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Commission**  
Reforming the law

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## **Wildlife Law Interim Statement**

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**15 October 2013**

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# **WILDLIFE LAW INTERIM STATEMENT**

## **INTRODUCTION**

- 1.1 The wildlife law project was proposed by the Department for Environment, Food and Rural Affairs for the Law Commission's 11th programme of law reform, effective from July 2011. In March 2012, the Department asked us to include consideration of appeals, and we have done so.
- 1.2 The project includes consideration of the law relating to the conservation, control, protection and exploitation of wildlife in England and Wales. It does not include discussion of the law relating to habitats or the Hunting Act 2004.
- 1.3 The project provided for a review point following consultation. In September 2013, DEFRA Ministers agreed that the project should continue to the next phase. This agreement does not necessarily mean that the Government agrees with our conclusions as contained in this statement.
- 1.4 During the next phase, the Law Commission will produce draft legislation and a final report. This interim statement sets out the Law Commission's conclusions in advance of drafting. The process of developing draft legislation is likely to result in some changes of substance to the approach outlined here. This statement should not be construed as necessarily our final position.

## **Summary of consultation**

- 1.5 Our consultation paper was published on 14 August 2012.<sup>1</sup> Consultation ran from that date to 30 November 2012. The deadline was further extended to 21 December for some respondents. We received 488 consultation responses. We will publish a full analysis of the responses with our final report.
- 1.6 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. We took part in meetings and other events with a wide range of public bodies and non-governmental organisations including Natural England, the (then) Countryside Council for Wales, the Marine Management Organisation, the Environment Agency and the Forestry Commission, the Royal Society for the Protection of Birds, the Royal Society for the Prevention of Cruelty to Animals, the League Against Cruel Sports, Wildlife and Countryside LINK, the Wildlife Trusts, the Woodland Trust, the Wildfowl and Wetlands Trust, the British Association for Shooting and Conservation, the Game and Wildlife Conservation Trust, the Country Land and Business Association, and the Countryside Alliance. We ran seminars with the Wildlife Trusts and the Institute of Ecology and Environmental Management, and two discussion groups at the Wildlife Crime Officers Annual Conference. In Wales, we met with officials working on the Natural Environmental Framework, presented at the Wales Biodiversity Partnership annual meeting 2012 and also at regional biodiversity partnership meetings.

<sup>1</sup> Wildlife Law (2012) Law Commission Consultation Paper No 206.

### **Our basic approach to regulated activity**

- 1.7 The purpose of the project is to produce clear, workable and coherent law, which allows those subject to the law to understand their obligations. It is about the framework of the law. The Commission is not concerned with value-judgements about what wildlife should be protected.
- 1.8 The exception is where a particular level of protection is required as a matter of EU law. In general, EU law requires that the transposition of Directives is effective and clear. Transposing the regime contained in the Wild Birds<sup>2</sup> and Habitats<sup>3</sup> Directives is central to the project. We have sought the accurate and proportionate implementation of EU obligations, including the avoidance of gold-plating. We have also had regard to the UK's obligations under relevant international treaties, particularly the Bern Convention and the Aarhus Convention.<sup>4</sup>

### **PROPOSED NEW REGIME**

- 1.9 The regime we are proposing can be broken down as follows:
- (1) regulatory structure and general provisions;
  - (2) prohibited activities;
  - (3) permitted activity;
  - (4) compliance and sanctions; and
  - (5) appeals and challenges.

### **REGULATORY STRUCTURE AND GENERAL PROVISIONS**

#### **Marine extent**

- 1.10 We consulted on whether the project should extend to include the offshore marine area adjacent to England and Wales (that is, the sea from the territorial limit of 12 nautical miles to 200 nautical miles). We regard this as a purely technical question. To extend the project would add to the complexity of the drafting of the Bill. It would not affect the content of the law, and therefore would not reduce the number of different substantive regimes. It would, however, mean that a single legal instrument covered both the territorial and offshore areas (or at least that adjacent to England and Wales), with consistent legislative language and concepts. Following discussions with DEFRA, we concluded that our reform should extend to the territorial limit of 12 nautical miles.

<sup>2</sup> Wild Birds Directive 2009/147/EC, Official Journal L 20 of 26.01.2010 p 7.

<sup>3</sup> Habitats Directive 92/43/EEC, Official Journal L 206 of 22.07.1992 p 7.

<sup>4</sup> 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).

### **Single statute**

- 1.11 We recommend 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 current 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.
- 1.12 We recommend that there is no need to include provisions contained currently in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996.

