

SUMMARY – WILDLIFE LAW

- 1.1 This summary is the companion piece to our Consultation Paper on wildlife law,¹ and is composed of five sections. First, we address the issue of what we mean by wildlife law. Second, we set out the scope of the project. The third section outlines the pertinent EU legislation. The fourth section sets out the key features of our reform. Finally, we include a complete list of the provisional proposals and consultation questions contained in our Consultation Paper.
- 1.2 The wildlife law project was proposed by the Department for Environment, Food and Rural Affairs. When a project is taken on by the Law Commission, as this has been, the work of the Commission is independent of the Government.
- 1.3 This paper summarises our full consultation paper, which is available at: <http://lawcommission.justice.gov.uk/consultations/wildlife.htm>

WHAT IS WILDLIFE LAW?

- 1.4 Historically, wildlife has been treated by the law as an economic or a leisure resource, or as something to be controlled, rather than something worthy of protection in its own right. Until the twentieth century, wildlife law in England and Wales focused primarily on the creation and protection of rights over wildlife associated with land. So, for example, the Game Acts of the nineteenth century sought to protect the economic interests of landowners in wildlife exploitation.²
- 1.5 Given its origins and subsequent development, there is no homogenous purpose or theme to wildlife law. It has varying, and sometimes conflicting, aims and roles. We suggest, though, that four principal strands have emerged over time.
- 1.6 First, wildlife law provides the framework within which wildlife can be controlled, so that it does not interfere unduly with the conduct of human activity, such as development. Second, the law allows for the exploitation of wildlife as a valuable natural asset. Third, the law seeks to conserve wildlife as part of our common natural heritage. Finally, the law protects individual animals from harm above a permitted level (animal welfare).

SCOPE

- 1.7 Our project encompasses consideration of the species-specific provisions allowing for the conservation, control, protection and exploitation of wildlife present within England and Wales. It covers the species-specific protection afforded to wild birds and other animals under part 1 of the Wildlife and Countryside Act 1981; the species protection provisions of the Conservation of Habitats and Species Regulations 2010;³ and Acts covering individual and limited

¹ Wildlife Law (2012) Law Commission Consultation Paper No 206.

² Night Poaching Act 1828; Game Act 1831; Game Licences Act 1860; Ground Game Act 1880.

³ SI 2010 No 490.

groups of species.⁴

1.8 The project takes a broad approach to wildlife. This is partly because one of the principal pieces of legislation, the Wildlife and Countryside Act 1981, deals with both plants and animals. Our project includes consideration of wild animals, plants and fungi.

1.9 There are four particular limitations to the project:

- (1) The legislative provisions on habitats are excluded from the project:
- (2) The levels of protection afforded to particular species are to remain as now;
- (3) The Hunting Act 2004 is outside the scope of the project; and
- (4) The consideration of legislative schemes is limited to territorial waters.

EU OBLIGATIONS

1.10 The environment has been a specific EU competence since 1987;⁵ consequently the EU can make specific legislation, such as Directives, on environmental matters.

1.11 There are two Directives that are of particular importance to our project: the Wild Birds Directive and the Habitats Directive.⁶ Directives such as these create legal obligations requiring member states to undertake particular action and achieve defined outcomes. For example, Article 12 of the Habitats Directive requires that member states “establish a system of strict protection” for certain listed species.⁷ Failure to undertake action required by a directive can lead to an “infringement” case before the Court of Justice in Luxembourg. The EU position means, therefore, that there are constraints on how we can proceed in certain areas of our project.

OUR PROVISIONALLY PROPOSED NEW REGIME

1.12 This section is further divided into four subsections:

- (1) general provisions;
- (2) invasive non-native species;
- (3) sanctions and compliance; and
- (4) appeals.

⁴ Such as the Conservation of Seals Act 1970 and the Protection of Badgers Act 1992.

⁵ A “competence” is a subject matter on which the EU can make legislation, such as relating to the internal market or consumer protection.

⁶ Directives 2009/147/EC and 92/43/EEC.

⁷ The term “transposing” is used when implementing a requirement of an EU Directive in domestic legislation.

