RSPB response to Law Commission Consultation Paper No 206: Wildlife Law

Executive summary

Existing wildlife laws have been important to the conservation and recovery of some species and have largely consigned practices such as egg collecting to the history books; any reform of the legislation protecting wildlife in England and Wales must not overlook this.

However, the case for review and evolutionary change is clear; we need modern laws that help a) reverse the loss of biodiversity from England, Wales and associated Marine Areas and b) achieve Government's ambition to be the first generation to pass on the natural environment in a better state to the next. There is strong public support for effective legislation to protect wildlife.

Unacceptable practices, including the systematic persecution of some birds of prey, persist due to inadequate enforcement and insufficient sanctions; the police and courts need greater powers, and resources, to tackle this. Existing laws have failed to address problems caused by invasive non-native species; fundamental reform is needed along the lines of changes made to Scottish statute.

Any new legislation should establish a framework that a) ensures the protection and enhances the conservation of species in accordance with international requirements, while b) allowing limited control and sustainable exploitation of certain species where conservation status allows.

While we support the Law Commission in its objective of simplifying and improving laws protecting and conserving wildlife in England and Wales, laws are only as effective as the bodies enforcing them: we need Natural England and Natural Resources Wales to be independent, effective champions of the natural environment.

Introduction

The RSPB is Europe's largest wildlife conservation charity. With the support of more than one million members, we conserve and enhance the populations of wild birds, other wildlife and the habitats in which they live. We focus on priority species, habitats and sites and set clear conservation objectives and actions. These include taking action to protect threatened species at national and international level, owning and managing land as nature reserves and influencing land-use practices and government policies to benefit wildlife and the wider countryside. The RSPB is the UK Partner of BirdLife International.

The RSPB welcomes this opportunity to respond to the Law Commission's provisional proposals for reform to wildlife law. Our comments arise from our understanding of the principles of the EC Birds and Habitats Directives, our knowledge of wildlife management legislation, the needs of biodiversity in England and Wales and our long experience of supporting the enforcement authorities in the investigation and prosecution of wildlife crime, particularly offences against wild birds.

Our responses to the consultation questions are set out below, after some introductory observations. We also make suggestions for a number of other improvements in statute that we believe the Law Commission should consider as part of its proposals to modernise wildlife law in England and Wales. Such opportunities are rare and we recommend that a comprehensive and strategic approach is adopted.

In addition to these improvements in legislation, we also consider that the Governments in England and Wales, their agencies, the police and the Crown Prosecution Service need to redouble their efforts to ensure **the proper implementation and enforcement of existing statutes to protect species and the habitats in which they live**.

The case for reform

The Wildlife and Countryside Act 1981 (as amended) (WCA) is the primary legislation protecting wild birds in England and Wales. It is a critical component in transposing the EC Birds and Habitats Directives into domestic law and plays an important role in protecting certain other wildlife. It has stood the test of time since the Protection of Birds Acts 1954 and 1967 were replaced in 1981 and, while heavily amended, remains an essentially sound piece of legislation. It continues to play a key role in assisting the conservation and recovery of many species. For example, the deterrent value of custodial sentences introduced by the Countryside and Rights of Way Act 2000 has – we believe – reduced significantly the incidence of egg collecting which remains at a low level today[1]. There has been a steady reduction in the number of individuals convicted of such offences and the number of such incidents reported. This has relieved some scarce breeding species of a key factor limiting population growth, though egg collecting remains a threat to very rare breeding birds, including the re-colonising red-backed shrike.

However, the impetus for review and evolutionary change is clear – despite existing measures, declines in the conservation status of many species of birds and other native wildlife continue.

In 2008, it was reported that just 11% of priority species under the UK Biodiversity Action Plan were increasing in England, and 9% in Wales[2]. Three times as many species were added to the Red List of Birds of Conservation Concern than were removed during its last

[1] *Birdcrime 2011: offences against wild bird legislation in 2011* http://www.rspb.org.uk/Images/Birdcrime_2011_edit_tcm9-324819.pdf

[2] 2008 UK Biodiversity Action Plan Reporting Round http://jncc.defra.gov.uk/page-5398; National Assembly for Wales Sustainability Committee Inquiry into Biodiversity in Wales, January 2011 http://www.assemblywales.org/cr-ld8384-e.pdf

review (there are now 52 species on the Red List)[3]. Ecosystems continue to degrade[4], marine protected areas are still not in place, and approximately 44% of priority terrestrial habitats in England were not in favourable or recovering condition in 2012[5]. National and international commitments to halt biodiversity loss by 2010 were not met[6], nor have legal commitments made under the Birds and Habitats Directives been fulfilled. Unregulated movement of species continues to cause problems for native wildlife, as demonstrated by the ongoing "ash dieback" crisis. Crimes against wild birds, most notably the persecution of birds of prey, persist due largely to inadequate enforcement[1] and the absence of sanctions sufficient to deter those who permit persecution to take place on land under their control.

It is hard, then, to have confidence that existing measures are, or will in the future be, sufficient to enable governments in England and Wales to (a) meet stated ambitions for the natural environment, and (b) meet the ultimate objective of the Birds and Habitats Directives: to maintain and restore species populations to favourable conservation status.

We want the governments in England and Wales to be the greenest ever and to succeed in being the "first generation to leave the environment in a better condition than we found it"[7].

This should be the starting point for assessing whether wildlife management law, as it applies in England and Wales, is fit for purpose.

A statutory purpose for wildlife legislation

The Law Commission's web site suggests that the aim of this project is 'to make the law better for all concerned with wildlife.' We believe that this is too narrow; an equally important aim should be for the law to work harder for wildlife.

The statutory purpose for new legislation should be to consolidate the wildlife protection elements of existing legislation[8] and, in so doing, establish a framework that (i) ensures the protection and enhances the conservation of species in accordance with the requirements of the EC Birds and Habitats Directives and the more general provisions of the Convention on Biological Diversity, while ii) allowing limited control of wildlife for defined purposes and the sustainable exploitation of certain species where conservation status allows.

We note the current political appetite for de-regulation, antipathy towards "gold-plating" and desire for economic growth, and accept that the Law Commission will have been mindful of these themes in developing its proposals for reform. However, it is

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[3] Eaton MA, Brown AF, Noble DG, Musgrove AJ, Hearn R, Aebischer NJ, Gibbons DW, Evans A and Gregory RD (2009) Birds of Conservation Concern 3: the population status of birds in the United Kingdom, Channel Islands and the Isle of Man. *British Birds* 102,pp296–341 http://www.rspb.org.uk/Images/BoCC_tcm9-217852.pdf

[4] National Ecosystem Assessment http://uknea.unep-wcmc.org/Resources/tabid/82/Default.aspx

[5] Unpublished Terrestrial Biodiversity Group papers

[6] *Natural Choice: securing the value of nature*, June 2011 (paragraph 1.9) http://www.official-documents.gov.uk/document/cm80/8082/8082.pdf; CBD http://www.cbd.int/gbo3/?pub=6667&section=6673

[7] Caroline Spelman, launching the Natural Environment White Paper http://www.defra.gov.uk/news/2011/06/07/natural-environment/

[8] Including the Wildlife and Countryside Act 1981, the Conservation of Habitats and Species Regulations 2010, the Game Acts, various species-specific acts and elements of the Natural Environment and Rural Communities Act 2006

inappropriate for this review – the outputs of which may set the tone for wildlife protection and management for decades – to be unduly influenced or led by political short-termism. We note frequent references to "reducing burdens" and an apparent desire to introduce economic factors alongside the core purpose of wildlife protection/conservation without signalling the precedence of the latter. This is of considerable concern to us. **Wildlife law must be about protecting and conserving wildlife, and should be a statement of Government's intent to intervene, in the public interest, to ensure that our wildlife prospers.**

We believe that there is increasingly strong support from the general public for effective legislation to protect wildlife and that this is not outweighed by the desire for economic growth. A recent public opinion poll[9] carried out for Wildlife and Countryside Link showed that 81% of the public agreed that 'the natural environment and its wildlife should be protected at all costs'. In addition, only 33% agreed that 'the natural environment is less important than economic growth' and 55% disagreed.

