



**Law
Commission**
Reforming the law

Wildlife Law Report Summary

(2015) LC362 (Summary)

FINAL REPORT ON WILDLIFE LAW: SUMMARY

INTRODUCTION (CH 1)

- 1.1 This summary sets out the main policy areas covered by the Law Commission's Report on wildlife law. For a more detailed examination of the issues and the reasoning behind the decisions we have taken, reference should be made to our Report and the draft Wildlife Bill annexed to it, which are available from our website.¹

Background to the wildlife project

- 1.2 The wildlife law project was proposed by the Department for Environment, Food and Rural Affairs (Defra) for the Law Commission's eleventh programme of law reform, effective from July 2011.
- 1.3 Our consultation paper on wildlife law was published on 14 August 2012.² During the consultation period we received 488 consultation responses. A number were generated by campaigns; others were submitted by organisations which included charities, trade associations and other interest groups, private companies, Government agencies, local authorities, enforcement authorities and Defra. We also received responses from interested individuals. We heard from individuals with both professional interest (such as academics, lawyers, environmental consultants and other practitioners) and personal interest in the outcome of the project (for example, falconers, bird breeders, pigeon fanciers, landowners and gamekeepers).
- 1.4 The project schedule provided for a review point following consultation. In September 2013, Defra Ministers agreed that the project should continue to its final stage. Following Defra's decision, in October 2013 we published an interim statement to keep stakeholders informed about the general policy direction that the Law Commission had taken in the light of the consultation process.
- 1.5 In February 2014, following a request from Defra, we published an early Report recommending the introduction of a regime to assist with control of invasive non-native species, which provided for the issue of "species control orders" in England and Wales,³ in line with a similar power introduced in Scotland in 2011.⁴ Our recommendations have now been given effect by sections 23 to 25 of the Infrastructure Act 2015, which insert a new schedule 9A into the Wildlife and Countryside Act 1981.

¹ Wildlife Law (2015) Law Com No 362

² Wildlife Law (2012) Law Commission Consultation Paper No 206.

³ Wildlife Law: Control of Invasive Non-native Species (2014) Law Com No 342.

⁴ Wildlife and Natural Environment (Scotland) Act 2011 asp 6 (Scottish Act) Pt 2, s 16.

Rationale for reforming wildlife law

- 1.6 In the last two centuries wildlife legislation has developed in a piecemeal fashion, often in reaction to specific pressures on domestic legislation, whether local or international. The result is that the current legislation governing the control, exploitation, welfare and conservation of wild animals and plants in England and Wales has turned into a complex patchwork of overlapping and sometimes conflicting provisions.
- 1.7 A certain level of complexity is, in part, an inevitable consequence of the breadth of wildlife law. The natural environment is a complex system and the law concerning it needs to apply in a range of different situations and reflect a range of (potentially competing) interests. In many cases, however, there appears to be little obvious rationale for the existing complexity.
- 1.8 The sort of flexibility we now require of regulatory regimes is also absent from important areas of wildlife law. This is due, in part, to the age of certain pieces of legislation that are still in force. As the conservation status of wild species, their migratory patterns and reproductive habits may change over time as a result of direct human activities or changes to climatic conditions, a regulatory regime is only effective if it is capable of being regularly updated and reviewed to ensure that the law adequately responds to current threats and political preferences.
- 1.9 In the last forty years, efforts to conserve wild species of fauna and flora have acquired a significant international dimension. As of now, a large proportion of domestic wildlife protection legislation falls within the scope of a number of international agreements and EU Directives including, in particular, the Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention), the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention), the Wild Birds Directive⁵ and the Habitats Directive.⁶ Those developments have significantly increased the pressure on the existing domestic regulatory regimes. The use of old regulatory structures to implement new regulatory regimes, for example, has recently come under severe scrutiny from the European Commission.⁷ A comprehensive reform of the existing regulatory structure is, therefore, the most effective way to ensure a harmonious coexistence between domestic policy choices and the UK's external obligations.

⁵ Directive on the conservation of wild birds 2009/147/EC, Official Journal L 20 of 26.1.2010 p 7.

⁶ Directive on the conservation of natural habitats and of wild fauna and flora 92/43/EEC, OJ L 206 of 22.7.1992 p 7.

⁷ See, in particular, Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017.

- 1.10 Lastly, the current regime relies heavily on the criminal law, and tends therefore to stigmatise as “criminals” those found guilty of an offence. Criminalising regulatory transgressions may not always be the most appropriate or effective way of ensuring beneficial outcomes. In certain circumstances it may be better to provide the non-compliant individual or organisation with advice or guidance. At the other end of the scale, the criminalisation of harmful activities and the sentences available may not be severe enough to control certain serious transgressions.⁸ More serious sanctions may be merited.

General approach to the reform of wildlife law

Maintaining the core of current policy

- 1.11 One of the main purposes of 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.
- 1.12 As expressly agreed in the terms of reference of this project, altering the level of protection afforded to particular species is outside the scope of this project, unless such changes are required to ensure compliance with the UK’s obligations under relevant international treaties and EU law. The rationale behind this limitation is simple: decisions on the level of protection that a particular species should be afforded are policy decisions that would be usually taken on the basis of sound scientific advice. The Law Commission does not have the political mandate, nor the necessary scientific expertise, to make such decisions.
- 1.13 As the above restrictions have significantly curtailed our ability to simplify a number of existing provisions, we recommend that before introducing legislation giving effect to our recommendations, Defra and the Welsh Government should consider whether the new regulatory framework could be further rationalised by minor alterations to species protection levels, which would have little or no effect in practice but make the law more uniform and therefore easier to understand and comply with. We have indicated in the Report the areas which would benefit from this sort of attention.

Effective, clear and transparent transposition of our external obligations

- 1.14 EU law requires that the transposition of directives is effective and clear. In transposing the regimes contained in the Wild Birds and Habitats Directives, we have endeavoured to give effect to their requirements in a way which is both clear and effective.

⁸ See R Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) and P Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) p 7.

- 1.15 In line with our terms of reference, in cases where domestic obligations are more stringent than the corresponding obligations under EU or international law (commonly known as “goldplating”), we have generally opted in favour of the most flexible or least burdensome option. However, we have approached the issue of “goldplating” on a case by case basis. We have retained domestic provisions that go beyond the requirements of the Directives in cases where there are domestic policy reasons for doing so or – in the context of methods and means prohibitions – in cases where retaining the domestic approach allowed us to harmonise EU obligations with domestic preferences.
- 1.16 The protection of a number of wild animals and plants also falls within the scope of a series of international treaties to which the UK is a contracting party.⁹ We would normally expect our domestic law to reflect the obligations placed on the UK as a result of treaties it has entered into. Accordingly, our recommendations are also aimed at ensuring that the UK’s international commitments are appropriately given effect in domestic law.

Improved flexibility

- 1.17 This is the first time that wildlife law, in its modern form, has been reviewed as a whole. It is important that the regime created is sufficiently flexible to change with developing scientific understanding (on issues such as the effects of climate change), changing political preferences or changes to the conservation status of protected species.

Scope of the project

- 1.18 The project encompasses consideration of the species-specific provisions governing the conservation, control, protection and exploitation of wildlife present within England and Wales.

Marine extent of the project

- 1.19 Except for the Offshore Marine Conservation (Natural Habitats) Regulations 2007,¹⁰ wildlife legislation within the scope of this project only extends up to 12 nautical miles from the baseline.¹¹ In consultation we asked whether the scope of 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 over which the United Kingdom exercises sovereign rights).

⁹ See, in particular, the Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) and the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention).

¹⁰ SI 2007 No 1842.

¹¹ United Nations Convention on the Law of the Sea 1992, art 5, defines the “baseline” as “...the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.” The UK’s baseline is set in the Territorial Waters Order in Council 1964, as amended by the Territorial Sea (Amendment) Order 1998 SI 1998 No 2564.

- 1.20 Some stakeholders criticised the current split between legislation giving effect to the Wild Birds and Habitats Directives within territorial waters and legislation giving effect to the Directives outside the territorial limit of 12 nautical miles on the basis that developments or other operations that cross the 12 nautical mile boundary currently need to apply for two different wildlife licences. Other stakeholders pointed out that because many protected marine species are highly mobile, it would make little ecological sense to retain two different regimes that apply within and outside territorial waters.
- 1.21 We have not found the above arguments sufficiently persuasive to justify the extension of the scope of the project beyond territorial waters. The first argument points to a problem that could be easily dealt with at administrative level. Similarly, the simple fact that marine species are mobile, and therefore move between legal regimes, does not of itself seem persuasive. There will always be differences in territorial regimes, especially following devolution in the UK – such that the law applicable in Wales, England, Scotland and Northern Ireland can reflect national preferences.
- 1.22 In addition, if we chose to extend the project to include the offshore marine area adjacent to England and Wales, the implication would be the division of what is now a UK-wide regulatory structure into one that applied to England and Wales, a second for Scotland and a third for Northern Ireland. We came to the view, therefore, that it was better not to disrupt the current approach by extending our proposals beyond territorial waters.

The protection of habitats

- 1.23 In consultation many stakeholders noted the exclusion of habitats from the scope of the project. They argued that in ecological terms it was inappropriate to separate consideration of individual species from the habitats that support them.
- 1.24 While that is a valid consideration, our view is that it overlooks the distinction between an area of law selected for reform and the underlying policy structure within which that area of law exists. We have concluded that the overwhelming majority of the problems with wildlife law that we have identified can be addressed independently of the wider policy framework within which they exist. There are very few overlaps, in fact, between the regulatory regimes addressing the protection of species and the regulatory regimes addressing the protection of habitats. We are satisfied, therefore, that the decision to exclude habitats protection was sensible in the light of the object and purpose of a Law Commission review of this area of law.

Other self-contained regimes falling outside the scope of the review

- 1.25 In our consultation paper we provisionally proposed that Acts dedicated to welfare protection, in particular the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996 should not be integrated in our single statute on wildlife law. We argued that these complementary acts constitute a self-contained animal welfare code, and to include them would cause unnecessary confusion.
- 1.26 In consultation most stakeholders accepted the reasons behind this provisional proposal, and we therefore do not include the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 2006 within our draft Wildlife Bill.

- 1.27 We were, however, persuaded not to pursue our provisional proposal to incorporate the provisions of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006, so as to create a new animal welfare code applicable both to animals living wild and animals within the control of man.
- 1.28 As Defra noted during consultation, the considerable difference in the level of intentionality required by the offences in the two Acts makes it impossible to integrate the two regimes without altering existing levels of protection. Therefore, whilst in principle we think that there is a good case for reforming the Wild Mammals (Protection) Act 1996 offences so as to allow them to dovetail better with their counterparts in the Animal Welfare Act 2006, such reform falls outside the scope of the current project as it would necessarily involve consideration of changes to the level of protection afforded to wild animals.
- 1.29 In our consultation paper we included discussion of the Salmon and Freshwater Fisheries Act 1975, as it was thought worthwhile to include the species protection provisions in that Act in any new regime. On reflection, and after consultation, we have concluded that removing the species protection provisions found in sections 1 to 4 of the 1975 Act and placing them in a separate statutory framework would unnecessarily complicate the existing regulatory regime for fisheries.

The Hunting Act 2004

- 1.30 The terms of reference of the project expressly exclude review of the Hunting Act 2004. Whilst a number of stakeholders from the hunting industry questioned this decision, we remain convinced that it would have been inappropriate and counter-productive for the Law Commission – an independent, non-political, advisory body – to consider an issue as politically polarised as this one.

REGULATORY STRUCTURE (CH 2)

Single statute

- 1.31 Many problems with the current regulatory landscape arise because the applicable provisions are scattered around a number of different enactments. This makes it difficult to discover the full legislative regime that applies to a particular species. In consultation, stakeholders overwhelmingly agreed that a single statute containing wildlife law would allow for increased consistency in terms of language, definitions and policy and improve the transparency and accessibility of the existing framework.
- 1.32 We have concluded, therefore, that the new regulatory regime should take the form of a single statute, or a pair of materially identical statutes,¹² incorporating all legislation on the protection, control and exploitation of wild fauna and flora in England and Wales. The regulatory structure of the new single statute would supersede and, therefore, enable the repeal of a large number of existing regulatory regimes, including:

¹² Whether our recommendations are given effect by an “England and Wales” statute accompanied by a legislative consent motion in the Welsh Assembly, or by parallel legislation for England and for Wales, is a matter for discussion between the United Kingdom and Welsh Governments.

- (1) the Conservation of Habitats and Species Regulations 2010,¹³
- (2) the Protection of Badgers Act 1992,
- (3) the Deer Act 1991,
- (4) the Wildlife and Countryside Act 1981,¹⁴
- (5) the Import of Live Fish (England and Wales) Act 1980,
- (6) the Conservation of Seals Act 1970,
- (7) the Weeds Act 1959,
- (8) the Pests Act 1954,
- (9) the Agriculture Act 1947,
- (10) the Prevention of Damage by Rabbits Act 1939,
- (11) the Destructive Imported Animals Act 1932 and
- (12) the Hares Preservation Act 1892.

Statutory factors

- 1.33 In our consultation paper we suggested that one deficiency of the current regime is a lack of transparency as to decision-making. This can lead some to think that when competent authorities take decisions priority is given to a particular interest.¹⁵ We argued that the introduction of a non-hierarchical list 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 taken into account before coming to a particular decision.¹⁶
- 1.34 In the light of the consultation responses, and after having given further thought to its practical implications, we have decided to drop this proposal. We found it impossible to draft a list of factors which was neither so general as to be ineffective nor so specific as to interfere with the domestic implementation of the Wild Birds and Habitats Directives by either “gold-plating” or breaching their requirements.

¹³ Parts 3, 4, 5 and 7.

¹⁴ Part 1 other than sections 8 and 15 (insofar as the Act applies to England and Wales).

¹⁵ Wildlife Law (2012) Law Commission Consultation Paper No 206, para 5.27.

¹⁶ The list of statutory factors we provisionally proposed in the consultation paper included the following: conservation of the species with which the decision is concerned; preservation and conservation of biodiversity; economic implications; wider social factors; and the welfare of animals potentially affected by the decision.

- 1.35 Transparency in decision-making remains a prerequisite of any modern regulatory regime. We have concluded, therefore, that the potential benefits of statutory factors could instead be achieved by introducing an express duty to give reasons in writing in connection with decisions to grant or refuse a licence.

General regulatory approach

- 1.36 In the consultation paper we analysed the existing law and identified that the basic regulatory approach is to prohibit certain behaviour, permit limited exceptions and otherwise license desirable activity affecting defined lists of species. We provisionally proposed that this approach should be retained in any new regulatory regime for wildlife. There was overwhelming support in consultation for this proposal, which also reflects the approach adopted in the Wild Birds and Habitats Directives. We have therefore followed this basic regulatory approach in the new framework.
- 1.37 We also provisionally proposed in the consultation paper that the new regime be organised by reference to individual species or groups of species. This generally reflects the current approach in the relevant EU Directives and the latest domestic wildlife protection legislation.¹⁷ Given the broad support in consultation for this provisional proposal, we have concluded that the new regulatory framework should be organised, subject to existing exceptions, in schedules containing lists of species to be protected or controlled. In the context of our recommended single statute, this approach will ensure that the level of protection of each species will be capable of being tailored to the prohibited conduct that best reflects the protection needs of that species.