### **Statutory factors**

- 1.13 In our consultation paper, we suggested setting out statutory factors to which decision makers should have regard. We have now rejected this proposal. It is not possible to draft a list of factors which is not so general as to be ineffective, or which either gold-plates, or breaches, one or other of the Wild Birds and Habitats Directives.
- 1.14 However, the transparency of decision-making would be enhanced by a statutory duty to give reasons for key decisions. The decisions covered would be the listing of a species for a particular level of protection, the imposition or variation of a close season, and the granting or refusal of a wildlife licence.

### **Basic approach**

- 1.15 We recommend that the regulation of individual species continues to be organised on a species by species basis, such that the particular provisions relevant to a species are determined by how it is listed within the legal regime.
- 1.16 There are exceptions to the current approach. Certain activities are prohibited generally, irrespective of the species affected or potentially affected. For instance, the use of spring traps is prohibited, except in certain circumstances, irrespective of the species the user intends to trap. These prohibitions would also persist.
- 1.17 This approach does not mean that the species unlisted (or unaffected by a particular prohibited activity) will be wholly unprotected, as other protective regimes may still apply, such as those contained in the Animal Welfare Act 2006, the Wild Mammals (Protection) Act 1996 or the Hunting Act 2004.

### ***Review of species listing***

- 1.18 Keeping listing, or scheduling, up to date is important for the proper functioning of the regulatory regime.
- 1.19 There is already a requirement in the Wildlife and Countryside Act 1981 for this to happen to some schedules. The UK conservation bodies acting through the Joint Nature Conservation Committee may at any time, but in any event every five

years from 30 October 1991, advise the Secretary of State on updating schedules 5 and 8 to the 1981 Act.<sup>5</sup>

- 1.20 We recommend that the five year review period should apply to all species lists. Listing between reviews would remain possible, subject to appropriate consultation.

***Species specific issues: protected wild birds***

- 1.21 The Wild Birds Directive places an obligation on member states to establish a general system of protection for “all species of naturally occurring birds in the wild state in the European territory of the Member States”.<sup>6</sup>
- 1.22 We suggested in our consultation paper that the current definition in the Wildlife and Countryside Act 1981, based on whether the bird species was ordinarily resident rather than naturally occurring, might extend protection to species which the Wild Birds Directive did not intend to protect. The current Act protects species that have established self-sustaining wild populations (such that they should be regarded as ordinarily resident) irrespective of how they came to establish the population.
- 1.23 The result is that certain species regarded as invasive non-native species are also protected by the Wildlife and Countryside Act 1981. An example is the ring-necked parakeet.
- 1.24 This approach based on “naturally occurring” was supported on consultation. We recommend the adoption of a definition for “protected wild bird” based around the term “naturally occurring” (that is, present in the wild state not as a result of introduction by humans). Wild birds currently protected but not contained within the definition of naturally occurring could, of course, be listed to achieve the current level of protection, if that was desired.
- 1.25 We also recommend the exclusion of captive bred individual birds from protection under wildlife law, reflecting EU law.<sup>7</sup>
- 1.26 Therefore, European protected wild birds would include individuals of species naturally occurring in the EU which have not been born and reared in captivity. All members of species that do not occur naturally in the EU would be excluded, as well as those which do occur naturally in the EU but had been born and reared in captivity.

***Species specific issues: protected animals (not EU protected wild birds)***

- 1.27 Other species would be protected according to the level of species protection they were assigned by listing. Listed species would include European Protected Species listed under Annex 4 of the Habitats Directive with a natural range including the UK, and those species protected for domestic reasons or under international obligations.

<sup>5</sup> Wildlife and Countryside Act 1981, s 24(1).

<sup>6</sup> Wild Birds Directive 2009/147/EC, Official Journal L 20 of 26.01.2010 p 7, arts 1(1) and 5(1).

- 1.28 We have concluded, following consultation, that the Salmon and Freshwater Fisheries Act 1975 should not be incorporated into the single Act. The 1975 Act governs various aspects of the regulation of salmon and freshwater fisheries, not just species protection, and it would be preferable for it to persist as a freestanding code.

### **Close seasons**

- 1.29 We recommend a general power to impose and vary close seasons. Given that the effect of imposing a close season is the criminalisation of otherwise lawful behaviour, any decision to impose a close season should be subject to the same order-making process as that for listing species. Consequently, there would be an appropriate opportunity for the views of those potentially affected to be considered and taken into account.

