actions which might lead to a breach of the law and the results to date in Scotland appear simply to have placed a significant burden of paperwork and considerable expense in legal fees on moorland owners. We doubt whether those who might be inclined to break the law would be deterred from doing [so on] such an instruction or that it would change existing habits.

6.31 Lastly, a few consultation responses highlighted the complexity of employer-employee relationships in certain sectors. The National Farmers Union, for example, pointed out that:

> The nature of the farming industry is possibly unique in that farmers may have employees who perhaps are employed to drive machinery, or milk cows but who also might carry out wildlife control, whether on their employer's land or land belonging to others. Often it might be unclear as to whether wildlife control is to be carried out at the direction of an employer or purely as a sporting interest, ie not under formal direction, and without remuneration. In addition, farmers might allow third parties to come on to their land to carry out (for example) rabbit control and it would be wrong for farmers to be vicariously liable for their actions.
>
> In our view, the only way in which such an approach could be appropriately adopted is where there could be shown to be a very clear employer and employee relationship and for there to be an absolute direction by the employer to carry out the criminal activity.

6.32 The National Federation of Fishermen's Organisations pointed to problems of a similar nature in the context of the fishing industry:

> Firstly, there is usually no employer/employee relationship between fishing vessel owners and skippers through a contract of employment as the majority of skippers are self-employed. This raises the question as to how an employer may affect a suitable regime that binds a self-employed skipper through contractual arrangements.

Secondly, the work of third party self-employed skippers is a world away from the working environment of an estate owner and game keeper. In the case of marine fisheries the employee is unable to be supervised or observed in any practical manner.

Thirdly, we find it difficult to conceive how a health and safety type of regime could apply in order to enact such an approach in the case of sea fishing when fishing grounds can range hugely, the specific locations of protected species are not known and there are few known mitigation options to prevent the capture of many protected species. Such a regime would inevitably place additional regulatory burdens upon working fishermen operating in an often risky operating environment.

**Conclusion**

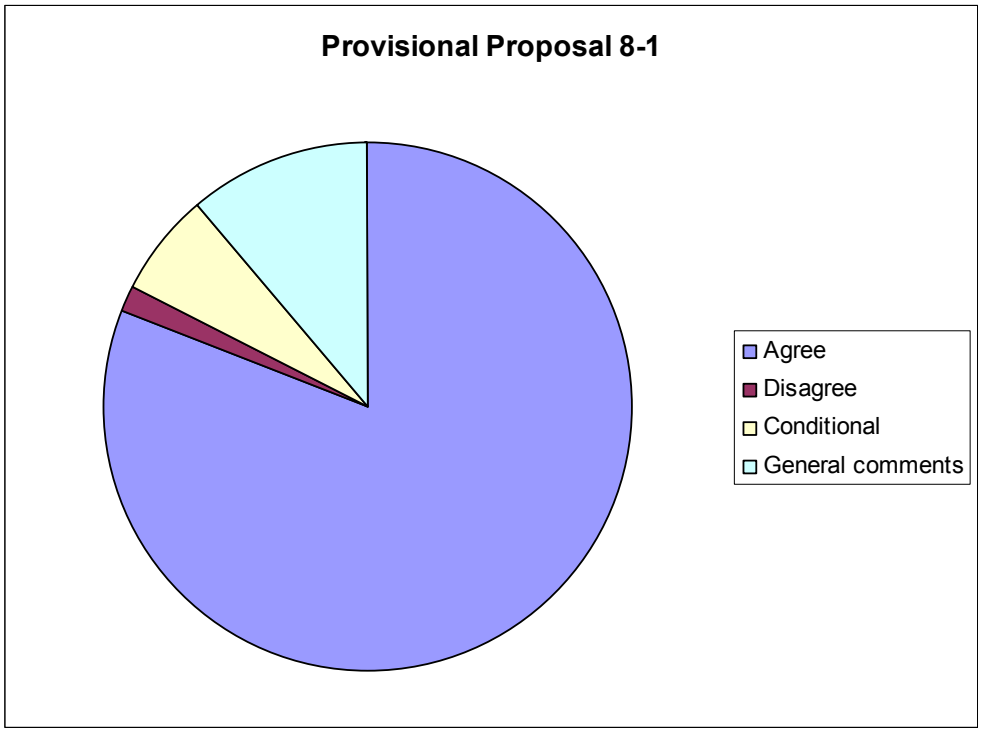
6.33 Consultation on vicarious liability was generally supportive, at least as far as raw numbers go, but with significant opposition. The opposition focused on the idea that the proposal would result in an unjust extension of the normal principles of liability to those legitimately conducting businesses involving wildlife. Not surprisingly, much of the opposition came from the communities that the Scottish offence was aimed at: game estates. A key consideration raised was whether we should be increasing the burdens on developers or others in the current economic climate.

## TOOLS TO ENSURE PROPER FUNCTIONING OF AN INVASIVE NON-NATIVE SPECIES REGIME

**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.

6.34 Provisional proposal 8-1 was the subject of campaigns from the RSPB. If repeat responses generated by campaigns are taken into account, around 127 responses were received, of which 115 agreed with the provisional proposal; one disagreed; four gave conditional responses; and seven made general comments.

6.35 If the repeat consultation responses from campaigning are counted as one, we received 63 consultation responses concerning Provisional Proposal 8-1: 51 agreed; one disagreed; four gave conditional responses; and seven made general comments.




6.36 Provisional Proposal 8-1 was overwhelmingly supported by consultees, who almost unanimously agreed that the current legislative framework is insufficient to tackle the problems with invasive non-native species effectively.

6.37 Regulators strongly agreed with the provisional proposal. The Countryside Council for Wales, for example, pointed out that there have been no successful prosecutions under section 14 of Wildlife and Countryside Act 1981 as:

> the current offence is practically impossible to prove and there is no power for an enforcing agency to sanction the removal of, or cease the spread of, a non native species. It is therefore necessary to ensure such provisions are included within new legislation.

6.38 They added that there is a need for a more structured and coordinated rapid response strategy in order to address new threats from invasive non-native species and that the question of financial responsibility for the eradication costs should also be addressed: “At sea who could be responsible for hull fouling incidents? The marina operator or the boat owner?”. Natural England agreed that:

> while there has been substantial progress in policy development and the preparation of a comprehensive government strategy, existing legal mechanisms for effectively tackling this issue need to be enhanced in England and Wales.

6.39 As to the unenforceability of section 14, the RSPCA added that it was considered by DEFRA’s working group in 2001 and held to be “ineffective for preventing introductions” and “difficult to enforce”. The National Wildlife Crime Unit confirmed that section 14 (of…) has had no impact on existing problems and that prosecutions have proved to be particularly problematic in relation to plants.

6.40 Jennifer Harrison specifically argued that the wording “into the wild” in relation to the offence of “causing a plant to grow in the wild” makes the law unenforceable as causing the infestation of Japanese Knotweed in agricultural land may not fall under the definition. The Ribble Rivers Trust (on behalf of the Lancashire Invasive Species Project) suggested that the expressions “escape from control” or “no longer under control” are much more appropriate and, unlike the Wildlife and Natural Environment (Scotland) Act, they should also apply to plants.

6.41 A long list of further problems with the current framework was highlighted in the various consultation responses. A number of organisations, including Wildlife and Countryside LINK, the RSPCA and Animal Aid, pointed out that the Convention on Biological Diversity recognises prevention as the most desirable and cost-effective measure for invasive non-native species and that domestic legislation fails to incorporate this principle. The RSPB, for example, generally noted that current provisions “fail to prevent future introductions and there are no regulatory tools to effectively control contain and eradicate established species”. The Wildfowl and Wetlands Trust commented that:

> The UK Government and businesses spend large amounts of money tackling invasive non-native species. In reform there is the potential to reduce this spend through improved prevention measures. Invasive non-native species are one of the three top causes of biodiversity loss globally, together with habitat loss and climate change. Strengthening of the regulation and enforcement tools available would help combat the spread of invasise non-native species in England and Wales, would lead to a greater ability to reach our biodiversity targets, and makes economic sense.

6.42 The RSPCA and Wildlife and Countryside LINK suggested that the new framework should include a ban on the import of invasive non-native species, as this would allow tackling the problem upstream rather than downstream.

6.43 A number of consultees also submitted that more stringent rules should apply to the possession of invasive non-native species. Simon Baker for, example, noted that a major problem is the potential for animals kept as pets to escape or be released in the environment and become invasives:

> The keeping of some species by private individuals is regulated by the Dangerous Wild Animals Act 1976 but this now covers fewer species than it did and was not designed to prevent the release of invasive non-native species. I do not believe that provisions in the Wildlife and Countryside Act 1981 are sufficient to prevent escapes or releases from captivity of animals kept as pets in private households. […] There needs to be a mechanism for placing a prohibition on the keeping of potentially invasive species as pets by private individuals or for them only to be kept under licence.

6.44 In relation to enforcement tools, the Hampshire and Isle of Wight Wildlife Trust (New Forest Non-Native Plants Project) also explained that voluntary cooperative approaches to implementing the invasive non-native species framework strategy at local level, in partnership with landowners, has been generally successful. However, it highlighted that they have experienced difficulties that jeopardised the effectiveness of control measures when:

(1) landowners have refused to cooperate; and

(2) landowners could not be traced despite extensive research.

6.45 Plantlife also suggested that labelling standards for plants should be tightened and argued that certain current labelling practices could be challenged under the Unfair Trading Regulations 2008.

6.46 A number of consultees, including Scottish National Heritage, the Wildlife Trust, the Wildfowl and Wetlands Trust and the Woodland Trust, also highlighted the importance of having similar regulatory tools across Great Britain. In their view, this would ensure that efforts on one side of the border are not compromised by different provisions or enforcement tools on the other.

6.47 Some consultees also expressed concern about the proposal to reform existing regulatory and enforcement tools. The NFU and NFU Cymru, for example, argued that bans on sale may interfere with the horticultural industry and therefore should be based "on sound science and justified by robust expert evidence and peer reviewed information". Moreover:

> restrictions on the introduction of species may prevent farmers and growers from being able to react to markets and to grow new varieties of crops [eg the Rhododendron] as and when they become commercially available.… full regard must therefore be given to commercial production processes and sufficient lead-in time must be given to allow all existing stocks to be sold and wound-down before any ban came into place.

6.48 A number of consultees, including the National Gamekeepers' Organisation, the Self Help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA (SHG), the Woodland Trust and the International Fund for Animal Welfare, also expressed the view that it would be premature to reform the law before the expected EU Directive on invasive non-native species comes out. The Hawk Board submitted that the reform of the law in this area should lead to a stand alone legislative framework and should be subject to extensive separate consultation.

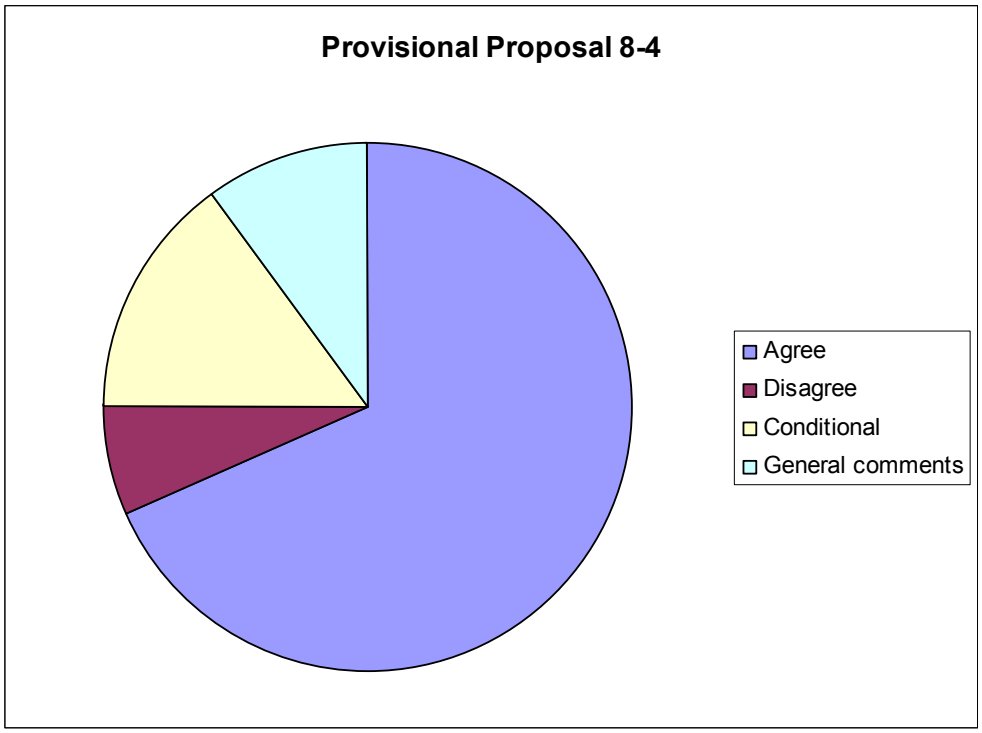
**Conclusion**

6.49 On the basis of consultation, there was overwhelming support for reform, though some queried the geographical extent of our provisional proposal and its timing.

**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.**

6.50 Provisional proposal 8-4 was the subject of campaigns from the RSPB. If repeat responses generated by campaigns are taken into account, around 126 responses were received, of which around 105 agreed; four disagreed; nine were conditional; and six offered general comments.

6.51 If the repeat consultation responses from campaigning are counted as one, we received 62 consultation responses concerning Provisional Proposal 8-4: 41 agreed;[3] four disagreed; 9 were conditional; and six offered general comments.




6.52 While Provisional Proposal 8-4 received strong support from consultees, a number of recurring concerns were identified.