General order-making procedure under the Bill

- 1.38 In consultation we provisionally proposed that section 26 of the Wildlife and Countryside Act 1981 (the 1981 Act) should be adopted as the model for the procedure that the Secretary of State or Welsh Ministers should follow to make regulations under the Wildlife Bill. Section 26, among other things, requires the Secretary of State or Welsh Ministers, before making any orders or regulations under the 1981 Act,
- (1) to give local authorities and any other person affected an opportunity to submit objections or representations with respect to the subject matter of the order or regulation;
 - (2) except when responding to the advice of the Joint Nature Conservation Committee (JNCC) to update schedules 5 and 8, to consult with whichever advisory bodies they consider is best able to advise them as to whether the order or regulation should be made.
- 1.39 In the light of the general support for this provisional proposal, we have concluded that, as a general rule, regulation-making powers under the new Wildlife Bill should be exercisable in line with the requirements currently imposed by section 26 of the 1981 Act in connection with orders and regulations made under that Act.

¹⁷ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 5.50 to 5.55.

Review of lists of species

- 1.40 Most of the provisions in our proposed regulatory framework are accompanied by a schedule listing the species of fauna or flora – or the prohibited methods of killing or capturing – to which the provision applies. Effective and flexible processes to keep those schedules up to date, therefore, are key to the proper functioning of the regulatory regime.
- 1.41 In the consultation paper we provisionally proposed that the current requirement for the GB conservation bodies (Natural England, Natural Resources Wales and Scottish Natural Heritage) acting through the Joint Nature Conservation Committee (JNCC) to review the schedules regularly should be extended to all relevant schedules under the new regime. We also suggested that in line with the quinquennial review process that currently applies to schedules 5 and 8 to the 1981 Act, the review process should be carried out at least every five years. Lastly, we proposed that, while the Secretary of State or Welsh Ministers should be free to depart from the advice of the relevant conservation bodies in connection with the review of a list, they should be bound to issue a public statement giving reasons for that decision.
- 1.42 Consultees generally expressed overwhelming support for the above proposals, although there was some disagreement in connection with the maximum period between reviews.
- 1.43 On balance, we have concluded that the current five-year period between reviews should be adopted as the model for the general obligation to review the schedules periodically. A ten-year interval appears to us to be too long to ensure that schedules adequately reflect real management and conservation priorities on an ongoing basis. Over-frequent changes to the schedules, on the other hand, may cause uncertainty for those engaging in regulated activities and impose undue burdens on all those interested in wildlife protection.
- 1.44 In line with section 26 of the 1981 Act, we have also concluded that under the new framework the Secretary of State or Welsh Ministers should have the power to update schedules by regulations outside the quinquennial review process. In that case, in line with the general order-making procedure discussed above, the Secretary of State or Welsh Ministers should consult whichever of the advisory bodies they consider best able to advise them as to whether the schedule should be updated.
- 1.45 The fact that the quinquennial review process under the new statutory framework will extend to a broader range of schedules will, in our view, increase the likelihood of future divergence between expert advice and political decision-making. We are of the view that an express requirement for the Secretary of State or Welsh Ministers to give reasons for departing from the expert advice should guarantee the transparency of the decision-making process and clarify the interface between science and policy.

Criteria for adding or removing entries to or from the relevant schedules

- 1.46 Currently the power to amend certain schedules is restricted by statutory criteria. In reviewing the existing procedures for updating schedules, we considered whether retaining those criteria would undesirably restrict the flexibility of the new framework.

- 1.47 Section 22(3)(a) of the 1981 Act, for instance, currently provides that the Secretary of State or Welsh Ministers may only add to schedules 5 or 8 an animal or plant which, in their opinion, is in danger of extinction in Great Britain or is likely to become so endangered unless conservation measures are taken.¹⁸ A species may only be removed from schedule 5 or 8 if, in the opinion of the Secretary of State or Welsh Ministers, that species is no longer so endangered, or likely to become so endangered.
- 1.48 Our view is that the Secretary of State or Welsh Ministers should be able to list animals and plants in the schedules replicating schedules 5 and 8 to the 1981 Act for reasons other than the risk of extinction of a species. It should be possible, for instance, to protect an animal or plant because it is an essential component of an ecosystem and the exploitation of that animal or plant threatens the ecological balance of a particular habitat. We think, therefore, that the current restriction unnecessarily prevents the development of different criteria in the future.
- 1.49 We have concluded, however, that the Secretary of State or Welsh Ministers should not be able to remove an animal or plant from those schedules unless, in their opinion:
- (1) the animal is not endangered or unlikely to become endangered;
 - (2) the presence of that animal in that schedule is unnecessary for the protection of the animal or plant in question (by reason of an equivalent entry added, or proposed to be added, to any other schedule); or
 - (3) the removal of the plant or animal from that schedule is necessary in order to comply with an international obligation.

General power to introduce close seasons for animals other than wild birds

- 1.50 In the consultation paper, we provisionally proposed that there should be a general power to introduce, remove or amend close seasons¹⁹ by order.
- 1.51 We thought that such a power would be useful for two reasons. First, existing close seasons can only be altered by Act of Parliament. This does not seem sufficiently flexible to ensure that a relevant close season reflects the conservation or welfare needs of the species in question. Secondly, it may well be necessary in the future to impose a close season on a species that does not currently have one. Effective measures – including the introduction of close seasons – to maintain the population of certain species at a favourable conservation status, for instance, are expressly required by article 7 of the Bern Convention and article 14 of the Habitats Directive.

¹⁸ Schs 5 and 8 to the Wildlife and Countryside Act 1981 include, respectively, animal and plant species protected for domestic conservation policy reasons.

¹⁹ Periods during which the hunting of an otherwise huntable animal is not permitted.

- 1.52 Consultees, including Defra and Natural England, generally expressed strong support for the proposal. We have concluded, therefore, that under the new framework there should be a general power to introduce, remove or alter close seasons in any specified area and for any animal, other than wild birds listed in annex 2 to the Wild Birds Directive.²⁰
- 1.53 In consultation, both conservation and pro-hunting groups raised concerns about the risk that the power to alter close seasons may be used to further the political objectives of a particular group rather than being exercised according to a sound set of principles.
- 1.54 The exercise of the power to introduce close seasons will be, in practice, underpinned by the surveillance obligations and conservation imperatives flowing from articles 11 and 14 of the Habitats Directive.²¹ In addition, because any decision to impose a close season would have to go through the same order-making process that applies to the amendment of any other schedule under the new Act, there will be ample opportunity for the views of interested parties to be considered and taken into account. As the Secretary of State and Welsh Ministers will be under an express obligation to give reasons in the event that they decide not to follow the expert advice from the relevant conservation bodies (the JNCC, Natural England or Natural Resources Wales), we expect that any decision to depart from scientific advice will be for sound, principled reasons.

CORE INTERNATIONAL AND EU OBLIGATIONS (CH3)

- 1.55 As discussed above, a significant proportion of domestic wildlife law is underpinned by international and EU rules.
- 1.56 While the usual approach to the transposition of EU Directives in England and Wales is, save in exceptional circumstances, to “copy out” the requirements of the Directives, in the draft Wildlife Bill we have taken a more strategic and comprehensive approach to transposition. The Law Commission’s role is to keep the law under review with a view, in particular, to making recommendations for the purpose of simplifying and modernising it. Modern and simple legislation needs to be accessible, effective and enforceable. Those principles apply equally to the transposition of EU Directives. We have followed a “copy-out” approach to transposition, therefore, only when we considered it the most effective, accessible and simple means of transposing the obligations of the Directives; in other cases we have sought to encapsulate the requirements of a Directive in more accessible language.
- 1.57 We have also worked hard to identify inadequate transposition in current domestic law and to ensure that EU and international obligations are accurately transposed in the draft Wildlife Bill.

²⁰ The hunting of wild birds listed in annex 2 to the Wild Birds Directive, as discussed below, will be subject to a specific regime to give effect to art 7 of the Wild Birds Directive. The order-making power, however, may be used for the purpose of protecting birds that fall outside the protection regime of the Wild Birds Directive.

²¹ In line with art 14 of the Habitats Directive, the Secretary of State and Welsh Ministers will have to ensure that – in the light of the surveillance programmes required by article 11 – effective measures are taken to ensure that the exploitation of such specimens is compatible with the maintenance of that species at a favourable conservation status.

1.58 In chapter 3 of the Report we discuss in detail three complex transposition issues that we have encountered in the context of the wildlife project:

- (1) the extent of the UK's obligations under EU law arising out of the Bern Convention;
- (2) the transposition of the word "deliberate" in wildlife crimes giving effect to primary prohibitions²² under the Habitats and Wild Birds Directives; and
- (3) the prohibitions connected to the disturbance and harassment of protected wild flora species.

The Bern Convention

1.59 The parties to the Bern Convention include the United Kingdom, a number of other EU member states and the EU itself (then known as the European Economic Community or EEC). Article 22 of the Convention permitted contracting states (but not the then EEC) to enter reservations against particular obligations under the convention at the time of ratification – meaning that the obligation in question was not being accepted. The UK did so in connection with particular means of killing and capture in respect of particular species.

1.60 In the meantime the case-law of the Court of Justice of the EU has developed in a manner that suggests that EU member states are under an obligation under EU law to enable the EU to comply with obligations that the EU has undertaken under an international agreement involving the EU as well as member states. There is no Court of Justice case-law on the status of reservations under such an agreement, but the case-law could be interpreted, in a situation where the EU has not entered any such reservations, as requiring member states to comply fully with the agreement despite any reservations they have themselves entered.

1.61 However, our examination of the Bern Convention has led us to conclude that the EU's inability to enter reservations under it does not mean that it is under an international law obligation to over-ride reservations entered by its member states. We have therefore concluded that the UK is not under an obligation as a matter of EU law to give up its reservations. Our draft Bill is drawn accordingly. This has, however, made the Bill's provisions more complicated than they would otherwise be. We suggest that the Government might consider with stakeholders whether there remains a case for continuing not to prohibit the means of killing or capture detailed in the reservations.

Transposing "deliberate"

1.62 The Bern Convention, the Wild Birds Directive and the Habitats Directive consistently couch their core primary prohibitions in terms of "deliberate" action.

²² The expression "primary prohibition", in this summary, refers to all prohibitions related to activities directly interfering with protected animals, such as killing, injuring, capturing and disturbance.

- 1.63 The word “deliberate”, in its ordinary English meaning, is generally understood as a synonym of “intentional”.²³ In our consultation paper, we noted that relevant guidance and the case-law of the Court of Justice of the European Union have expanded the meaning of the word “deliberate” significantly beyond its ordinary meaning in the law of England and Wales.²⁴ In Case C-221/04 *Commission v Spain*, the latest Court of Justice ruling on this issue, the Court of Justice held, among other things, that

For the condition as to “deliberate” action in article 12(1)(a) of the Directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, *at the very least, accepted the possibility of such capture or killing* [emphasis added].²⁵

Current transposition of deliberate

- 1.64 Section 1 of the Wildlife and Countryside Act 1981 – the provision intended to transpose article 5 of the Wild Birds Directive – transposes “deliberate” with the term “intentional”. Regulations 41 and 45 of the Conservation of Habitats and Species Regulations 2010 (the 2010 Regulations), which respectively transpose articles 12 and 13 of the Habitats Directive use the word “deliberate”, which is defined as having the same meaning as in the Directive.²⁶
- 1.65 In the light of the Court of Justice’s case-law, we suggested in consultation that the transposition of the word “deliberate” in section 1 of the 1981 Act is excessively narrow; the word “intentional” does not cover activities where the defendant merely “accepted the possibility” of harm to a protected wild bird. We also suggested that the “copy-out” approach adopted under the 2010 Regulations fails to transpose the Habitats Directive’s prohibitions clearly and unambiguously. Using the word “deliberate” would mislead most readers, on the basis that its ordinary meaning is significantly narrower than the Court of Justice’s definition.²⁷
- 1.66 We provisionally proposed adopting the expression “intentionally or recklessly” to transpose the term “deliberately” in the Wild Birds and Habitats Directive.

²³ The Oxford English Dictionary defines “deliberate” as follows: “well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention”.

²⁴ Wildlife Law (2012) Law Commission Consultation Paper No 206, para 6.36.

²⁵ Case C-221/04 *Commission v Spain* [2006] ECR I-4515, [71]. Further infringement proceedings concerning “deliberate” actions were brought in November 2014 against Greece; the Court of Justice of the European Union has not yet ruled on the matter (see Case C-504/14 *European Commission v Hellenic Republic*).

²⁶ Conservation of Habitats and Species Regulations 2010, reg 3(3).

²⁷ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 6.42 and 6.43.

Discussion

- 1.67 After careful thought, we have concluded that our provisional proposal was not adequate. The concept of “recklessness” covers a wider range of knowledge and attitudes than the term “deliberate” as defined by the Court of Justice in *Commission v Spain*. Its adoption could result in the criminalisation of a number of legitimate economic activities, such as forestry, agriculture or the operation of wind farms. “Recklessness” could criminalise all instances where it was established that the defendant knew about a risk of harm to a species and carried out an activity despite that knowledge, in circumstances where the court considered that it was unreasonable for the defendant to do so.
- 1.68 Whilst in the context of the Habitats Directive activities could be authorised on grounds of “overriding public interest” (in line with the derogation regime set out in article 16(1)), the Wild Birds Directive does not allow member states to derogate from its general protection regime on such grounds. Transposing “deliberate” with “recklessness”, therefore, could create problems in that any bird strike caused by the operation of a wind farm, for instance, could potentially give rise to criminal liability without it having been possible for the operator to seek a licence.²⁸ We concluded that such a result would be unacceptable, and could not possibly reflect the object and purpose of either Directive.
- 1.69 In the light of a comparative analysis of the different approaches to intentionality in criminal law, we reached the conclusion that the Court of Justice’s ruling in *Commission v Spain*, read together with the Advocate General’s Opinion, defines “deliberate” in line with the concept of “*dolus eventualis*”, as understood in a number of continental legal systems and international courts and tribunals.²⁹
- 1.70 In those jurisdictions, an individual may be treated as having deliberately produced a prohibited result when, having foreseen a serious risk that the result may occur, he or she does things that bring about the prohibited result whilst “consciously accepting” the potentially harmful consequences of the activity.

²⁸ This result is concurrently caused by the extended definition of deliberate and the fact that retaining the “incidental result of a lawful operation” defence – as discussed below – would constitute a clear breach of art 9 of the Wild Birds Directive.

²⁹ In terms of continental legal systems we explored, in particular, the case-law of German and Italian courts. In terms of international courts and tribunals, we focused on the case-law of the International Criminal Tribunal for Yugoslavia and the International Criminal Court.

1.71 There are two main differences between *dolus eventualis* and recklessness. First, while the level of foresight of risk in the domestic definition of “recklessness” is unqualified, in the context of *dolus eventualis* the necessary threshold of foresight of risk is generally defined in terms of “real” or “serious” risk.³⁰ Secondly, in the context of *dolus eventualis*, the concept of “acceptance of the prohibited consequences” introduces a volitional component that is absent from recklessness: the defendant must not only foresee the risk of harm but, to avoid renouncing the activity and its eventual advantages, decide to act “whatever the cost”.³¹

Transposition of “deliberate” in domestic law

1.72 From looking at the Court of Justice’s definition of “deliberate” through the lens of the civil law concept of *dolus eventualis*, it became clear to us that there was scope to transpose the term “deliberate” with a prohibition which reflects the object and purpose of the Directives whilst avoiding the unnecessary criminalisation of legitimate economic activities.