## **PROHIBITED ACTIVITIES**

### **Mental element for offences against EU protected species**

- 1.30 Both the Habitats and Wild Bird Directives specify that in order to be criminal the performance of the proscribed acts must be “deliberate”.<sup>8</sup> In the Wildlife and Countryside Act 1981, this was transposed as a requirement that the acts were performed “intentionally”. The Conservation of Habitats and Species Regulations 2010, which transpose the Habitats Directive, use the term “deliberate”, which has the same meaning as in the Directive itself.<sup>9</sup>
- 1.31 Since 1981, both domestic and European law have changed. In domestic criminal law, a defendant acts intentionally towards a result if he or she acted in order to bring about the result. A jury may also find that the defendant intended the result if it was a virtually certain outcome of his or her conduct and that he or she foresaw that as being the case.<sup>10</sup>
- 1.32 In case law dating from 2006, the European Court of Justice has extended the meaning of “deliberate” so that it is broader than this understanding of “intentionally”. The Court of Justice, in *Commission v Spain*<sup>11</sup> characterised “deliberate” as including not only that a perpetrator intended to kill or capture, but also that he or she “at the very least, accepted the possibility of such capture and killing”. Other formulations have referred to a perpetrator having to be both “aware of the risk to the protected species and also accept[ing] that risk”;<sup>12</sup> or that he or she “is sufficiently informed and aware of the consequences his action will

<sup>7</sup> Case C-149/94 *Didier Vergy* [1996] ECR I-299.

<sup>8</sup> Wild Birds Directive 2009/147/EC, Official Journal L 20 of 26.01.2010 p 7, art 5; Habitats Directive 92/43/EEC, Official Journal L 206 of 22.07.1992 p 7, art 16.

<sup>9</sup> SI 2010 No 490, reg 3(3).

<sup>10</sup> *R v Woollin* [1998] UKHL 28; [1999] 1 AC 82.

<sup>11</sup> Case C-221/04 *Commission v Spain* [2006] ECR I-4515.

<sup>12</sup> Opinion of Advocate General Kokott, Case C-221/04 *Commission v Spain* [2006] ECR I-4515 at [54].

most likely have and nevertheless performs the action, leading to the capturing or killing of specimens (eg as an unwanted but accepted side-effect)".<sup>13</sup>

- 1.33 *Commission v Spain* concerned the use of the term in the Habitats Directive. The two Directives have been described as comprising a single regime for the protection of wildlife, and in some (fairly limited) cases, the Court has used case law relating to a term in one Directive in order to interpret the other. We think it unlikely that the drafters of the Habitats Directive considered that “deliberate” would have different meanings in the two Directives.
- 1.34 It follows that the transposition of “deliberate” in the 1981 Act no longer complies with the Directive. In our consultation paper, we proposed that, in the light of *Commission v Spain*, we should transpose “deliberate” as “intentionally or recklessly”. In the law of England and Wales, a defendant has acted recklessly as to a given consequence if a defendant foresees any risk of that consequence, but goes on unjustifiably to take that risk.<sup>14</sup> These are now standard and settled mental elements in domestic law, and well understood in the criminal courts.
- 1.35 However, this approach would lead, we now believe, to undesirable and unintended consequences. This is the result of the difference in licensing grounds under the Habitats and Wild Birds Directives. An activity can be licensed under the Habitats Directive if, among other reasons, there are “imperative reasons of overriding public interest, including those of [an] [...] economic nature”.<sup>15</sup> There is no equivalent licensing ground in the Wild Birds Directive. The result is that a wind farm, for instance, could be licensed in respect of the high likelihood that at least some bats would be killed as a result of its operation, but cannot be licensed in relation to the killing of birds. Given the predictability of bird strikes, it would be necessarily criminal to operate a wind farm (the same is true of many activities in agriculture and forestry).
- 1.36 This cannot be what was intended by the Court of Justice, nor does it fit with other provisions in the Directives, particularly the acceptance that there will be “incidental” killing of European Protected Species in article 12(4) of the Habitats Directive.
- 1.37 We recommend that, rather than using the available concepts in the law of England and Wales, we define a mental element that as exactly as possible replicates what it appears the Court of Justice had in mind in *Commission v Spain*, bearing in mind the need to allow for beneficial human activity. The Court’s approach is clearly influenced by a legal concept in civil law regimes which, while in some ways broadly comparable to our concept of “recklessness”, also includes elements of “acceptance” of a risk, beyond mere foreseeability. “Acceptance of risk”, in this context, does not mean that the existence or extent of the risk is acknowledged or denied but is closer to the voluntary assumption of the consequences of that risk. It is also capable of accommodating a requirement for a higher level of probability that a risk will occur than “recklessness”.