6.53 Many consultees agreed with the provisional proposal on the basis that knowledge of the location of invasive non-native species is key to their effective eradication. The Hampshire and Isle of Wight Wildlife Trust (New Forest Non-Native Plants Project), for example, submitted that:

> effective eradication of an invasive non-native species depends on knowledge of all locations of that particular species. To gain this knowledge rapidly (so the infestation can be dealt with quickly and

[3] Note: a further (around) 64 campaigning responses from members/supporters of the RSPB also agreed with PP 8-1). Thus, in the overall number of consultation responses agreeing with PP 8-1, would be around 105. Here the 65 campaigning responses have been counted as just one.

effectively) will depend on landowners or land managers providing information on the presence of a particular invasive non-native species on their property.

6.54 Natural England, whilst agreeing that this is an important provision, argued that it:

> …will only be appropriate in certain circumstances (eg to tackle a newly emerging threat or during an eradication campaign).
>
> The requirement to report specific species should be time-limited and subject to review (to avoid the situation that there is with the grey squirrel, which people are still expected to report under an order issued under the Destructive Imported Animals Act 1932).

6.55 DEFRA agreed with this position, suggesting that the provision should be flexible and allow easy removal of the requirement in cases where the species becomes so widespread that the reporting simply becomes a burden.

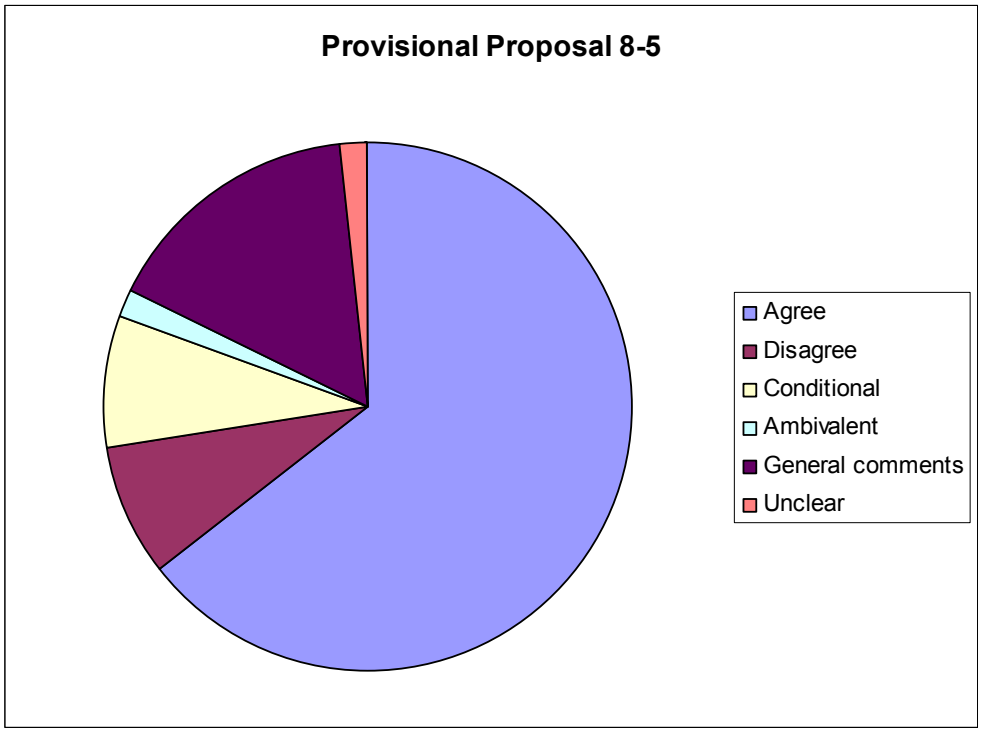
6.56 The Countryside Council for Wales submitted that it is unclear how the Secretary of State or Welsh Ministers could judge that a person or a class of persons has or should have the knowledge of, or is likely to encounter, the invasive non-native species to which the order relates. This would be particularly complex in the marine environment. They further argued that the financial responsibility for control or eradication should be resolved, as such a provision in Scotland has resulted in some groups becoming reluctant to undertake relevant training for fear of being liable – for example, having knowledge of the presence of invasive non-natives.

6.57 The issue of regulatory burden on landowners and occupiers of land and the question of which people or organisations should be deemed to have the knowledge and skills to identify invasive non-natives was highlighted by a number of organisations across the spectrum, ranging from the Countryside Alliance and the Country Land & Business Association to the RSPCA and the Wildlife Trust. The Woodland Trust similarly highlighted the importance of educating landowners, the horticultural sector and companies or individuals which have powers to enter land such as railways, gas and electricity companies, consultant ecologists and land surveyors.

**Provisional Proposal 8-5: We provisionally propose that there should be a defence of "reasonable excuse" for failing to comply with the requirement.**

6.58 62 consultation responses were received concerning Provisional Proposal 8-5: 40 agreed; five disagreed; five were "conditional"; one was ambivalent; ten offered "general comments"; and one was unclear.[4]

[4] 16 consultation responses argued that "reasonable excuse" should be defined. Amongst those consultation responses, 10 argued that they could not agree with the provisional proposal as the CP failed to properly define what this defence would imply.




6.59 Provisional Proposal 8-5 also received strong support from consultees. However, a large number of consultees, including regulators and DEFRA, wondered which circumstances would be covered by the "reasonable excuse" defence and requested additional guidance.

6.60 The Institute of Chartered Foresters and CONFOR, supported by IEEM, submitted that a clear line should be drawn between unwillingness and inability to comply as "there must be no possibility of individuals being prosecuted because they have failed to carry out work which they cannot afford. In this case the [Secretary of State]'s order must be backed with the necessary resource and the right of entry to land as appropriate". The London Invasive Species Initiative suggested that the defence should incorporate a "due diligence clause". DEFRA and the Marine Management Organisation pointed out that in the context of fisheries the fishery owner or the fisherman may often be unaware of the presence of invasive non-native species.

**Conclusion**

6.61 Overall, both of these provisional proposals were supported, even when the repeat submissions elicited by the RSPB are removed from the calculations.

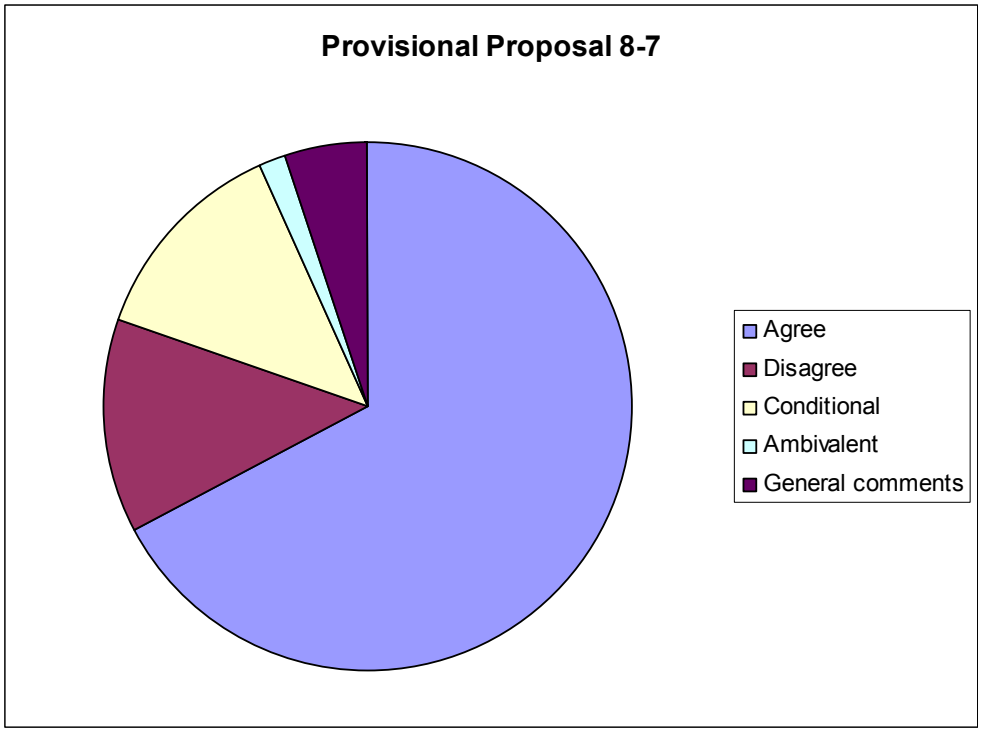
6.62 Where there were concerns raised, these related to managing the burden placed on those subject to an order; clarifying those subject to an order; and ensuring that orders do not unduly criminalise individuals or businesses.

**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.**

6.63 Provisional proposal 8-7 was the subject of campaigns from the RSPB. If repeat responses generated by campaigns are taken into account, around 125

responses were received, of which 105 agreed with the provisional proposal; eight disagreed; eight gave conditional responses; one was ambivalent; and three made general comments.

6.64 If the repeat consultation responses from campaigning are counted as one, we received 61 consultation responses concerning Provisional Proposal 8-7: 41 agreed; eight disagreed; eight gave conditional responses; one was ambivalent; and three made general comments.




6.65 Provisional Proposal 8-7 received strong support by consultees, although various concerns were expressed by different organisations.

6.66 The Ribble Rivers Trust (on behalf of the Lancashire Invasive Species Project) submitted that the proposed system would "significantly improve the efficiency and efficacy of these control programs. It would prevent the roadblocks to such programs presented by being denied access to a crucial section of land. Furthermore, if public funding for invasive species control is reduced in the future, this system could ensure that the gains made are not lost". They also explained that the two key features of the Scottish model that should be adopted are

(1) It allows for the judicious application of species control orders [as it] targets control work to where it is most needed and integrates with current control programs.

(2) It allows for an escalation of response from species control agreements to control orders and emergency control orders. Species control agreements would allow the statutory body to work in cooperation with landowners and still make the most of the current infrastructure of voluntary organisations carrying out invasive species control. Where control agreements fail, control orders are available.

6.67 Natural England also fully agreed with the provisional proposal but argued that there should also be a clear provision to allow entry to land to investigate the presence of invasive plants and animals, as the current wording implies that the presence of a species must be demonstrated beforehand.

6.68 In that regard, a number of organisations, ranging from the Wildlife Trust and the National Anti-Snaring Campaign (and others) to the Country Land & Business Association and the National Farmers' Union and NFU Cymru, wondered what safeguard would be available to protect the interests of landowners. The National Anti-Snaring Campaign (and others), for example, submitted that the proposed provision "is oppressive to those who do not want harm to come to wildlife on their land" and that "such a control order should only come where there is a 'serious' threat to public health or safety". The Country Land & Business Association similarly argued that they would like to see an appropriate system of checks and balances in place to protect the landowners' interests.

6.69 Another important consideration was the question of regulatory burden and costs. The Countryside Council for Wales argued that "serious consideration should be given to the implications of the proposal and the potential resource implications on enforcement authorities." At the opposite end, the National Farmers' Union and NFU Cymru submitted that they would be concerned "if the control orders placed [a] burden on the landowner/occupier to undertake actions for something that they had no control over, or where costs were disproportionate to impact".

6.70 DEFRA agreed with the provisional proposal and considered the application of species control orders to fisheries:

> Species control orders may also have a useful role in non-native fish control, though probably more appropriate for open waters. For still waters, the proposed live fish permit will set out any control measures required and if a permit is not held, notice can be served to take action. We would not wish to change the current proposed model for live fish.

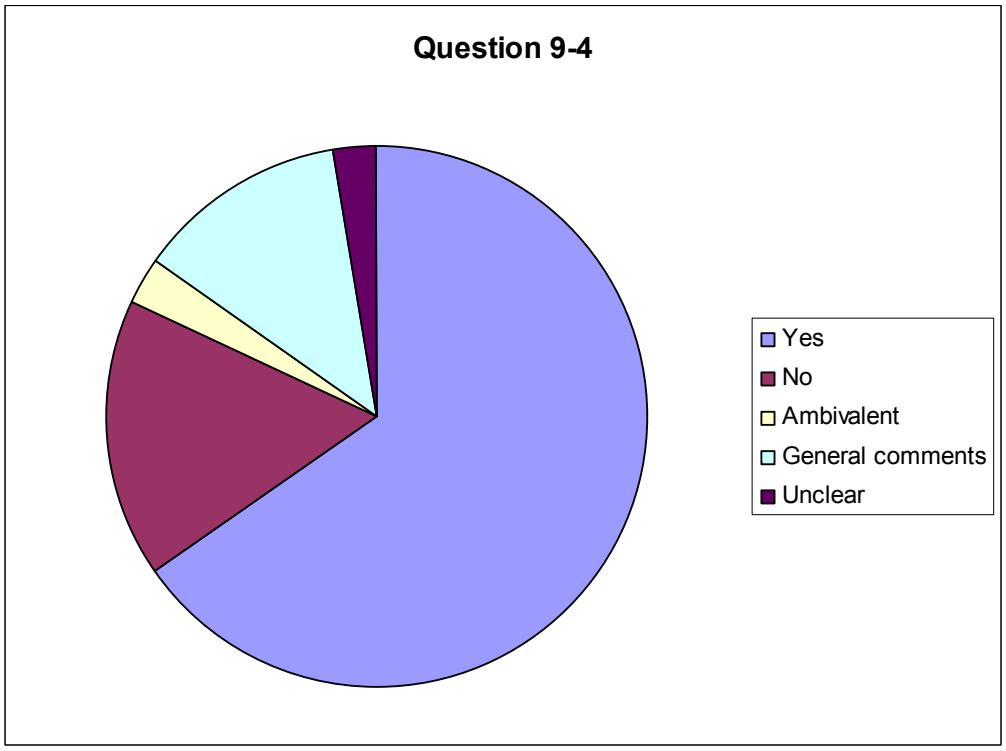
**Conclusion**

6.71 In general these orders were supported, and many could see their potential value. However, as with other orders, especially intrusive orders such as the notification order considered above, there was a worry that species control orders could be used too widely or impose unnecessary burdens on those subject to that. Cost was also a concern expressed by some.