1.73 We have concluded, therefore, that a person should only be held liable if the prosecution establishes that his or her action (or in some circumstances inaction) caused, for instance, the death of a protected animal or bird, and

- (1) he or she intended to cause the death of that animal or bird; or
- (2) his or her actions presented a serious risk to animals or birds of the relevant species unless reasonable precautions were taken and he or she was aware that that was the case but failed to take reasonable precautions; or
- (3) his or her actions presented a serious risk to animals or birds of the relevant species whether or not reasonable precautions were taken, and he or she was aware that that was the case.

1.74 In line with the Advocate General’s Opinion, we have concluded that the “seriousness” of the risk should be interpreted by reference to either the degree of probability of a protected animal being harmed by the activity in question or the consequent effect on the distribution or abundance of the local population of a species of a protected bird or animal that may be affected or (in most cases) a combination of both.

³⁰ German and Italian courts, for example, require a minimum threshold of foresight of risk to satisfy the cognitive element of *dolus eventualis*. In Germany the threshold is generally expressed in terms of “more than an entirely distant possibility”; in Italy the threshold is generally higher and is often described in terms of “serious” or “concrete” possibility. European Commission guidance follows the latter approach.

³¹ Marinucci, G and Dolcini E (2012) *Manuale Di Diritto Penale. Parte Generale*, Fourth ed, p 367. In one of the latest leading cases on the concept of *dolus eventualis*, the Italian Supreme Court described the concept as being characterised by the foresight of a concrete possibility of an accessory result to the primary scope pursued by the defendant, and the acceptance of the risk of such accessory result (Cass. Pen. Sez. I. 01.2.11 (dep. 15.3.11), n. 10411).

- 1.75 We have also concluded that in considering the steps taken to prevent the action from causing harm, a court should be able to take into account the defendant's compliance with guidance, regulations, permits and other relevant instruments issued by public authorities falling within the scope of regulation 9(1) in pursuance of their nature conservation functions listed, in particular, under regulation 9(2) of the Conservation of Habitats and Species Regulations 2010.

Transposing “disturbance” prohibitions

- 1.76 The Bern Convention, the Wild Birds Directive and the Habitats Directive prohibit activities causing “disturbance” to wildlife.
- 1.77 While in those three instruments the meaning of “disturbance” is left undefined, the European Commission's guidance on article 12 of the Habitats Directive explains that “disturbance” should be understood as including any activity which is detrimental to a protected species in the area in which the act is carried out. Prohibited interference includes activities that reduce the survival chances, breeding success or reproductive ability of a species or lead to a reduction of the area occupied by such species.³²
- 1.78 Article 5(d) of the Wild Birds Directive requires member states to prohibit the deliberate disturbance of wild birds only when such disturbance would be “significant having regard to the objectives of [the] Directive”, which is in line with the formulation of the disturbance prohibition in article 6(c) of the Bern Convention. The words “significant having regard to the objectives of [the] Directive” are, however, omitted from article 12(1)(b) of the Habitats Directive.
- 1.79 We have taken the view that both Directives follow the same general principle. Broadly speaking, what the Directives intend to prohibit are not, in most cases, activities that merely affect a particular specimen. The general intention of both is to prohibit activities that are likely to have a negative effect on the conservation status of a protected species in the area where the activity is carried out.

Disturbance prohibitions under the new framework

- 1.80 Regulation 41(2) of the Conservation of Habitats and Species Regulations 2010 currently provides that the disturbance of protected animals includes, in particular, any disturbance which is likely—
- (1) to impair their ability to survive, to breed or reproduce, or to rear or nurture their young, or
 - (2) in the case of animals of a hibernating or migratory species, to impair their ability to hibernate or migrate; or
 - (3) to affect significantly the local distribution or abundance of the species to which they belong.

³² European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007) p 38.

- 1.81 This list of prohibited results is in line with the European Commission’s guidance and, in our view, significantly improves the clarity of the transposition of the disturbance prohibition in article 12(1)(b) of the Habitats Directive.
- 1.82 For the purpose of domestic transposition, the disturbance prohibitions under the two Directives should in our view be treated as requiring an equivalent level of protection. We have concluded, therefore, that the existing non-exhaustive list of prohibited results in regulation 41(2) of the 2010 Regulations should be retained in the new framework and extended to the domestic transposition of article 5(d) of the Wild Birds Directive.
- 1.83 Under the new framework, therefore, a reference to an action that causes disturbance to the local population of a species protected under the Bern Convention, the Wild Birds Directive or the Habitats Directive, should expressly include, in particular, a reference to
- (1) Any action that is likely to impair the ability of specimens of the relevant species –
 - (a) to survive;
 - (b) to breed or rear their young;
 - (c) in the case of a migratory species, to migrate;
 - (d) in the case of a hibernating species, to hibernate;
 - (2) Any action that is likely to have a significant effect on the distribution or abundance of the population of the species in the area.
- 1.84 Alongside the transposition of the disturbance prohibitions under the Bern Convention, the Wild Birds Directive and the Habitats Directives, domestic law further prohibits the “disturbance” of a number of other animals in order to give effect to domestic conservation preferences or other international commitments.³³
- 1.85 In consultation we suggested that overlaps should be removed and provisionally proposed that the disturbance prohibitions giving effect to the Directives in domestic law could be harmonised with the disturbance prohibitions giving effect to domestic policy choices.
- 1.86 We have since taken the view, however, that the domestic disturbance prohibitions have a significantly different focus. As discussed above, under the Bern Convention and the two Directives, “disturbance” describes interferences that have negative effects on the conservation status of the population of a protected species. In the context of domestic disturbance prohibitions, on the other hand, “disturbance of an animal” has a straightforward meaning. It does not require any evidence of broader impacts on the conservation status of the species.

³³ See, for instance ss 9(4) and (4A) of the Wildlife and Countryside Act 1981.

1.87 Subject to the discussion of “harassment” below, therefore, we have concluded that in the draft Wildlife Bill all species protected under the Bern Convention, the Wild Birds Directive and the Habitats Directive should be protected by disturbance prohibitions giving effect to the UK’s external obligations. Other species protected as a matter of domestic policy should be protected against individual disturbance. We recommend, however, that consideration be given to whether any or all of the species protected under the Bern Convention and the directives should be given additional protection through “individual disturbance” prohibitions.

“Harassment” of protected specimens

1.88 The Bonn Convention, the African-Eurasian Waterbirds Agreement and the Agreement on the Conservation of Albatrosses and Petrels, all of which are binding on the UK, additionally require contracting parties to prohibit the “harassment” of the species protected by them.

1.89 The “harassment” of a species is not expressly prohibited in England and Wales, though a criminal offence of intentional or reckless harassment of certain protected birds and animals (the basking shark, cetaceans and the white-tailed eagle) was introduced in Scotland in 2004.³⁴

1.90 We considered the option of creating a free-standing harassment offence to give effect to the UK’s international obligations. After discussions with Parliamentary Counsel, however, we reached the view that the introduction of such an offence would simply add an unnecessary layer of complexity to domestic legislation. A “harassment” prohibition would add very little to the existing “individual disturbance” prohibition; both provisions aim at prohibiting conduct which causes distress to an individual specimen, regardless of the potential or actual consequences on the survival of the species. We have concluded, therefore, that under the new framework animals protected from “harassment” under the international agreements should be protected from “individual disturbance”, in line with section 9(4A) of the 1981 Act.

³⁴ Following an amendment to ss 1 and 9 of the Wildlife and Countryside Act 1981.

PROTECTION OF WILD BIRDS (CH 4)

Definition of “wild bird”

- 1.91 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 on the European territory of the member states to which the Treaty [on the Functioning of the European Union] applies”.³⁵ The specific protection obligations under articles 5, 6 and 8 of the Wild Birds Directive apply to species within that definition. The definition excludes birds that are only indigenous to territories geographically located outside Europe (or territories geographically located in Europe to which the Treaty does not apply) and whose presence in a European territory to which the Treaty applies is dependent on direct or indirect introduction by man.³⁶
- 1.92 The Wildlife and Countryside Act 1981 currently defines a protected bird as any bird (apart from, broadly speaking, a bird bred and kept in captivity, which we discuss below) “of a species which is ordinarily resident in or is a visitor to the European territory of any member state in a wild state”, excluding poultry or, except in sections 5 and 16, any game bird. In consultation we suggested that the current definition extends the domestic protection regime to species which the Directive was not intended to cover.³⁷ The key problem we identified is that the term “ordinarily resident” covers species that have established self-sustaining wild populations in the European territory of member states irrespective of how the population was established. Consequently, non-native populations which may in fact need to be controlled currently fall within the domestic protection regime.
- 1.93 In the light of the general support for our provisional proposal to this effect, we have concluded that the definition of “protected wild bird” under the new framework should be based around the term “naturally occurring”. This approach would bring our transposition into line with the definition contained in the Directive and exclude from the general domestic protection regime non-native species whose protection, in most cases, would not serve any conservation purpose.
- 1.94 As a number of consultation responses rightly pointed out, aligning the definition of “wild bird” with article 1 of the Directive will remove a number of non-native birds present in the wild in England and Wales from the domestic protection regime. Our view is that an effective regulatory regime should be capable of allowing the Secretary of State or Welsh Ministers to protect those bird species for reasons not necessarily connected to conservation (animal welfare, for instance). We have therefore concluded that under the new framework, the Secretary of State or Welsh Ministers should have the power to list specific bird species that fall outside the general definition of “wild bird” for the purpose of protecting them.³⁸

³⁵ Wild Birds Directive, art 1.

³⁶ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 6.7 to 6.11.

³⁷ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 6.7 to 6.10.

³⁸ We have recommended that the common pheasant and the Canada goose should be expressly listed in the new schedule on the basis that, whilst generally considered non-native to the European territory of EU member states, they are expressly listed as huntable birds under annex 2 to the Wild Birds Directive.

Reverse burden of proof

- 1.95 Under section 1 of the 1981 Act, a bird of a protected species is presumed to be “wild” unless it can be shown that it was bred in captivity (unless it was bred in captivity and subsequently released into the wild as part of a re-population or re-introduction programme). A bird, moreover, will not be treated as captive-bred unless the defendant shows that its parents were lawfully captive when the egg was laid.³⁹ In other words, the burden of proving that a bird is captive-bred rests on the defendant – this is called a reverse burden.
- 1.96 A reverse burden of proof may be incompatible with article 6(2) of the European Convention on Human Rights, which guarantees the presumption of innocence in criminal proceedings.⁴⁰ Case-law suggests, however, that a reverse burden will be justified where it is proportionate and is reasonably necessary in all the circumstances. Any shift in the burden should be confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.⁴¹
- 1.97 We have concluded that the reverse burden of proof, in this context, is justified by the significant information imbalance between defence and prosecution. In the absence of a reverse burden of proof, the prosecution would have to prove beyond reasonable doubt that a bird had not been bred in captivity. This may be reasonably easy with a golden eagle, but far more difficult with certain more popular traded birds, as in most cases there is no obvious genetic difference between a wild and a captive-bred bird. As the defendant would be reasonably expected to know the provenance of a bird that was found in his or her possession, in most cases the burden of proof would not be a heavy one.
- 1.98 Certain stakeholders argued that the above provisions impose an unreasonable burden on people who breed or possess captive-bred birds belonging to species protected under the Wild Birds Directive.
- 1.99 Whilst we were not persuaded by the argument that a requirement to show that the parents of a bird were lawfully in captivity when the egg was laid is wrong in principle, we have accepted that such requirement may create legal uncertainty in connection with trade in and possession of certain birds, particularly where the parents of the bird in question originate from another member state with different documentary requirements in place. We have concluded, therefore, that while the above reverse burden should be retained, the Secretary of State or Welsh Ministers should have the power to make regulations specifying particular ringing, marking or other registration requirements that, if complied with by the defendant, would restore the burden of proof to the prosecution in the context of both trade and possession offences.

³⁹ Wildlife and Countryside Act 1981, ss 1(6) and 27(2).

⁴⁰ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.51-7.57.

⁴¹ See *Salabiaku v France* (1988) 13 EHRR 379 (App No 10519/83) at [28]. See also *Hoang v France* (1993) 16 EHRR 53; *X v UK* (1972) 42 CD 135 (App No 5877/72); *Sheldrake* [2005] 1 AC 246; and *A-G's Reference (No 1 of 2004)* and *R v Edwards and others* [2004] EWCA Crim 1025; [2004] 1 WLR 2111.

Regulating trade in wild birds

- 1.100 Whilst the provisions regulating trade in wild birds under article 6 of the Wild Birds Directive are relatively simple, the domestic regime that regulates that trade is exceptionally difficult to navigate. In domestic legislation, express distinctions are drawn between live and dead birds, wild and captive-bred birds, “game birds” and “wild birds”, and different times of the year during which certain birds may be traded. The complexity of domestic legislation is compounded by the presence of a number of general licences aimed in part at addressing problems with primary legislation.
- 1.101 Currently, domestic legislation expressly prohibits the sale of certain captive-bred birds despite the fact that, as the Court of Justice of the European Union ruled in *Vergy*,⁴² captive-bred birds fall outside the scope of the Directive. The effect of General Licences 17 and 18 (in England) and General Licences 010 and 012 (in Wales), however, is that trade in most live or dead captive-bred birds is currently authorised, but subject to conditions that birds from other member states may well not be able to satisfy.⁴³
- 1.102 We accept the basic conservation imperative that requires the boundary between captive-bred birds and birds from the wild to be policed. Our view, however, is that the most straightforward way of policing this boundary is to control the market in birds from the wild and their eggs rather than the market in captive-bred birds. As the Court of Justice explained in *Vergy*, the negative impacts on conservation created by trade in birds of protected species derive from trade in birds from the wild, not from trade in captive-bred birds. It follows that the only reason for controlling the market in captive-bred birds is that, unless documentary or ringing requirements are imposed on traders, it would often be impossible for the regulators to distinguish between captive-bred birds and protected wild birds.
- 1.103 In line with the discussion in the section above, under our new recommended framework any bird which has not been ringed, marked or registered in accordance with regulations issued by the Secretary of State or Welsh Ministers will be presumed to be a wild bird. A bird that has been ringed, marked or registered in accordance with regulations, on the other hand, will be presumed to be a captive-bred bird unless the prosecution proves that it was not captive-bred and that the defendant knew, or had reason to suspect at the time of the alleged offence, that the bird was not captive-bred.

⁴² Case C-149/94 *Didier Vergy* [1996] ECR I-299.

⁴³ A review of the regulation of trade in live captive-bred birds is under way for the purpose of addressing concerns that the current strict approach to ringing requirements constitutes an unlawful barrier to the import of birds bred in other EU member states (see <https://www.gov.uk/government/consultations/captive-bred-birds-changing-how-we-regulate-trading-in-england-scotland-and-wales> (last visited 26 October 2015)).

- 1.104 In other words, under the new framework the boundary between the market in captive-bred birds and the market in wild birds will be effectively policed by the presence of a reverse burden of proof on the defendant and the possibility of making regulations, compliance with which would allow trade in the relevant birds on the ground that they would be presumed to be captive-bred. It follows that the new framework will avoid the cumbersome model of a prohibition of trade in all birds of the protected species subject to exceptions (themselves subject to conditions) for captive-bred birds spread between the primary legislation and licences. This will allow the requirements of article 6 of the Directive to be effectively transposed in a significantly simpler fashion.
- 1.105 In line with article 6(1) of the Directive, under the new framework sections 6(1)(a) and 6(2)(a) of the 1981 Act will be replaced by a prohibition of selling, offering for sale, exposing for sale or being in possession for the purpose of sale of any wild bird of a protected species, any part of such a bird or anything derived from such a bird.
- 1.106 To give effect to articles 6(2) and 6(3) of the Directive, we have concluded that under the new framework trade in birds listed in part A of annex 3 to the Directive (and, subject to the relevant consultation requirements, part B of annex 3) should not be prohibited unless the prosecution shows that the bird had been killed or captured in contravention of domestic legislation or the law of other member states and the defendant knew or had reason to believe that this was the case.⁴⁴

Hunting

- 1.107 Article 7 of the Wild Birds Directive expressly provides that member states may authorise the recreational hunting of certain wild bird 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” and 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 sustainable population levels. Article 7 also requires member states to introduce close seasons during the breeding season, the various stages of reproduction and, in the case of migratory birds, the return to their breeding areas.