<sup>13</sup> European Commission, *Guidance on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007) p 36.

<sup>14</sup> *R v G* [2003] UKHL 50; [2004] 1 AC 1034.

<sup>15</sup> Habitats Directive 92/43/EEC, Official Journal L 206 of 22.07.1992 p 7, art 16(1)(c).



1.38 A definitive statement of the mental element of the offence requires close consideration of its drafting with the assistance of Parliamentary Counsel and further detailed research. However, the definition would proceed by considering:

- (1) a middle way between the foresight of a very high degree of probability of risk founding liability in “intention” (foresight of virtual certainty) and foresight of *any* (unreasonable) risk founding liability in “recklessness” (if a risk is foreseen);
- (2) building on the idea of “acceptance” of the risk. The taking of all reasonable precautions to mitigate a risk could be seen as *evidence* that the risk was not “accepted”; and that there may be a relationship between the nature of the activity undertaken and the level of mitigation appropriate to negative “acceptance”.

1.39 So constructed, the offence would fit well with Environmental Impact Assessments, which, for instance, assess the risks of new development to birds on the basis of a calculation of the likelihood that an individual bird of a certain species will be able to avoid the hazards created.

1.40 Article 13 of the Wild Birds Directive provides that measures taken under the Directive should not lead to a deterioration of the relevant conservation status of birds. The criminal offence as finally drafted must be measured against this requirement, and, if necessary, supplemented by powers to control developments or practices which would be so deleterious that they threatened the objectives of the Directive, but nonetheless escaped liability.

#### **Mental element for offences against non-EU protected species**

1.41 Current offences protecting domestic species vary. Some require that the defendant acts with intention as to the relevant consequences, others that intention or recklessness as to the consequences suffices. The single statute would replicate this distinction, a familiar one in the law of England and Wales. One result of this is that there would be two higher levels of mental element – the purely domestic, and the European derived “deliberate” category. It would be a matter for Ministers whether they varied the use of these categories by means of listing animals in the appropriate schedule.

#### **External element for Wild Animal offences**

1.42 The existing law prohibits the following activities:

- (1) taking, killing or injuring individuals;
- (2) taking eggs or young;
- (3) destruction of breeding or resting sites;
- (4) disturbance;
- (5) use of certain proscribed methods;
- (6) possession;

- (7) certain commercial offences (such as sale); and
  - (8) poaching.
- 1.43 We recommend including these elements as presently understood in the new wildlife regime.

***Destruction or obstruction of breeding or resting sites***

- 1.44 We recommend that the current reverse burden in the offence of digging for a badger (section 2 of the Protection of Badgers Act 1992) should remain.
- 1.45 We considered whether including the term “obstruction” in section 9(4)(c) of the Wildlife and Countryside Act 1981 amounted to gold-plating of the Wild Birds and Habitats Directives. Following consultation, we concluded that the term usefully clarifies the way in which places of breeding and rest can be detrimentally affected, and does not amount to gold-plating.

***Disturbance***

- 1.46 The Habitats Directive requires member states to prohibit disturbance, which is unqualified, whereas the Wild Birds Directive refers to disturbance “in so far as disturbance would be significant having regard to the objectives of this Directive”.<sup>16</sup> When transposed into the Wildlife and Countryside Act 1981, the concept of the significance of the disturbance was omitted. We do not consider that “disturbance” requires further definition generally.
- 1.47 The omission of the “significance” qualification in relation to wild birds appears to be gold-plating. However, if each individual act of disturbance had to be “significant having regard to the objectives of [the] Directive”, the criminal offence would be robbed of all efficacy in the vast majority of cases. We recommend therefore that the formulation used to transpose the Wild Birds Directive should reflect the need for a level of significance above minimal disturbance, but does not copy out the words of the Directive.

***Possession offences***

- 1.48 We considered the reverse burden imposed on the defendant in relation to the offence of possessing or controlling a wild bird or an egg of a wild bird, to show that the bird or egg had been lawfully acquired.<sup>17</sup> Given the difficulty of the prosecution proving the provenance of a bird or egg, and the ease with which the defendant can do so, we concluded that the reverse burden should be retained.

***Commercial offences***

- 1.49 Domestic law makes it an offence to sell certain wild animals and plants. The provisions across the legislation are broadly similar in intent but with occasional variations. In order to clarify the law, we suggested that the commercial offences

<sup>16</sup> Wild Birds Directive 2009/147/EC, Official Journal L 20 of 26.01.2010 p 7, art 5(1); Habitats Directive 92/43/EEC, Official Journal L 206 of 22.07.1992 p 7, art 12(1)(b). In both Directives, reference is made to the particular importance of protection against disturbance during breeding and rearing, and in relation to Habitats, also to hibernation and migration.