We believe that the law must reflect the overarching conservation objective of the Birds and Habitats Directives, i.e. to maintain and restore species' populations to favourable conservation status[10]. This will also assist Government in meeting its international and domestic obligations to conserve biodiversity. **To achieve this, the Law Commission must develop proposals for proactive, positive legislative measures which will further the conservation of biodiversity.** Specifically, we believe that the Law Commission should address the UK's commitment under the Convention on Biological Diversity Aichi targets to prevent extinctions and improve the status of declining threatened species[11].

Though the Law Commission has focused on wildlife law and has excluded, for example, the legislative provisions on habitats from this review, we believe that any new legislation should take account of other legislative instruments which impact on wildlife. For example, those that relate to habitat protection and management, site protection, pollution and climate change (more specifically provisions for adaptation).

In considering options for delivering positive conservation action, we draw the attention of the Law Commission to relevant legislative provisions adopted in other countries, which demonstrate that such measures can make a positive difference. For example, the primary purpose of the United States' Endangered Species Act of 1973 (ESA), as amended, is 'to protect and recover imperilled species and the ecosystems upon which they depend.'[12] It declares from the outset (Section 2) why such measures are necessary: because species are valued, because species are threatened with – or have already succumbed to – extinction, and because there are international obligations in place to conserve them. The ESA's

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[9] ComRes Wildlife and Countryside Link Countryside Survey November 2012 http://www.wcl.org.uk/docs/ComRes_Countryside%20_Survey_November_2012.pdf (the survey covered GB but the percentages provided are for respondents in England and Wales).

[10] EU Guidance on hunting under the Birds Directive states that while the Directive does not explicitly refer to favourable conservation status, it is reasonable to argue that the more implicit "ecological requirements" in Article 2 of the Birds Directive has been replaced by the more explicit "favourable conservation status" phrase of the Habitats Directive

[11] Aichi target 12: By 2020 the extinction of known threatened species has been prevented and their conservation status, particularly those in most decline, has been improved and sustained. https://www.cbd.int/sp/targets/

[12] http://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf

requirements include the development of fully costed recovery plans for listed species, the implementation of which must be reported upon every two years (Section 4). The US Fish and Wildlife Service claims that the ESA has prevented the extinction of 99% of species listed[13]. It is also credited with the recovery of such species as bald eagle and whooping crane[14]. We see significant merit in the principles underpinning the ESA and believe that the law in England and Wales should positively address declines in biodiversity.

Public body duties

We believe that providing clear legislative duties are vital to making the step change needed to deliver the national biodiversity ambitions for species (e.g. those set out in 'Biodiversity 2020: A strategy for England's wildlife and ecosystem services'[15]). These provisions should strengthen the existing statutory biodiversity duties of the Natural Environment and Rural Communities Act 2006 (s40 for England and Wales; s41 for England and s42 for Wales). It is not clear from the consultation paper whether these duties are to be incorporated within new statute; we believe they should be, and improved upon as follows.

In addition to identifying those species (hereafter "listed species") that are of principal importance for the conservation of biodiversity (s41 and s42), we believe that the Secretary of State for the Environment and the National Assembly for Wales (NAW; 'the Welsh Ministers') respectively should have the following duties:

- To identify and list those naturally occurring species that are most at risk of becoming extinct in England and/or Wales ("at risk species").
- To identify measures needed to prevent the extinction of such at risk species and measures to achieve favourable conservation status for at risk or listed species that have suffered significant decline. This should include, as appropriate:
  a) Species protection and targeted species recovery work for at risk or listed species.
  b) Protection of specific habitat(s), its management, restoration and re-creation insofar as and targeted at the needs of at risk or listed species (this should include identification of appropriate measures for other agencies to take in accordance with the new provisions under regulation 9 of the Conservation of Habitats and Species Regulations 2010 (as amended).
- To report on the status of all listed species every three years. This would provide public transparency on progress towards our national and international commitments, and either an early warning that progress is inadequate or an important check that new approaches to biodiversity conservation are working (e.g. national environment accounts/'state of nature').

As regards England, the Government has changed its approach to biodiversity conservation which was based previously on producing and implementing a series of specific species and habitat action plans. It now favours (under the new 'Biodiversity 2020' strategy) a more integrated approach that seeks to encourage landscape scale conservation and delivering species conservation through wider habitat measures.

[13] http://www.fws.gov/endangered/esa-library/pdf/recovery.pdf
[14] http://policy.audubon.org/sites/default/files/documents/esasuccess.pdf
[15] http://www.defra.gov.uk/publications/files/pb13583-biodiversity-strategy-2020-111111.pdf

However, the strategy recognises that not all species can be adequately conserved through this approach and that these species will still need targeted conservation action[16]. Our suggested duty addresses this.

As regards Wales, the Welsh Government does not have a specific biodiversity strategy; instead, biodiversity targets have been incorporated into national schemes and strategies, with many policy mechanisms involved in delivery. Responsibilities for the delivery of these mechanisms fall on a number of bodies but ultimately reside with the Welsh Government. Currently the Wales Sustainable Development Scheme and the Environment Strategy for Wales are the main national strategies that include key outcomes for biodiversity.

However, in response to the failure to meet 2010 biodiversity targets, the Welsh Government began the development of a Natural Environment Framework (NEF or 'A Living Wales' programme) in January 2010.

The 'Living Wales' programme is in development[17], the central proposal of which is to move Wales' environmental regulation and management to one based on an 'ecosystem approach'. The original intention was to '*improve the resilience and diversity of the Welsh environment and its supporting biodiversity; provide simpler and more cost effective regulation and, offer greater certainty for decision makers*'[18]. However, due to a focus on ecosystem services and natural resource use to the exclusion of biodiversity conservation, we remain unconvinced that 'A Living Wales' will engender greater protection and appropriate management for wildlife and in particular threatened species without effective and targeted conservation action. Again, our duty addresses this.

Response to consultation questions/proposals

CHAPTER 1: INTRODUCTION

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

No, the marine extent should not be limited to territorial waters. It is artificial to stop at the boundary of 12 nautical miles: species do not cease to occur beyond this point, so if measures for species protection are considered necessary within this limit, they will also be required beyond it. Furthermore, limiting the marine extent to 12nm could be considered a failure to properly transpose the Birds and Habitats Directives, which extend to 200nm. We believe the project should therefore extend to the UK Marine Area which, until such time as the UK declares an Exclusive Economic Zone, extends to the limit of the Renewable Energy Zone or Continental shelf, whichever is further.

[16] Priority Action 1.3 of the Biodiversity 2020 strategy http://www.defra.gov.uk/publications/files/pb13583-biodiversity-strategy-2020-111111.pdf (see page 21)
[17] A Green Paper. 'Sustaining a Living Wales' closed for consultation in May 2012
[18] http://wales.gov.uk/docs/desh/consultation/120210nefgreenpaperen.pdf

CHAPTER 5: THE NEW FRAMEWORK FOR WILDLIFE REGULATION

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

We agree in principle with this approach, as we acknowledge the benefits to users of a rationalised and simplified statute. However, we note also the potential risks it may pose, e.g. the loss of key provisions, or the application of lower levels of protection (i.e. a lowest common denominator approach) to species previously afforded greater protection (e.g. birds on Schedule 1 of the WCA). In developing a new regulatory regime, the Law Commission must ensure that appropriate levels of protection are maintained, and that the implementation of the Birds and Habitats Directives is not compromised.

Furthermore, if new statute is to deal with species-specific provisions for wildlife conservation it needs to incorporate (and improve upon, as described above) s40-42 of the Natural Environment and Rural Communities Act (2006).

We make further comments on the inclusion of existing statute towards the end of this document (see 'Additional comments', page 40).