Domestic regulation of hunting

- 1.108 Article 7 of the Wild Birds Directive is currently transposed in the following ways: first, by protecting game birds from killing or capture during statutory close seasons; secondly, by listing certain wild birds (ducks and other water fowl) in part 1 of schedule 2 to the 1981 Act and excluding them from the protection of section 1 outside the close season; thirdly, through the use of general licences based on one of the existing licensing grounds in section 16 of the 1981 Act, such as the prevention of damage to crops.⁴⁵

⁴⁴ We have also concluded that the exception should include “game birds” that have been captive-bred, on the basis that to replicate existing domestic policy preferences, certain primary activity prohibitions under the new framework will apply to game birds regardless of their “wild” or “captive-bred” status.

⁴⁵ See, for example, General Licence GL – 04 (in England).

- 1.109 This method of transposition is problematic for a number of reasons. The Game Act 1831,⁴⁶ for instance, requires the amendment of primary legislation in order to vary the dates of close seasons, a process which is arguably too inflexible to ensure that huntable species are appropriately protected in line with changes to their population level and external climatic conditions, as required by article 7(4) of the Directive. Whilst the hunting regime established under section 2 of the 1981 Act is more flexible, the regulatory powers under section 2 remain insufficient to transpose article 7 of the Directive effectively. Under sections 2(5) and 2(6), for instance, it is impossible to impose additional conditions which may be necessary to ensure “wise use” as required by the Directive, such as reporting requirements or quotas on the number of birds that may be hunted in an area.
- 1.110 In the consultation paper we provisionally proposed that article 7 should be expressly transposed in the new framework. In the light of the consultation responses, however, we have accepted that our original proposal to satisfy this requirement by means of codes of practice was unnecessarily burdensome and risked creating legal uncertainty.
- 1.111 In our interim statement we suggested that the hunting of wild birds falling within annex 2 to the Directive, including “game birds”, could be more easily regulated by means of general and class licences.⁴⁷ After further discussions with stakeholders, however, we realised that while the creation of a licensing regime would introduce the necessary level of flexibility in the regulatory regime, it would not necessarily constitute the most appropriate mechanism to regulate a large economic sector such as the shooting industry. We have concluded that a more appropriate balance between flexibility and political accountability could be achieved through a system based entirely on regulation-making powers. In line with our general policy of retaining, as far as possible, the existing regulatory structures, such a system would also constitute a significantly less radical departure from the way hunting activities have been regulated until now.

Hunting under the new framework

- 1.112 Under the new regime, therefore, the Secretary of State or Welsh Ministers will have the power to introduce open seasons for huntable birds by regulation, derogating from the general protection regime described above. The power to introduce open seasons, however, will be conditional on the Secretary of State or Welsh Ministers being satisfied that hunting activities authorised in the regulations comply with the principles prescribed by article 7.
- 1.113 To ensure that hunting activities carried out during the open season comply with the conditions in article 7, the Secretary of State or Welsh Ministers will have the power to restrict hunting activities carried out during the open season by prohibiting the killing or capture of specified species in certain areas, during certain periods or through particular hunting methods, or by making hunting activities conditional upon compliance with relevant monitoring or reporting obligations. The Secretary of State or Welsh Ministers will also be under an express obligation to ensure that the specified period during which the relevant birds may be hunted does not include any period prohibited by article 7(4).

⁴⁶ Game Act 1831, s 3.

⁴⁷ Wildlife Law (2013) Law Commission Interim Statement, paras 1.57 to 1.61.

PROTECTION OF WILD ANIMALS OTHER THAN BIRDS (CH5)

1.114 In contrast to the current regulatory regime for the protection of wild birds, provisions for the protection of wild animals are scattered across a large number of often inconsistent and overlapping legal instruments. In the light of the intricate nature of the current legislative landscape, recommendations in this area have primarily focused on the rationalisation and harmonisation of the current regulatory regime. The aim is to remove unnecessary overlaps and ensure that the new regulatory framework is consistent and, as far as possible, easily accessible to users.

Definition of “wild animal”

1.115 At both EU and domestic level, the protection of wild animals is primarily based on schedules listing the individual species or sub-species to which each specific prohibition applies. As in the context of offences against wild birds, however, it is equally important to determine when an animal of a protected species should be protected by wildlife protection legislation.

1.116 The wording of article 12(1) of the Habitats Directive appears to restrict the scope of the primary activity prohibitions (those of killing, injury and capture) to animals of protected species that are located “in the wild”. This approach differs from article 6 of the Bern Convention and article 5 of the Wild Birds Directive, both of which refer to the status of the animal or bird in question rather than the location where it was killed or captured.

1.117 We have taken the view that the approach in the Habitats Directive is anomalous. First, it could create legal uncertainty in relation to species – such as bats – that roost inside premises. Secondly, it would mean that once person A captures an animal of a protected species, person B could kill the animal without committing a wildlife crime. Those results, in our view, could not possibly accord with the object and purpose of the Bern Convention and the Habitats Directive.

1.118 In line with our recommendations in connection with the transposition of the Wild Birds Directive, we have concluded that – for the purpose of transposing article 12(1) of the Habitats Directive under the new framework – “wild animal” should be defined⁴⁸ as any animal which was not bred in captivity, or an animal that was bred in captivity which has been lawfully released into the wild as part of a re-population or re-introduction programme. In addition, an animal should not be considered “captive-bred” unless its parents were lawfully in captivity at the time the animal was bred.

1.119 The Wildlife and Countryside Act 1981 (“1981 Act”) defines “wild animal” as “any animal (other than a bird) which is or (before it was killed or taken) was living wild”.⁴⁹ In addition, an animal is presumed to be a wild animal unless the contrary is shown.⁵⁰

⁴⁸ In line with the ruling of the Court of Justice of the European Union in Case C-149/94 *Didier Vergy* [1996] ECR I-299.

⁴⁹ Wildlife and Countryside Act 1981, s 27(1).

⁵⁰ Wildlife and Countryside Act 1981, ss 9(6) and 11(5).

- 1.120 We have taken the view that this approach is substantively identical to the way we have approached the definition of “wild bird” and “wild animal” for the purpose of transposing the Directives. The only difference is that the definition used in the 1981 Act would also cover captive-bred animals of a protected species that have escaped into the wild. Because the great majority of animals protected under the 1981 Act are not animals that are ordinarily bred in captivity, and the burden of proving that the animal had been bred in captivity would remain on the defendant, we have reached the view that, in practice, the two definitions are interchangeable. We have concluded, therefore, that under the new framework the definition of “wild animal” in the provisions reproducing the 1981 Act should be aligned with the definition of “wild animal” in the provisions giving effect to the Bern Convention and the Habitats Directive.
- 1.121 For similar reasons, we have concluded that the same approach should extend to the protection of badgers under the Protection of Badgers Act 1992, the protection of seals under the Conservation of Seals Act 1970 and the protection of hares under section 3 of the Game Act 1831. The aim of the drafters of those instruments was clearly the conservation of wild specimens rather than the protection of the welfare of animals in zoos. We have concluded, therefore, that restricting the scope of the above protection provisions to animals that were not bred in captivity will have no substantive effect on the level of protection that animals of that species currently enjoy.
- 1.122 The Deer Act 1991 (the 1991 Act) is different in that under that Act the line is drawn between deer that are kept for the purpose of meat production and other deer. This distinction ensures that deer that are kept for the purpose of meat production may be killed all year round by their owner without the need to seek a licence, on the basis that there would be no conservation or animal welfare reason for imposing a close season on farmed deer.⁵¹
- 1.123 We have noted that the same distinction does not currently apply to the prohibition of the killing or capture of deer during the night and the prohibition on the use of certain prohibited methods of killing or capture.⁵² As deer kept for the purpose of meat production are protected by the Animal Welfare Act 2006, however, it is difficult to find a good reason why they should continue to be protected by provisions that were designed to regulate hunting. We have concluded, therefore, that under the new framework all provisions replicating the 1991 Act should extend to any deer except those kept for the purpose of meat production falling within the scope of section 2(3) of the 1991 Act.

⁵¹ The welfare of farmed animals is currently primarily protected by the Welfare of Farmed Animals (England) Regulations 2007 (SI 2007 No 2078) and the Welfare of Farmed Animals (Wales) Regulations 2007 (SI 2007 No 3070) (W 264) as amended.

⁵² Deer Act 1991, ss 3 and 4.

Offences against badgers: reverse burden of proof

- 1.124 Section 1(2) of the Protection of Badgers Act 1992 (the 1992 Act) imposes a reverse burden on the defendant once the prosecution has provided evidence “from which it could be reasonably concluded” that the defendant was attempting to kill, take or injure a badger. Similarly, section 2(2) of the 1992 Act provides that if in any proceedings for an offence under section 2(1)(c) of the 1992 Act (digging for a badger) there is evidence from which it could reasonably be concluded that at the material time the accused was digging for a badger, he or she should be presumed to have been digging for a badger unless the contrary is shown.
- 1.125 As discussed above, the use of reverse burdens of proof, if unjustified, may be incompatible with article 6(2) of the European Convention on Human Rights. As a result, we asked consultees whether in their view there were good reasons for retaining the reverse burden of proof currently imposed on the defendant in proceedings for the offence of “digging for a badger” under section 2(1)(c) of the 1992 Act.
- 1.126 On the basis of the evidence provided in consultation, we have concluded that there are indeed such good reasons. We are persuaded that in the absence of a reverse burden it would be extremely difficult to prosecute this offence successfully. The defendant would otherwise almost always be argue that he or she had been digging for a legitimate purpose – for instance, that he or she was legitimately digging for foxes and not badgers.⁵³
- 1.127 We have not consulted on the reverse burden imposed under section 1(2) of the 1992 Act in connection with offences of attempting to kill, injure or capture a badger. On balance, however, we have come to the conclusion that section 1(2) is justifiable, on the basis that attempts to kill, take or injure badgers often take place during the night – when badgers come out of their setts – and in remote areas of the countryside. Those circumstances, arguably, make it extremely difficult for the prosecution to collect enough first hand evidence to satisfy a criminal standard of proof. Anyone stopped for attempting to kill or injure a badger could easily claim that they were legitimately hunting some other animal.

Removing inconsistencies and outdated provisions

Harmonising the mental element of certain offences

- 1.128 In the consultation paper we highlighted the lack of consistency in the mental element required to convict a person for a wildlife crime:⁵⁴ killing an animal protected by article 9(1) of the 1981 Act, for instance, is prohibited if the activity is carried out “intentionally”; killing a wild animal protected under the Habitats Directive is prohibited if carried out “deliberately”; killing badgers and seals is prohibited if carried out “wilfully”.⁵⁵

⁵³ This is because foxes often use badger setts as places of rest or refuge.

⁵⁴ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.5 to 7.9.

⁵⁵ Protection of Badgers Act 1992, s 1(1); Conservation of Seals Act 1970, s 2(2). Since the case of *R v Sheppard* [1981] AC 394 the courts have consistently interpreted the term “wilful” as including both “intention” and “recklessness”.

- 1.129 Consultees expressed overwhelming support for options that would bring a higher level of consistency across the protection regime. However, there was no consensus as to what that level of protection should be. We concluded, therefore, that we would not be comfortable with substantively altering the level of protection of species for the sole purpose of simplifying the regulatory regime. This is a policy decision that should be taken by elected representatives, in the light of sound scientific advice.
- 1.130 Whilst refraining from substantially altering the level of protection of wild animals, we have concluded that it is possible to simplify the new regime by reducing the number of prohibited mental elements to two: “intentional” and “deliberate” action. Activities that are currently prohibited when carried out intentionally should continue to be prohibited when carried out intentionally. Activities that are currently prohibited when committed “wilfully” or “recklessly”, on the other hand, should be prohibited under the new framework when carried out “deliberately”, in line with the definition of “deliberate” discussed above.
- 1.131 Whilst the terms “reckless” and “wilful” impose a marginally lower threshold of proof than “deliberate”, in the legislation as originally enacted the offences capable of being committed recklessly or wilfully were subject to the defence that the effect on the animal was the incidental result of a lawful activity and could not reasonably have been avoided. However, the Court of Justice subsequently held that that defence infringed the Habitats Directive in the case of species protected by the Directive by going beyond the grounds of derogation permitted by article 16. We have taken the view that our recommendations on the transposition of the prohibition of “deliberate” activity in the Directive will both reflect the requirements of EU law and meet the concerns that appear to have underlain the introduction of the “incidental result” defence. For the same reasons, we take the view that replacing the recklessness element of offences that protect animals for reasons of domestic policy with a prohibition of “deliberate” action will leave the practical scope of the offences virtually unchanged while reducing the number of different mental elements used in the offence-creating provisions of wildlife law.

Rationalising methods and means offences

- 1.132 Currently, prohibited methods of killing, capturing or injuring wild animals are scattered around a large number of different Acts and Regulations. This makes it difficult for the public to figure out which methods are prohibited in relation to which species. One of the reasons for such complexity is that to satisfy specific domestic preferences and, in particular, certain developments in international and EU law, a number of self-standing legislative provisions have been developed independently and not integrated properly into existing regulatory structures.
- 1.133 The list of methods of killing or capture prohibited by section 11 of the 1981 Act (which was primarily aimed at ensuring compliance with the Bern Convention), for example, applies to a list of wild animals which are protected from the use of almost identical methods under regulation 43 of the Conservation of Habitats and Species Regulations 2010 (which was primarily aimed at transposing the Habitats Directive in the law of England and Wales). The licensing regimes to authorise the same activities under the two legal frameworks, as well as the available defences, however, are significantly different.

1.134 As the aim of the two domestic legal regimes is to give effect to exactly the same set of prohibitions (one of the main aims of the Habitats Directive was to give effect to the Bern Convention obligations in the EU legal order), the existence of two overlapping sets of prohibitions makes the law, at best, unnecessarily complex, and, at worst, misleading. We have concluded, therefore, that under the new framework all animals protected from the use of methods and means prohibited under the Bern Convention or the Habitats Directive should be protected through a single regulatory regime which gives effect to both the Convention and the Directive.

Harmonising the language of trade offences

1.135 In the consultation paper we noted a number of variations in the language of existing unlawful trade offences, the harmonisation of which, we suggested, would continue to capture the original intention of Parliament whilst improving the consistency and effectiveness of the legislation.⁵⁶

1.136 The 2010 Regulations and the Protection of Badgers Act 1992, for instance, only make it an offence to “offer for sale” rather than “expose for sale” as in the 1981 Act.⁵⁷ In the consultation paper we explained that the expression “expose for sale” is broader – in contract law, exposing items for sale in a shop is generally regarded as an “invitation to treat” rather than an offer for sale.⁵⁸ It is difficult, however, to find a rational reason why a person should not commit an offence if they invite people to buy prohibited items. Similarly, we suggested that it is difficult to find good reasons why a statute making it an offence to offer an animal for sale should not also prohibit “advertisements likely to be understood as conveying that [the advertiser] buys or sells, or intends to buy or sell” the protected animal in question.⁵⁹

1.137 We asked, therefore, whether consultees thought that the offence of selling certain protected wild animals (or plants) should include offences of offering for sale, exposing for sale and advertising to the public. In the light of the overwhelming support for this proposal, we have concluded that – in line with sections 9(5) and (6) of the 1981 Act – all trade prohibitions in relation to protected animals (and plants) should cover the following conduct:

- (1) sale;
- (2) offering or exposing for sale;
- (3) being in possession or transporting for the purpose of sale

⁵⁶ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 7.19 to 7.22.