<sup>17</sup> Wildlife and Countryside Act 1981, ss 1(2) and (3).

should be unified around prohibiting offering for sale, exposing for sale and advertising to the public.

### **Poaching**

- 1.50 The current law on poaching dates back to the eighteenth century and is unduly complicated. Our provisional proposal to modernise it took a radical approach, basing the offence on killing an animal without the consent of the person having the appropriate rights. Following consultation, we are persuaded that the modernised offence should retain the requirement for trespass in the current law.

### **External element for plant and fungi offences**

- 1.51 During consultation stakeholders pointed out that the offences as they are currently drafted do not adequately take into account the differences between fungi and plants. We recommend that the new offences be drafted to do so.

### **PERMITTED ACTIVITIES**

- 1.52 The regulatory regime must make provision to allow activity otherwise prohibited where that it necessary. This raises a number of issues.

### **Licensing regime for wild birds**

- 1.53 The Wild Birds Directive only permits the deliberate killing and taking of EU protected wild birds under the derogations in articles 7 and 9. The list of derogations in the Wild Birds Directive is more restrictive than that in the Habitats Directive, and the two cannot therefore be assimilated as a matter of EU law. The Court of Justice has also made clear that the list of derogations in the Directives is exhaustive.<sup>18</sup>

### **Article 9 licensing and judicious use**

- 1.54 The Wildlife and Countryside Act 1981 expressly transposes most of the licensing grounds in the Directive, except that relating to "judicious use", for which is substituted a list of specific activities (such as taxidermy and photography). The Directive allows "under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers".<sup>19</sup>
- 1.55 Use of the "judicious use" ground would make the regime more flexible and allow Natural England to license a broader range of activities. Such activities could range from the taking of wild birds for taxidermy to the hunting of wild birds in the close season.<sup>20</sup> We do not agree with those consultees who argued that such transposition would reduce the necessary protection of wild birds, given the restrictions on when licensing would be allowed (there must be "no other satisfactory alternative", affect only "small numbers", and under "strictly supervised conditions and on a selective basis").

<sup>18</sup> See Case C-192/11 *Commission v Poland (unreported)* at [39-43]; Case C-6/04 *Commission v UK* [2005] ECR I-9017 at [111-114].

<sup>19</sup> Wild Birds Directive 2009/147/EC, Official Journal L 20 of 26.01.2010 p 7, art 9(1)(c),

<sup>20</sup> See Case C-182/02 *Ligue pour la protection des oiseaux and others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement* [2003] ECR I-12105.

- 1.56 We recommend the express transposition of “judicious use”.

### ***Hunting licences under Article 7 of the Wild Birds Directive***

- 1.57 Article 7 of the Wild Birds Directive allows hunting for certain wild birds species “owing to their population level, geographical distribution and reproductive rate throughout the Community”. There are a number of restrictions. Hunting must not “jeopardise conservation efforts”. Member states must ensure that hunting “complies with the principles of wise use and ecologically balanced control of the species of birds concerned” and is compatible with the species’ populations. Article 7 also requires close seasons.<sup>21</sup>
- 1.58 The UK currently seeks to transpose hunting permitted under article 7 in the following ways: first, by the listing of game birds in the Game Acts,<sup>22</sup> secondly, by listing in schedule 2 to the Wildlife and Countryside Act 1981, excluding them from protection outside the close season (ducks and other water fowl),<sup>23</sup> and thirdly, by issuing general licences for one of the grounds listed in section 16 of that Act, such as the prevention of damage to crops (pigeons).
- 1.59 This means of transposition is flawed. In particular, there is no necessity for birds to be subject to a “wise use” requirement, either under the Game Acts or under Wildlife and Countryside Act 1981, schedule 2. The five yearly reviews of the latter are unlikely to satisfy the “wise use” requirement.
- 1.60 Where general licences are issued currently for the protection of crops, and this is relied on to permit recreational hunting, the licence requires that it can only be relied on where there is no other satisfactory solution. This is not a requirement for hunting under article 7 of the Wild Birds Directive. The current regime, arguably, is an example of gold-plating for certain wild bird species.
- 1.61 We therefore recommend that article 7 be transposed directly in the new statute, incorporating a “wise use” requirement. We accept that our original proposal to satisfy this requirement by means of codes of practice was burdensome and unnecessary. We now propose that hunting be allowed outside the close season by means of licences. For most purposes, a general licence would be issued, and there would be no practical difference from the perspective of the user to the current system. Licensing would, however, allow the Secretary of State or Welsh Ministers to introduce other restrictions if it were necessary to do so in the light of particular threats to the population of a huntable bird.