**CRIMINAL SANCTIONS**

**Question 9-4: Do consultees think that that the current sanctions for wildlife crime are sufficient?**

6.72 Seventy-seven consultation responses were received in relation to Question 9-4: 13 agreed that the current level of penalties is sufficient; 50 disagreed, 2 responses were ambivalent; 10 provided general comments; and 2 were unclear.




6.73 A strong majority of consultation responses supported the view that current sanctions are insufficient and should be increased. Consultees who thought that current sanctions are insufficient included DEFRA, wildlife conservation and animal welfare organisations, regulators, consultant ecologists and some representatives of the shooting industry (BASC and the Council of Hunting Associations). The representatives of gamekeepers, the forestry industry, falconers and representatives of the game shooting industry were in favour of the current sanctions.

6.74 Very few arguments were presented in favour of retaining the current penalties. The Moorland Association, together with the National Anti Snaring Campaign and others, pointed out that the main problem is not the current level of penalties but the failure to investigate and prosecute wildlife crime. The National Gamekeepers' Organisation submitted that current penalties are sufficient and pointed out that "if a gamekeeper or wildlife manager is convicted, he may well lose his firearms and thus his job and his house".

6.75 The Magistrates' Association maintained that they are content with "the general level of sanctions which are for the most part at the maximum level available for summary jurisdiction in the magistrates' courts". They noted, however, that the current level of fines under section 4 and section 8 of the Animal Welfare Act 2006 is £20,000 and that crimes under the COTES Regulations are also triable in the Crown Court.

6.76 The RSPCA, supported by Wildlife and Countryside LINK, argued that it is currently impossible to answer this question because of the inconsistent sentencing by judges and magistrates due to the lack of sentencing guidelines. They suggested following the Environmental Audit Committee's recommendation that the Government should review the available penalties and work with the Sentencing Council and the Magistrates' Association to introduce sentencing guidelines for the judiciary and training for magistrates in relation to wildlife offences.

6.77 Many consultees highlighted that the level of fines available are insufficient. The Countryside Council for Wales, for example, submitted that:

> CCW and other parties have received representations from companies that are seeking to ensure compliance will not place them at a commercial disadvantage. The key message is one of parity. At present levels of fine imposed are in favour of the non-compliant operator.

6.78 Similarly Natural England submitted:

> The maximum fine for a Level 5 offence is only £5,000; this is insignificant compared to the typical cost associated with complying, for example, with legislation protecting European Protected Species for medium and large scale development projects (costs cited can range from tens to hundreds of thousands of pounds).

6.79 DEFRA agreed, submitting that while sanctions should provide sufficient deterrence, this is currently not the case in the context of wildlife crime "as in some instances the severity of the penalty does not outweigh the benefit from committing the offence".

6.80 The Bat Conservation Trust and the Badger Trust submitted further anecdotal evidence. The Bat Conservation Trust referred to a recent court case in Cumbria which resulted in "record fines of £7,500 (£2,500 on each of the three charges) and explained that:

> The defence in that case made the point that since destroying the three roosts subject of charge, they had spent over £16000 in mitigation for bats. The attitude of the defendant in that case is to be applauded in that they spent considerable monies in providing mitigation which could not have been imposed on them. Had they not done so then clearly the financial penalty imposed by the courts would have been less than the cost of complying with the law, indeed the maximum penalty that could have been imposed (£15000) was less than the cost of mitigation.

6.81 The second argument was also brought forward by a large number of consultees, including the National Wildlife Crime Unit, Wildlife and Countryside LINK, the RSPB, UKELA, the Badger Trust and Nicholas Crampton (former prosecutor).

6.82 The National Wildlife Crime Unit, for example, made the following points:

> (1) A person who shoots a peregrine falcon is liable under the Wildlife and Countryside Act to a fine not exceeding £5000 and/or six months imprisonment. However, if he then sells that same bird he is liable under the provisions of the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (as amended) to unlimited fines and/or five years imprisonment. […]
>
> (2) A person who sells a Hermanns tortoise (the most commonly traded species of tortoise, commonly ranched but still listed as an endangered species) without a licence faces the potential of unlimited fines and or five years imprisonment under the provisions of the COTES regulations. However a person who shoots the last breeding pair of Hen Harrier in England will face sanctions of a £5000 fine and or six months imprisonment.
>
> In 2005 government took the view that penalties for illegally trading in endangered wildlife were insufficient and increased the maximum term of imprisonment from 2 to 5 years. In order to address these scenarios it seems logical to suggest that penalties for the most serious offending against our protected species should be similar.

6.83 The RSPB also referred to the Environmental Permitting (England and Wales) Regulations 2010, which provides for £50,000 fines and/or up to 12 months imprisonment in the magistrates' mourt and unlimited fines and /or up to five years imprisonment in the Crown Court for failing to comply with an environmental permit condition. They further submitted that in 55 cases relating to birds between 2001 and 2010 custodial sentences were awarded under different legislation and a review of those cases show that courts have generally been careful and selective, reserving custodial sentences only for serious cases or for people with previous convictions.

6.84 Nicholas Crampton also pointed to the transposition of the species specific provisions of the Habitats and Birds Directive in different EU member states, which demonstrate that:

> the UK is at the bottom in terms of level of maximum penalties available under criminal enforcement, apart from offences relating to invasive non-native species, and rather oddly, impersonating a wildlife inspector.

6.85 He also referred to paragraphs 26 to 35 of the Environmental Audit Committee Report in relation to the persecution of birds of prey and pesticides, which "suggest a concern that sentences are inadequate". He further explained that:

> Whilst the killing of a wild bird is a WCA offence, imprisonable but triable summarily only, the provisions of the Control of Pesticide Regulations 1986 are made offences under section 16(12) Food and Environment Protection Act 1985 and which are triable either way by virtue of section 21(3). The maximum penalties are a fine either of the statutory maximum in the Magistrates' Court or unlimited in the Crown Court. This creates an impossible situation for the Magistrates' Court faced with a serious wildlife incident where pesticides are involved. They cannot commit the 'more serious because imprisonable' WCA

> offences for trial. But the defendant can elect for jury trial on the COPR/FEPA offences, and then place considerable pressure on the Prosecution not to proceed with the WCA offences. The Prosecution may invite committal of these under section 41 Criminal Justice Act 1988, but the Crown Court can only deal with these if the defendant pleads guilty to them. If he refuses to do so, or accepts only some, the 'left-overs' must go back to the Magistrates' Court. It is not in the interests of justice to have two criminal courts dealing with the same incident, nor is it the public interest to allow a defendant to 'use' the judicial procedures to seek to obtain a lighter outcome any more than it would be for the prosecution to do so to obtain a heavier sentence.

6.86 Lastly, some stakeholders highlighted the potential incompatibility between the current penalties for wildlife crimes and the Environmental Crime Directive, which requires offences committed by both natural and legal persons against Wild Birds under Annex I of the Wild Birds Directive and European Protected Species to be "punishable by effective, proportionate and dissuasive criminal penalties".[5] The RSPB concluded:

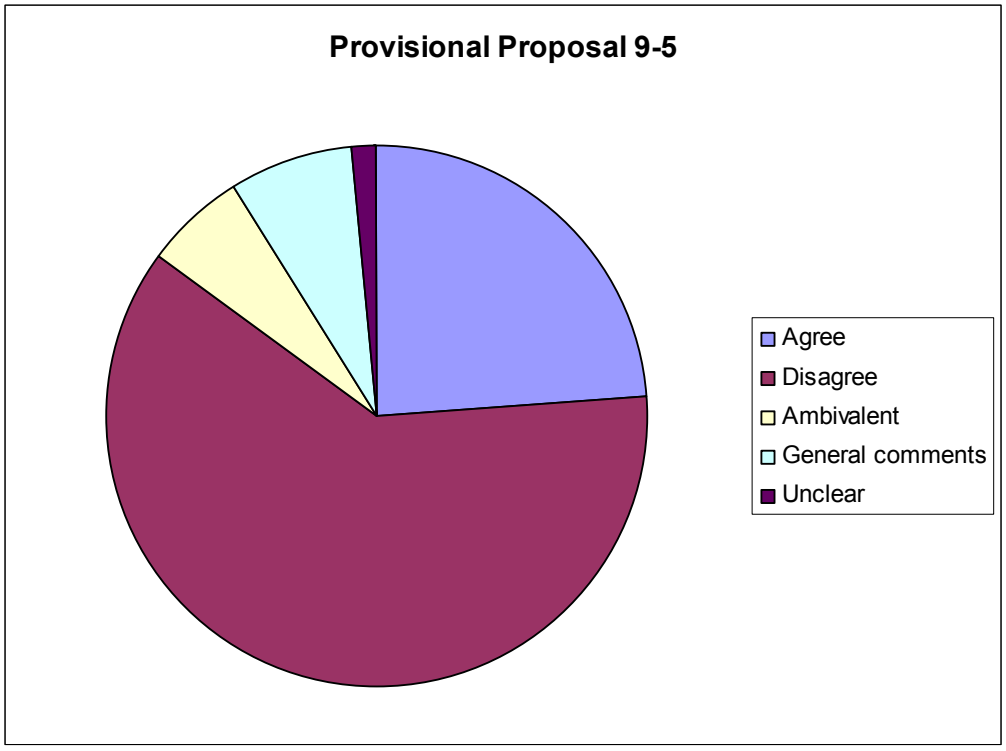
> "Effectiveness" requires that the penalty furthers the relevant goals of the legislation. Given that the goal of European environmental law is to reach a high level of environmental protection, penalties should further this goal. The effectiveness of a penalty will to a large extent depend upon its ability to create deterrence.
>
> "Dissuasive" requires that criminal law should be of such a type and magnitude that the expected costs are higher than expected benefits to the perpetrator. In addition the lower the probability of detection, the higher the penalty must be.
>
> "Proportionality" requires consideration of the particular interests which are protected by the specific crimes. If a crime would merely protect administrative interests, it is less serious than when ecological values would be protected. The manner in which the interests are infringed is also important: causing concrete harm to an interest is of course more important than merely endangering an interest.
>
> It can be strongly argued that these requirements are not met by domestic legislation, particularly in relation to persecution of birds of prey on Birds Directive Annex I or regularly occurring migratory species.

[5] Article 5 and Article 7 Environmental Crime Directive.

**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.**

6.87 Provisional Proposal 9-5 was the subject of campaigns from the RSPB and the Wildlife News Blog. If repeat responses generated by campaigns are taken into account, 362 responses were received, of which 16 agreed with the provisional proposal; 318 disagreed; four were ambivalent; five provided general comments and 19 were unclear.

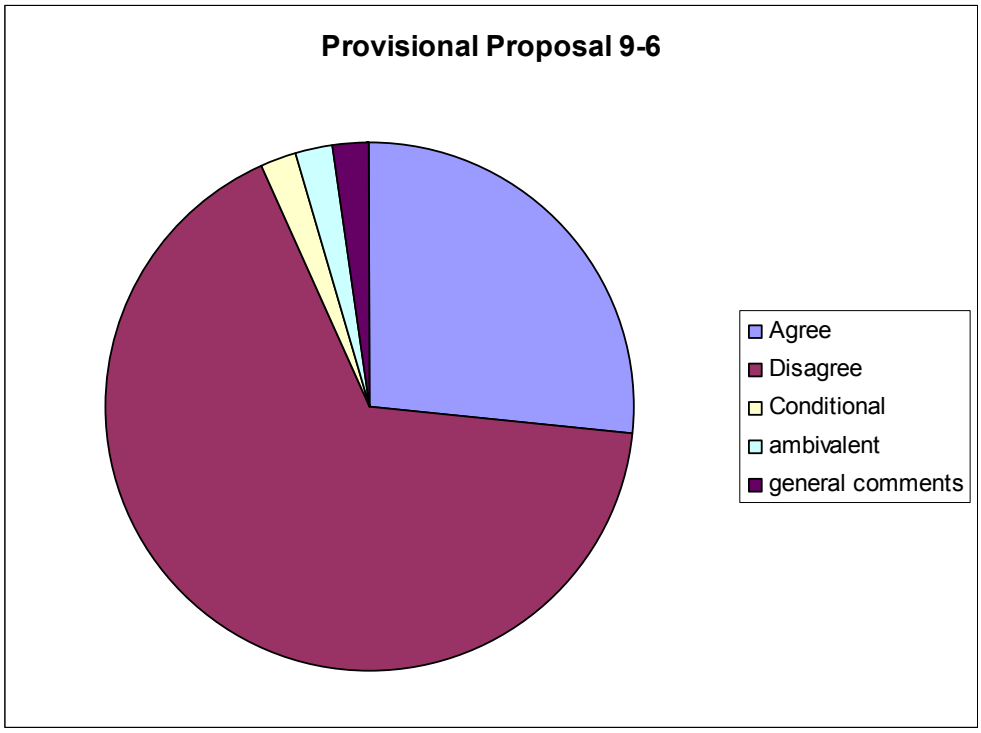
6.88 If the repeat consultation responses from campaigning are counted as one, we received 67 consultation responses concerning Provisional Proposal 9-5: 16 agreed; 41 disagreed; four were ambivalent; five provided general comments; and one was unclear.