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

We agree that the proposed single statute should not include the general welfare offences in the Animal Welfare Act 2006 and the Wild Mammals (Protection) Act 1996.

However, we disagree with the Law Commission's contention that 'the regime in which the general welfare provisions are located currently is a modern comprehensive one' (Paragraph 5.23). According to the AWA's Explanatory Notes, it does not at present apply to the sea[19]. This is a critical flaw, as illustrated by the failed case against a sea fishery in Filey Bay, North Yorkshire[20]. In 2008, evidence of malpractice was gathered by the RSPB in relation to the capture of razorbills as by-catch during the legitimate operation of a salmon fishery in Filey Bay. Video evidence showed that entangled and struggling birds were left to drown in nets whilst salmon were removed and taken back to harbour to sell. The evidence was passed to the RSPCA and North Yorkshire Police in consideration of a prosecution under the AWA for causing unnecessary suffering to the razorbills, but the Crown Prosecution Service had to drop the case when it became apparent that the AWA did not apply to incidents taking place offshore. We urge the Law Commission to close – or recommend the closure of – this gap in the legislation.

[19] http://www.legislation.gov.uk/ukpga/2006/45/notes/division/6

[20] http://www.telegraph.co.uk/earth/earthnews/3346019/Sea-birds-die-in-fishermens-nets.html; http://www.rspb.org.uk/community/ourwork/b/investigations/archive/2009/01/13/is-filey-a-nice-place-to-die-_3f00_.aspx

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

This is not our area of expertise but we can see that, in the interests of simplification, there may be merit in the incorporation of the Wild Mammals (Protection) Act 1996 into the Animal Welfare Act 2006.

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

It is not clear to us how this approach will benefit wildlife or simplify the law, so we are unable to support this proposal (we explore these issues in more detail in our response to Question 5.6).

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

Please see our response to Question 5.6.

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

As stated above, we are not persuaded that the introduction of statutory factors will benefit wildlife (by ensuring protection/conservation is the primary consideration) or simplify the law. Our concerns with this approach are as follows:

The suggested use of statutory factors is inconsistent with the requirements of the Birds and Habitats Directives. The text indicates that the suggested factors would be applied in any decision of certain decision makers, as listed in Paragraph 5.26. For decisions made pursuant to the Directives this would be unlawful. It is clear from the Birds Directive that economic considerations as mentioned in Article 2 should not be regarded as an autonomous derogation from later provisions in the Directive (this is acknowledged at Paragraph 2.46). Yet paragraph 5.44 suggests that economic considerations should be taken into account generally. Furthermore, derogations are only permitted under very specific circumstances as carefully prescribed in the Directives. Therefore to the extent that the Law Commission seeks to retain a list of "statutory factors" within any new legislation, the drafting would have to carefully carve out the application of those factors to any decision in implementation of the Directives' requirements. We think that such "carve out drafting" will be complex and lead to confusion over when and where the factors would be relevant. Furthermore our view is that in many decisions where economic or social factors may be relevant (eg the decision to prosecute), there are existing mechanisms through which these factors may be taken into account (eg Natural England's Enforcement Policy; CPS guidance as to when prosecution is in the public interest).

It is not clear from the consultation paper if the proposed factors are considered to be of equal importance, or if they are listed in order of priority. If these factors are to be included within new statute, we believe that prioritisation is essential. It is not clear if there will be a requirement within new statute for decision makers to explain how a decision has been reached but prioritisation would ensure a much more transparent and unambiguous process, for decision-makers and potential appellants alike. Wildlife law is about wildlife protection and conservation. If the new regulatory regime is to reflect properly the Directives it seeks to transpose, **conservation of species/biodiversity must be considered the primary statutory factor to be taken into account by public bodies when making decisions on wildlife management.** Economic and other considerations are important, but secondary; indeed, they may not always be relevant, yet this proposal may result in an assumption that economic and social considerations must be taken into account at all times.

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

We agree with this approach (provided that the current levels of protection demanded by European legislation for certain species and groups of species (e.g. EPS, birds) continue to be observed). The principle and value of providing a hierarchy of protection is well established and does not warrant change. The most obvious problem will arise at the point of allocating species to schedules/lists, as the status of certain species will be contentious. We believe that JNCC and the devolved agencies should review the existing WCA schedules (and consider future scheduling) in parallel with the Law Commission's Wildlife Project, so the eventual implementation of any new statute is not delayed by debates over controversial species. Moreover, the formal/statutory definition of the term "wildlife" should be explicitly stated so it is clearly understood to include species across the taxonomic spectrum (to eliminate the potential for 'doubt' and aid interpretation).

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

We have no objections to this proposal.

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

We support this proposal. It is important that Ministers are required to carry out strategic periodic reviews (e.g. every five to seven years) of species lists to ensure they reflect conservation need. In doing so, Ministers should seek the formal advice of Natural England and Countryside Council for Wales (or equivalent body) and consult all stakeholders. Advice should also be sought from JNCC in relation to matters that have a pan-Great Britain impact (noting that consultation of JNCC will be obligatory if the marine extent is taken out to 200nm). Indeed, while any duty on Ministers provided by amended legislation can only apply to England and Wales, it would be biologically appropriate – and helpful in terms of enforcement – for such reviews to be conducted in partnership with Ministers from Scotland

and Northern Ireland so that an appropriate biogeographic approach can be adopted. The implications of climate change for species' ranges further supports this approach.

This should not replace the existing power to make ad hoc revisions. This must remain to deal with sudden or unexpected changes in circumstances.

Furthermore, though we recognise that this review will not examine the species listed on the current schedules, it is important that JNCC and the devolved agencies do so in parallel with this process, so that any new legislation reflects the most up-to-date analysis of conservation need.

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

We support this proposal and recommend it should extend logically to Welsh Ministers in parallel circumstances in Wales.

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

We have no strong view on the appropriate review period but would suggest that a five or seven year interval provides a balance between effective biodiversity conservation and administrative cost. However, in exceptional/emergency circumstances where new evidence and/or conservation imperative is identified there should be provision for emergency listing between scheduled reviews.

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

We support this approach in principle, but require clarity on the species to which this would apply (is it really "any animal"?). This would need to be determined in consultation with the relevant statutory nature conservation body and stakeholders.

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

This seems to be a sensible approach, but ultimately our support will depend on its application: the nature of the activity involved, the species subjected to the activity, and the tests applied before the activity may occur.

In keeping with our suggestions above, **the basic regulatory approach should also a) recognise the need for, and b) require positive conservation measures for species with an unfavourable conservation status.**

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

Before considering the desirability of defining in statute individual, class or general licences, **we believe the priority for the Law Commission is to ensure that <u>all</u> licences issued under new statute affecting species protected by EU law comply with the derogation requirements of the Birds and Habitats Directives.**

For wild birds, this means that licences – be they individual, class or general – must comply fully with Article 9 requirements to be considered lawful within the terms of the Birds Directive. These requirements specify that where there is no other satisfactory solution, licences may be issued in certain circumstances (Article 9 (1)) provided the consequences are not incompatible with the Directive (Article 9 (4)). Member States must report annually to the Commission on the implementation of this Article (Article 9 (3)).

We have fundamental concerns with regard to the existing use of general and class licences permitting the killing/taking of wild birds. Section 16(1A)(a) of the Wildlife and Countryside Act 1981 (as amended) states (in our view rightly) that the appropriate authority "shall not grant a licence for any purpose mentioned in subsection (1) unless it is satisfied that, as regards that purpose, there is no other satisfactory solution". In our view it is this requirement which transposes the "no other satisfactory solution" requirement of the Birds Directive (Art 9(1)), although the condition which is currently imposed on general licences is clearly intended to support this (i.e. "the licence can only be relied on in circumstances where the authorised person is satisfied that appropriate legal methods of resolving the problem such as scaring and proofing are either ineffective or impracticable").