### **Licensing regime for European Protected Species**

- 1.62 The licensing regime for European Protected Species under article 16 of the Habitats Directive is appropriately transposed in domestic legislation by regulation 53 of the Conservation of Habitats and Species Regulations 2010. The existing licensing grounds need only to be reproduced in the new statute.

<sup>21</sup> Wild Birds Directive 2009/147/EC, Official Journal L 20 of 26.01.2010 p 7, art 7(1) and 4,

<sup>22</sup> Under the Game Act 1831, s 2, this includes pheasants, partridges, grouse, heath or moor game and black game.

<sup>23</sup> Wildlife and Countryside Act 1981, s 2(1).

### **Licensing regime for species protected by domestic law**

- 1.63 There is no standardised system for the licensing of domestically protected species in current legislation. We believe that licensing conditions can be standardised around the exemptions contained in the Bern Convention, without significant shifts in species protection. While this would expand the range of activities that could be licensed, appropriate use of the power to decline or impose conditions on the grant of a licence should obviate any adverse consequences.
- 1.64 Because the licensing conditions would be the same as those for European Protected Species under the Habitats Directive, this change would simplify the law and thereby reduce burdens on those seeking licences.
- 1.65 Our proposal to this effect was broadly supported on consultation, and we now recommend it. Particular issues may arise in relation to the protection of badgers. We believe that the ability to cull badgers for the prevention of the spread of disease would be retained under the Bern conditions, but if on further development of the proposals with Parliamentary Counsel it appeared that that is not the case, special provision could be made.

### **General requirement to show that there are no other satisfactory solutions**

- 1.66 Both of the Directives and the Bern Convention require that, before a licence is issued, there should be no other satisfactory solution. There would accordingly be a general requirement to this effect across each of the licensing regimes.

### **Length of licences**

- 1.67 There are different maximum periods in wildlife law for the grant of licences. Following consultation, and in particular discussions with regulators, we now recommend the abolition of maximum length requirements. The effect would be that licences would be issued for as long as it is appropriate, in the light of the requirement that the licence should only be issued if there is no other satisfactory solution. To the extent that the current maxima have effect to limit licences, this would remove a burden from both licence-holders and regulators.

### **Removal of incidental results defence for wild birds**

- 1.68 There is currently a defence in section 4(2)(c) of the Wildlife and Countryside Act 1981 for otherwise illegal activity that is “the incidental result of a lawful operation and could not reasonably have been avoided”. The equivalent provision in the Habitats Regulations 1994 was ruled illegal by the Court of Justice in *Commission v UK*.<sup>24</sup> We do not think it would be realistically possible to resist a similar conclusion if the UK were to be infracted over the defence in the Wildlife and Countryside Act 1981. We, therefore, recommend the removal of that defence from any wildlife regime.
- 1.69 There is a similar defence for species only protected as a matter of domestic law in section 10(3)(c) of the Wildlife and Countryside Act 1981. This can be retained.

<sup>24</sup> Case C-6/04 *Commission v UK* [2005] ECR I-9017.

## **COMPLIANCE AND SANCTIONS**

1.70 Regulatory systems require effective means to ensure compliance. We propose reforms to improve compliance under the following headings:

- (1) breach of a licensing condition
- (2) the criminal liability of employers and principals;
- (3) trial and sentencing of wildlife offences;
- (4) tools to ensure proper functioning of an invasive non-native species regime; and
- (5) civil sanctions.

### **Breach of a licensing condition**

1.71 It is an offence to breach a condition in a licence issued under the Conservation of Habitats and Species Regulations 2010<sup>25</sup> or under the Protection of Badgers Act 1992.<sup>26</sup> There is no similar offence in the Wildlife and Countryside Act 1981. The problem is that in the absence of such offence, certain licensing conditions may become unenforceable after a certain lapse of time.

1.72 Under the Wildlife and Countryside Act 1981, where a person breaches a licence condition they commit the underlying offence. However, the limitation period for prosecuting the underlying offence is set at two years from the commission of the offence. A licence may be granted allowing the killing of certain wild birds in year one, subject to the condition that the local population is monitored for five years. The gap in the current law is that any failure to comply with the monitoring requirement from the end of year three cannot be prosecuted, as the prosecution of the primary offence (the killing of wild birds in year one) is time barred. In other words, the monitoring requirement from year three onwards becomes unenforceable.