General provisions

Single statute

- 1.13 First, we provisionally propose that there should be a single statute which covers the species-specific law on the conservation, protection and exploitation of wildlife. Many of the problems with the legal regime arise because the governing provisions are strewn across various enactments. This makes it difficult for individuals to discover the exact legislative regime that applies to a particular species, or even to know where to find it.
- 1.14 A single statute for wildlife management would have definite benefits. It would allow for increased consistency (where different terms have been used to mean the same thing in different statutes). It would also provide a comprehensive statute for those interested in wildlife law, rather than having to trawl through existing legislation.
- 1.15 We do not think that the new regime needs to include the wildlife welfare provisions contained in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996. We think to include those provisions would add to confusion and separate unnecessarily the welfare regime for all animals into wild and domesticated.

Statutory factors

- 1.16 One criticism of our current domestic law is the potential lack of transparency, and this can lead some to think that priority is given to a particular interest. We suggest that the introduction of statutory factors could play a role in ensuring transparent decision-making and thereby improve the engagement of those representing competing interests. Statutory factors would show specific factors that need to be considered, and in many cases balanced, in coming to a particular decision.
- 1.17 We suggest that the following factors would be appropriate for the legislative regime we are proposing:
- (1) conservation of the species about which the decision is concerned;
 - (2) preservation and conservation of biodiversity;
 - (3) economic implications;
 - (4) wider social factors; and
 - (5) the welfare of those animals potentially affected by the decision.

Basic approach

- 1.18 One of the principal requirements in both the Wild Birds and Habitats Directive is that member states establish protective regimes for particular species. The protective regimes are to prohibit certain activity, such as the taking or killing of a protected species. The features of such protective regimes vary between species, according to the Directives' provisions.

- 1.19 On this basis, we suggest that the regulation of individual species continue to be organised on a species by species basis. Therefore, the regime applicable to a species would be dependent on the particular species (or groups of species, such as “wild birds”).⁸ This is the current underlying approach and we do not suggest changing it.

Full range of regulatory techniques

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

Reckless commission

- 1.21 The protective regimes for individual species are currently contained in criminal law. Many of the provisions, such as most in the Wildlife and Countryside Act 1981, require a specific intention to injure or kill the particular animal. So, for example, it is a criminal offence to intentionally kill a wild bird.⁹
- 1.22 However, there are occasions where an individual who is aware of the possibility of potentially adverse consequences arising from their actions but proceeds with the actions in any event commits a criminal offence. In such a situation, the individual is considered to be reckless. As an example, it is an offence to intentionally or recklessly disturb a Red Kite whilst it is building a nest.¹⁰
- 1.23 There are three elements of an offence where the possibility of recklessness being included in the definition of the crime can occur: conduct; consequence and circumstance. To use a wildlife example, the conduct would be shooting a gun or setting a trap. The consequence would be killing or taking a bird, and the circumstances would be whether the bird taken or killed was protected, or not.
- 1.24 Under the present law, a person needs to deliberately use the weapon, or set the trap. In other words, the conduct must be intended.
- 1.25 Currently, the intention to kill or take a bird is required by law. If, however, the offence included an individual’s recklessness as to the consequence of their actions, then the killing or taking a bird would be an offence if a person deliberately chopping a tree for firewood was aware of the possibility that a bird might be killed by his or her doing so, but chopped down the tree regardless.
- 1.26 With regard to circumstances, the law may require that knowledge is needed. In other words, that an individual needs to know that the species in question is protected. Alternatively, it may be sufficient that the defendant was reckless as to whether the species was protected or not.

⁸ Wild birds are defined in EU law as those individual birds that belong to a species that occurs naturally in the EU, and which are not captive bred.

⁹ Wildlife and Countryside Act 1981, s 1(1)(a).

¹⁰ Wildlife and Countryside Act 1981, s 1(5)(a) and schedule 1..

- 1.27 Recent case law of the Court of Justice has examined the meaning of the term “deliberate” within the Habitats Directive. Given the judgments, deliberately in the Habitats Directive includes recklessly. The transposition into domestic law of “deliberate” should reflect this. Therefore, it should be an offence to intentionally or recklessly kill a dormouse.¹¹
- 1.28 The same term, “deliberate”, is used in the prohibitions required by the Wild Birds Directive, and the Court of Justice has tended to treat terms within the Directives similarly.
- 1.29 Consequently, we provisionally propose that the term “deliberate” in the Wild Birds Directive should also be transposed into domestic law as prohibiting both intentional and reckless behaviour.
- 1.30 In relation to species not covered by either of those Directives, we ask more open questions as to whether reckless activity should be prohibited.