6.89 As with Question 9-4, the majority of stakeholders, including DEFRA, disagreed with the proposed level of sanctions. However, around 15 non-campaigning responses that disagreed with the level of sanctions suggested, agreed in principle with harmonisation. As only around three stakeholders (the NFU, NFU Cymru and the SHG) explicitly opposed the proposal to harmonise sanctions, the result of consultation on this provisional proposal is that the majority of consultees agree with harmonisation of sanctions but disagree with the level of sanctions proposed.

**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.**

6.90 Forty-five consultation responses were received in relation to Provisional Proposal 9-6: 12 agreed; 30 disagreed; one was conditional; one was ambivalent; and one provided general comments.




6.91 Provisional Proposal 9-6 was overwhelmingly rejected by a range of different consultees, including wildlife protection organisations, regulators and a number of representatives of the shooting industry, landowners and gamekeepers (the Moorland Association, BASC, NGO, the Scottish Association for Country Sports, the Countryside Alliance, the Game and Wildlife Conservation Trust). DEFRA also disagreed with the provisional proposal.

6.92 The main reason for this response is that consultees found that there was no logical reason why poaching offences should have lower penalties than other wildlife crimes.

6.93 The RSPCA, for example, submitted that imposing a lower penalty for poaching:

> immediately implies that they are less serious offences. These offences often involve high levels of criminality and organisation and considerable animal welfare implications. This was by illustrated by evidence to the Environmental Audit Committee from the National Gamekeepers' Organisation.

6.94 DEFRA similarly submitted that:

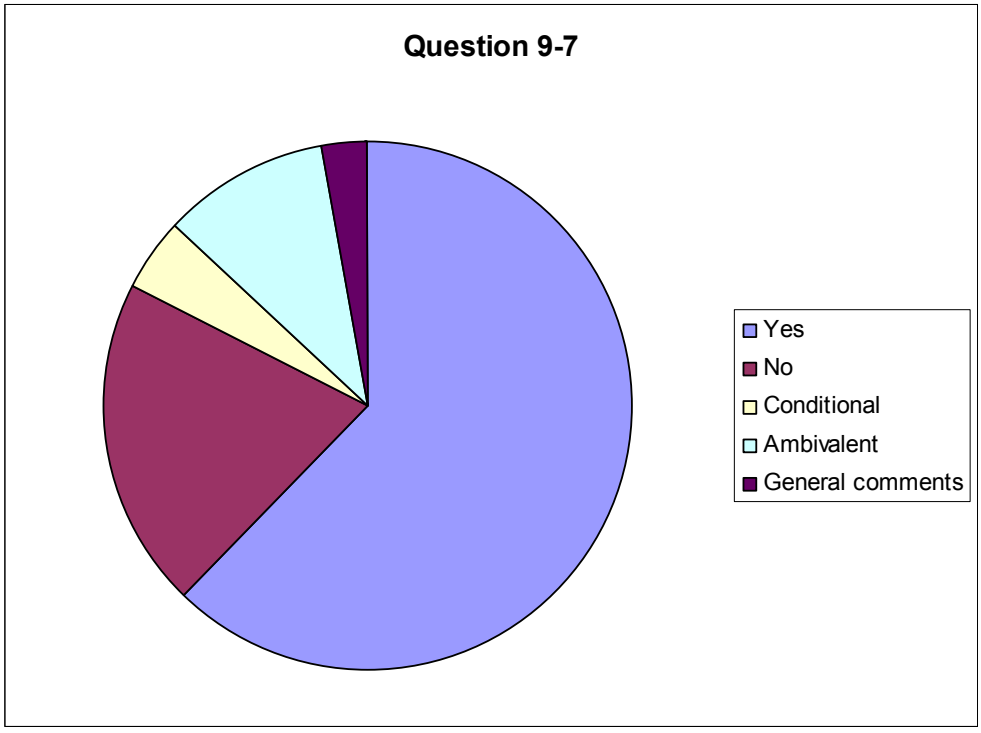
> consideration should be given to raising this so that it is line with the other offences. It is unclear why poaching offences are being proposed at a lower level. For fisheries this really depends on what is to be defined as poaching. If it is an offence against hunting, shooting or fishing rights then the proposed level 4 fine is out of step with the recently introduced level 5 fine for fishing without permission, which was increased because it was seen as an inadequate deterrent.

6.95 Nicholas Crampton compared the proposed sanctions with those provided in other European States:

Poaching may be seen as the equivalent of “hunting without a licence”. Thus, under the Italian Law on Hunting no. 157 of 11 February 1992 administrative sanctions (ie fines) are imposed for breaches of the hunting licence regime (Article 31), but hunting in the close seasons carries a heavier criminal penalty than killing protected species (Article 30(1)(a)). In Malta, hunting without a licence carries the heaviest penalty, (see Reg 27 Conservation of Wild Birds Regulations, Legal Notice 79 of 2006). In none of these jurisdictions is ”illegal hunting” seen as a proprietary offence but an offence against conservation, and is punished accordingly. Scotland does not follow the proposed pattern. Why should the English and Welsh part of the UK have the weakest anti-hunting laws in Europe?

**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?**

6.96 Sixty-nine consultation responses were received in relation to Question 9-7: 43 submitted that the provision should be retained; 14 disagreed; three responses were conditional; seven were ambivalent; and two provided general comments.




6.97 While a clear majority of consultation responses argued for retaining the provision, opinions were predictably split between conservation and animal welfare organisations on the one hand, and organisations representing the shooting community, landowners and gamekeepers. Natural England, the Countryside Council for Wales and the Wildfowl and Wetlands Trust submitted conditional responses, arguing that they would support the removal of the provision only if general penalties are increased. DEFRA only provided general comments, arguing that, in any event, “the fine should be capable of reflecting the gravity of the facts” and the key consideration should be the “seriousness of the offence with regard to favourable conservation status”.

6.98 The main argument in favour of retaining the provision was based on its alleged deterrent effect. A number of consultees conceded, however, that good guidance should be provided to judges on how to apply the principle in practice. The World Society for the Protection of Animals argued that:

> as the multiplication principle can have an important dissuasive effect, both for the particular offender and other potential offenders, and there may be cases where a simple multiplication is appropriate, we strongly suggest that it should remain. Guidelines can help courts determine how to pitch sentences in cases involving multiple offences committed on a single occasion. The consultation makes the point that the current approach can lead to anomalies in that it could place higher societal disapproval on the killing of a common species over the killing of the last breeding pair of a seriously endangered species. But the answer to this is to ensure that the sanctions regime is sufficiently robust to be dissuasive of the latter conduct, not to make it insufficiently robust to be dissuasive of the former conduct.

6.99 The Royal Society for the Protection of Birds added that in its experience the application of the principle has not led to any disproportionate fine in cases of offences with low conservation impacts. It argued that it is nevertheless a very helpful tool for the prosecution:

> On occasion, the defence has argued that the grouping of items, which are capable of being individual offences in their own right, is duplicitous. This has been countered by express reference to the sentencing powers within section 21(5) WCA which allows a court to impose a penalty in respect of each item.
>
> Being able to group birds or eggs into offences where the evidential issues are the same, or very similar, is extremely helpful rather than having to resort to a large number of individual offences. On some occasions several thousand birds' eggs have been included in a single charge. All items within a charge are also subject to mandatory forfeiture upon conviction.
>
> Without this provision prosecutors may feel forced to proceed with large numbers of individual offences rather than sensibly grouping like instances together. With a large number of instances this will not be administratively practicable and could result in the prosecution being restricted in what evidence can be placed before a court, and the court losing the ability to forfeit items obtained through criminal acts.

6.100 The National Farmers' Union and NFU Cymru agreed that the provision can be a useful tool that should nevertheless be used "at the discretion of the magistrates, taking into consideration the effect of the criminal act on the wider species".

6.101 Natural England, the Countryside Council for Wales and the Wildfowl and Wetlands Trust took an intermediate position. Natural England, for example, submitted that:

> It should also be noted that the multiple instances provisions are rarely (if ever) used because they are contrary to sentencing guidelines.
>
> Our approach (ie increasing maximum fines and dropping this provision) is simpler, fairer and more proportionate; it is also likely to prove a more effective deterrent.
>
> If, however, the level of sanctions is not significantly increased as we recommend then this provision should remain. To remove this provision without increasing the maximum level of the sanction would significantly weaken enforcement provisions, thereby potentially encouraging non-compliance.

6.102 Nicholas Crampton similarly noted that:

> The current WCA section 21(5) is a hang over from the days when all penalties under WCA were financial, and became largely otiose when sentences of imprisonment were added. It was not used in the implementation of the Habitats Directive. However, it is a clear indication that some wildlife offences should have a heavier maximum penalty. Their residual use for large companies prosecuted under WCA has not been effective, and the availability of unlimited fines in the Crown Court would be a far more effective tool for the judiciary to apply fairly in the case of companies or 'legal persons', tailoring the penalty to the offence seriousness, the degree of responsibility and the means to pay.

6.103 Other organisations who opposed the principle submitted that offences should be taken as a whole, and generally highlighted the potential for disproportionate and unfair fines. The National Gamekeepers' Organisation, for example, submitted that:

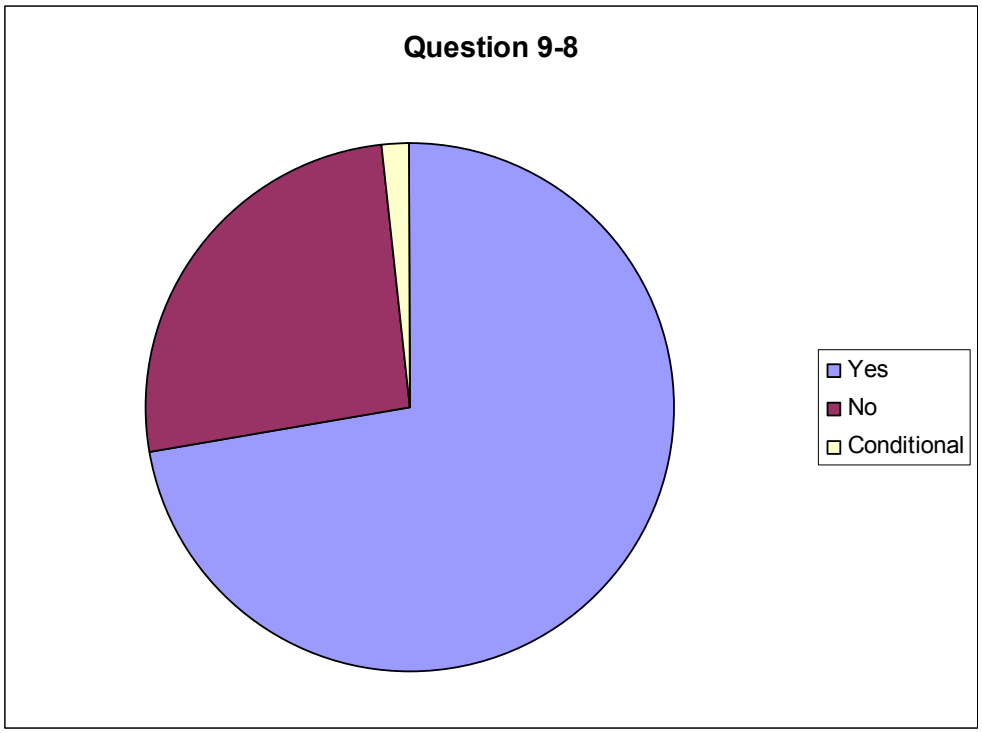
> If, for example, several birds of prey die as a result of the one incident, then the court can take that into account in sentencing but having a straight multiplier written into legislation could lead to injustices. Better to leave it to the courts to decide on the case in question.

6.104 The National Federation of Fishermen's Organisations pointed out that such an approach could be particularly disproportionate if applied to marine fisheries, where "a single act of violation may result in the loss of a number of individuals, and the numbers of losses would usually not be foreseen".

6.105 The Scottish Association for Country Sports added that "the offence lay in attempting to take wild birds and the absolute number of birds [a person] happened to take [in one day] would be down to simple chance". The Justice Clerks' Society also agreed that it would be "preferable for multiple instances to be treated as an aggravating factor instead".

**Question 9-8: Do consultees think that the provisions for such offences should be extended to cover all species?**

6.106 Sixty-one consultation responses were received in relation to Question 9-8: 44 agreed that the provisions mentioned in Question 9-7 should be extended to cover all species; 16 disagreed; one consultee provided a conditional response.




6.107 The consultation responses to Question 9-8 reflected the positions expressed by consultees in relation to Question 9-7.