1.73 We recommend that the breach of licence conditions generally should be an offence. The appropriate limitation period would then run from the breach of the licensing condition, rather than from the commission of the underlying offence (when, for instance, the bats were disturbed or taken).

### **Criminal liability of employers and principals**

1.74 We originally proposed a version of the “vicarious liability” offence recently introduced in Scotland.<sup>27</sup> That offence, broadly, makes an employer or principal liable for a wildlife offence committed by the employee or agent, unless the defendant can demonstrate that they took all reasonable steps to prevent the offence.

<sup>25</sup> SI 2010 No 490, reg 48.

<sup>26</sup> Protection of Badgers Act 1992, s 10(8).

<sup>27</sup> Wildlife and Countryside Act 1981, s 18A, (as amended by the Wildlife and Natural Environment (Scotland) Act 2011, s 24).

- 1.75 Although consultees were generally supportive, we have accepted the arguments of the minority who opposed the proposal, on the basis that it would result in an unjust extension of the normal principles of liability to those legitimately conducting businesses involving wildlife and increase burdens on rural businesses and developers.
- 1.76 Nevertheless, we still consider that there is force in the argument that the criminal law should be able to respond to the real economic incentives for the commission of some wildlife crimes. We therefore now recommend that it should be an offence for an employer or principal knowingly to permit an act to be done which, when done by the employee or agent, amounts to a wildlife crime. The purpose of the proposed offence is to pin criminal liability on the ultimate beneficiaries of wildlife crime.
- 1.77 By way of illustration as to the operation of the proposed “knowingly permit” element of the offence, a developer who instructed a sub-contractor to destroy a structure that the developer knew contained bat roosts would be liable for the underlying offence, as now. If the developer did not give an instruction, but knew that the action of the sub-contractor was going to destroy a structure that the developer knew contained bat roosts, and did nothing to prevent it, then they would be liable. If, however, the developer did not know of the roosts or had instructed the sub-contractor not to destroy the roosts without a licence (or had taken whatever other preventative steps were reasonable), then the developer would not be liable. In each case, the burden of proof would remain on the prosecution. The prosecutor would have to prove, so that a jury or magistrate were sure of it, that the developer had the necessary knowledge and/or had not taken the necessary preventative steps.

#### **Trial and sentencing of wildlife offences**

- 1.78 A large majority of stakeholders thought that the current sanctions against wildlife crime were insufficient. We recommend that penalties in the magistrates’ court be standardised, with most attracting the highest maxima allowed on summary trial.
- 1.79 However, raising these maxima is a response of only limited efficacy, as the seriousness of some wildlife crime, for instance involving organised criminal gangs, is not matched by the penalties available in the magistrates’ court. We therefore recommend that, where appropriate, wildlife crime be triable either summarily in the magistrates’ court, or on indictment at the Crown Court, where more serious penalties would be available.

#### **Tools to ensure the proper functioning of an invasive non-native species regime**

- 1.80 The approach taken in this project to invasive non-native species is complicated by the proposed Invasive Alien Species Regulation under discussion at EU level.<sup>28</sup> In the consultation paper, we confined ourselves to considering reforms to regulatory methods which, we hoped, could be of use in transposing what was then an expected draft Directive. It is now apparent that the EU instrument has been substantially delayed.

<sup>28</sup> COM (2013) 620 fin.

- 1.81 We think that the tools provisionally proposed are necessary whatever the substantive prohibitions, and the provisional proposals in our consultation paper were supported overwhelmingly. In the light of the forthcoming EU legislation, and its uncertain timetable, we will pursue the reforms to enforcement we proposed in the context of the current law, but without considering reform of the existing law's substantive prohibitions.

### ***Species control orders***

- 1.82 Species control orders have been introduced in Scotland. They allow entry onto land in order to control an invasive non-native species. They may be used following failure to agree a course of action between the regulator and the owner or occupier of land on which invasive non-native species are present.<sup>29</sup>
- 1.83 We recommend the introduction of species control orders in England and Wales. Stakeholders generally supported this proposal. We recommend that express consideration of proportionality should be required before making the order, taking into account the concerns raised by some stakeholders about the intrusive nature of the power. There would be the ability to challenge such orders as we outline below.

### ***Power to require notification by individuals of invasive non-native species***

- 1.84 The ability to locate invasive non-native species is fundamental to effective control. In Scotland, a power has been introduced to allow Ministers to make orders requiring a defined group of people to give notice of invasive non-native species where those people become aware of the species' presence.<sup>30</sup>
- 1.85 We recommend the creation of a similar power in England and Wales. This proposal was broadly welcomed on consultation, subject to concerns about 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.
- 1.86 The use of the power should be proportionate, reasonable and focused. We will draft the order-making power to avoid its use to impose excessive burdens, or apply to large categories of people (like all farmers, or all vets).