⁵⁷ The Wildlife and Countryside Act 1981, ss 6, 9 and 13, prohibits both “offering” and “exposing for sale” protected species.

⁵⁸ In *Partridge v Crittenden* [1968] 1 WLR 1204, for example, the defendant was acquitted of the offence of “offering for sale” a protected bird in contravention of s 6(1) of the Protection of Birds Act 1954 on the basis that advertising the sale of the bird only constituted an “invitation to treat”. The phrase “expose for sale” was introduced to avoid that outcome.

⁵⁹ Under s 9(5)(b) of the Wildlife and Countryside Act 1981, advertising the sale of a wild animal of a species listed in sch 5 is now expressly prohibited.

- (4) publishing or causing to be published any advertisement likely to be understood as conveying that a person buys or sells or intends to buy or sell.

Repealing outdated provisions

- 1.138 Wildlife protection legislation also continues to contain a number of obsolete provisions that should have no place in a modern regulatory framework. Since the invention of refrigerators and freezers, for instance, prohibiting trade in hares or leverets during particular periods of the year is neither an effective nor a proportionate mechanism to remove the incentive to kill or capture wild hares during those periods.
- 1.139 We have concluded, therefore, that the Hares Preservation Act 1892 should be repealed. Under the new framework, of course, the Secretary of State or Welsh Ministers will be able to provide additional protection to hares by prohibiting, if appropriate, their killing or capture during a prescribed close season, prohibiting the use of particular methods of killing or capture or generally prohibiting trade in them subject to a licensing regime.

PROTECTION OF PLANTS (CH 6)

- 1.140 Broadly speaking, the current regulatory structure for the species-specific protection of wild plants, algae and fungi mirrors the structure of the current regulatory regime for the protection of wild animals. Our recommendations in connection with the reform of the protection provisions in relation to wild plants, therefore, broadly mirror the recommendations in connection with the reform of protection provisions in relation to wild animals. This section focuses on a set of policy issues which differ, to some extent, from those discussed above.

Definition of “wild plant”

- 1.141 For the reasons discussed above in connection with the definition of “wild animal”, we have concluded that the prohibitions under the new framework should consistently refer to “wild plants”, rather than “plants in the wild”.
- 1.142 In line with the approach that we have taken in the previous sections we considered whether “wild plant” could be defined by reference to the exclusion of plants that have been artificially propagated. Because of the variety of ways plants, fungi or algae reproduce, however, we were concerned that adopting a definition along those lines could give rise to unforeseen problems. On balance, therefore, we have concluded that – in line with section 27(1) of the Wildlife and Countryside Act 1981 – “wild plant” should be generally defined as “any plant that is growing wild or has, at any time, grown wild”. For the reasons discussed above, a plant should be presumed to be wild unless the contrary is shown.

Fungi and algae

- 1.143 In discussions with stakeholders, we were informed that whilst on the face of the legislation the Conservation of Habitats and Species Regulations 2010 and the 1981 Act refer to “wild plants”, their relevant protection provisions also extend to fungi, algae and lichens.

- 1.144 While, in taxonomic terms, most “algae” fall within the plant kingdom, fungi fall under a completely separate category of organisms; lichens are organisms that result from a symbiotic relationship between a fungus and an alga.⁶⁰
- 1.145 The Natural Environment and Rural Communities Act 2006 tackled the potential uncertainties created by the absence of a reference to fungi, algae and other organisms by adding section 71(2) to the 1981 Act, which now expressly provides that any reference to a “plant” includes a reference to “fungi and algae”.⁶¹ In the 2010 Regulations, on the other hand, the word “plant” has been left undefined.
- 1.146 As the absence of an express reference to fungi and algae in the 2010 Regulations may be potentially misleading, we have concluded that, in line with section 71(2) of the 1981 Act, the new regulatory framework should generally provide that a reference to a “plant” includes a reference to fungi and algae. As lichens are the result of a symbiotic relation between a fungus and an alga, we have taken the view that they are implicitly covered by the definition.

“Plants at any stage of their biological cycle”

- 1.147 The 2010 Regulations reflect the Habitats Directive by clarifying that a “plant” means a plant at any stage of its biological cycle. While section 13 of the 1981 Act (relating to the protection of wild plants), as it applies in England and Wales, is silent as to the stages of the biological cycle to which the offence applies, in Scotland that section expressly makes it an offence to pick, uproot or destroy “any seed or spore attached to [a wild plant of a protected species]”. Section 27(3A), in addition, provides that a reference to a plant includes a reference to “a bulb, corm and rhizome”.
- 1.148 In the light of the object and purpose of section 13 of the 1981 Act – which is conservation of endangered wild plant species – we have taken the view that a reference to a protected “wild plant” should be read as including a reference to a plant at any stage of its biological cycle, including its seeds and spores. The collection of the seeds of a wild plant, indeed, may have an equivalent effect on the conservation status of that plant to the taking of the plant itself. We have concluded, therefore, that the new framework should expressly provide that any reference to a plant includes a reference to a plant at any stage of its biological cycle. As it may be unclear to many users what exactly the “biological cycle” of a plant includes, we have concluded that a non-exhaustive list including “bulbs, corms, rhizomes, spores and seeds” would make the definition more accessible to non-expert users of the legislation.

Harmonisation of prohibited activities in connection with protected plants

- 1.149 Apart from the substantive differences in the mental element required to establish the commission of an offence, we have concluded that there is significant scope for harmonising the list of prohibited activities.

⁶⁰ Oxford English Dictionary; Natural Environment and Rural Communities Act 2006, explanatory notes, para 237.

⁶¹ Natural Environment and Rural Communities Act 2006, sch 11, para 97.

- 1.150 While section 13(1)(a) of the 1981 Act – in contrast to regulation 45(1) of the 2010 Regulations – does not expressly make it an offence to “collect” or “cut” a protected wild plant, the definitions of “uprooting” and “picking” under section 27 of the 1981 Act clarify that those terms were intended to cover such activities. “Uprooting”, for instance, is defined as including the taking of organisms that do not, strictly speaking, have roots. Our view is that the same concept is covered by the prohibition of “collecting” protected wild plants as its natural meaning suggests that it was intended to extend the scope of prohibited activities to the taking of any organism from the ground, whether or not “rooted” to the ground.⁶² Similarly, because “picking” includes “plucking any part of a plant without uprooting it”, it is clear that it was intended to include activities such as “cutting”.
- 1.151 We have concluded, therefore, that the list of prohibited activities in connection with plants of a protected species should be harmonised in line with the current domestic transposition of the Habitats Directive in regulation 45 of the 2010 Regulations.

Addressing inadequacies in the existing protective framework

- 1.152 Stakeholders argued that existing primary activity prohibitions are inadequate for two main reasons. First, they are limited to interferences carried out intentionally. They fail to restrict, therefore, activities other than collection that negatively interfere with certain plants and fungi, such as land management or forestry. Secondly, the language of the prohibitions focuses on plants and does not address the differences between activities that negatively interfere with plants and activities interfering with other organisms, such as fungi and lichens.
- 1.153 Our view is that the first concern is addressed by the flexible structure of the new regulatory regime, which will make it possible to move species from one schedule to another by regulations. Under the new framework, activities interfering with plants protected under the Bern Convention and the Habitats Directive will be prohibited not only when carried out intentionally, but also when carried out “deliberately” in the sense that we have explained above. It follows that if the Secretary of State or Welsh Ministers consider that a plant species should be protected – as a matter of domestic policy – from a broader range of activities than mere collection, they will be able to achieve this aim by moving that species into the protection regime giving effect to the UK’s external obligations.
- 1.154 In response to the second concern, our view is that whilst the “uprooting” offence may well be irrelevant to the protection of fungi, other prohibited activities, such as “deliberate destruction”, would appear to be highly relevant. As long as a solid causal connection can be established, the term destruction may well include activities which – whilst not directly destroying the fungus in question – cause its destruction by removing the “life support” on which the fungus is dependent. We would expect, for example, that a person who chops down a tree, in the knowledge of a serious risk that doing so will remove the support that a protected lichen needs in order to survive, may well be found guilty of an offence under the new regulatory regime.

⁶² The term “*ramasser*”, adopted in the French language version of the Directive, is defined by the Larousse Online Dictionary as including the taking of organisms that live, grow or are disseminated on the ground.

- 1.155 In sum, our view is that the new regulatory framework will contain a number of species-specific prohibitions that are directly relevant to the protection of organisms other than plants. Of course, we do not exclude the possibility that such organisms may not benefit from the creation of new species-specific prohibitions designed to increase their legal protection. We have concluded, however, that the creation of new self-standing offences designed to protect particular plants or fungi from specific threats would inevitably result in substantive changes to their current level of legal protection. Our view is that this is a matter of policy which falls outside the scope of the current review.

LICENSING AND DEFENCES (CH 7)

- 1.156 In the current domestic regulatory framework, most prohibited activities may be lawfully carried out as long as the activity is authorised by a licence or carried out in circumstances falling within the scope of a defence-creating provision.
- 1.157 In this section we discuss our main recommendations for the reform of the current licensing regimes and the reform of existing defences for otherwise prohibited activities. As discussed above, the domestic protection of a number of protected species falls within the scope of international and EU law. In that context, our recommendations primarily aim at ensuring that the mechanisms designed to authorise activities interfering with those species accord with the UK's external obligations. In the context of species protected as a matter of domestic policy, our recommendations aim at simplifying and modernising a regulatory regime which is both inconsistent and unnecessarily complex.

Licensing: procedural reform

Availability of class and general licences

- 1.158 The Protection of Badgers Act 1992 provides that the relevant licensing authority may grant a licence to any person, authorising "that person" to conduct an otherwise prohibited activity.⁶³ The effect of this provision is that the licensing authority may only grant a licence to a named individual. As we suggested in the consultation paper, this restriction potentially creates unnecessary burdens. If a named digger operator fails to show up for work one day, a replacement may not carry out the same activity unless expressly named in the licence. The same issue arises under the Deer Act 1991 and the Conservation of Seals Act 1970.

⁶³ Protection of Badgers Act 1992, s 10(2).

- 1.159 As this restrictive approach is not mirrored in the more recent protection regimes,⁶⁴ we suggested that badger licences should, for the same reasons, be capable of being granted to individuals, classes of persons or the public at large. Whilst consultation responses were evenly split, the arguments against our provisional proposals were primarily based on a general opposition to the use of class and general licences. Not a single response provided convincing reasons why the licensing regime for authorising activities interfering with badgers should be stricter than the licensing regime to authorise activities interfering with other animals protected under the Conservation of Habitats and Species Regulations 2010 or the Wildlife and Countryside Act 1981, such as otters or cetaceans.
- 1.160 As discussed below, under the new framework the licensing regimes for species protected for domestic policy reasons will be harmonised in line with the derogation regime under the Bern Convention. This means that licences will only be granted if the relevant licensing authority is satisfied that there is no other satisfactory solution. As this requirement applies both to the content and the form of the licence sought, our view is that it provides adequate protection against licences with an excessively broad scope. We have concluded, therefore, that there is no reason why licences to authorise activities interfering with badgers, deer or seals should be expressly restricted to individuals named in a licence.

Duration of licences

- 1.161 In the consultation paper we pointed out that there are different maximum durations of wildlife licences and asked whether the duration of wildlife licences could be standardised, and, if so, at what length.⁶⁵
- 1.162 Consultation responses suggested that there was no real consensus as to the appropriate maximum duration of the length of wildlife licences. Some argued that limits on length reduce the flexibility of the regulatory regime undesirably. Conversely, others thought that there was a danger that imposing maximum licence lengths would encourage regulators to use the maximum as the standard duration of every licence.
- 1.163 With the benefit of consultation, we were persuaded by the view that maximum licence durations would unnecessarily fetter the flexibility of the new regulatory framework and preclude necessary licences from being granted. This is not to say that licences should be issued for indefinite periods: a licence should say transparently how long it is intended to last for, so that its obligations and effects are clear. The duration of a licence, in addition, will be indirectly controlled by the general requirement that a licence cannot be granted for a particular length of time unless there is no other satisfactory solution but to grant it for that length of time. Regulators highlighted in consultation that the bulk of licences are granted for terms considerably shorter than the two year maximum because of this requirement.

⁶⁴ See Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490), reg 55(2)(b) and Wildlife and Countryside Act 1981, s 16(5)(b).

⁶⁵ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 5.90 and 5.91.

Breach of licence conditions

- 1.164 Most wildlife licensing regimes make it an offence to breach the conditions of a licence unless the defendant shows that he or she took all reasonable precautions and exercised due diligence to avoid the commission of the offence, or that the commission of the offence was otherwise due to matters beyond his or her control. This is not the case in the context of wildlife licences issued under the 1981 Act, where a person who breaches a licence condition may only be prosecuted for the commission of the underlying offence to which the licence, if complied with, would have provided a defence.
- 1.165 We have concluded that under the new framework breaching a condition of a licence should – subject to the existing defences – constitute an offence in itself. The purpose of this offence is to cover cases where prosecuting for the underlying offence is problematic – for example where licence obligations (such as monitoring obligations) continue after the licensed activity is carried out.

Appeals against wildlife licences

- 1.166 The issue of whether there should be a dedicated appeals mechanism for wildlife licences was one that engaged the interest of many consultees. In our consultation paper we set out the current law, explaining that there is no appeals mechanism at present and that parties wanting to challenge the grant or refusal of a wildlife licence have to rely on judicial review. We presented consultees with the following options:
- (1) there should be no new appeals process for wildlife licences;
 - (2) there should be an appeals process open to applicants only; or
 - (3) there should be an appeals process open both to applicants and to members of the public with a “sufficient interest”.
- 1.167 Though in consultation a significant majority of respondents were in favour of an appeals process, this was based predominantly on assertions that the excessive cost of and delays in judicial review proceedings make them an inappropriate mechanism for challenging wildlife licensing decisions. There was, however, no consensus as to who should be able to benefit from a new self-standing appeal mechanism. In general, those representing land or development interests favoured “applicant only” appeals, whilst environmental organisations argued in favour of an appeals process that would also be open to any member of the public with a sufficient interest.
- 1.168 We have concluded, on balance, that there are not sufficiently compelling arguments to suggest that an appeal process on the merits would be necessary. As highlighted by some consultees, there may well be disadvantages to a further appeal process. Such a system, for instance, could lead to greater legalism in the processes adopted by the regulators. In policy terms we are not convinced that the benefits of adopting a self-standing appeal mechanism to challenge wildlife licences would justify taking these risks.