Hunting of certain wild bird species

- 1.31 The current regime is confusing and outmoded. Currently birds can be hunted under the Game Acts, schedules to the Wildlife and Countryside Act 1981 and general licences.
- 1.32 The Wild Birds Directive contains specific provision allowing for hunting to be permitted for particular species listed in Article 7. It requires that permitted hunting must not “jeopardise conservation efforts”. Member states must ensure that the practice of hunting “complies with the principles of wise use and ecologically balanced control of the species of birds concerned”. Further, any practice must be compatible with the species’ populations.
- 1.33 Hunting permitted under Article 7 cannot take place “during the rearing season or during the various stages of reproduction”.¹² Therefore, hunting would need to have close seasons.
- 1.34 We think that the regime contained in Article 7 is a simpler and more preferable way of structuring permitted hunting in England and Wales. It also directly transposes the requirements of the Wild Birds Directive. We, therefore, provisionally propose its adoption.

Licensing “judicious use”

- 1.35 Currently we do not fully transpose the reasons for which activity can be allowed under the Wild Birds Directive. The current regime does not allow for a licence to be granted allowing “judicious use in small numbers”. We suggest, in line with our general approach of using the full scope of the Directives relevant to our project, that the term is used as one of the possible reasons for which a wildlife licence could be granted.

¹¹ Conservation of Habitats and Species Regulations 2010, SI 2010 No 490, regs 40, 40(1)(a) and schedule 2.

¹² Directive 2009/147/EC, art 7(1) and 7(4).

Poaching

- 1.36 The current law on poaching dates back to the eighteenth century and is unduly complicated. We suggest that the offence needs to be modernised. The new offence we provisionally propose would not focus on a requirement for trespass which is a requirement of the existing law but on having acted in a manner beyond that allowed by the owner or occupier of the land on which the wildlife was situated.

Invasive non-native species

- 1.37 Invasive non-native species are “species whose introduction and/or spread threaten biological diversity or have other unforeseen impacts”.¹³ A species may become regarded as an “invasive non-native species” when it is introduced outside its natural range as a result of human intervention (whether deliberately or accidentally) and then considered a problem which needs to be addressed.
- 1.38 The annual cost of invasive non-native species to the economy is estimated at £1.3 billion to England and £125 million to Wales.
- 1.39 The current regime in England and Wales is primarily contained in the Wildlife and Countryside Act 1981. We do not think that the current regime is sufficient, given the importance of the issue and the fact that problems associated with it are increasing. In particular, there are not sufficient tools available to ensure that current policy can be delivered.
- 1.40 However, there is likely to be an EU Directive in the near future, although its precise timing is uncertain, which will most likely contain requirements as to the structure of the regulatory regime required of member states. On that basis, we think that it is inappropriate to explore extensive reform of the current approach, given that this may have to change to match that contained in any future Directive.
- 1.41 The position in respect of the regulatory tools available is different. Here, we can see benefits in updating the current regime to allow for the implementation of current and future policy choices.
- 1.42 Consequently, we propose adopting some of the powers based on recent reforms in Scotland with the Wildlife and Natural Environment (Scotland) Act 2011. These include :
- (1) The power to “emergency list” a species (for up to one year) so as to facilitate the rapid response to emerging threats;
 - (2) The power to make orders requiring a defined group of people (a person or type of person) to notify invasive non-native species where they are aware or become aware of the presence of invasive non-native species;

¹³ Department for Environment, Food and Rural Affairs, *The Invasive Non-Native Species Framework Strategy for Great Britain* (2008) para 3.3.

- (3) The power to make “Species Control Orders”, which can require those subject to the order to do something, such as destroy species present on their land.¹⁴ Such orders would also permit a person to enter onto land (without the need for permission from those in occupation or ownership) in order to carry out operations (including destruction) required by the order.

Sanctions and compliance

1.43 An effective regulatory system has two principal elements. The first sets out desired outcomes. In wildlife law, this normally means protecting species at a particular conservation level and ensuring the welfare of species. The second element seeks to ensure the delivery of those outcomes – ensuring compliance.¹⁵

1.44 We propose reforms to the second element, which fall into three categories:

- (1) Civil sanctions;
- (2) Harmonisation of criminal sanctions; and
- (3) “Vicarious” liability;

Civil sanctions

1.45 Civil sanctions are imposed by a regulator and administered through the civil justice system. The law, contained in the Regulatory Enforcement and Sanctions Act 2008, allows for the creation of a regime whereby regulators can issue the following civil sanctions:

- (1) Fixed monetary penalties.
- (2) Discretionary requirements. Here a regulator may require the payment of a monetary penalty, impose a requirement to take such steps as a regulator may specify, or impose a requirement to restore the position to what it would have been if the offence had not been committed.
- (3) Stop notices. The provisions for stop notices allow a regulator to prohibit an individual from carrying on an activity specified in the notice until the individual has taken certain steps specified in the notice.
- (4) Enforcement undertakings. These allow the regulator to accept an undertaking from an individual to take such action as specified in the undertaking. The effect of an undertaking is to protect the individual from conviction of the relevant offence.