In our view, the imposition of this condition on a general or class licence does not remove the s16(1A)(a) duty from the appropriate authority, which it must fulfil prior to granting the licence. We regard s16(1A)(a) as the primary means by which Article 9(1) is implemented and this must, in our view, remain in place in any new legislation.

This raises the question of the lawfulness of general and class licences as currently issued, and we note that the Law Commission also appears to question this, at Paragraph 5.89:

Firstly, under s16(1A)(a) WCA the licensing authority is required to make a judgement, based on evidence before it, that the s16(1A)(a) test is met at the time it grants a licence. It is therefore in our view unlawful for the licensing authority to "duck out" of making that judgment through the use of a condition which instead makes the potential licensee responsible for making that judgement. It is not a valid argument that compliance is nevertheless achieved because such a licensee may be prosecuted if he or she makes that judgment incorrectly. The Court of Justice in *Commission v France* (383/09) has made clear that in relation to Article 12 of the Habitats Directive, the Article 12 system of strict protection requires "coherent and coordinated measures of a preventative nature" (para 19-

21), indicating that the criminal law, which bites only retrospectively, is inadequate. We would suggest in the light of this case that reliance on the criminal law as a means of securing the "no satisfactory alternative" test is inadequate.

Secondly, whether the s16(1A)(a) WCA duty can be met in respect of general or class licences at all given their "general nature" (and whether this requirement has been correctly met in the past) would depend on the circumstances of each case and the evidence available before the licensing authority at the relevant time. We suggest below the considerations which the licensing authority should take into account when discharging its s16(1A)(a) WCA duty in relation to potential class or general licences; and our view is that where these criteria are not met, killing or taking should only be permitted under individual licences, requiring the licensing authority to scrutinise each application:

- That wild birds should only be killed or taken as a last resort and for particular, pre-determined, legal purposes. Lethal control can only be justified when a) a genuine and serious problem exists, b) non-lethal measures are demonstrably impracticable or ineffective, c) it will be successful in resolving the problem, and d) it will not adversely affect the conservation status of the species concerned.
- That species should only be included on the kill/take general or class licences (if these licences persist under new statute) when a) there is demonstrable evidence of a serious problem, b) the problem is so widespread that granting individual licences would be impractical, c) the conservation status of the species will not be compromised by virtue of it being included on the licence and d) mandatory reporting means that impact on conservation status, and effectiveness of killing in resolving the problem, can be monitored.

Furthermore, our view is that the UK is not meeting fully its obligation to make an annual report to the Commission on implementation of Article 9 because there is currently no requirement to report action taken under general licences

Returning to the original question, provided the Law Commission addresses these concerns and produces a statute ensuring licences comply fully with the Directives we have no particular view on defining them within statute. However, we recommend that the circumstances under which licences are used and relied upon should be clarified in some way, perhaps through statutory guidance. It has long been our contention that the existing general licence permitting killing/taking to conserve wild birds (or flora and fauna) would benefit in particular from an explicit explanation of purpose. We believe that clearer guidance is needed to define the circumstances under which action is deemed necessary to 'conserve wild birds', particularly as there is no evidence to suggest that any of the species listed on the existing licences in England and Wales have caused the decline of a bird species. For example, we do not feel that widespread control of magpies under licence (i.e. killing in gardens under the guise of conserving wild birds in the countryside) is appropriate, yet this is a common practice under the general licence. Furthermore, it remains uncertain whether the intention of this general licence is to permit the killing of magpies and other corvid species to protect gamebirds, since the purpose of such activity is to produce a shootable surplus of game and not their conservation. We question how licensing of this activity complies with the provisions of the Birds Directive.

Furthermore, several general licences permit the use of cage traps. We are concerned that the use of various designs of cage trap, and the threat these pose to non-target species, may be contrary to Article 5 of the Birds Directive (prohibits the deliberate killing or capture of birds covered by Article 1) and Article 8 (prohibits non-selective capture of the same). We have concerns that these types of traps may be as – or even more – efficient, at catching non-target species such as buzzards than they are at catching target species such as crows. We ask the Law Commission to consider this issue and make recommendations to better regulate the use of these traps.

We expect that this review will lead to more rigorous transposition of the Directives with regard to derogations, reflected both in amended legislation and associated policy. With regard to the general licences, it would be appropriate to require by law an annual review of the need for and conditions pertaining to each licence, and place a duty on the relevant (licensing) authority to ensure the general licences they issue are fit-for-purpose.

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

We do not support this proposal: licences to kill should have a maximum length of one year to ensure adherence to licensing tests, regular review and to minimise the risk to species' populations. For example, it has been necessary to amend the general licences permitting the use of cage traps several times as their usage to capture non-target protected species has become apparent and as concern over welfare conditions for decoy birds and trapped birds has grown. Being able to alter the terms and conditions of the general licences on an annual basis is necessary to adequately reduce the risk of unlawful capture or continued welfare abuse.

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

We do not support this proposal: it is unclear on what basis a ten-year period has been selected but when considering, for example, Schedule 1 licences, sales or taxidermy licences, ten years is far too long. We are sympathetic to the concerns of museums and other institutions holding collections of specimens quite legitimately, but licences such as these should be viewed separately from licences involving disturbance of Schedule 1 species, taking, sales or taxidermy, i.e. where the risk of criminal activity persists. Consequently, we strongly support a limit of two years on licences for these types of activities.

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

We are aware of the suggested benefits of the introduction of this offence; in environmental law, offences for breaches of environmental permits or licences are common place, so replication within the new framework would improve consistency and potentially provide a valuable and proportionate regulatory tool.

However, we reserve our position on this proposal as it is not clear from the consultation paper who will be tasked with enforcing this aspect of the proposed regime, and how proportionality will be achieved. We seek clarification as to the circumstances under which a breach of licence offence would be deemed appropriate. We accept that for minor technical breaches of a licence, a lower range of penalties (than those available for the relevant primary offence) may be appropriate. However, we would be extremely concerned if, for example, a person operating a cage trap illegally under general licence (e.g. to trap birds of prey) was charged with (or negotiated through a plea bargain the charge of) a breach of licence offence rather than the substantive offence under Section 5 of the WCA. A mechanism is needed to ensure that the seriousness of offences is assessed properly, by the police, and that the most appropriate course of action, in terms of charging and potential sanctions, is taken.

CHAPTER 6: SPECIES PROTECTED UNDER EU LAW

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

We recognise that domestic law would reflect more closely the aspirations of the Wild Birds Directive if the definition of "wild bird" in Article 1 was transposed, so in principle, we support this proposal. However, our support is qualified.

Firstly, we are concerned about the Law Commission's statement at Paragraph 6.9 that, 'In our view, the phrase "naturally occurring in the wild state" refers only to those species that are indigenous **to the relevant territory'** (emphasis added). We require clarification on what is meant by "relevant territory". The current WCA definition of "wild bird" stems from the 2004 amendment[21] which brought that definition in line with the requirements of the Birds Directive. This amendment reflected correctly the objectives of the Birds Directive and ensured that all species of bird that occurred naturally anywhere within the European territories of the Member States were also protected within the UK, even if they had never occurred in the wild in the UK. This ensured, for example, that egg collectors could not illegally collect wild birds' eggs of protected European species not native to the UK in other parts of the EU and keep them in their collections inside the UK with impunity. This is supported by European case law (see Didier Vergy C-149/94, ECR 1996 paras16 – 18). Our support for the Law Commission's proposal is provisional on this situation remaining the same.

Secondly, we are mindful that a number of species not native to the EU but currently afforded protection under the WCA 1981 (by being 'ordinarily resident') would no longer be considered "wild birds" and may therefore lose their protected status. The consultation paper fails both to outline the implications of this new definition for these species (e.g. ring-

[21] http://www.legislation.gov.uk/uksi/2004/1487/regulation/4/made

necked parakeet, mandarin duck, common pheasant) and to clarify the legal status of these species within a new domestic framework. Though we strongly support a robust approach towards addressing the threats posed by non-native species (see comments on Chapter 8), we believe lethal control – if justified, both legally and ethically, as a last resort – must be taken strategically and through means and methods which minimise suffering. We believe provision must be made within the new framework to ensure that species falling outwith the definition of "wild bird" are protected from inappropriate action.