- 1.169 A number of consultees challenged the current reliance on judicial review on the basis that, at the time we consulted, there were serious concerns as to the legality of judicial review in the light of the UK's international commitments on access to justice in environmental matters under the Aarhus Convention, particularly in connection to the costs regime which applies to claimants in environmental cases.
- 1.170 In the light of the reform to the Civil Procedure Rules in April 2013 and the objective and subjective assessment of prohibitive costs elaborated by the Court of Justice in the *Edwards* case,⁶⁶ we have concluded that the issue of prohibitive costs liability, on its own, would no longer appear to constitute a compelling reason for shifting away from the current reliance on judicial review for the purpose of challenging decisions to grant or refuse wildlife licences.⁶⁷

Licensing: substantive reform

Licensing the capture or other "judicious use" in small numbers of protected birds

- 1.171 In the consultation paper we noted that the grounds of derogation authorised by article 9(1) of the Wild Birds Directive have been transposed in domestic law more strictly than necessary.
- 1.172 In line with the list of derogation reasons authorised under article 9(1) of the Wild Birds Directive, therefore, we have decided to introduce a catch-all licensing provision for authorising the capture, keeping or "other judicious use" of wild birds. In line with article 9(1), licences relying on this residual ground will only be capable of being issued if
- (1) there is no other satisfactory solution;
 - (2) the otherwise prohibited activity will be carried out under strictly supervised conditions; and
 - (3) the otherwise prohibited activity will be carried out on a selective basis and in relation to a small number of birds.

⁶⁶ See *R (Edwards and another) v Environment Agency and another (No 2)* [2013] UKSC 78, [2014] 1 WLR 55, and Case C-260/11 *R (Edwards and another) v Environment Agency and others* ECLI:EU:C:2013:221 and Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvoivotného prostredia Slovenskej republiky* [2011] ECR I-1255.

⁶⁷ We note, however, that – whilst largely welcoming the direction of the recent reforms to the costs regime for "Aarhus Convention cases" – the Aarhus Convention Compliance Committee has suggested that further steps should be taken to ensure full compliance with the costs obligations under article 9(4). In particular, the Committee found that there continued to be a lack of clear guidance, or legally binding directions to the judiciary, on how the cost caps will be applied to individual applicants with different means or how cost caps would be shared in cases with multiple applicants: UN Economic and Social Council, Report by the Compliance Committee on the Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, 22 May 2014 ECE/MP.PP/2014/23.

1.173 Our view is that this will, again, increase the flexibility of the existing licensing regime under the 1981 Act by replacing the current closed list of authorised grounds, such as photography, taxidermy and falconry, with a more open-ended list with a view to ensuring that the licensing regime will be capable of adapting to future needs.

1.174 A real life example of the effects of the restrictive nature of the current licensing regime is the fact that, for instance, pigeon fanciers are currently unable to obtain licences under the 1981 Act to capture certain raptors for the purpose of protecting racing pigeons. Whilst we have no views as to the merits of managing sparrowhawk populations, we remain convinced of the benefits of allowing a regulatory regime to be flexible in order to be able to adapt to changing circumstances. The above example is just one of a number that could be given where the distribution of species has changed such that conflicts may have to be managed. An effective regulatory regime should at the very least allow this to be considered. This does not mean, of course, that licences would necessarily be granted; an applicant would still have to make out that there was no other satisfactory solution than the granting of a licence on the terms sought. This is a high threshold and we consider it sufficient to prevent “judicious use” licences circumventing the general obligation to conserve wild birds found in the Directive.

Harmonisation of the licensing conditions for species protected as a matter of international or EU law

1.175 The language used to describe the effects that derogations may, or may not, have on a protected species is not consistent across the UK’s international and EU obligations. Article 9(1) of the Bern Convention provides that a contracting party may only derogate from the activities otherwise prohibited by the Convention if the exception “will not be detrimental to the survival of the population concerned”. While article 9 of the Wild Birds Directive is silent on this point, article 13 generally provides that the application of the measures taken pursuant to the Wild Birds Directive “may not lead to deterioration in the present situation as regards the conservation of species referred to in article 1”.⁶⁸ Later instruments, such as the Habitats Directive, only authorise derogations when they will not be detrimental to the “favourable conservation status” of a protected species – a concept which also underpins the Bonn Convention and its daughter agreements.⁶⁹

1.176 We have taken the view that there is no significant difference between the above formulations. In essence, all three expressions require member states to be satisfied that, on a long term basis, authorised activities derogating from the relevant protection provisions do not have unsustainable impacts on the population of the relevant protected species.

⁶⁸ Art 13 should be read together with art 2, which generally requires member states to “take the requisite measures to maintain the population of the species referred to in article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level”.

⁶⁹ The Habitats Directive defines the conservation status of a species as “the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations” (Directive 92/43/EEC, art 1(i)).

- 1.177 The above position is supported by the European Commission’s guidance on the Habitats Directive, which explains that the concept of “conservation status” is a “flexible and proportional approach to the use of derogations” that allows member states to take a broad approach to the impact of a particular derogation on the population of a species.⁷⁰ The above view is also expressly supported by the European Commission’s guide to sustainable hunting under the Wild Birds Directive, which suggests that “whereas the term ‘favourable conservation status’ is not mentioned explicitly in the Directive [...] it is implicit from the requirements of article 2”.⁷¹
- 1.178 We have concluded, therefore, that before granting a licence authorising otherwise prohibited activities affecting any animal of a protected species under the new framework, the appropriate authority should be satisfied that the permitted activity will not be detrimental to the maintenance of the population of the protected species concerned at a “favourable conservation status” in its natural range. This approach will rationalise and harmonise the domestic approach to derogations to the relevant international and EU legal instruments, whilst ensuring full compliance with the UK’s external obligations.

Harmonisation of domestic licensing regimes

- 1.179 Otherwise prohibited activities affecting species protected primarily for domestic reasons are currently licensed under five different licensing regimes, depending on the specific species or activity in question.⁷²
- 1.180 In consultation we suggested that the presence of a large number of different, and sometimes inconsistent, licensing regimes appeared to be primarily the result of the law being spread across different statutes, some of which predate by almost 150 years the UK’s international and EU obligations under the Habitats and Wild Birds Directives. We suggested that the different licensing regimes for species primarily protected for domestic reasons could be rationalised in line with the licensing regime giving effect to article 9 of the Bern Convention.
- 1.181 While we accept that the presence of separate licensing regimes has the benefit of ensuring that the licensing reasons are specifically tailored to the activities affecting the species in question, a unified licensing regime would significantly reduce complexity for both decision-makers and prospective applicants. A licensing regime based on article 9 of the Bern Convention would, in addition allow the licensing of otherwise prohibited activities for a broader range of reasons, such as development or other “judicious exploitation” of certain wild animals in small numbers.

⁷⁰ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive* (2007) p 62. Available at http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf (last visited 26 October 2015)

⁷¹ European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds* (2009) p 20, n 28. Available at http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf (last visited 26 October 2015).

⁷² See the Protection of Badgers Act 1992, s 10; Deer Act 1991; and Wildlife and Countryside Act 1981, ss 16(3) and (4).

- 1.182 This does not mean, as suggested by some environmental organisations, that the protection of species would be watered down under the new regime. First, as Natural England explained in consultation, a broader licensing regime may carry conservation benefits, in that it allows the licensing authority more control over activities that, in the absence of a licensing ground, would otherwise be carried out in reliance on the available criminal defences. Secondly, in line with the transposition of article 9 of the Bern Convention discussed above, the licensing authority will only be able to license an activity if satisfied that there are no other satisfactory alternatives and that the activity would not be detrimental to the favourable conservation status of the relevant species.
- 1.183 We have concluded, therefore, that under the new framework, otherwise prohibited activities in relation to species protected as a matter of domestic policy should be licensable in accordance with the licensing regime designed to give effect to article 9 of the Bern Convention.

Defences: ensuring compliance with EU law

- 1.184 A number of provisions of the 1981 Act grant derogations from the prohibitions giving effect to the Wild Birds Directive without the need to rely on a licence issued by a competent authority, reflecting the regulatory approach adopted in connection with the protection of birds and other animals in earlier legislation. In the light of the subsequent case-law of the Court of Justice of the European Union, however, it is clear that such a broad approach to the transposition of article 9 of the Directive is now, in most cases, inadequate. The Court has consistently highlighted that the circumstances in which a member state may derogate from the prohibitions under the Habitats Directive, and by analogy the Wild Birds Directive, must be interpreted restrictively,⁷³ and that mere administrative practices which are alterable at will by the public authorities cannot be regarded as appropriately fulfilling the requirements of article 9 of the Wild Birds Directive.⁷⁴

Acting in pursuance of an order

- 1.185 Section 4(1) of the 1981 Act provides a defence to primary activity prohibitions in connection with wild birds where the activity is carried out in pursuance of a requirement issued under section 98 of the Agriculture Act 1947 (a “pest control order”) or an order issued under the Animal Health Act 1981 (an “animal health order”).
- 1.186 As highlighted by some consultees, the defence under section 4(1) of the 1981 Act fails to transpose the Wild Birds Directive appropriately. It automatically authorises activities carried out in pursuance of orders which are not subject to the conditions listed in article 9 of the Directive. The powers to issue such orders, for instance, currently fail to require the relevant authority to be satisfied about the absence of other satisfactory alternatives before authorising activities which could interfere with protected species.

⁷³ See, for example, Case C-6/04 *Commission v United Kingdom* [2005] ECR I-09017 at [111].

⁷⁴ Case C-339/87 *Commission v Netherlands* [1990] I-00851 at [29]. See also generally European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007) pp 50 to 51.

- 1.187 In the absence of the above defence, a person acting in pursuance of an animal health order or a pest control order would be unable to kill or capture protected wild birds without committing a wildlife offence, unless the relevant action was separately authorised by a wildlife licence. In other words, the competent authority would have to issue two separate documents for the purpose of authorising the same activity. As this would be both administratively inconvenient and potentially confusing for the end user, we have taken the view that a more effective way of ensuring compliance with the Directive will be to retain the existing defences in the new framework whilst integrating the wildlife licensing requirements into the order-making process.
- 1.188 In other words, under the new framework a person acting in pursuance of an animal health order or a pest control order will not be liable for a wildlife crime. Orders authorising the killing of a protected species, however, may only be issued if the Secretary of State or Welsh Ministers are satisfied that the order is issued for one of the purposes listed in article 9(1) of the Directive, that there is no other satisfactory way of achieving that purpose and that making the order will not be detrimental to the maintenance of the population of the relevant species at a favourable conservation status within its natural range.

The “incidental result” defence

- 1.189 Section 4(2)(c) of the 1981 Act provides a defence to primary activity prohibitions in connection with wild birds when the defendant shows that the otherwise prohibited act was the “incidental result of a lawful operation and could not reasonably have been avoided”.
- 1.190 In the consultation paper we provisionally proposed that this defence be repealed. This is because a virtually identical defence was found to be in breach of the derogation regime authorised under article 16 of the Habitats Directive, on the basis that it automatically authorises any “lawful” activity which results, as an “unavoidable” side effect, in the death, injury, capture or disturbance of protected species without any consideration of the potential impact of such activities on the population levels of the species concerned. Because, in line with the Habitats Directive, the ultimate aim of the Wild Birds Directive is the maintenance of populations of protected species at sustainable levels, it is hard to see how the defence could possibly be considered as an acceptable derogation.
- 1.191 In the absence of any convincing argument explaining why the defence under section 4(2)(c) of the 1981 Act would be treated differently from the defence that was already struck down by the Court of Justice, we have concluded that the “incidental result” defence should be repealed.
- 1.192 In consultation a number of stakeholders expressed concerns with the prospect of repealing the “incidental result” defence, arguing that a number of legitimate economic activities – such as farming, forestry or development – may as a result be disproportionately criminalised. Our view is that the effect of the definition of “deliberate” discussed above will generally be to allow such activities to be carried out lawfully.

Defences: retaining domestic policy preferences

- 1.193 Our approach to the reform of criminal defences is different when it comes to species protected solely for domestic reasons. In the absence of any international or EU obligations, substantive changes to criminal defences would, in most cases, fall outside the scope of this reform project, as they would inevitably alter the level of protection of the species in question. In line with the overwhelming support for our general proposal to consolidate the common exceptions to prohibited acts set out in existing wildlife protection legislation, therefore, we have concluded that existing defences in connection with activities prohibited as a matter of domestic law should simply be replicated under the new framework and, where relevant, simplified or harmonised with equivalent exceptions.

POACHING: SUBSTANTIVE PROHIBITIONS (CH 8)

- 1.194 As discussed in our consultation paper, poaching prohibitions are scattered across a collection of statutes dating back to the Night Poaching Act 1828, commonly referred to collectively as the Game Acts. Apart from the Deer Act 1991, which consolidated existing poaching prohibitions in connection with deer, the language of the poaching prohibitions under the Game Acts is archaic and inconsistent.⁷⁵ In this section we discuss some of our recommendations aimed at modernising and simplifying existing substantive poaching offences.

A consolidated poaching offence

- 1.195 In the consultation paper we suggested that under the new framework there should be a consolidated offence of poaching, covering all “game” animals that are currently protected from poaching under the relevant statutes.⁷⁶
- 1.196 We further proposed a reform of the language of existing offences intended to capture what we considered the core aim of the law of poaching: the protection of the legal rights of an individual over certain wild animals on specified land. We suggested that reference to trespass was unnecessary, on the basis that the core of the existing poaching prohibitions is the interference with a person’s sporting rights, which may often be held by someone who is not the person against whom the act of trespass was committed.
- 1.197 In the light of the strong support for our provisional proposals in consultation, we have concluded that under the new framework a person should (subject to the defences discussed below) be guilty of a poaching offence if he or she:
- (1) intentionally kills, injures or captures an animal of any listed game species on any land;
 - (2) enters or remains on any land in search or pursuit of any listed game species with the intention of killing, injuring or capturing it or of removing it if dead; or

⁷⁵ Wildlife Law (2012) Law Commission Consultation Paper No 206, pp 7.23-7.24.

⁷⁶ “Game” protected by existing poaching provisions include the following kinds of animals: deer, hare, rabbit, pheasant, partridge, black grouse, red grouse, ptarmigan, woodcock and snipe.

- (3) removes any dead game on land, or enters or remains on land with the intention of removing dead game on that land.
- 1.198 A person should not be guilty of an offence if he or she is authorised to carry out the activity on the relevant land by virtue of having a private right to kill or take game on the land (or permission from the holder of the right), or any other lawful authority to do the thing in question.
- 1.199 In line with section 1(3) of the 1991 Act, we have concluded that it should be a defence that the person acted in the belief that he or she had lawful authority to do so or that permission would be granted if the holder of the sporting rights knew what the person was doing and the circumstances in which it was being done. This will exclude liability for activities carried out, for instance, in pursuance of an animal health order, or activities such as the “mercy killing” of an injured animal, where the nature of the activity, the circumstances in which the activity is carried out or the relationship between the defendant and the rights holder would make it unreasonable to convict a person of poaching.
- 1.200 As it will not be necessary under the new framework to establish trespass in order to convict a person of a poaching offence, we have concluded that it is unnecessary to retain the offence of killing game at night on a public road, highway or path.⁷⁷ More broadly, we have also taken the view that there is no logical reason why it should be a separate offence to kill, injure or capture game during the night. Whilst carrying out such activities at night may well be considered an aggravating factor for purposes of sentencing, we have concluded that the new poaching offence should cover daytime and night-time activities without distinction.
- 1.201 We have also concluded that it is unnecessary to replicate the effect of the existing aggravated “group poaching” or “armed poaching” offences under the new framework. As discussed below, under the new framework the crime of poaching will be triable on indictment as well as summarily and punishable by up to two years’ imprisonment or a fine (or both).⁷⁸ The seriousness of any particular poaching offence, therefore, will be capable of being addressed in sentencing.