**Conclusion**

6.108 A significant majority of consultees thought that the current sanctions in wildlife crime were insufficient. Consultees who proposed an increase in sanctions had three, interlinked, arguments against current levels. Firstly, consultees argued that they are insufficiently deterrent and can be easily internalised by offenders. The second argument that was advanced is that they are disproportionately lenient compared to similar environmental offences. Thirdly, consultees argued that they are in breach of the requirements of the Environmental Crime Directive.[6]

**CIVIL SANCTIONS**

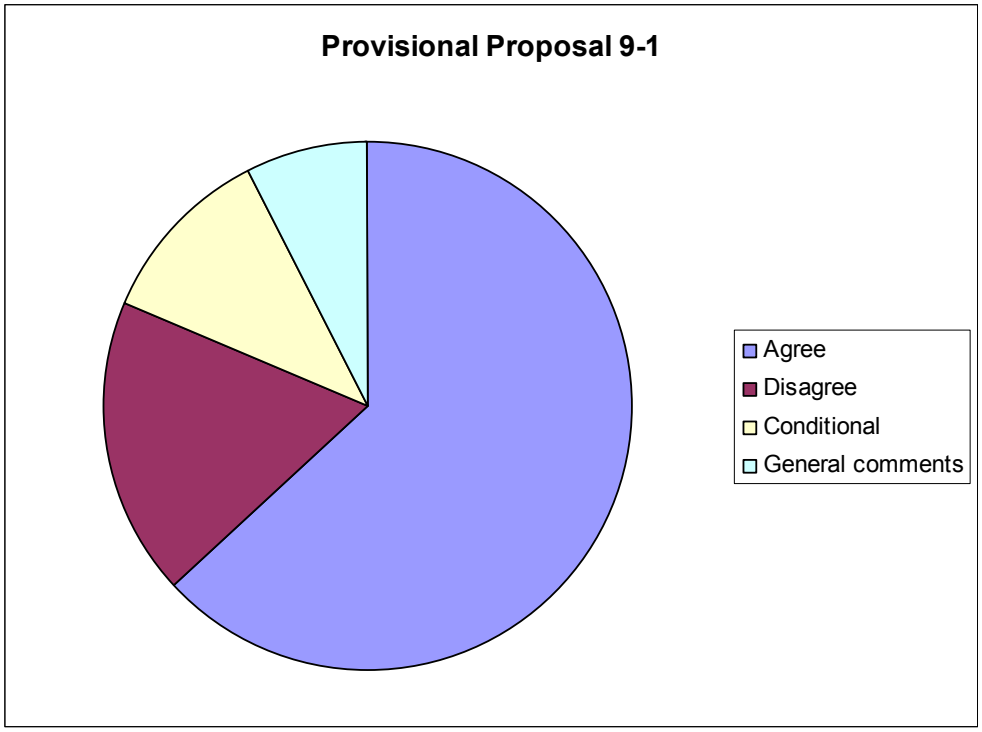
[6] Directive 2008/99/EC on the protection of the environment though criminal law OJ L 328 p 28 (6 December 2008).

**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.**

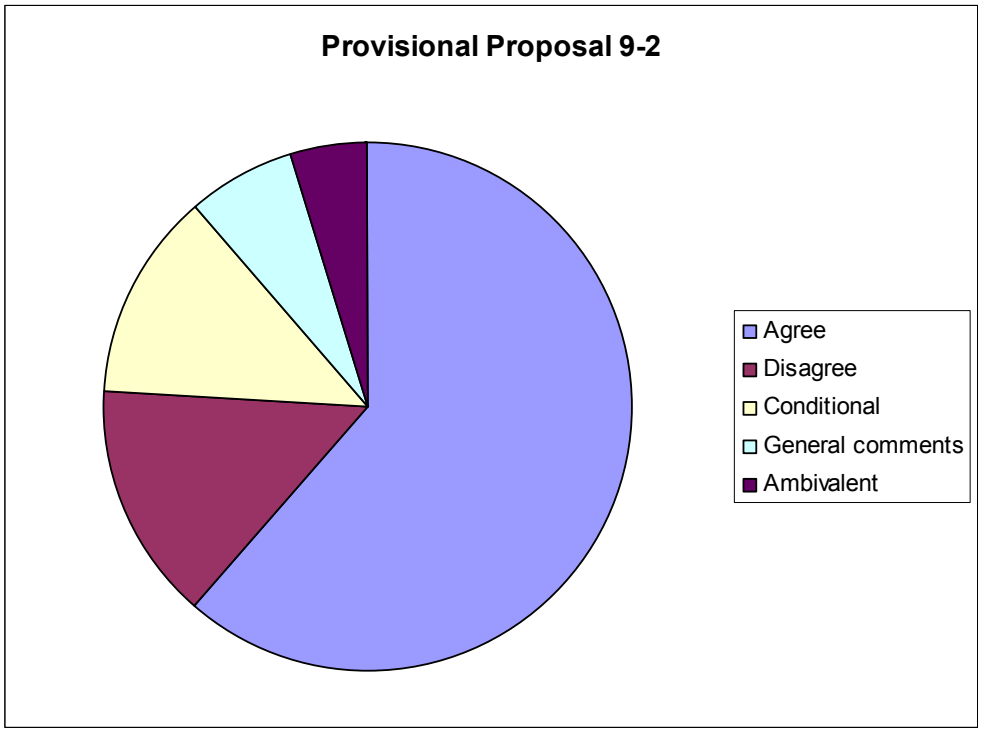
**Provisional Proposal 9-2: We provisionally propose that the full range of civil sanctions (so far as is practicable) should be available for the wildlife offences contained in the reforms set out in Chapters 5 to 8 of this Consultation Paper.**

6.109 We have taken the analysis of Provisional Proposals 9-1 and 9-2 together, as that is the way in which many consultees addressed the proposals.

6.110 Fifty-four consultation responses received concerning Provisional Proposal 9-1: 34 agreed; 10 disagreed; six were conditional; and four gave general comments.




6.111 Sixty-two consultation responses received concerning Provisional Proposal 9-2: 38 agreed; nine disagreed; eight were conditional; four made general comments; and three were ambivalent.




6.112 While Provisional Proposals 9-1 and 9-2 received general support from consultees, they were strongly opposed by certain wildlife protection and animal welfare organisations, including the RSPB, the RSPCA and the League Against Cruel Sports. On the other hand, the provisional proposals were generally supported by regulators and enforcement authorities (Natural England, the Countryside Council for Wales, the marine Management Organisation and the National Wildlife Crime Unit), DEFRA, representatives of the shooting community, farmers, gamekeepers and consultants as well as a number of other wildlife protection and animal welfare organisations.

6.113 Natural England fully supported the provisional proposals, arguing that the consultation paper failed to highlight the fact that civil sanctions perform better than criminal sanctions in delivering environmental outcomes:

> Criminal sanctions can usually only deliver a financial penalty, whereas civil sanctions such as stop and restoration notices can halt ongoing harm to wildlife and require the remediation of damage to a species' habitat.
>
> In December 2011 Natural England consulted on its application of civil sanctions to enforce breaches of species licences as well as offences within protected habitats. The concept of civil sanctions as alternatives to prosecution and the model outlined by part 3 of the RES Act 2008 received strong support including from those we regulate.

6.114 They also agreed that the full range of civil sanctions should be available as this would help to keep the law concise, simple and consistent. The details on the circumstances in which civil sanctions should be used should be left to guidance. They admitted, however, that they do not currently have the necessary resources to exercise enforcement functions in relation to all species offences:

> Currently our role in species enforcement is restricted to investigating and sanctioning breaches of species licences that we issue, of which there are approximately 70 cases every year. The Police deal with over 4000 species offences committed by those without a licence every year. As such we are not resourced to investigate all species offences and do not currently have plans to expand our investigative role into this area.
>
> The position may be different for sanctioning. If civil sanctions were to become available for all species offences we would consider whether we could apply civil sanctions to species offences in circumstances where they would be particularly beneficial. The Police would then have the choice of passing a file to the CPS where they felt prosecution was proportionate, or to us where they felt a civil sanction would be appropriate. Again, however this would be subject to a fairly significant increase in our resource capacity.

6.115 DEFRA argued that:

> the Regulatory Enforcement and Sanctions Act is not without problems but it's probably the best model and the proposed powers would at least align with the recent environmental civil sanctions for EA[7] and NE[8].

6.116 They added that:

> certain civil sanctions should be added to the suite of sanctions as the burden of proof required for criminal sanctions means that in most cases the law can be broken without any danger of prosecution.

6.117 Professor Macrory agreed with the provisional proposals and explained that even if civil sanctions are especially suitable for strict liability offences, such sanctions could also play a valuable role where an offence is committed intentionally or recklessly, for example in relation to first time offenders.

6.118 The National Farmers' Union and NFU Cymru expressed support for the introduction of civil sanctions, noting that:

> This gives regulators and Courts the breadth of tools they need to ensure a fairer and better approach to environmental enforcement. Civil sanctions will allow a fairer enforcement response to non-compliance by those who have committed an offence despite a good general approach to compliance – with the stigma of a criminal conviction being reserved for the worst case offenders.
>
> A more flexible toolkit eg fixed monetary penalties, enforcement notices, or enforcement undertakings would be beneficial in helping to unlock the stalemate that often exists in ensuring compliance in

[7] The Environment Agency.

[8] Natural England.

> certain pieces of legislation. A particular example is Pests Act 1954 and the control of rabbits.

6.119 The NFU and NFU Cymru submitted that Government should ensure that enforcement is consistent and that advice and guidance should remain the default response in the majority of cases. They further submitted that civil sanctions should only be imposed on a criminal standard of proof and only after:

> the regulator has issued a notice of intent to the offender which will include the grounds for proposing to impose the penalty; the detail of the penalty; how it should be paid and complied with etc. The recipient must then have a period of time in which to make written representations and objections to the regulator about the proposal to impose the penalty.

6.120 An appeal process should be also provided and penalties paid into a consolidated Government fund.

6.121 Nicholas Crampton, former prosecutor, criticised the proposal on the basis that regulatory agencies such as Natural England should not be granted a quasi-judicial role on top of their investigative role. In his view the Act:

> creates complicated bureaucratic mechanisms with an appeals structure that would have to be created at some significant expense. It would be exploited by large development companies, and not exclude the Courts as applications for Judicial Review would be possible at several stages in the procedures.

6.122 In other words, while civil sanctions are a useful tool, the proposed implementation model is incorrect.

6.123 Mr Crampton proposed that a better solution would be the application of Civil Orders, with sanctions available on application to the County Court, building on section 24 of the Environmental Protection Act 1990 which allows civil proceedings to be taken to the High Court. He suggested that an alternative would be section 120 of the Environmental Protection Act 1990, which gives criminal courts:

> in addition to or instead of imposing any punishment, order [a convicted defendant] within such time as may be fixed by the order to take such steps as may be specified in the order for remedying those matters.

6.124 Under this framework, regulatory agencies could be given the power to apply to the county court for orders which would be similar to the proposed sanctions: Financial Penalty Orders (FPO), Habitat Protection Orders (HPO), Species Protection Orders (SPO) and Environmental Stop Orders (ESO). Lastly, acknowledging that the range of civil sanctions could be effective in relation to development projects, he doubted whether civil sanctions would be the appropriate penalty for activities such as illegal hunting and shooting of protected species.

6.125 The National Wildlife Crime Unit disagreed with Mr Crampton's last argument, arguing that most, if not all, conservation legislation is "suitable at the lowest end of offending for disposal through civil sanctioning". At the same time, when the offence is serious and organised it should be considered straight away by the police and Crown Prosecution Service. Poaching and persecution offences, therefore, should be investigated by the police and subject to criminal sanctions.

6.126 The League Against Cruel Sports took the view that Natural England is not an appropriate body for imposing sanctions on the basis that it is not independent and not fit for the purpose of overseeing all wildlife crime: "currently the Board of Natural England consists mainly of farming and conservation interests and no board member has declared an animal welfare background or interest". Moreover, the Environmental Audit Committee's report on wildlife crime notes that "Natural England take a collaborative approach to wildlife crime which is at odds with the approach of the police, the Environment Agency and UK Border Force". It also noted that there is a "striking difference in the amount of enforcement action taken between Natural England and other regulatory bodies".

6.127 Interestingly, the Moorland Association, together with the Country Land and Business Association and the National Gamekeepers' Organisation, reached a similar position. They submitted that the power to impose civil sanctions could undermine their ability to work collaboratively with landowners and land managers to achieve favourable conservation. They said that Natural England has, in recent years, "regarded itself as a campaigning body, with a mission to achieve its view of a desired outcome". It was the view of consultees that such a role is inconsistent with a judicial or enforcement function.

6.128 The Wildfowl and Wetlands Trust supported the provisional proposals on the basis that they would introduce flexibility and ensure that sanctions will be proportionate to offences. Nevertheless, together with the RSPB, they also doubted the ability of Natural England to effectively implement the regime, on the basis that they do not have the necessary resources to apply, monitor and enforce civil sanctions outside of fairly limited areas. They also expressed concern over Natural England's use of language in this context, noting that the Environmental Audit Committee's report considered Natural England's choice of language unusual in describing as "customers" those who perpetrate environmental crime.

6.129 The RSPCA strongly opposed the introduction of a civil sanctions regime, arguing in particular that it would have the potential to create confusion between the respective responsibilities of different enforcement bodies. They noted that an attempt to provide some clarity over roles and responsibilities is provided by a Memorandum of Understanding (MoU) between Natural England, the Countryside Council for Wales, the Association of Chief Police Officers and the Crown Prosecution Service. The Association doubted, however, that this would be sufficient to provide clarity. They added that the Law Commission's Consultation Paper on Wildlife Law failed to appropriately assess the existing flexibility within the criminal sanctions regime, and that the introduction of civil sanctions could have the effect of creating an uneven playing field:

> A criminal sanctions route does not necessarily involve a rush straight to court. It could entail advice, an informal warning or an adult caution

> and therefore, within the "criminal sanctions" regime, there are a range of tools. If it goes to court then the magistrates have options - depending on circumstances etc - as to the nature of the penalty imposed […].
>
> The criminal sanctions route also enables immediate action to be taken in relation to, for example, finches that are found trapped. They can be seized and removed from the person and thus their welfare taken care of. This is not possible under the civil sanctions route. In criminal cases, there is the potential to recover [at least some] costs. That does not apply with civil sanctions. Our understanding is that some regulatory bodies don't like using FMPs because of the costs involved and the fact that these aren't recouped by the FMP […].
>
> Importantly, and from the perspective of fairness, there is potentially a risk of creating an uneven playing field regarding how an offence is dealt with. For example, if a report of someone illegally taking wild birds was reported to police/RSPCA then the criminal sanctions route is likely to be applied. [NB. The RSPCA cannot use civil sanctions.] If that same offence was reported to Natural England and they applied a civil sanctions regime then that could lead to the same offence having a very different outcome. This prospect was seen as a major problem by Natural England during consultation over the draft Environment Civil Sanctions Order.