¹⁴ Wildlife and Countryside Act 1981, s 14K(3).

¹⁵ N Gunningham, “Enforcing Environmental Regulation” (2011) 23 *Journal of Environmental Law* 169, 170.

- 1.46 We think that the current regime for civil sanctions is neither transparent nor consistent. Under the current law, fixed monetary notices and environmental undertakings are not available for the species provisions in the Wildlife and Countryside Act. Civil sanctions are not available at all for species offences under the Conservation of Habitats and Species Regulations 2010,¹⁶ including breach of a licence condition. The full range of civil sanctions is not available for offences under the Protection of Badgers Act 1992 or the Deer Act 1991.
- 1.47 We think that the full range of civil sanctions should be available for the wildlife offences contained in our new regulatory regime. This would allow for the development of a flexible and coherent enforcement strategy which was not solely (or even primarily) reliant on criminal sanctions.

Harmonisation of criminal sanctions

- 1.48 We think that there are inconsistencies in the current level of sanctions that it would be sensible to address, such as inconsistencies in the maximum sentences available for similar offences.
- 1.49 We suggest that the general offences for wildlife (such as that under section 1(1)(a) of the Wildlife and Countryside Act of killing a “wild bird”), and excluding those for invasive non-native species and poaching, should have their sanctions harmonised at 6 months or £5000 (or both) on summary conviction.
- 1.50 We suggest that the poaching offences for wildlife should have their sanctions harmonised at four months or £2500 (or both) on summary conviction.

Vicarious liability

- 1.51 This concerns the creation of a possible “vicarious liability” offence, as exists in Scotland by way of section 24 of the Wildlife and Natural Environment (Scotland) Act 2011. Under such an offence, the employer or person having control of another is liable to the same extent as their employee or person under their control for the commission of wildlife offences. The regime would have in-built defences, so those having the equivalent of a safe system of work would not become liable for the unsanctioned activity of one in their employ or under their control.
- 1.52 We can see three key advantages to this approach. First, it fits with the sort of economic regulatory approach that we are considering. Second, it seeks to ensure the responsibility of those who directed the regulatory transgressions or could have prevented them. Third, it fits with the regulatory regime for areas such as health and safety.
- 1.53 However, it is also a considerable step from the current regulation of wildlife and could impose significant burdens on business, as well as considerably increase anxiety. It will, therefore, be contentious. Unfortunately, it is too soon to see what effect the change in the law in Scotland has had, or will have.
- 1.54 Consequently, we ask an open question as to the desirability of having such an offence in England and Wales.

¹⁶ The exception here is the issue of a warning letter, which does not need a special power.

Appeals

- 1.55 The final topic to be considered is whether there should be new provisions for appeals against decisions made by regulatory bodies. In the context of wildlife law, there are three potential types of appeal:
- (1) Against a decision granting (or not granting) a wildlife licence, or the conditions contained in a wildlife licence.
 - (2) Against an order made by a regulator which requires an individual or company to do something. For example, a species control order in relation to invasive non-native species.
 - (3) Against a civil sanction imposed on an individual or company for breaching the requirements of our provisionally proposed regulatory regime.
- 1.56 In relation to the last, each of the civil sanctions contained in part 3 to the Regulatory Enforcement and Sanctions Act 2008 require an appropriate appeals mechanism for challenging decisions of the regulator. This is on the basis that it was wrong in law, unreasonable or based on an error of fact. Such appeals can only be made to the First-tier Tribunal or another tribunal created under an enactment. Consequently, we suggest that appeals against civil sanctions go to the existing First-tier Tribunal (Environment).
- 1.57 We think that the First-tier Tribunal (Environment) would also be the appropriate place to hear appeals against the imposition of Species Control Orders.
- 1.58 More contentious are appeals against a decision granting (or not granting) a wildlife licence, or the conditions contained in a wildlife licence. Currently, there is no appeals process, only judicial review. Similar areas of law, such as planning, only allow the applicant to appeal, and challenge by way of judicial review by third parties.
- 1.59 This is an area where there is a developing body of EU law in relation to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The Aarhus Convention requires that contracting states allow access to courts or tribunals in certain circumstances to members of the public with a “sufficient interest” in the decision being appealed.
- 1.60 Given the nature of the area, we put forward three options for appeals or challenge and ask consultees to give their opinions on the desirability of each. The three options that we put forward are as follows:
- (1) That judicial review is sufficient to meet our international obligations and internal drivers for an appeal process – such as developers’ desire to challenge wildlife licensing decisions.
 - (2) That there is an appeal process only for applicants.
 - (3) That there is the option of a more general appeals system, which includes the public, where they have a “sufficient interest”.