Furthermore, the Law Commission must clarify the legal status of vagrant birds originating from outside the EU (e.g. wild birds native to North America, Asia and Africa which have been blown off course on migration). As such individuals occur through natural means (i.e. without human intervention), in some numbers and on an annual basis and often include species occurring for the first time in Europe, we believe they warrant full legal protection.

Finally, note should be taken of the Van der Feesten ruling (Van der Feesten, C 202/94, ECR (1996-I) 355) which held that sub-species of native EU birds that occur only outside of the EU still fall under the definition of "wild bird" if the species or other sub-species of that species occur naturally within a Member State of the EU.

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

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

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

We think it would be appropriate to deem native game birds (e.g. grey partridge, black grouse) "wild birds". This will not threaten hunting interests – hunting these species is consistent with the Birds Directive – but it will better enable the UK to fulfil its obligations under that Directive. At present, these species are reliant on the antiquated 'Game Acts' for their protection, but these Acts were created in the 18th and 19th centuries for purposes quite separate to conservation.

As stated previously, an anomaly arises when considering common pheasant; this species is not "naturally occurring in the wild state in the European territory" but is released on a large scale for game shooting. As stated in response to Provisional Proposal 6-1, we believe such species falling outwith the definition of "wild bird" should be afforded some basic protections. **We believe the new regime must distinguish between native game birds and those which are reared and released for sporting purposes** (currently common pheasant and red-legged partridge). We advocate the placing of pheasant and red-legged partridge on a new Schedule "*Non native gamebirds*". This schedule should have equivalent effect to the present Schedule 9, "*Animals which are established in the wild*" in recognition of these birds' non-native status. This has the result of prohibiting their release into the wild. However, we wish to make it clear that we are not suggesting that a ban should be imposed by this means. We further advocate publication of a general licence (or equivalent) permitting

release of pheasant and red-legged partridge into the wild. Should clear and credible scientific evidence emerge in the future that large-scale releases of these non-natives present a threat to native biodiversity or special habitats (or compromise the public interest in any other way) the licence could be modified to mitigate any such threat (without necessarily precluding releases altogether). Given the proposed approach to species organisation in Chapter 5, we do not see that making this distinction would be unduly complicated. We also reject the notion that this would be 'disadvantageous to the shooting industry' and question the basis for this claim.

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

We believe that it is important to maintain the *status quo* on this issue. Currently, under Section 1 of the WCA, all EU native birds fall under the definition of a "wild bird", whether they are wild or captive . It is important that this remains the case. In order to effectively protect birds in the wild it is essential to have some control over the same species of birds in captivity. This is because it is usually impossible to distinguish wild-caught individuals brought into captivity to sell on the black market from captive-bred individuals of the same species. Closed leg rings supposed to signify that a bird is captive bred can be fitted to wild-caught birds to 'legitimise' them[22].

The strict liability nature of possession offences under Section 1 WCA means that the burden of proof falls on the possessor of a captive bird of a native species to be able to demonstrate that their possession is lawful. However, for the purposes of Section 1 a wild bird does not include "any bird which is shown to have been bred in captivity unless it has been lawfully released into the wild as part of a re-population or re-introduction programme" (Sec 1(6) WCA). It is important that this wording, introduced by s48 of the NERC Act 2006, is retained. Showing that a bird is captive-bred is not an onerous task since the level of proof required is only on 'a balance of probabilities'.

It is imperative that this burden of proof is not reversed. To do so would mean that any native bird in captivity will be assumed to be captive-bred and the enforcement authorities will then be faced with the almost impossible task of proving beyond reasonable doubt that the bird is wild. This defeats the purpose of the Birds Directive and goes to the heart of the strict liability nature of possession under the WCA.

Note that in Section 6 of the WCA a similar defence of being captive bred has been incorporated into the legislation but in a different way, effectively 'outsourcing' the defence to Schedule 3 Part 1 or to the general licences covering sales.

There is no such defence under Section 5 WCA for birds in traps. This means that welfare concerns surrounding the use of traps apply equally to birds in captivity as well as to birds in the wild.

[22] See www.youtube.com/watch?v=IY69WKkBGgM&list=UUdlZ0kSPzV9FdLKwpnhwq1w&index=9&feature=plcp

<u>Provisional Proposal 6-5</u>: We provisionally propose using the term "intentionally or recklessly" to transpose the term "deliberately" in the Wild Birds and Habitats Directives.

We support this proposal. It is routine within Scottish wildlife legislation to use the term "intentionally or recklessly" (and it is also used in relation to site protection in England and Wales under s28 of the WCA) so it follows that this should be the case for species legislation in England and Wales. Without the "reckless" provision, the law provides too great a scope to argue that, whilst the prohibited action was committed by the accused, the action was not intended or deliberate. **The current law also does nothing to discourage or prevent irresponsible and negligent actions which, whilst they may not be intentional acts of destruction, can nonetheless have serious consequences for wildlife.**

Recklessness implies that, where an individual is aware of the presence of a protected species, particular care should be taken to avoid any consequent death, injury, damage, destruction or disturbance. The legal test involved in establishing recklessness is already well understood by the courts e.g. in relation to motor traffic and firearms offences. The proposed change to the law would significantly update the provisions of the WCA and bring it into line with e.g. the Protection of Badgers Act 1992. We expect the concept of recklessness to be sufficiently robust to ensure that legitimate and responsible users of the countryside would not be penalised for accidents and unforeseen consequences of otherwise lawful activities or where genuine efforts have been made to minimise risks. An offence would not be committed where destruction or damage was truly accidental and could not reasonably be foreseen or where it is clear that genuine efforts have been made to minimise any risks.

In particular, we believe that the statutory defence available under Section 4 (2)(c), 'the incidental result of a lawful operation and could not reasonably have been avoided' has proved to provide sufficient and robust defence for those going about their lawful business. We are not aware of any vexatious or frivolous prosecutions that have arisen from the 'reckless' provisions so far enacted.

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

Yes, badgers should be protected from intentional and reckless behaviour.

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

It is, in our view, not appropriate to define "disturbance" for the purpose of the Birds Directive within new statute. In general, defining "disturbance" is extremely difficult, as the concept affects different species (and even individuals of the same species) in different ways. In our experience, the challenge in prosecuting disturbance offences is not in defining

disturbance but in showing that it was caused by the defendant. Guidance on "disturbance" and its implications would be of benefit, and could perhaps be delivered through statutory advice or a code of practice.

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

We note that sections 1(1) (aa) and 1(1)(b) WCA 1981 do not refer to disturbance and therefore wonder whether these references are in error?

With regard to s1(5), s9(4)(b), 9(4A) WCA 1981 and section 3(1) PBA 1992, we see merit in the proposal as a means of simplifying the law and facilitating enforcement, but can only support upon assurance that existing levels of protection will be maintained.

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

This is not our area of expertise.

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

We think that the protection afforded European Protected Species under section 9(4)(c) of the WCA 1981 does not amount to "gold plating".

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

We reserve our position on this proposal. We acknowledge the reasons the Law Commission provides for removing the defence, but believe further consideration must be given to the potential implications of its deletion for those who may previously have relied on this defence to carry out their lawful business.

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

We find this proposal confusing and we are concerned about its interaction with the requirements of the Habitats Directive for EPS. It seems to us that a defence as proposed would mean that reliance would be placed on the defence and, in the case of EPS, no EPS

licence would then be obtained prior to the killing of the EPS animals. Para 6.81 states that an order granted under conditions in s21 AHA 1981 would nevertheless fulfil the conditions for granting a licence under both the Protection of Badgers Act 1992 and the Conservation Regulations 2010. We would query this:

- In relation to the 2010 Regulations, we can see that the "imperative reasons" and "satisfactory alternatives" tests of reg 53 of the 2010 Regulations may be covered by the AHA 1981 but we do not see how the "maintenance of the population at a favourable conservation status" test under reg 53 is met by the AHA 1981. Therefore we do not see how the full requirements of Article 16 Habitats Directive can be met without either maintaining the requirement for a licence or through modification of the AHA 1981 so as to impose this further consideration when considering an order.