### **Civil sanctions**

- 1.87 In the consultation paper, we proposed that a system of civil sanctions should be introduced to allow the regulators (Natural England and Natural Resources Wales) to make use of the range of sanctions drawn from the Regulatory Enforcement and Sanctions Act 2008, Part 3. This would allow the regulators to issue fixed monetary penalties, discretionary requirements, stop notices and to accept enforcement undertakings, as alternatives to criminal prosecutions.

<sup>29</sup> Wildlife and Countryside Act 1981, ss 14D to 14P (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 16).

<sup>30</sup> See Wildlife and Countryside Act 1981, s 14B(5) (as amended by Wildlife and Natural Environment (Scotland) Act 2011, s 14(5)).



- 1.88 On consultation, these proposals attracted a high level of support. They were, however, opposed by a number of conservation and welfare organisations as a weakening of the sanctioning regime. Our view remains that civil sanctions would provide a flexible and proportionate system which would encourage greater compliance without requiring adversarial and stigmatising criminal prosecutions where they are not necessary.
- 1.89 In November 2012, the Department for Business, Innovation and Skills announced a general Government policy to limit the use of some civil sanctions to undertakings with more than 250 employees.<sup>31</sup> The policy expressed was not absolute.<sup>32</sup>
- 1.90 We recommend nonetheless that a system of civil sanctions should be introduced for all sizes of enterprises. The vast majority of businesses with which wildlife regulation is concerned would fall below the 250 employee limit. They would still be subject to the criminal law. The effect of adhering strictly to the BIS guideline would be that the binary “criminal or not” regime would apply to small businesses whilst the few large businesses would benefit from a reactive, graduated and modern regulatory regime.

## **APPEALS AND CHALLENGES**

### **Civil sanctions and other regulatory orders**

- 1.91 We recommend that appeals against both civil sanctions and species control orders be to the existing First-tier Tribunal (Environment).

### **Wildlife licences**

- 1.92 In order to meet our obligations under EU law and the Aarhus Convention, there needs to be a substantive review process for wildlife licences concerning large scale projects and those species protected by the Habitats or Wild Birds Directives. This review process must ensure the effective enforcement of EU law, including by environmental non-governmental organisations, and not be “prohibitively expensive”.
- 1.93 Judicial review is currently open to those with a “sufficient interest”, which is defined broadly, and includes environmental non-governmental organisations. There are concerns that judicial review is, however, too expensive to constitute compliance with our obligations, both under EU law and the Aarhus Convention. These issues are under review within Government, and for current purposes we must assume that they will be resolved.
- 1.94 For an appeals process to meet the requirement of providing substantive review, it needs to allow the proportionality of a decision to be challenged, not just its formal legality. In relation to species protected as a matter of EU law,

<sup>31</sup> Written Ministerial Statement of Rt Hon Michael Fallon, Minister of State for Business and Enterprise, Department for Business, Innovation and Skills (8 November 2012), available at: <http://news.bis.gov.uk/Press-Releases/Use-of-Civil-Sanctions-Powers-Contained-in-the-Regulatory-Enforcement-and-Sanctions-Act-2008-682e6.aspx> (last visited 7 October 2013).

<sup>32</sup> UCL Faculty of Laws, *The New System of Environmental Enforcement and Sanctions: From Principle into Practice* (November 2012)

proportionality already forms a ground of judicial review. Therefore, in relation to this aspect of the EU and Aarhus Convention requirements, there is no legal reason to introduce a system other than judicial review.

- 1.95 We were asked to consider whether there should be an appeals process, in addition to judicial review, on the merits of licensing decisions. Some argued that such an appeal should be available only to an applicant (so, against a refusal of a licence, or conditions to a licence). We do not consider that consultees provided sufficient arguments to suggest that an appeals process on the merits is necessary, apart from our EU and international obligations. There may well be disadvantages to a further appeals process. Such a system could lead to greater legalism in the processes adopted by the regulators and thus to greater reliance on legal services. It could also increase delays. No compelling case for appeals which would justify taking these risks has been made.
- 1.96 Had we been persuaded that there was a need for a further appeals process, it is likely that we would have recommended that the process should be available to both applicants and third parties (such as environmental non-governmental organisations), not just to applicants. The creation of new rights of appeal for one side but not the other may not accord with our international obligations under the Aarhus Convention, and risk breaching EU law.