Animals to which the new poaching offence applies

- 1.202 In consultation we proposed that the new poaching offence should continue to apply to all animals covered by existing poaching prohibitions. We recognised, nevertheless, that the market in or hunting practices in connection with particular species may change in the future.⁷⁹ We provisionally proposed, therefore, that under the new framework there should be a power to update the list of species to which poaching prohibitions could apply.

⁷⁷ Night Poaching Act 1844, s 1.

⁷⁸ Currently the only effect of the aggravated offences is to raise the maximum fine that may be imposed on summary conviction from level three (£1,000) to level four (£2,500) or five (unlimited).

⁷⁹ Wildlife Law (2012) Law Commission Consultation Paper No 206, para 7.25.

- 1.203 A large majority of consultees agreed. There was, nevertheless, no clear consensus as to the purpose for which such powers should be capable of being exercised. Defra, Natural England and the Wildlife Trusts, for instance, argued that the new poaching offence should extend to any animal or bird that has a financial or amenity value for the landowner. Wildlife and Countryside Link and other organisations simply argued that the power to amend the relevant list of “game” species should only allow for the addition of species to the list; removal from the list of species that have been the subject of poaching laws for centuries should only be possible through primary legislation.
- 1.204 In the light of the broad support for the proposal, we have concluded that under the new framework there should be a power to alter the relevant list by regulations. We have taken the view, nevertheless, that it would be inappropriate for us to recommend the creation of a general power to amend the existing list of “game” species subject to poaching laws by regulations where the effect of that power could be to radically change the underlying principles on which poaching laws have been grounded for centuries.
- 1.205 We have taken the view, therefore, that the power to remove a species from a list should only be capable of being exercised in circumstances where the species in question is either extinct, or no longer capable of being hunted (other than in accordance with a wildlife licence). On the other hand, we consider that the power to add a new “game” species to the list should be restricted to species which may be lawfully hunted (otherwise than in accordance with a wildlife licence) and are being, or foreseeably will be, exploited in that way.⁸⁰

Sale of poached game

- 1.206 Section 3A of the Game Act 1831, broadly speaking, makes it an offence to sell game birds that have been poached, and which the person concerned knows or has reason to believe have been poached. Section 10 of the 1991 Act, similarly, makes it an offence to sell, purchase or receive any venison that comes from a deer that has been killed or taken in contravention, among other things, of the poaching prohibitions under section 1 of the 1991 Act, and which the person concerned knows or has reason to believe have been so taken or killed.

⁸⁰ Any reference to “species which may be lawfully hunted” should be understood as a reference to any species the hunting (killing, capturing or injuring) of which is not prohibited or is only prohibited during particular times of the year.

- 1.207 In consolidating and replicating the above prohibitions under the new framework, we were unable to find any logical reasons why the sale of other animals subject to poaching prohibitions, such as hares, or the sale of the eggs of birds that have been taken in contravention of section 24 of the 1831 Act, should not, in principle, also be prohibited.⁸¹ As the sale or other exchange of the poached animal (whether live or dead) is an obvious economic driver of poaching activities, we have taken the view that under the new framework the sale of an animal, of part of an animal, of anything derived from an animal that has been killed (or the egg of an animal that has been taken) in contravention of poaching prohibitions should constitute a criminal offence if the person concerned knows or has reason to believe that the animal or egg in question has been so taken or killed.

CONTROL OF NON-NATIVE SPECIES, PESTS AND WEEDS (CH 9)

Introduction to the reform of invasive non-native species legislation

- 1.208 As we explained in our Report on the control of invasive non-native species,⁸² a species is generally considered “non-native” where it has been introduced by human agency outside its “natural range”. The term “natural range” refers to the natural past or present distribution of a species but for any direct human intervention. Non-native species are generally described as “invasive” where their “introduction and/or spread threaten biological diversity or have other unforeseen impacts”.⁸³
- 1.209 The appearance of non-native species in new locations is not always a cause for concern. A large number of species that are not native to a habitat are not considered to be “invasive”. Species which establish self-sustaining populations in a new area, however, may often carry the threat of causing harm to the new environment, even though the threat may not always be immediately apparent.⁸⁴

⁸¹ Similarly, we have taken the view that there is no good reason why selling a live deer that has been poached, should not also constitute a criminal offence.

⁸² Wildlife Law: Control of Invasive Non-native Species (2014) Law Com 342, paras 1.5 and 1.6.

⁸³ Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23. The Wildlife and Countryside Act 1981, sch 9A, para 2(2) now defines “invasive species” as a species that, if uncontrolled, would be likely to have a significant adverse impact on – (a) biodiversity; (b) other environmental interests; or (c) social or economic interests.

⁸⁴ F Williams and others, *The Economic Cost of Invasive Non-native Species on Great Britain* (2010) pp 11 and 33.

- 1.210 When we published the consultation paper in August 2012, the Invasive Alien Species Regulation was still the subject of protracted negotiations at EU level.⁸⁵ In the light of the uncertainties as to the future scope of the EU regime, we concluded that a substantive reform of non-native species legislation would be premature. We suggested, nevertheless, that the situation was different in connection with the reform of the regulatory and enforcement tools for the control of non-native species. This is because, whatever mechanism were used by the prospective Regulation to identify the species to be controlled, effective domestic enforcement mechanisms would be required to give effect to such obligations.⁸⁶
- 1.211 In the light of the broad support for our provisional proposal to introduce a power to issue species control orders, and to accommodate the Government's intention to introduce early legislation giving effect to that proposal, in February 2014 we published a Report making recommendations for the introduction of such enforcement mechanisms in England and Wales. Our recommendations have now been given effect by sections 23 to 25 of the Infrastructure Act 2015 which insert Schedule 9A into Wildlife and Countryside Act 1981.
- 1.212 In the next section we discuss our further recommendation of a power to require specified individuals to notify a competent authority of the presence of specified invasive non-native species. One of the primary objectives of this project is to rationalise and modernise domestic legislation. Subsequently we discuss our recommendations aimed at reshaping the existing framework in a way that will provide competent authorities with a modern and consistent regulatory toolkit for the effective management and control of invasive non-native species, from prevention to long term management.

Non-native species: new enforcement mechanisms

- 1.213 As advocated by the Conference of the Parties of the Convention on Biological Diversity, an effective surveillance system and the early notification of the presence of invasive species are key preventive measures for ensuring that effective early eradication or control measures are put in place to prevent the introduction, establishment or spread of new invasive non-native species.⁸⁷
- 1.214 Provisions requiring relevant persons to notify competent authorities about the presence of invasive non-native species are not unprecedented in domestic law. Section 5(2) of the Destructive Imported Animals Act 1932, for instance, requires the occupier of any land who knows that musk rats are to be found thereon to give notice to the appropriate government department. The same obligation automatically applies to any other "non-indigenous [destructive] mammalian species" which is specified by an order under section 10 of the 1932 Act.

⁸⁵ Official Journal L 317/35 of 4.11.2014. The Invasive Alien Species Regulation prohibits a broad range of activities in connection with a limited list of species of Union concern, including the intentional importation, keeping, breeding, transport, sale and release into the environment of these species. The Regulation further provides for the introduction of a number of monitoring, enforcement, control and eradication obligations.

⁸⁶ Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 8.61 to 8.64.

⁸⁷ Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, 7 – 19 April 2002 – The Hague, Netherlands, Decision VI/23.

- 1.215 In the consultation paper we provisionally proposed that under the new framework the Secretary of State and Welsh Ministers should have a general power to require certain persons (or types of persons) to notify a relevant authority about the presence of an invasive non-native animal or plant in line with section 14B of the 1981 Act as it applies to Scotland. This power, as in Scotland, would reform and replace the automatic obligation to notify the presence of “non-indigenous destructive mammalian species” specified by order under section 10 of the 1932 Act.
- 1.216 This proposal received broad support in consultation. Certain consultees, nevertheless, expressed concern, arguing that nothing would prevent the Secretary of State or Welsh Ministers from imposing disproportionate burdens on the addressees of the notification requirement. This position was primarily based on the fact that until very recently the effect of the Grey Squirrels (Prohibition of Importation and Keeping) Order 1937⁸⁸ made under section 10 of the 1932 Act was to make it an offence for any occupier of land to fail to report the presence of grey squirrels to the relevant government department, thus criminalising virtually any occupier of land in England and Wales.
- 1.217 We are not persuaded that a power modelled on section 14B of the 1981 Act as it applies in Scotland would raise such problems. First, it is unlikely that the Secretary of State or Welsh Ministers would be able to impose notification requirements upon very broad classes of individuals, as the power to require notification will be limited to persons who have or should have knowledge of, or are likely to encounter, the relevant species. Secondly, the obligation to notify the competent authority will only apply to cases where a relevant person is aware, or has become aware, of the presence of a relevant species. It follows that the new power will not be capable of imposing any obligation to take active steps to discover the presence of specified invasive non-native species. Lastly, there are no rational reasons why the Secretary of State or Welsh Ministers would replicate a notification requirement similar to the one that, until recently, applied to grey squirrels. Such a requirement would be both unenforceable in practice and of no value to the control and management of the relevant species.
- 1.218 We have concluded, therefore, that under the new framework the Secretary of State or Welsh Ministers should have the power to issue notification requirements in connection with invasive non-native animals or plants, in line with the Scottish Ministers’ powers under section 14B of the 1981 Act. In line with section 14B(5) a person failing to notify the relevant authority should not be guilty of an offence where he or she had a reasonable excuse for failing to do so.

⁸⁸ The Grey Squirrels (Prohibition of Importation and Keeping) Order 1937 SI 1937 No 478 has now been amended by the Deregulation Act 2015, sch 13, part 1. The effect of the amendment is to exclude the application of section 5(2) of the Destructive Imported Animals Act 1932 to grey squirrels.

Non-native species: rationalisation and consolidation of existing legislation

- 1.219 Existing provisions connected to the control of non-native species are scattered around a number of different legislative instruments including, in particular, the Destructive Imported Animals Act 1932, the Import of Live Fish (England and Wales) Act 1980 and the Wildlife and Countryside Act 1981. The haphazard development of this area of law has given rise to a number of overlapping provisions, inconsistent definitions and inexplicable gaps.
- 1.220 In line with our general policy of rationalising and modernising wildlife law, we have recommend replicating the existing provisions within a coherent regulatory structure containing all relevant powers and obligations of general application which may be necessary to tackle the threat of non-native species effectively, from prevention to long-term management:
- (1) a power to control the importation of invasive non-native species;
 - (2) a power to issue notification requirements in connection with invasive non-native species (discussed above);
 - (3) a power to prohibit being in possession or control of invasive non-native species;
 - (4) a power to prohibit the sale of invasive non-native species;
 - (5) a general prohibition on the release of new species;
 - (6) a power to control and eradicate invasive non-native species (discussed above);
 - (7) a power to issue codes of practice for the purpose of providing practical guidance in respect of the application of any of the above provisions;
 - (8) a licensing regime to authorise otherwise prohibited activities.
- 1.221 The scope of the new framework will broadly reflect the range of measures that EU member states will have to take in relation to “invasive alien species of Union concern” for the purpose of giving effect to the Invasive Alien Species Regulation. Member states are expressly authorised to take such measures in connection with the control of invasive alien species of “member state concern”.⁸⁹

Definition of “invasive non-native species”

- 1.222 We have concluded that “invasive non-native species” should be defined in line with the definition recently introduced in schedule 9A to the 1981 Act. Under the new framework a species will be considered “non-native” if
- (1) its natural range does not include any part of Great Britain; or
 - (2) it is an animal species whose natural range includes any part of Great Britain which has ceased to be ordinarily resident in, or a regular visitor to, Great Britain.

⁸⁹ Invasive Alien Species Regulation, arts 7, 12, 14, 15, 16 and 17.

1.223 In addition, a non-native species, or a species which is no longer normally present in Great Britain, will be regarded as “invasive” if, uncontrolled, it would be likely to have significant adverse impacts on biodiversity, other environmental interests, or social or economic interests. To retain the different approach to the definition of “invasive species” under the 1980 Act, we have also concluded that a species of fish should also be regarded as “invasive” if, uncontrolled, it might compete with, displace, prey on or harm the habitat of any freshwater fish, shellfish or salmon in England and Wales.

Reforming the prohibited conduct of the existing “release” offence

1.224 Section 14(1) of the 1981 Act currently makes it an offence to “release” or “allow to escape” into the wild any animal of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state or any other animal listed in parts 1A or 1B of schedule 9 to the 1981 Act.

1.225 In replicating the effect of section 14(1) of the 1981 Act under the new framework, we have taken the view that the expression “release or allow to escape into the wild” should, in line with the Scottish reform of section 14,⁹⁰ be replaced by the phrases “releasing from captivity” and “allowing to escape from captivity”.

1.226 The first aim of this policy is to simplify the “release” offence by removing unnecessary references to the imprecise concept of “the wild”.⁹¹ As section 14(1) is intended to prevent the release of animals that may have negative impacts on the surrounding environment, whether the environment is a wildlife reserve, a cultivated field or the electricity grid, it should not matter whether the release happens “into the wild”. It is also worth noting that many animals can travel long distances. It follows that whether the release of an animal from captivity takes place “into the wild” may well be irrelevant to the potential threat that the animal may pose. The second aim of the policy is to ensure that conduct prohibited under section 6(d) of the 1932 Act and conduct prohibited under section 1 of the 1980 Act is still covered in full. Both provisions merely require evidence that the animal in question was “released” or “allowed to escape”, whether or not the release or escape took place “into the wild”.⁹²

⁹⁰ Wildlife and Natural Environment (Scotland) Act 2011 asp 6 (Scottish Act) Pt 2, s 14(2)(a).

⁹¹ See the Department for Environment, Food and Rural Affairs’ guidance on the meaning of “into the wild” at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69205/wildlife-countryside-act.pdf (last visited: 26 October 2015).

⁹² Incidentally, the above reform would also have the benefit of bringing the new “release” offence in line with the language of the “release” prohibition under article 7(1)(h) of the Invasive Alien Species Regulation, which prohibits any intentional release “into the environment”, an expression which is clearly broader than “into the wild”.

Pests and weeds

- 1.227 The principal aim of our recommendations in connection with the current legislation on pests and weeds is to restate the law in the context of a simple, coherent and modern regulatory structure. The present drafting style, and the significant number of cross-references between the provisions, makes them laborious to read and difficult to understand. The text of the legislation may also mislead the reader as, in places, it continues to refer to repealed pieces of legislation or to long abolished decision-making bodies. We have taken the view, therefore, that restating the existing provisions in modern terms, and in the context of a simpler and more consistent structure, could significantly benefit the clarity and accessibility of this area of law.
- 1.228 As we have not specifically consulted on this area of law, we have decided to refrain from making recommendations in connection with the substantive reform of the existing powers to control pests and weeds. In line with the general policy of modernising and rationalising the existing regulatory framework, however, we considered that there would be scope for reforming existing regulatory and enforcement tools with a view to aligning them with our recent recommendations in connection with the control of invasive non-native species, as given effect under schedule 9A to the 1981 Act.⁹³

CRIMINAL LIABILITY, ENFORCEMENT AND SANCTIONS (CH 10)

- 1.229 In this section we discuss our main recommendations aimed at simplifying, rationalising and reforming the mechanisms for ensuring effective compliance with the substantive prohibitions discussed above.

Extending criminal liability to the ultimate beneficiaries of wildlife crime

- 1.230 In the consultation paper we provisionally proposed the introduction of a version of the “vicarious liability” offence recently introduced in Scotland.⁹⁴ That offence, broadly speaking, makes an employer or principal liable for certain wild bird offences committed by a person under their control, unless the employer or principal can demonstrate that they took all reasonable steps to prevent the commission of the offence by the subordinate. The creation of the above offence was driven by a perceived need to help prevent raptor persecution, particularly on grouse moors.