6.130 The need for clarity and transparency in the use of civil sanctions and in the respective roles and responsibilities of regulatory and enforcement agencies was also highlighted by the Wildlife and Countryside LINK, the Woodland Trust, and the Bat Conservation Trust.

6.131 A number of consultees, including the RSPB, the RSPCA and Dr Angus Nurse, further challenged the appropriateness of civil sanctions in the context of wildlife and expressed concern that the introduction of such a regime could undermine the use of criminal sanctions. The RSPB, for example, argued that:

> This proposal will reduce the enforcement powers of the police and result in a default position of using civil sanctions instead of prosecution. We fail to see how such an outcome will benefit the protection and conservation of wildlife; instead we fear that the inappropriate use of these sanctions will have the opposite of the desired effect and make offenders far less fearful of the repercussions of committing criminal acts.

6.132 They further submitted that:

> whilst civil sanctions such as stop notices may be effective in dealing with operations that may be damaging to protected habitats, and in dealing with species offences which are the unfortunate by-product of negligent businesses operating without sufficient due diligence, they cannot be effective at dealing with species offences such as illegal killing or taking, use of prohibited methods and attempting to commit such offences […].

> We would be concerned that dealing with reported incidents in isolation by civil sanction could prevent a proper investigation into wider offending. Furthermore we believe there is a real danger of more serious offences being significantly downgraded. For example, the use of a cage trap baited with a live pigeon to take a rare species like a goshawk is a serious conservation offence. Without a proper assessment and criminal investigation we are concerned that such matters could simply be treated as a "breach of general licence" issue and subject to a civil minor financial penalty […].
>
> The suggestion is made that the expanded role of NE in the investigation of WCA Part 1 offences could be carried out by Wildlife Inspectors. However, Wildlife Inspectors are not trained to the same level as police officers in investigative techniques and this would be a concern if they were to be tasked with taking on what are often very complex cases which often necessitate the use of forensic techniques to obtain a level of evidence required to prove the offence. Nor do they have, for example, the powers of the arrest that the police have in order to question suspects to obtain evidence.

6.133 The RSPB also argued that the introduction of a civil sanctions regime could be inconsistent with the requirements of the Environmental Crime Directive.

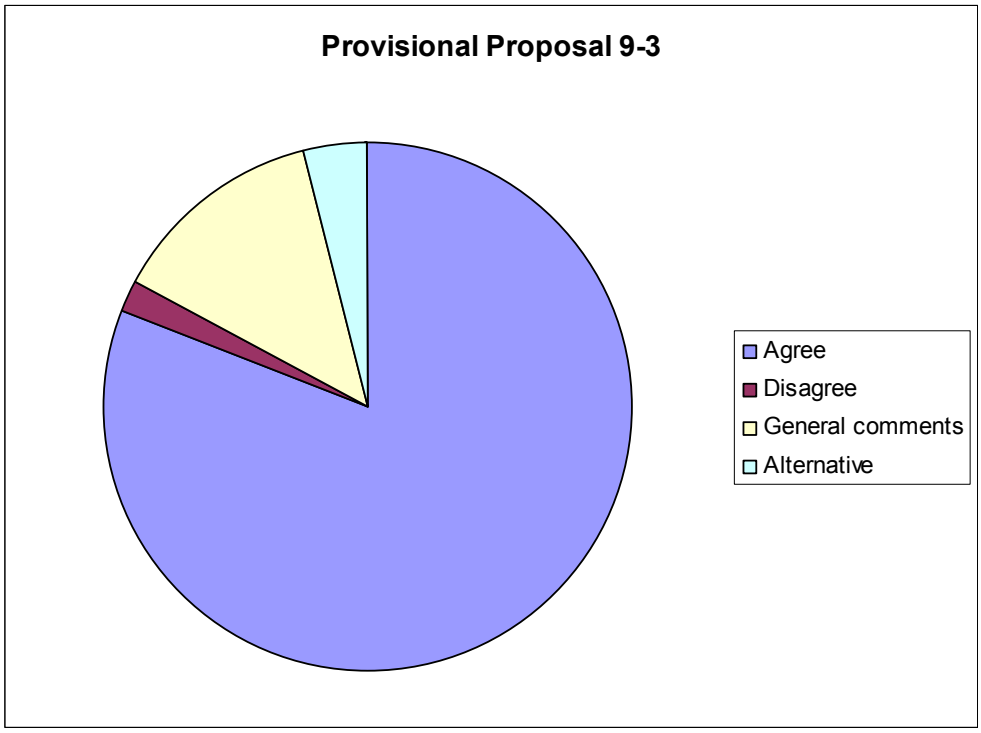
> Finally, whilst we appreciate that there may be circumstances where civil sanctions are appropriate, article 5 of the Environmental Crime Directive (2008/99/EC) requires Member States to "take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties." […] Thus, Member States must use effective, proportionate and dissuasive criminal penalties and cannot allow the application of civil sanctions to undermine the overall system of environmental protection.

6.134 Lastly, Professor Colin Reid highlighted the importance of publicity in relation to the consequences of the unlawful conduct:

> The impact of the offences may be visible and the public therefore needs there to be a visible response if they are to have confidence in the law and be reassured that it is worth reporting wrong-doing. Private undertakings may be wholly effective in practice, but miss out the important condemnatory element which must follow from the state having declared certain conduct to be unacceptable.

**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.**

6.135 Fifty-two consultation responses were received concerning Provisional Proposal 9-3: 42 agreed; one disagreed; seven made general comments; and two suggested alternative approaches.




6.136 Natural England supported the proposal, but argued that this could be achieved by simply amending existing guidance. They suggested that the changes should be reviewed by their enforcement stakeholders rather than being subjected to full consultation.

6.137 DEFRA noted that the guidance on civil sanctions powers issued by regulators should be subject to the approval of the Secretary of State as under the Regulatory Enforcement and Sanctions Act 2008.

6.138 The Institute for Ecology and Environmental Management submitted that local authorities should be included "in the process of issuing guidance and that a template or framework is needed to aid consistency of interpretation and implementation" and that "guidance needs to be flexible to allow for sanctions to be applied at the most appropriate level, for example, in some instances it will be necessary to apply the highest sanction available". The Badger Trust added that "guidance should take into account key differences between species' ecology and patterns of offences relating to them".

6.139 The Countryside Council for Wales and the National Wildlife Crime Unit pointed out that competent authorities should define their respective responsibilities very clearly in a published guidance or memorandum of understanding. The Marine Management Organisation queried whether they would be granted the same powers as Natural England or the competent authority in Wales.

**Conclusion**

6.140 In general, consultees favoured the creation of a comprehensive scheme for civil sanctions, accepting that our provisional proposals would form a useful enforcement mechanism within a balanced regulatory regime. However, there was some disagreement. Several consultees, including high-profile conservation and welfare organisations, opposed the adoption of civil sanctions. In particular, the RSPCA, RSPB and League Against Cruel Sports raised concerns which

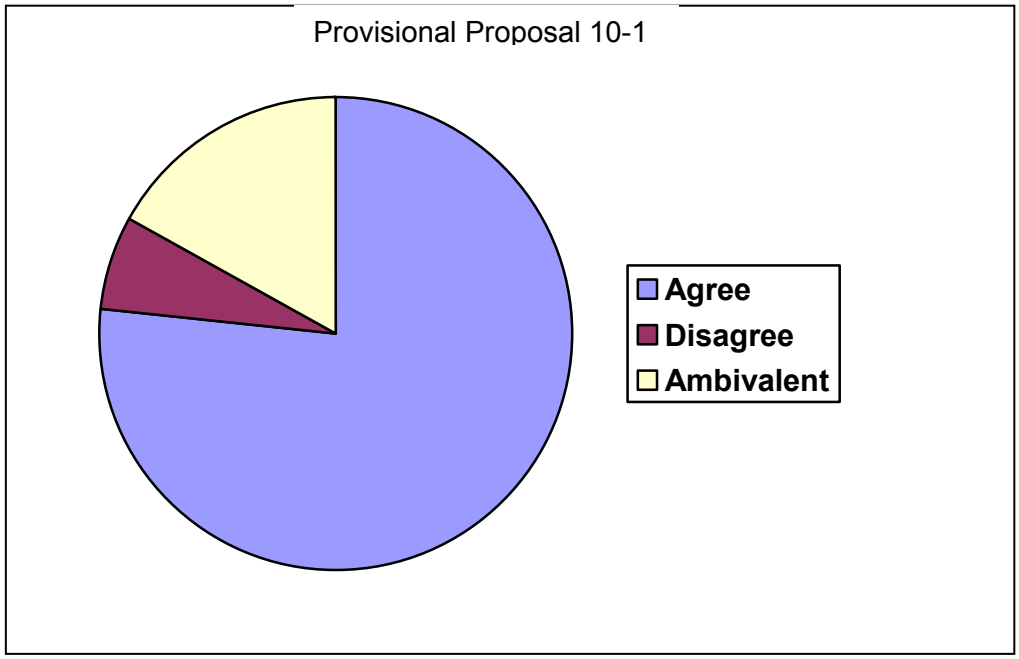
essentially equated the creation of a regime for civil sanctions with a lessening of sanctions, a reduction in the powers of police and the possibility of creating confusion between the regime for civil sanctions and criminal prosecution. Certain consultees opposed the use of civil sanctions, not because of a disagreement with the concept itself, but more due to a mistrust of the regulator that would potentially be imposing them: Natural England.

# CHAPTER 7
# APPEALS AND CHALLENGES

## APPEALS AGAINST PRESCRIPTIVE ORDERS AND CIVIL SANCTIONS

**Provisional Proposal 10-1: Do consultees agree that the appropriate appeals forum for appeals against orders and civil sanctions under our new regime is the First-tier Tribunal (Environment)?**

7.1 We received 47 consultation responses in relation to our provisional proposal: 36 consultees agreed with our provisional proposal; 3 disagreed; and 8 were undecided or offered an alternative such as the Ombudsman or a panel of experts.




7.2 Those opposed were principally worried about the lack of a track record for the First-tier Tribunal (Environment). For example, both the Union of Country Sports Workers and RSPB both noted that the First-tier Tribunal (Environment)'s suitability was currently untested. The Union of Country Sports Workers in particular argued that as the First-Tier Tribunal had not yet proved itself, it was difficult to "assess its effectiveness". However, after making a similar observation the RSPB acknowledged that:

> …in its favour are the composition of the Tribunal (comprising one judge and two lay members with some environmental background or knowledge), its relative inexpensiveness and the speed of the process. These characteristics would all help ensure compliance with Article 9(4) of the Aarhus Convention which requires that relevant review procedures should be 'fair, equitable, timely and not prohibitively expensive.'

7.3 This point was echoed by the Wildlife Trust, who were in support of the proposal, and stated that:

> Even though the First-tier Tribunal (Environment) is yet to hear a case, the intention to have lay members with some environmental knowledge is desirable. In addition, it is likely to be a less expensive option and a quicker process than pursuing Judicial Review.

7.4 A minority of consultees who expressed concern about the track record of the First-tier Tribunal (Environment) suggested alternatives. The Countryside Alliance suggested:

> Given that civil sanctions will be imposed for actions that would otherwise amount to criminal offences we take the view that the appropriate body to hear appeals would be the Magistrates Court. This would be a similar position to appeals against abatement notices and other statutory notices issued by local authorities and other government agencies for environmental offences at the moment.

7.5 The British Bird Council also suggested an alternative, but instead considered that appeals should go through an impartial and informed body such as the Ombudsman. The International Ornithological Association suggested that independent or experienced committees in the field would be the suitable forum for appeals.

7.6 Other consultees who disagreed or who expressed conditional support such as the Somerset Badger Group, discussed the importance of ensuring there is a "simplified and transparent appeals process, which results in quality justice". The Self Help Group for Farmers, Pet Owners and Others experiencing difficulties with the RSPCA (SHG) tended to agree with the proposal, but expressed reservations because of their concern that:

> if an appeal eventually makes its way right up to judicial review the requirement to move through each of the lower tribunals in step is going to make appeals even more costly.

7.7 The SHG also raised a question about the availability of legal aid, and observed that:

> not everyone is wealthy enough to employ specialist legal advisers or able enough to handle their own appeal, especially when technical legal argument becomes necessary.

7.8 A few consultees, such as Animal Aid and National Anti Snaring Campaign, expressed opposition to species control orders.

7.9 However, those consultees in the majority who were in support of the proposal stressed the benefits of the First-tier Tribunal (Environment)'s expertise and cost effectiveness. For example, the RSPCA pointed out the advantage that "the expertise that a combination of one or two judges and two lay members with environmental background or knowledge would bring". This was also echoed by the Wildfowl and Wetlands Trust who noted that the tribunal:

> offers an opportunity to develop and apply expertise in this area of environmental law as it comprises one judge and two lay members which have some environmental background or knowledge. The tribunal system is also relatively quick and inexpensive.

7.10 The increased cost effectiveness was also a point of approval for the Wildlife and Countryside Link.

7.11 In addition, the Bar Council and National Farmers Union observed that as civil sanctions appeals under the Regulatory Enforcement and Sanctions Act 2008 go to the First‑tier Tribunal (Environment), it is "sensible" that the same happens in this context.

7.12 Some consultees, such as Professor Richard Macrory, considered that our proposals ought to go further. Professor Macrory suggested that the grounds of appeal for potential appeals should be wider than those required by part 3 of the Regulatory Enforcement and Sanctions Act 2008. He argued that:

> An appeal to the Tribunal should be extended to any ground and not confined to an error of law or fact (this extension has been made in the initial regulations in the environment field).