- The Law Commission makes no comment as to whether an order under s22 AHA 1981 would fulfil the conditions for granting an EPS / Badgers Act licence (it only comments on s21 AHA 1981). This needs to be considered.

With regard to wild birds, we agree that the AHA 1981 order process is likely to have the effect of satisfying the "no other satisfactory solution" test under Article 9 of the Birds Directive. However, **we reserve our position on this proposal** because we are unclear as to how the AHA 1981 order process ensures consistency with the broader aims of the Birds Directive (i.e. the conservation of wild birds).

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

We support this proposal in principle; as stated previously, the protection afforded to native gamebirds by the Game Acts does not fulfil the requirements of the Birds Directive. However, we refer the Law Commission to our responses to 6.3 (regarding the status of non-native game birds), 6.14-6.16 and 6.19. Article 7 requires that hunting "complies with the principles of wise use and ecologically balanced control", and "does not jeopardise conservation efforts." We therefore object strongly to the assertions made within the consultation paper that transposition of Article 7 has the advantage of 'reducing' the risk of returns being required for huntable species (Paragraph 6.98). We believe the obligations of the Wild Birds Directive cannot be adequately fulfilled without a reporting requirement to ensure compliance with the stated principles (see response to 6.19).

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

We support this proposal, but believe the term "close season" must be carefully defined within the law to cover the breeding season through to the end of rearing. Without this definition, the ability to alter close seasons by order introduces the risk of close seasons being amended such that they are not long enough to adequately protect the species. In particular, serious consideration will need to be given to defining the start of the breeding season, as the most biologically sensible definition will vary significantly between taxa.

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

We welcome the Law Commission's intention to create tools within the statute to ensure that compliance with the principles of "wise use" as set out in Article 7 is delivered, and acknowledge that codes of practice may be beneficial in this instance. However, we require more detail on the proposed scope and content of these codes of practice, noting that the European Commission has issued guidance on the principle of wise use.[23] This guidance notes that the principle includes consideration of population impact, habitat use, game management, conservation status of huntable species, and education, training and awareness. We would expect codes of practice on wise use in England and Wales to reflect these concepts as a minimum. A range of additional factors would also require inclusion, such as use of appropriate ammunition types (notably, excluding the use of lead shot due to risk of secondary and primary poisoning of wildlife). Furthermore, we ask the Commission if the codes of practice are to cover the other restrictions provided by Article 7 and referred to in Paragraph 6.89 (e.g."ecologically balanced control").

However, we do not believe that codes of practice alone will be sufficient to underpin a rigorous system of quarry management. Experience suggests that voluntary approaches alone cannot be relied on to deliver effective environmental goods. We therefore contend that "wise use" can only be achieved through better regulation of the practice of game shooting.

Shooting in the UK is largely – and uniquely – unregulated compared to the situation elsewhere in Europe and North America[24]. This leaves open the potential for significant environmental harm occurring to populations of quarry species, with no effective legal recourse available.

We recommend the introduction of a form of licensing of shooting practice to ensure delivery of "wise use" principles. It is accepted that such an approach should be "light touch" to minimise regulatory burden. Although individual game licences were removed in 2006, we believe there is significant merit in the introduction of a modern licensing regime. Such a system would place requirements on individuals to, for example, provide annual bag statistics (vital to achieving "wise use"). Non-compliance in this regard would preclude the individual from obtaining a licence in subsequent years. There is existing precedent for such regulation in England and Wales – for example, the practice of angling, like most other industries relying on the exploitation of a natural resource, is regulated through the issue by the Environment Agency of rod licences. The revenues generated by this (£24 million in 2009/10) are invested in work to protect, improve and develop fisheries and associated wetland environments. We believe that options for similarly regulating the practice of game shooting in England and Wales should be explored through the Law Commission's project.

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[23] European Commission (2008) *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"*

[24] Mustin K, Newey S, Irvine J, Arroyo B, Redpath S (undated) Biodiversity impacts of game bird hunting and associated management practices in Europe and North America, Contract report, James Hutton Institute http://www.hutton.ac.uk/sites/default/files/files/RSPB_ReportFINAL_Covers.pdf

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

As described above, we require further information on the proposed scope and content of the codes of practice, and believe that "wise use" can only be achieved fully if the practice of game shooting is properly regulated, which would include a requirement to report on all members of a species killed or taken (see response to 6.19). **Therefore, while we support Provisional Proposal 6-16 in principle, we question how it would operate in the absence of a reporting requirement and licensing mechanism.** In the absence of a system of adaptive quarry management, underpinned by annual bag reporting, it would be (a) very difficult for a defendant to demonstrate how they did or did not comply with the principle of wise use, and (b) almost impossible to enforce these codes of practice. Therefore, while we agree with the option of proposal 6-16 to reverse the burden of proof if the codes of practice are breached this is unlikely to be realised as the proposals stand. We recommend this proposal be developed alongside a system of individual licensing and bag reporting (see response to 6-15), to ensure effective transposition of Article 7.

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

We support this proposal, provided these codes of practice are produced in conjunction with the advisory bodies and in consultation with stakeholders and underpinned by an appropriate licensing system (see response to 6-16).

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

We oppose this addition without an extremely restrictive definition, as we cannot see any situation where its inclusion will benefit biodiversity conservation. Any other approach would risk abuse of the term and unlawful licensing outcomes. The Law Commission needs to state its proposed definition of the term, and clarify the types of activity this would and would not permit. The current provisions are clearly defined in the WCA; the proposed change risks increased uncertainty and reduced transparency.

We note that the European Commission's guidance on sustainable hunting discusses this term[25]. We note also that the addition of "judicious use" was considered, and subsequently dismissed, during the development of the Wildlife and Natural Environment Bill in Scotland[26]. Given the potential for "judicious use" to be used to approve activities which would not normally be considered licensable, we think the decision in Scotland was correct.

[25] http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf
[26] http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6053&mode=html#iob_54307 (search text for Amendment 103)

If this term were introduced in England and Wales, a reporting requirement here, as in other areas of licensing, would be essential.

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

We disagree. A reporting requirement is crucial, for species killed both under the derogation mechanism (Article 9) and hunting provisions (Article 7). With regards the former, we do not see how the Government can meet its obligation under Article 9.3 of the Birds Directive without a reporting requirement (and we do not agree that the absence of legal action by the European Commission on this front thus far is a wise or justifiable reason not to do so!)

We strongly oppose and reject the assertions made within the consultation paper that transposition of Article 7 'reduces the risk of returns being required for huntable species'. Collecting statistics on the number of individuals harvested for each quarry species is fundamentally important to any system purporting to ensure wise use. This is recommended by the European Commission in its guidance for sustainable hunting, which states:

> *'…there is a need for sound, scientifically based monitoring mechanisms to ensure that any use is maintained at levels which can be sustained by the wild populations without adversely affecting the species' role in the ecosystem or the ecosystem itself. This should include information on bag statistics…'* (Paragraph 2.4.16)

This should not constitute an additional burden on shooting businesses, which traditionally record such information for their own uses. It is the norm in almost all other countries – the UK is unique in Europe and North America in having no form of, or potential for, the regulation of game shooting beyond sites designated for their nature conservation importance.

Delivery of "wise use" is entirely dependent on the existence of a rigorous tool for assessing compliance with these principles. The accurate, regular reporting of statistics on birds killed is vital to assess potential impacts on biodiversity conservation and must be a legal requirement of any system if Directive obligations are to be met. Licensing the practice of shooting (see response to 6.15), if done properly, would be an efficient, effective way of ensuring compliance with this requirement.