PROVISIONAL PROPOSALS AND QUESTIONS

- 1.61 The list below sets out our provisional views for consultation. They are divided between provisional proposals where the Law Commission has a preliminary view and is seeking views on it and open questions where we are seeking more evidence and have not reached a preliminary position.
- 1.62 It would be helpful if you could give us your views on the provisional proposals and questions that we ask as well as on other areas that you feel are important.
- 1.63 We have also published a consultation impact assessment, which outlines some of the monetised and non-monetised costs and benefits of the reforms we are provisionally proposing.¹⁷ It would be helpful if you could also give us your views on that, including any information on costs and benefits that you have.

List of provisional proposals and consultation questions

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

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

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

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

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

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

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

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

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

¹⁷ The impact assessment is available on our website at:
<http://lawcommission.justice.gov.uk/consultations/wildlife.htm>.

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

Provisional Proposal 5-10: We provisionally propose that where the Secretary of State decides not to follow advice made by a regulator (such as Natural England) on updating a list there should be a duty on the Secretary of State to explain why the advice is not being followed.

Provisional Proposal 5-11: We provisionally propose that five years should be maintained as the maximum period between reviews of the listing of species within the regulatory regime.

Provisional Proposal 5-12: We provisionally propose that the regulatory regime should have a general power allowing close seasons to be placed on any animal, and to allow for the amendment of close seasons by order.

Question 5-13: Do consultees think that the appropriate regulatory technique for the management of listed species is to prohibit certain activity, permit certain exceptions, provide specified defences and allow for the licensing of prohibited activity?

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

Provisional Proposal 5-15: We provisionally propose that the maximum length of a licence provision permitting the killing of member of a species, including licensing a particular method, should be standardised at two years for all species that require licensing.

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

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

Provisional Proposal 6-1: We provisionally propose that the definition for “wild bird” in Article 1 of the Wild Birds Directive (birds of a species naturally occurring in the wild state in the European territory of EU member states) be adopted in transposing the Directive’s requirements.

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

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

Question 6-4: Do consultees think that the exclusion of captive bred birds in EU law is best transposed by solely transposing the provisions of the Wild Birds Directive, or by express reference to the exclusion?

Provisional Proposal 6-5: We provisionally propose using the term “intentionally or recklessly” to transpose the term “deliberately” in the Wild Birds and Habitats Directives.

Question 6-6: Do consultees think that badgers protected under the Protection of Badgers Act 1992 or those protected currently by section 9(1) of the Wildlife and Countryside Act 1981 (from damage, destruction or the obstruction of access to a shelter or place of protection, or the disturbance of an animal whilst using such a shelter or place of protection) should be protected from intentional and reckless behaviour?

Question 6-7: Do consultees think that the term “disturbance” does not need to be defined or qualified within the provisionally proposed legal regime, when transposing the requirements of the Wild Birds and Habitats Directives?

Provisional Proposal 6-8: We provisionally propose that the disturbance provisions contained in sections 1(1)(aa), 1(1)(b), 1(5), 9(4) and 9(4A) of the Wildlife and Countryside Act 1981, regulation 41(1)(b) of the Conservation of Habitats and Species Regulations 2010 and section 3(1) of the Protection of Badgers Act 1992 can be brought together and simplified.

Question 6-9: Do consultees think that the badger would be adequately protected from disturbance, and its sett protected if covered only by the disturbance provision?

Question 6-10: Do consultees think that the protection afforded European Protected Species (except the pool frog and the lesser whirlpool ram’s horn snail) under section 9(4)(c) of the Wildlife and Countryside Act 1981 does not amount to “gold-plating” the requirements of the Habitats Directive?

Provisional Proposal 6-11: We provisionally propose the removal of the defence of action being the “incidental result of a lawful operation and could not reasonably have been avoided” located currently in section 4(2)(c) of the Wildlife and Countryside Act 1981.