7.13 Professor Macrory also added that:

> In any appeal the burden of proof of the offence should be on the regulator rather than the appellant (again this was inserted in the initial regulations). The regulator should have all the evidence and be able to prove their case, and it is unfair for the appellant to have the burden place on him or her. The exception would be where the appellant raises a particular defence where in the equivalent criminal proceedings the burden would have shifted to them.

**Conclusion**

7.14 Although a range of concerns about the suitability of the First-Tier Tribunal (Environment) were raised by consultees, a significant majority supported the provisional proposal.

## APPEALS/CHALLENGES AGAINST WILDLIFE LICENCES

**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)?**

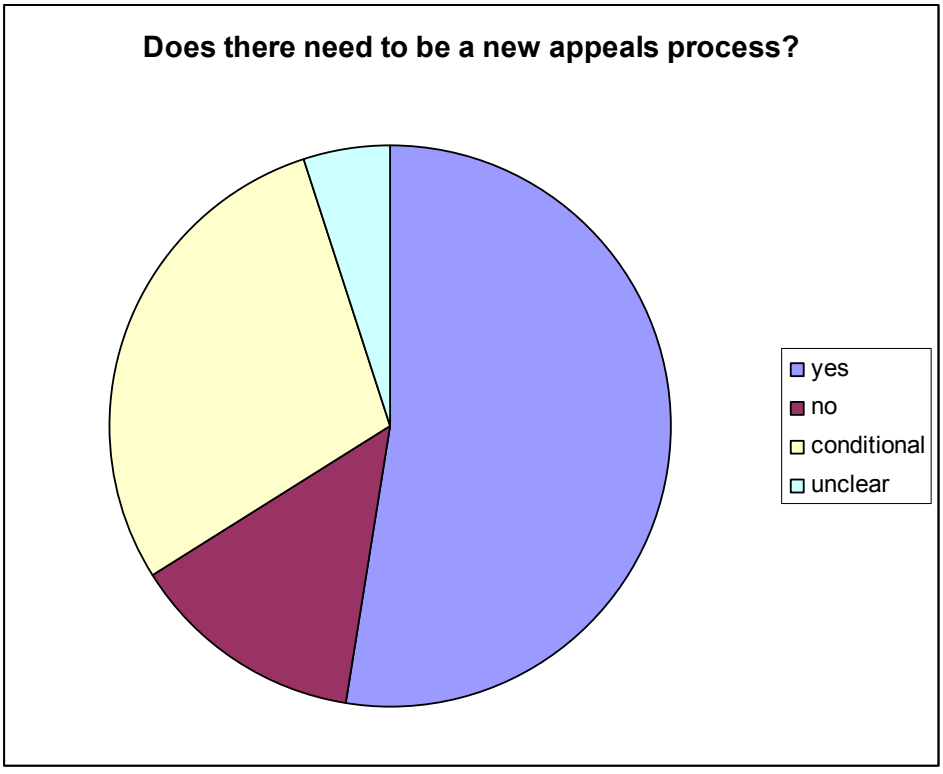
**Question 10-4: Do consultees think that the appeal process should be available for all types of wildlife licence (general, class and individual)?**

**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)?**

7.15 In consultation responses a clear preference was expressed for a new appeals process. However, there was no consensus as to who could use it. In general, those representing land or development interests favoured "applicant only" appeals and environmental non-governmental organisations favoured a wider approach. DEFRA was resistant to the wide approach; Natural England's response accepted it as probably inevitable if an appeal mechanism is created.

### *Question 10-2: Unnecessary to create a new appeals process*

7.16 We received 49 consultation responses on whether the current regime, which relies solely on judicial review, is sufficient: 31 consultees thought that it was not sufficient; eight thought it was; 17 gave conditional responses; and three responses were unclear.



7.17 The majority of consultees, including Sir Jeremy Sullivan (Senior President of Tribunals), were in support of a new appeals process. Many consultees who were dissatisfied with the current regime pointed out the flaws in the judicial review procedure.

7.18 For example, a large number of consultees criticised the high cost of bringing a judicial review claim. Consultees also criticised the delays common to bringing a judicial review claim. Christopher Jessel also pointed out that judicial review involves the "daunting prospect of a double application (to obtain leave and then conduct the case)". He also noted that judicial review has strict time limits. These issues were echoed in the National Gamekeepers Organisation's response:

> We are aware of several highly questionable licensing decisions made under the Wildlife and Countryside Act recently and the only way to address these at present is via the very expensive and not directly appropriate process of Judicial Review.

7.19 This Wildlife Trust observed that:

> Whilst Natural England very infrequently refuse outright licence applications, replying on Judicial Review to challenge a decision is both time-consuming and, for some, prohibitively expensive so an alternative process should be developed. However, a more transparent decision making process may reduce even further the number of cases where appeals are required.

7.20 Furthermore, the Institute for Ecology and Environmental Management submitted that judicial review is

> too expensive and onerous for most people and/or organisations if this is the only option for appeal…IEEM strongly believes that any significant erosion of the existing appeals structure and availability could potentially be detrimental to nature conservation

7.21 Some consultees expressed conditional support for the creation of a new appeals process. Many of these consultees pointed out that few licences were actually refused in fact. The Countryside Council for Wales submitted that:

> very few licenses are refused and very few cases in which licensing conditions are considered unreasonable or irrelevant by applicants and in case of development projects, issues of compliance with Article 16 of the Habitats Directive are generally considered before.

7.22 This position was echoed by the RSPCA, who thought that is not needed. The RSPCA added that a new appeals system could potentially lead to a "legalistic approach to licensing".

7.23 Amongst consultees there was also some disagreement as to whether the current regime was compliant with Article 9 of the Aarhus Convention. Some consultees who were not strongly in favour of a new appeals process on the merits thought that it was nonetheless necessary in order to meet obligations imposed by Article 9. For example, the Countryside Council for Wales considered that the establishment of a new appeals procedure was "inevitable" given the requirements flowing from Article 9.

7.24 On the other hand other consultees, including the Bar Council, thought that judicial review currently satisfied the requirements of Article 9 of the Aarhus Convention. The Bar Council considered that "what Article 9 requires is access to a Court (or similar Tribunal) for the purposes of judicial review of a decision under Article 6". However, the Wildlife and Countryside Link, whilst arguing that the current regime was sufficient, considered that Article 6 of the European Convention on Human Rights may require the introduction of an appeal. There was inconsistency in the interpretation of international obligations, and the implication of these obligations for the current regime.

7.25 The minority of consultees thought that the current regime was sufficient. Notably, Natural England pointed out that there was no evidence that the current regime was failing. This was also a point made by Amphibian and Reptile Conservation Trust, and suggested by the Wildlife and Countryside Link. Natural England further considered that:

> The key risk is that an appeals process will add bureaucracy and cost to the decision process, but may deliver very little real benefit to people who wish to dispute a licence decision. The licensing authority will need to be adequately resourced to cope with the anticipated increase in workload.

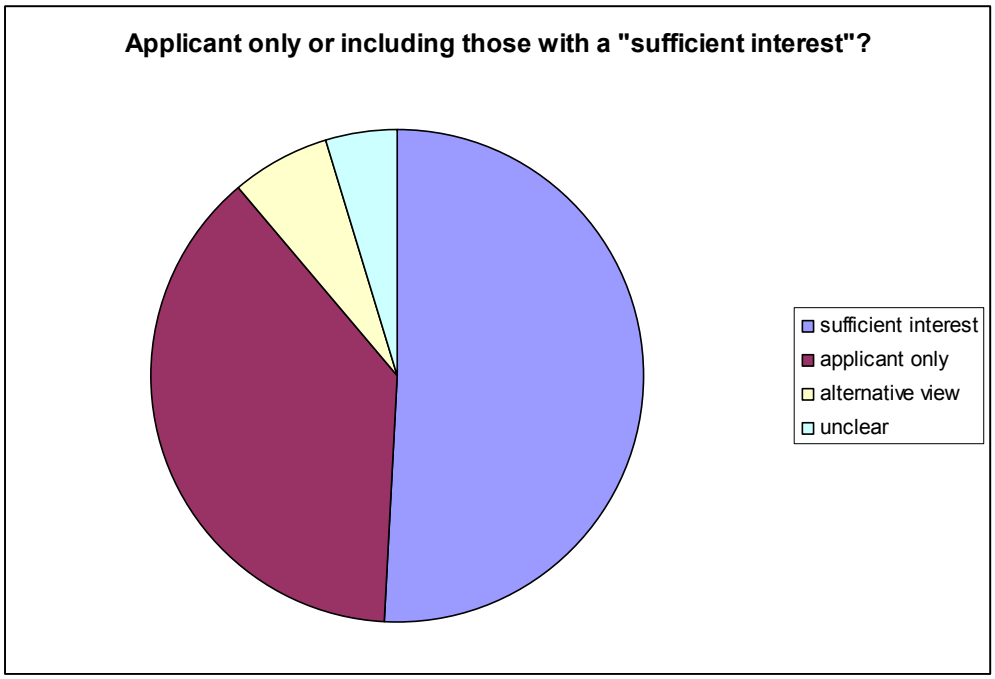
7.26 Both Natural England and Scottish Natural Heritage related that a right of appeal for species licences was considered when the Wildlife & Natural Environment Bill was at its Committee Stage in the Scottish Parliament in 2010. A submission to the Committee pointed out that a licence permits an act that had otherwise been deemed by Parliament to be illegal, and that therefore it should be considered to be an "exception" and not a "right". Scottish Natural Heritage added that:

> A new appeals process would also lead to a more adversarial licensing system and compromise the existing cooperative approach between applicant and regulator to agree suitable conditions and mitigation measures.

7.27 This concern was reflected in other consultees' concerns which commonly related to the risk of increased cost. DEFRA also questioned whether the benefits of allowing applicants to appeal outweighed the costs to taxpayers and the appellants, with the potential slowing down of license decisions.

***Question 10-3: Whether a new appeal process should be applicant only (option 2) or include those with a "sufficient interest" (option 3)***

7.28 Sixty-three consultees responded on the potential identity of those able to use any new appeals mechanism: 32 consultees favoured wider access, so as to extend to those with a sufficient interest, with two of these responses being conditional on other reforms. Twenty-four consultees favoured a more restrictive approach, such that the appeals process would only be open to the original applicants, of which one response was conditional. Four consultees put forward alternative approaches and three were unclear. Consultees ultimately supported opening an appeals process to those with sufficient interest.




7.29 The relative minority of consultees who were in favour of option 2, that a new appeal process should be applicant only, largely advanced three strands of argument.

7.30 Firstly, consultees considered that the appeal process should be analogous with the planning appeal system. DEFRA argued that option 3 would be inconsistent with other forms of appeal systems, such as planning appeals, marine licensing appeals and environmental permitting appeals. This was echoed by the Country Land & Business Association who stated that the same rationale behind the planning system should apply in this context.

7.31 Secondly, that enabling those with a "sufficient interest" would risk spurious appeals that clog the system. This was a common criticism of option 3 made by consultees who were in support of option 2. DEFRA expressed the concern that:

> Opening (the appeals process) up to interested parties will open it up to abuse, result in unnecessary delays and burdens on regulators.

This concern was echoed by stakeholders such as the Countryside Alliance, who stated that:

> option 3 would enable political pressure groups to create unnecessary litigation in straightforward cases as a tactic towards the ultimate aim of preventing the killing of wild animals under any circumstances.

The National Farmers Union also added that:

> Given the vastly differing opinions between conservation and wildlife management groups the appeals system could inadvertently become a platform for the debate of competing conservation issues and the appeals process for licensing decisions is not the appropriate forum for this.

7.32 Thirdly, it was argued that judicial review is already sufficient because it enables those with a sufficient interest to challenge a licence, and satisfies the requirements of the Aarhus Convention. DEFRA submitted that:

> Judicial Review would enable persons with a "sufficient interest" to challenge licensing decisions on the basis of their compliance with the Wild Birds or Habitats Directives. There doesn't need to be an additional appeals system to enable this.

This was also a common point made by consultees who were in favour of option 2. For example, Countryside Alliance argued that:

> In the event that a licence is granted on grounds that are illegal, irrational or procedurally improper then such groups already have the opportunity to take judicial review. The recent badger licensing decisions show that groups with sufficient interest are willing and able to take the judicial review route. We do not think that the appeals process should be bogged down in the sort of cases that would be brought if outside parties could appeal licensing decisions.

7.33 With regard to judicial review process' conformity with the requirements to the Aarhus Convention, DEFRA submitted that:

> In terms of the arguments relating to the Aarhus Convention as regards third party appeals, the requirements in article 9(3) relate to the ability to challenge acts or omissions "which contravene provisions of its national law relating to the environment". As indicated in the paper, the UK's position is that the availability of judicial review enables compliance with this provision.

7.34 The Bar Council shared this interpretation of the obligations of the Aarhus Convention and added that the introduction of an appeal process for those with a "sufficient interest" would

> be an important precedent. Thus Government would need to consider third party appeals more generally in environment and planning and consider the impacts, including both the extra resources required to determine these and the slowing down of development.

7.35 The relative majority of consultees in favour of option 3, an appeals process for those with a sufficient interest, commonly interpreted the obligations of the Aarhus Convention through the case law of the Court of Justice of the European Union, and put forward a different conclusion as to its requirements. Consultees, such as the Law Society (Planning and environmental law committee) and the Wildlife Trust, argued that the Aarhus Convention required an appeals process to be open to third parties with a sufficient interest. This was a core argument made by consultees in favour of option 3. For example, RSPCA submitted that:

> In the light of the Court of Justice rulings arising from the Aarhus Convention principles, it is untenable to suggest an appeals process only available to one category of person is either appropriate or compliant with EU and international obligations.