CHAPTER 7: REGULATION OF SPECIES PROTECTED SOLELY BY DOMESTIC LEGISLATION

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

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

We require clarity on the wording of Option 1: does the Law Commission intend for domestically protected species to be protected only from behaviours which are both intentional *and* reckless, or should the option read '...should be protected from being intentionally *or* recklessly taken, killed or injured'? We presume the latter, in which case we would support Option 1; if the former, we would support Option 3 but urge the addition of 'or recklessly'.

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

The RSPB believes the wording chosen must be sufficient in legal terms to cover all forms of sale, offering for sale, exposing for sale, advertising for sale etc (as currently outlined in Sections 6(1), 9(5) & 13(2) WCA).

The RSPB has experience of a previous failed prosecution where a suspect was charged under Section 6(1)(a) WCA in relation to a wild bird offered for sale in an advertisement. The court ruled that the advertisement was in fact 'an invitation to treat' and not an offer for sale and that the suspect should have been charged with an offence under Sec 6(2)(b).

The RSPB seeks reassurance that an advertisement for sale would constitute 'exposing for sale' as suggested at 7.22.

The RSPB is aware that under wildlife trade controls under Council Regulation (EC) No. 338/97, which are implemented in the UK by Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES), that there is a specific definition for 'offering for sale'. Article 2 (i) states that '"offering for sale" shall mean offering for sale and any action that may reasonably be construed as such, including advertising or causing to be advertised for sale and invitation to treat.'

Such an approach could help resolve the issues raised at Question 7-2.

There are also offences under COTES relating to purchase and we believe there would be merit in considering such offences in any new legislation arising from this consultation (see 'Additional comments' towards the end of our response).

The RSPB would also draw attention to the current difference in the definition of 'wild bird' and 'wild animal', illustrated when, for example, an individual illegally takes Schedule 5

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

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

This is not the RSPB's area of expertise, but the justification provided at Paragraph 7.25 suggests this is a sensible approach.

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

Yes, we think that the offence of poaching concerns matters beyond the control of species. Currently, it exists solely to protect those with a hunting/shooting interest on their land, but it should also protect the interests of landowners who wish to protect the wildlife on their land for other reasons, e.g. conservation, tourism, simple enjoyment, or ethical reasons.

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

We agree that whether a poacher has trespassed or not is immaterial if he/she managed to kill an animal without the permission of the landowner. However, we do not feel that the consultation paper provides sufficient information on proposed evidential requirements (regarding proof of acting without consent) to allow us to comment further on this proposal.

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

We agree, for the reasons outlined above.

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

It is not clear if this proposal relates only to poaching offences, or to all offences in the new regime. If the latter, we agree that it should remain an offence to attempt the offences.

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

We support this proposal if the intention is to improve interpretation and enforcement of the law.

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

We believe that further discussion is necessary regarding this proposal. As with the proposal to introduce "judicious use" for birds, careful consideration must be given to the types of activity these licensing conditions would and would not permit. The consultation paper is unclear on this point, and we also seek confirmation that this proposal does not relate to the licensing of wild birds (which is governed by the Birds Directive).

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

This is not our area of expertise, but in general we believe individual licensing should be the favoured approach.

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

We strongly support this proposal. The alternative would significantly compromise the protection of wild birds in England and Wales and is therefore unacceptable to us. 'Strict liability' offences form an extremely important part of the toolkit available to tackle crimes against wild birds. Detecting offences of illegally killing and taking birds and eggs is usually extremely difficult. Offences often take place in remote and private places by individuals taking care to ensure their actions are not seen. Consequently, there have been relatively few convictions for offences of individuals being 'caught in the act' for these types of offences under the WCA.

Consequently, possession offences are an extremely important component of the WCA and provide a deterrent to many offences relating to the killing and taking of protected species. The RSPB has records of over 500 successful convictions relating to the illegal possession of birds and eggs. The RSPB has extensive experience with this area of legislation and has assisted the statutory agencies with hundreds of successful prosecutions for possession offences. The RSPB is not aware of the courts expressing a view that there is any unfairness at the nature of strict liability provisions under the WCA.

We have no doubt that strict liability offences, particularly in relation to the possession of protected wildlife, are logical, sensible and fair:

First, the prosecution is required to prove beyond reasonable doubt that an individual is in possession of a specimen and that it is one that is covered by the legislation and is thereby guilty of the relevant offence. However a range of statutory defences are then available under the WCA and a defendant is entitled if he or she wishes to show, only on a balance of probabilities, that one of these defences apply. An example would be showing that, probably (more likely than not), a bird or egg was killed or taken lawfully. Examples of the

standards of evidence that have met this requirement are the production of genuine documentary evidence that cross referenced with serial numbers ('set marks') inscribed on a collection of wild birds' eggs, documentary evidence of captive breeding that cross referenced with a serial number on the leg ring of a captive bird, and taxidermy records showing the provenance of the specimen. For a prosecution to have succeeded in these circumstances there would have to be compelling evidence to show, for example, that the documentary evidence or records were falsified or that the eggs or bird had been illegally taken from the wild.

Secondly, the courts have made clear that strict liability does not infringe the presumption of innocence under ECHR, Article 6(2). The European Court of Human Rights has stated that 'in principle the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence'. Also the decision of *Salabiaku v France* has been referred to on a number of occasions by English appellate courts. They have held that Article 6(2) ECHR is restricted to procedural fairness and that strict liability does not infringe Article 6(2).

Thirdly, the appropriateness of use of strict liability offences in nature conservation law has been confirmed by the Court of Appeal decision in Kirkland v Robinson (1987)[27]. Lord Justice Brown in that case eloquently outlined the importance of this provision:

> *'In this day and age, there are areas of national life which are regarded as being of such importance that there must be an absolute prohibition against the doing of certain acts which undermine the welfare of society. The Wildlife and Countryside Act 1981 is designed to protect the environment. That is an objective of outstanding social importance. In my judgement, the provisions to which I have referred are intended by Parliament to be of strict interpretation. Thus, those who choose to possess wild birds are to be at risk to ensure that their possession is a lawful possession within the provisions of the Act.'*

Fourthly, we believe this does not impose an unfair regulatory burden on people who may lawfully be involved in the legitimate trade in such items such as taxidermists, or captive bred bird dealers. The records required to be kept are far less onerous than in many other businesses.

If the strict liability offences were removed, leaving a requirement for the prosecution to show, beyond reasonable doubt, that a specimen of bird or egg had been illegally killed or taken, we believe that this would place an almost insurmountable burden on the prosecution in most cases thereby defeating the purpose of the Act in protecting wild birds. The RSPB believes the legislation would effectively become unworkable, wildlife would be afforded very little protection and criminals an easy environment in which to operate. This is clearly contrary to the principles of the Birds Directive.

We can provide case studies to further support our arguments if required.

[27] *Kirkland v Robinson, (1987) 151 JP 377*

We are confident that the strict liability nature of possession offences does not 'ensnare' innocent parties such as people who have no interest in nest finding or egg collecting but simply inherit old collections of eggs from deceased relatives. The police and CPS have sufficient discretion to deal with these cases as not in the public interest and pursue other forms of disposal such as advice or caution. The RSPB often receives calls from members of the public asking for advice about old egg collections they have inherited and we provide them with advice both verbally and through our website. We are not aware of any instances of, and would certainly not encourage, the police attempting to prosecute in such circumstances.

The RSPB also seeks clarification on amendment to the Wildlife and Countryside Act 1981 via Statutory Instrument 2004/1487. Prior to 2004 there was an anomaly that possession of a wild bird taken contrary to the Protection of Birds Act 1954 was an offence but not for the egg of that bird. This was addressed by the 2004 amendment and gave birds and their eggs equal protection in relation to possession offences. However, due to a failure by the previous government to properly consult over these changes, and following a legal challenge, this piece of law was ruled unlawful in 2012 and we are back to the pre 2004 position. Defra indicated that it would re-consult on this matter but to date there has be no sign of any action. If the 2004 amendments are reinstated in the near future we would ask this to be considered as part of the review and incorporated into any new legislation.