Provisional Proposal 6-12: We provisionally propose that there should be a general defence of acting in pursuance of an order for the destruction of wildlife for the control of an infection other than rabies, made under either section 21 or entry onto land for that purpose under section 22 of the Animal Health Act 1981.

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

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

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

Provisional Proposal 6-16: We provisionally propose that breach of the codes of practice would mean that the defendant would have to show how they had complied with “wise use”, otherwise the underlying offence of taking or killing a wild bird would have been committed.

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

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

Question 6 -19: Do consultees think that it is not necessary to require the reporting of all members of a species taken or killed as a matter of law for our provisionally proposed regime?

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

- (1) All domestically protected species not protected as a matter of EU law should be protected from being intentionally and recklessly taken, killed or injured.
- (2) Badgers and seals should be protected from being intentionally and recklessly killed, taken and injured; all other domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured. It would be possible subsequently to move species between the two groups by order.
- (3) All domestically protected species not protected as a matter of EU law should be protected from being intentionally taken, killed or injured.

Question 7-2: Do consultees think that the offences of selling certain wild animals, plants and fish, should include the offences of offering for sale, exposing for sale, and advertising to the public?

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

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

Question 7-5: Do consultees think that the offence of poaching should require proof of acting without the landowner's consent in relation to the animal rather than proof of trespass?

Provisional Proposal 7-6: We provisionally propose that a reformed offence of “poaching” should be defined by reference to whether the person was searching for or in pursuit of specified species of animals present on another’s land, with the intention of taking, killing or injuring them, without the landowner or occupier’s consent, or lawful excuse, to do so.

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

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

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

Provisional Proposal 7-10: We provisionally propose that both individuals and classes of persons be able to benefit from a badger licence.

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

Question 7 -12: Do consultees think that, as under the present law, a person charged with digging for badgers should have to prove, on the balance of probabilities, that he or she was not digging for badgers?

Provisional Proposal 8-1: We provisionally propose that there is a sufficient case for the reform of the regulatory and enforcement tools available for the delivery of Government policy.

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

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

Provisional Proposal 8-4: We provisionally propose that the Secretary of State and Welsh Ministers should be able to issue an order requiring specified individuals (whether by type of person or individual identity) to notify the competent authority of the presence of specified invasive non-native species.

Provisional Proposal 8-5: We provisionally propose that there should be a defence of "reasonable excuse" for failing to comply with the requirement.

Provisional Proposal 8-6: We provisionally propose that the full range of licences can be issued for activity prohibited in our scheme for invasive non-native species.

Provisional Proposal 8-7: We provisionally propose that the power to make species control orders on the same model as under the Wildlife and Natural Environment (Scotland) Act 2011 should be adopted by our new legal regime.

Provisional Proposal 9-1: We provisionally propose that part 3 of the Regulatory Enforcement and Sanctions Act 2008 should be used as the model for a new regime of civil sanctions for wildlife law.

Provisional Proposal 9-2: We provisionally propose that the full range of civil sanctions (so far as is practicable) should be available for the wildlife offences contained in the reforms set out in Chapters 5 to 8 of this Consultation Paper.

Provisional Proposal 9-3: We provisionally propose that the relevant regulator, currently Natural England and the relevant body in Wales (either the Countryside Council for Wales or the proposed new single Welsh Environmental Agency), issues guidance as to how they will use their civil sanctions.

Question 9 -4: Do consultees think that that the current sanctions for wildlife crime are sufficient?

Provisional Proposal 9-5: We provisionally propose that offences for wildlife, excluding those for invasive non-native species and poaching, should have their sanctions harmonised at 6 months or a level 5 fine (or both) on summary conviction.

Provisional Proposal 9-6: We provisionally propose that the poaching offences for wildlife should have their sanctions harmonised at four months or a level 4 fine (or both) on summary conviction.

Question 9-7: Do consultees think that the provisions that mean that the fine for a single offence should be multiplied by the number of instances of that offence (such as killing a number of individual birds) should be kept?

Question 9-8: Do consultees think that the provisions for such offences should be extended to cover all species?

Question 9-9: Do consultees think that there should be a wildlife offence extending liability to a principal, such that an employer or someone exercising control over an individual could be liable to the same extent as the individual committing the underlying wildlife offence?

Provisional Proposal 10-1: We provisionally propose that the appropriate appeals forum for appeals against Species Control Orders and civil sanctions under our new regime is the First-tier Tribunal (Environment)?

Question 10-2: Do consultees think that it is necessary 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)?