7.36 Similarly, the International Fund for Animal Welfare suggested that:

> This would be in line with giving the fullest effect to Article 9(3) of the Aarhus Convention and the rulings of the Court of Justice of the European Union (CJEU) in Case C-240/09 *Lesoochranarske zoskupenie VLK v Ministerstvo Zivotneho prostredia slovenskej republiky*.

7.37 The Wildlife and Countryside Link provided a detailed analysis of the content of the international obligations:

> In Communication ACCC/C/2005/11, the Compliance Committee found that if Belgium did not relax its approach to standing (it had effectively blocked most, if not all, environmental organizations from access to justice with respect to town planning permits and area plans, as provided for in the Walloon region) it would fail to comply with article 9, paragraphs 2 to 4, of the Convention. The Compliance Committee similarly concluded, after examining Cases T-91/07 *WWF-UK Ltd v Council* and C-355/08 *WWF-UK Ltd v. Council*, that if the CJEU did not relax its approach to standing it would also be in noncompliance with Article 9(2) of the Convention41. There are many more examples of noncompliance with Article 9(2) of the Convention which have been examined by the Compliance Committee and which are resulting in widespread improvements to standing across the UNECE. It would therefore be perverse for the UK, at this time, to introduce such an appeal but adopt a restrictive approach to who could bring it.

7.38 It was also argued that Non-governmental Organisations who may bring a 'sufficient interest' appeal have expertise that applicants may not.

7.39 A number of consultees also reiterated that the First-tier Tribunal was a fast and cost efficient way of appealing. Consultees also drew attention to the fact that there is currently not a backlog of cases at the First-tier Tribunal. The RSPCA also argued that if there is a delay:

> this is an inevitable aspect of a system based on natural justice, which is outweighed by the public interest in having an objective appeals process.

7.40 Consultees in favour of option 3 were also in support of preventing vexatious or unmeritorious claims. It was argued, for example by the Badger Trust and the Wildlife Trust, that this could be prevented. The latter submitted that:

> the grounds for appeal need to be clearly articulated and/or a process similar to that within the Judicial Review process of initial determination could be adopted.

7.41 It was commonly put forward in responses that an initial determination or permission process would be an effective means of preventing vexatious or unmeritorious claims. The Wildlife and Countryside Link responded that:

> If this really is a genuine concern, and we wonder whether there is any evidence to show that there would be a significant number of cases, we suggest that it may be appropriate to consider introducing a form of permission 'filter', as is the case in Judicial Review. This would weed out any appeals which were deemed to be frivolous, vexatious or with poor prospects of success. The possibility of doing this in relation to statutory appeals (also to address the possibility of an increased number of unmeritorious cases being brought) was suggested in the Update Report of the Working Group on Access to Environmental Justice.

7.42 Some consultees expressed conditional support for option 3. Notably, the Marine Management Organisation (MMO) stated that if certain kinds of licences were open to public interest challenge, this could be undesirable. The MMO submitted that

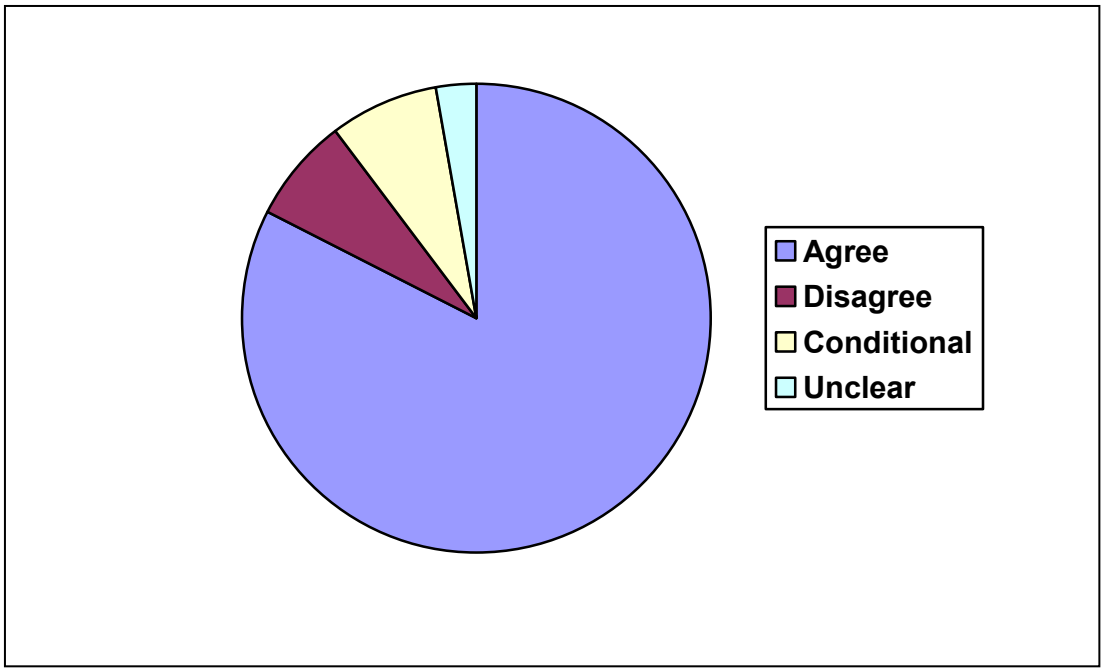
> For example, if the proposals are accepted, and in effect the only way in which the fishing industry could legally control seals was by licence (either class or individual), the issuing of any such licence(s) could likely be challenged by the public in all cases. For such an emotive subject, it would seem appropriate that such appeals can through a dedicated appeals process and go to tribunal. From the MMOs perspective, and assuming that the proposals for removal of the current 'netsmans defence' resulting in seals only being able to be killed under licence, it is likely that there will be many applications received, and therefore appealed against by the public, which would result in an increase work load.

7.43 In addition, a small number of consultees suggested alternative options. For example, Professor Richard Macrory argued that:

> there is a case for allowing another statutory consultee whose advice or recommendations have been ignored or overruled by the first decision maker to have a statutory right of merits appeal.

**Question 10-4: Do consultees think that the appeal process should be available for all types of wildlife licence (general, class and individual)?**

7.44 Overall, 57 consultees responded: 45 stated that all types of licence should be amenable to the appeals process; five suggested that the appeals process should not cover all types of licence; five consultees gave conditional responses; and two responses were unclear.




7.45 Clearly this question must be considered in light of question 10-3 (whether the appeals process should only be open to applicants or also be open to third parties). If an appeals system is only open to applicants it is difficult to see how a general license could be challenged through the appeals system.

7.46 There was an overwhelming majority in favour of the appeal process being available for all types of wildlife licence. The main arguments of the majority were twofold. Firstly, it was pointed out that all licences could affect the public interest in some way. Secondly, consultees also argued that there was no logic in differentiating between the kinds of licences. The RSPCA in particular submitted that:

> it would not be desirable to exclude class and general licences from the appeals process, such that the only route to challenge them was judicial review. As noted above, judicial review does not allow the same grounds for challenge as a statutory appeal mechanism could. The Court does not involve itself in a detailed consideration of factual scientific evidence…(that) may be required in this area.

7.47 Some consultees, such as Natural England and the Institute of Ecology and Environmental Management, who were in support of the appeal process being available for all types of wildlife licence, reiterated the importance of a screening process to prevent spurious appeals. The Game and Wildlife Conservation Trust also suggested that there be a time limit for appeals.

7.48 Consultees who expressed conditional support for the appeal process being generally available argued that in practice it would serve no purpose in relation to general licences unless enforcement mechanisms are improved. For example, it was argued by Animal Aid that:

> General licences must be amended, so that they can be properly regulated and enforced. Without rigorous enforcement there would be no reason for an appeal system.

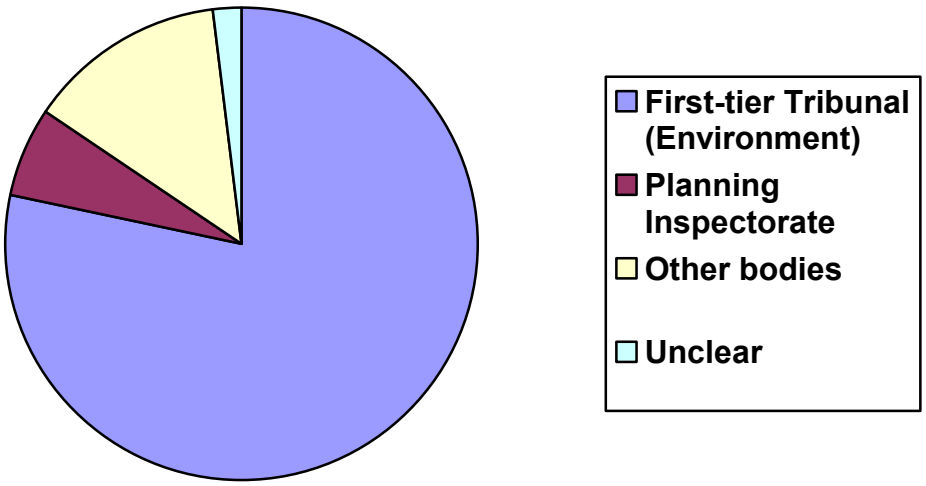
7.49 The minority felt that the appeal process should not cover all types of licences. DEFRA argued that the only people who would have an interest in appealing a class or general licence would be someone with a "sufficient interest" but no interest in carrying out an activity authorised by a licence. And DEFRA answered in relation to question 10-3 that the right to appeal should be limited to the applicants for a licence, so it would follow that the appeal body should be limited to considering individual licences. Similarly, Sir Jeremy Sullivan argued in relation to question 10-3 that the right to appeal should be limited to the applicant for a licence, so this should mean that the appeals body cannot consider general or class licences.

7.50 The International Fund for Animal Welfare responded on the basis of their wider argument in relation to question 5-14 that there should not be general or class licences. On this view, the appeal body would clearly be limited to considering individual licences.

7.51 The Scottish Association for Country Sports were of the view that general licences should not be capable of being appealed, but that class licences should be. They argued that the first tier tribunal is the most appropriate forum for appealing class licences at the first instance. A less litigious and costly form of appeal than judicial review is called for because of the wide range of individuals who will have a legitimate interest in an appeal of a class licence and the considerable variance in the conditions of class licences. However, they considered that challenges to general licences are likely to be rare and will be brought only by animal rights groups, who are capable of using judicial review for this purpose. Challenges to general licences are likely to be highly contentious because they are reflective of government policy. It is appropriate that such challenges are subjected to the "full court process" of judicial review.

**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)?**

7.52 Overall, 51 consultees responded: 40 stated that appeals should go to the First-tier Tribunal (Environment); three suggested the Planning Inspectorate; seven consultees either suggested another body or did not suggest a specific body; and one response was unclear.




7.53 A significant majority of consultees considered that the First-tier Tribunal (Environment) would be the most appropriate body to consider appeals concerning wildlife licences. It was argued that the Tribunal would provide expertise on both legal and wildlife matters, as its panel includes a judge and two lay members with an environmental background. By contrast, it was suggested that the Planning Inspectorate's expertise in relation to wildlife is limited to matters touching on planning related activities.

7.54 Furthermore, it was suggested that the Tribunal provides a relatively inexpensive and quick appeal mechanism. It was considered by consultees such as the Royal Society for the Protection of Birds that these characteristics would help to ensure compliance with article 9(4) of the Aarhus Convention which requires that the relevant review procedure should be "fair, equitable, timely and not prohibitively expensive". Consultees such as the Moorland Association argued that the Planning Inspectorate's procedure, by comparison, is more burdensome and subject to greater delays than the Tribunal.

7.55 Another reason suggested for favouring the Tribunal over the Planning Inspectorate is that it provides a greater degree of independence. The Badger Trust argued that:

> it is often alleged that a planning department or official is biased in favour of a development and has little concern for wildlife issues. However, were appeals to be heard by an independent body such as the First-tier Tribunal (Environment) then openness and transparency should be more likely, with an appeal to the Upper Tribunal where there was a serious failing in justice.

7.56 Lastly, Natural England argued that it would be simpler to use the Tribunal as it will have jurisdiction to consider appeals on civil sanctions.

7.57 The National Farmers' Union CYMRU were in favour of the Tribunal being used for appeals, but argued that it should be introduced in Wales to ensure consistency.

7.58 The consultees who favoured the Planning Inspectorate being used as the appeal body argued that the Planning Inspectorate has extensive experience of appeal decisions with a wildlife element, whereas the Tribunal is a relatively new body that lacks experience.

7.59 Some consultees responses did not identify a particular body as being the most appropriate. Richard Graves Consultants, for example, preferred to express their preference in general terms:

> it would be most appropriate to use the forum with the most expertise in this area available and which is able to determine the appeal in the shortest timescale.

7.60 And the International Ornithological Association suggested that "appeals should be heard by independent bodies with sufficient expertise in the subject matter".

7.61 Lastly, Countryside Alliance suggested that the most appropriate body would be the Magistrates Court sitting in its civil jurisdiction. It was considered in response to question 10-1 that the Magistrates Court would be the most appropriate body for considering appeals on civil sanctions and species control orders and it should also have responsibility for considering appeals on licences.

**Conclusion**

7.62 A clear preference was expressed for a new appeals process. However, there was no consensus as to who should be able to use it and what types of licence should be amendable to appeal. In general, those representing land or development interests favoured "applicant only" appeals and for the scope to be limited to individual licences, whereas environmental non-governmental organisations favoured a wider approach. DEFRA was resistant to the wide approach; Natural England's response accepted it as probably inevitable if an appeal mechanism is created. The majority of consultees suggested that the First-tier Tribunal (Environment) would be a more appropriate appeal body than the Planning Inspectorate.