⁹³ See the recommendations in: Wildlife Law: Control of Invasive and Non-native Species (2014) Law Com No 342.

⁹⁴ Wildlife and Countryside Act 1981, s 18A. Shortly after the publication of our consultation paper, the Environmental Audit Committee found that the current law appears to carry insufficient deterrent weight in the light of the scale of ongoing persecution of birds of prey. The Committee recommended, as a result, that the Government evaluate the effect of the introduction of an offence of vicarious liability in relation to raptor persecution in Scotland and considers introducing a similar offence in England and Wales in that light (see Environmental Audit Committee (2012) Wildlife Crime, Third Report of Session 2012-13, p 22).

- 1.231 We saw logic in having a wider offence which applied to all wildlife crime. First, the person in control, or the company employing an individual, could very well be the ultimate beneficiary of wildlife crime committed by their agent or employee. As a result, holding them liable for wildlife crime committed by those under their control in circumstances where they directed, or could have prevented, the relevant transgression would ensure that the ultimate beneficiary of the deviant activity is appropriately punished. Secondly, extending liability to employers or principals would enhance the deterrent effect of the legislation by encouraging employers and principals to take steps to prevent the commission of wildlife crimes by those who act for their benefit.
- 1.232 Although the majority of consultees supported this policy, the proposal was strongly opposed by Defra and many businesses including, in particular, stakeholders from the farming and the shooting industries. The argument against the introduction of a “vicarious liability” offence, in essence, was that it would constitute an unjust extension of criminal liability and that it would have the effect of imposing excessive burdens on businesses.
- 1.233 Whilst we remain persuaded of the need for an offence which furthers the policies set out above, we have accepted that creating a “vicarious liability” offence of general application would extend the normal principles of criminal liability further than is necessary. A “vicarious liability” offence of general application could carry the risk of imposing significant additional burdens on all those whose activity may affect wildlife, including farmers and developers.
- 1.234 After extensive discussions with stakeholders, we concluded that our policy could be more simply achieved by making it an offence for a principal knowingly to cause or permit the commission of a wildlife crime by a person under his or her control. We are persuaded that this formulation would be more proportionate and fair than the offence of “vicarious liability” as we originally conceived it. The reason why the “vicarious liability” offence stretches the normal principles of criminal liability is because it has the effect of making the defendant automatically liable for all offences committed by a subordinate unless he or she can demonstrate that reasonable steps had been taken to prevent the commission of the offence and that he or she did not know that an offence was being committed by the subordinate. Our proposed “causing or permitting” offence is different in that the burden of proof lies entirely on the prosecution. “Causing” or “permitting” offences are also relatively common in wildlife law, being already widely used in the context of commercial and methods and means offences.⁹⁵

⁹⁵ See, for instance, Wildlife and Countryside Act 1981, ss 5(1)(f) and 6(1)(b).

The Environmental Crime Directive: criminal liability of legal persons

- 1.235 Article 6 of the Environmental Crime Directive requires member states to extend liability for the commission of serious wildlife offences prohibited under the Wild Birds and the Habitats Directives to “legal persons”⁹⁶ (for example, companies) in cases where such offences have been committed for the benefit of the legal person by any person who has a “leading position” within that legal person or where the lack of supervision or control by a natural person in a “leading position” has “made possible the commission of an offence”.
- 1.236 In the law of England and Wales, criminal liability is traditionally attributed to corporate bodies on the basis of the “identification doctrine” as expressed in the case of *Tesco Supermarkets Ltd v Natrass*.⁹⁷ In this case the House of Lords held that a company may be held criminally liable only for the wrongful acts of a person “who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders”.⁹⁸
- 1.237 Current domestic case-law on corporate liability, on the other hand, does not appear to impose liability on legal persons where the mere “lack of supervision or control” by their officers has “made possible” the commission of the offence. Since wildlife protection legislation contains no express statutory provisions extending the criminal liability of corporate bodies in those circumstances, it would appear that article 6(2) of the Environmental Crime Directive is currently inappropriately transposed in domestic law.
- 1.238 We have concluded, therefore, that for the purpose of appropriately giving effect to article 6(2) of the Environmental Crime Directive, under the new framework there should be a free-standing offence extending the criminal liability of legal persons to circumstances where an individual has committed an offence while acting as employee or agent of the legal person and the offence would not have been committed but for the failure of an officer of the legal person to exercise appropriate supervision or control over the employee or agent in question.⁹⁹ Given the potentially significant extension of criminal liability involved, we have concluded that the application of the above offence should be strictly limited to the species and prohibited activities expressly referred to in articles 3(f) and (g) read together with article 2(b) of the Environmental Crime Directive.

⁹⁶ “Legal person” is defined as “any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisation” (Directive 2008/99/EC, art 2(d)).

⁹⁷ [1972] AC 153.

⁹⁸ *Per* Viscount Dilhorne at [187]. This traditional approach has been relaxed in a number of more recent cases following *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, where the Privy Council took a more flexible approach to the issue of corporate liability, suggesting that whether a particular act is to be attributed to a corporation should be a question of statutory construction. See generally, Ormerod, D (2011) *Smith & Hogan Criminal Law*, 13th Edition, pp 261-262.

⁹⁹ In connection with a body corporate, the reference to an officer should be understood as a reference to a director, manager, secretary or similar officer of the body and, in the case of a body corporate whose affairs are managed by its members, a member of the body. In connection with an unincorporated association, an officer should be understood as a reference to an officer of the association or a member of its governing body.

Consolidation and rationalisation of existing enforcement powers

- 1.239 As wildlife legislation is currently scattered around a large number of Acts dating back to the early nineteenth century, the scope and language of existing enforcement provisions is often inconsistent and, in the context of poaching, significantly outdated. The aim of our recommendations in connection with existing enforcement powers is to replicate their effect in a modern and coherent structure which applies consistently across equivalent offences.

Citizen's arrest powers

- 1.240 A number of nineteenth century statutes on poaching give occupiers of land, gamekeepers and other persons having the right to kill game a number of enforcement powers. Section 2 of the Night Poaching Act 1828, for instance, authorises the owner or occupier of the land, the lord of the manor or "any gamekeeper or servant of any of these people" to apprehend any person found to be committing a poaching offence in the relevant land "and to deliver him as soon as possible into custody so that he can be brought before a justice of the peace".
- 1.241 The above powers are the reflection of a different historical era, where gamekeepers had a police-like role in the countryside. Anecdotal evidence that we received in connection with the above provisions from a number of relevant stakeholders, including the National Wildlife Crime Unit and the National Gamekeepers' Organisation, suggests that the above powers of arrest and seizure are now very rarely (if ever) used. This is very likely to be because of the obvious physical risks involved in directly confronting armed poachers and the risk for the relevant gamekeepers or landowners of being themselves prosecuted.
- 1.242 We have concluded that the above powers of arrest and seizure should not be replicated in the new framework. We think that this would change little in practice, for two principal reasons. First, as noted above, the above powers of arrest are virtually never used. Secondly, as a result of our recommendations to make poaching crimes triable on indictment, a general citizen's power of arrest would be available under section 24A of the Police and Criminal Evidence Act 1984.

Power to require persons to give their name and address and leave the land

- 1.243 Section 31 of the Game Act 1831 provides that if a person is found on any land in search or pursuit of game, woodcocks, snipes or rabbits, it is lawful for any person having the right to kill game on that land or any occupier or gamekeeper to require that person to leave the land and give his or her name or address. If the person refuses or wilfully continues to return to the land, he or she can be apprehended and brought before a justice of the peace. Section 1(4) of the Deer Act 1991 similarly provides that if any "authorised person" suspects with reasonable cause that any person is committing or has committed a poaching offence, he or she may require that person to give his or her full name and address and quit the land forthwith.¹⁰⁰

¹⁰⁰ An "authorised person", for the purposes of s 1(4) of the Deer Act 1991 means "the owner or occupier of the land or any person authorised by the owner or occupier, and includes any person having the right to take or kill deer on the land".

- 1.244 We have taken the view that a power to require an alleged poacher to leave the land and give his or her name or address may still be useful in certain circumstances. Nevertheless, we have concluded that – in line with section 1(4) of the Deer Act 1991 – instead of being backed by a citizen’s power of arrest,¹⁰¹ under the new framework the above power should be simply backed by a criminal offence of failing to comply with the above instructions.

Civil sanctions for wildlife crimes

- 1.245 In the consultation paper we noted that criminal sanctions are not the only, nor necessarily the most effective, method of regulating unlawful activity concerned with wildlife.¹⁰² In the 2000s, the greater use of civil sanctions began to be explored, especially in the context of environmental law. At that time the position in the UK was in marked contrast to other systems, particularly that of the United States, where the Environmental Protection Agency was already making considerable use of administrative penalties for the purpose of ensuring compliance with environmental legislation.¹⁰³ The Hampton and Macrory reviews¹⁰⁴ had a significant impact on the UK’s position on the use of alternative approaches to the criminal law for the purpose of ensuring effective compliance with regulatory legislation. The reviews led in particular to the Regulatory Enforcement and Sanctions Act 2008, which introduced a general system for the issuing of civil sanctions as an alternative to criminal prosecutions in the context of a broad range of regulatory regimes.
- 1.246 In the consultation paper we provisionally proposed the creation of a comprehensive regime for issuing civil sanctions which would be additional to the current regime for criminal sanctions and replace the current limited civil sanctions regime applicable to wildlife offences. We suggested that the system contained in the 2008 Act provides a viable model for the creation of a “transparent, accountable, proportionate and consistent” regime of regulatory sanctions for wildlife offences. Because, subject to limited exceptions, it is not possible for any new regulatory regime to use the civil sanctions available under the 2008 Act directly, we proposed that an equivalent regime should be replicated under the new framework.

¹⁰¹ See Game Act 1831, s 31.

¹⁰² See Wildlife Law (2012) Law Commission Consultation Paper No 206, paras 4.15 to 4.18.

¹⁰³ See R Macrory, “Reforming regulatory sanctions – a personal perspective” (2009) *Environmental Law Review* 69, 69; R W Mushal, “Reflections upon American environmental enforcement experience as it may relate to post-Hampton developments in England and Wales” (2007) 19 *Journal of Environmental Law* 201.

¹⁰⁴ Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005) p 7; Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 10.

- 1.247 In the consultation paper we noted, among other things, that the current regime which provides Natural England (and, potentially, Natural Resources Wales) with the power to issue civil sanctions in connection with wildlife offences does not currently apply in connection with any wildlife offence under the Conservation of Habitats and Species Regulations 2010 or the Conservation of Seals Act 1970. We also noted that, for unclear reasons, it only applies to a very limited number of offences under the Protection of Badgers Act 1992 and the Deer Act 1991. We provisionally proposed that the full range of civil sanctions should be available for all substantive wildlife offences under the new framework.
- 1.248 In general, consultees favoured the creation of a comprehensive scheme of civil sanctions, accepting that our provisional proposals could usefully improve the consistency and effectiveness of the existing enforcement regime. Several consultees, nevertheless, expressed a general opposition to the use of civil sanctions as an enforcement mechanism complementary to criminal proceedings. In particular, a number of conservation and animal welfare organisations argued that the creation of a regime for issuing civil sanctions in connection with all wildlife crimes would necessarily result, in practice, in the decriminalisation of wildlife offences and a weakening of police powers.
- 1.249 We disagree with the view that the creation of a mechanism for civil sanctions would lead to the decriminalisation of wildlife offences. The creation of a civil sanctions regime has no effect whatsoever on the existence of the underlying offence and, if used in a transparent, accountable, proportionate, consistent and targeted way, is unlikely to interfere with the use of criminal sanctions for the purpose of responding to serious criminal activities. Our view is that the existence of a regime allowing regulators to issue civil sanctions could allow gaps to be filled in the current regime where the commission of an existing offence is not investigated, or, if investigated, is not prosecuted. For example, the breach of a licence condition offence is not one that lends itself to either police investigation (as they would not naturally know about the terms of the licences issued), or, in many cases, court proceedings; the appropriate enforcement mechanism may be a requirement to remedy the damage caused by the relevant activity, or a fine or the obligation to cease the activity until alternatives are agreed with the regulator.
- 1.250 The suggestion that the creation of a civil sanctions regime would weaken existing police powers is also, in our view, misguided, given that the power to create civil sanctions regimes under the 2008 Act has not been regarded as detrimental to the underlying criminal regime. Our view is that the opposite is more likely to be true in circumstances where resource limitations have an impact on the effectiveness of the enforcement regime. We agree, of course, that effective cooperation and communication between the regulatory agencies, the police, the Crown Prosecution Service and other environmental organisations involved in the prosecution of wildlife offences will be key to ensuring that the whole enforcement regime functions effectively and transparently.
- 1.251 In the light of the above discussion, we have concluded that the existing regime for issuing civil sanctions should be replicated under the new framework and that the whole range of civil sanctions should be available in connection with all substantive wildlife offences under the new framework.

Criminal sanctions

- 1.252 Currently, most wildlife offences are triable summarily in the magistrates' court with maximum penalties of either six months' imprisonment or a fine or both.¹⁰⁵ In consultation we asked whether consultees considered the current levels of criminal sanctions sufficient. A significant majority of consultees expressed the view that the current sanctions for wildlife crimes were insufficient for two main reasons.
- 1.253 First, a number of consultees, including the Department for Environment, Food and Rural Affairs, pointed out that current penalties are insufficiently deterrent and can be easily absorbed by many offenders. In connection with the above argument, some suggested that the current level of sanctions may therefore infringe the Environmental Crime Directive, article 5 of which provides that offences committed by natural persons involving the killing, destruction, possession or taking of a number of specimens protected under the Wild Birds and Habitats Directive should be punishable by effective, proportionate and dissuasive criminal penalties. For legal persons, similarly, penalties need to be "effective, proportionate and dissuasive" but do not need to be criminal.¹⁰⁶
- 1.254 Secondly, a number of consultees highlighted the fact that current sanctions are disproportionately lenient compared to similar environmental offences. Offences under the Control of Trade in Endangered Species (Enforcement) Regulations 1997, for instance, are punishable, on conviction on indictment, by maximum terms of imprisonment ranging from two to five years.
- 1.255 It became apparent in consultation that a sizable proportion of wildlife crimes are committed by organised criminal enterprises. This is the sort of activity that it is appropriately sentenced in the Crown Court rather than in a magistrates' court, as in such cases the question is not only about the appropriate level of a fine, but also about appropriate and effective levels of custodial sentencing.¹⁰⁷
- 1.256 We have concluded therefore that, in line with the penalties currently available for offences in connection with the release or sale of non-native species and offences in connection with trade in endangered species, all substantive wildlife offences, including poaching, should be punishable on summary conviction by imprisonment for a period not exceeding six months or a fine (or both) and on conviction on indictment by imprisonment for a period not exceeding two years or a fine (or both).

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¹⁰⁵ See, for instance, Wildlife and Countryside Act 1981, s 21(1). By virtue of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, offences punishable on summary conviction a maximum fine at level 5 on the standard scale may now be punished with an unlimited fine. See Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No 11) Order 2015 (SI 2015 No 504).

¹⁰⁶ Directive 2008/99/EC, arts 3, 5 and 7.

¹⁰⁷ See also Environmental Audit Committee (2012) Wildlife Crime, Third Report of Session 2012-13, pp 33 and 34.