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

This is not our area of expertise.

CHAPTER 8: INVASIVE NON-NATIVE SPECIES

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

We agree with this proposal; the case for reform of the legislation relating to invasive non-native species (INNS) in England and Wales is irrefutable. INNS are one of the principal causes of species extinctions and one of the five main drivers of global biodiversity loss, alongside habitat change, climate change, overexploitation and pollution[28]. Despite this, and their estimated cost to the UK economy of £1.7 billion annually[29], **it is widely acknowledged that the existing legislative framework relating to INNS in England and Wales is inadequate to deal with this escalating issue. A comprehensive review of these provisions is therefore timely, and urgent.**

[28] Millennium Ecosystem Assessment, 2005. Ecosystems and Human Well-being: Biodiversity Synthesis. World Resources Institute, Washington, DC. http://www.millenniumassessment.org/documents/document.354.aspx.pdf

[29] The Economic Cost of Invasive Non-native Species to the British Economy. CABI 2010.

Some serious omissions under the existing statutory provisions need urgent correction. For example, firstly the functional definition of 'non-native' (as found in s14(1)) currently omits species that are native to one part of Great Britain and that are released in, or escape to, areas where they are not native (e.g hedgehogs on Scottish islands, and resulting impacts on ground-nesting birds). Secondly, the current statutory provisions fail to prevent future problem introductions, and fails to provide adequate regulatory tools to control, contain or eradicate species already established (criminal offences such as those in s14(1) only deal with the "horse after it has bolted"). Thirdly, section 14(1)(b) is also difficult to enforce. Despite increasing international movements of people and goods and an accelerating rate of non-native introductions, few successful prosecutions have been brought for the release/escape of a species listed on Schedule 9 to the WCA 1981. The lack of formal definitions of terms such as 'non-native' and 'the wild' are partly responsible, as are difficulties in convincingly demonstrating such concepts as 'release' or 'allowing to escape' in courts.

Given that the impacts on biological diversity of INNS are unpredictable, legislation aiming to prevent harmful introductions should be based on the precautionary approach, in accordance with the guiding principles of the Convention on Biological Diversity[30]. The CBD principles recommend the adoption of a 3-stage hierarchical approach, within which an effective balance between prevention, early warning and rapid response, control and eradication must be found to ensure that action on INNS should take place at the earliest invasion stage possible. The emphasis on prevention must not preclude action on long-established INNS. It should be remembered that as environmental conditions change, for example through climate change, so long-established but previously non-invasive species might become invasive. Some INNS have shown very long time lags –decades – between initial establishment and the onset of invasive behaviour. Decisions on whether to take action should be risk-based and evidence led, to ensure that limited resources are targeted to the most urgent cases.

We believe that INNS legislation should take the approach of broad regulation of release of non-native species, coupled with listed exempt circumstances and activities. Such measures should be combined with a duty on (named) public bodies to investigate and instigate control measures on the most dangerous INNS. Lines of responsibility must be determined within statute – without this, the ability to act quickly and decisively at the earliest stage of invasion will be severely hampered, and costly delays will ensue. The law should specify:

- A list of priority non-native species and groups of species that constitute the greatest threats to England and Wales' ecology, economy and public health (with a requirement for regular review of this list).
- Which public body has primary responsibility for establishing and operating monitoring programmes to maximise capacity for early detection of new establishment or spread of INNS.
- Which public body takes a lead coordinating role in response action for each species or group specified in the priority list.
- Which public body is the first point of contact for stakeholders and the public
- Actions that will be the responsibility of named bodies
- That all public bodies shall carry out the duties assigned them in the Plan.

[30] http://www.cbd.int/decision/cop/?id=7197

Much progress has been made in Scotland through the Wildlife and Natural Environment Act 2011, which places Scotland at the forefront of EU action to tackle INNS, thanks to the pioneering provisions it contains. We strongly support the precautionary approach adopted by the Scottish Government, which underpins a general no-release principle in relation to non-native species, irrespective of whether or not they are known to be invasive.

This brings into question the extent of the Law Commission's current proposals for reform which, though welcome, fail to encompass the full range of provisions now in place in Scotland. Key preventative measures adopted in Scotland – namely the general presumption against release, and prohibition on keeping – appear to be absent from the new framework. This means that the legislation in England and Wales will not be consistent with either the equivalent legislation in Scotland or the hierarchical approach advocated by the CBD and adopted in England and Wales (Paragraph 8.17). Consistency in both cases is essential and, though acknowledging the potential implications of a future EU Directive on INNS, **we call on the Law Commission to rethink its proposals and bring them in line with the Scottish approach as a minimum.**

In support of this is a recommendation of the Environmental Audit Committee's recent report on wildlife crime which states that Defra, with the Scottish Government and Welsh Government, should examine how 'their commitment to **joint strategic action** on invasive non-native species in Britain could be refocused, with an emphasis on **bolstering a strategy of prevention** and setting clear milestones for implementation'[31] [emphasis added].

Finally, it is not clear how the Law Commission intends to tackle the sale of invasive non-native species – it appears that potential new offences have been considered (Paragraph 8.117) but no proposals are made. Furthermore, it is not clear if the intention is to incorporate the existing power to prohibit the sale of certain invasive non-native species (s14ZA WCA) within new statute. We advocate that it forms part of the new framework, and we expect Government to use it to ban the sale of those species most likely to cause real environmental or economic damage (which it has thus far failed to do).

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

We support this proposal.

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

No, we do not think emergency listing should be limited to one year. The time period required to establish the scale of invasion and determine appropriate control/eradication methods will vary between species and a year may not be sufficient. It would however be appropriate to require an annual review of the species on the emergency list.

[31] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf

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

We support this proposal.

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

In the absence of any information within the consultation paper on what might be considered a "reasonable excuse", we cannot comment on or offer support for this proposal.

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

It is difficult to comment on this proposal as the consultation paper offers little clarity on its implications and the likely activities such licences will permit. The only example provided (Paragraph 8.106) relates to the keeping of INNS which does not appear to be prohibited within the new regime, rendering licences for this purpose unnecessary. Licences permitting activity relating to INNS should only be issued in very carefully defined circumstances, probably on a case-by-case basis and carefully monitored. We suggest this would preclude the use of general licences in the majority of cases (though they may be relevant to our suggested approach for regulating the release of non-native gamebirds, if taken forward, and we recognise that others may call for permission to release rehabilitated animals of certain low risk species).

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

We support this proposal, provided it is only used where there is a strategic plan for control, containment and/or eradication in place.

CHAPTER 9: SANCTIONS AND COMPLIANCE

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

Our concerns regarding the use of civil sanctions are outlined in full in our response to Provisional Proposal 9-2. Central to this is the concern that the proposals will result in a default position of using civil sanctions *instead* of prosecution, and the proposed use of Part 3 of the Regulatory Enforcement and Sanctions Act 1981 ("**RESA 1981**") does little to assuage this. It is our understanding that under certain provisions of RESA 1981, the imposition of civil sanctions prevents or restricts the use of criminal sanctions:

- S41 RESA 1981 prevents the imposition of criminal proceedings where a person has complied with a fixed monetary penalty.
- S44 RESA prevents conviction of an offence in respect of an act or omission giving rise to a non-monetary discretionary requirement or undertaking, unless the non-monetary discretionary requirement / undertaking are not complied with.S50(4) RESA 1981 prevents conviction where a person has accepted an undertaking and has complied with that undertaking.

Clearly a model of this type for civil sanctions relating to wildlife offences could undermine the use of criminal sanctions which we view as a more appropriate and effective way of dealing with most species-related wildlife offences.

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

This proposal is of considerable concern to the RSPB. Whilst we recognise that there may be benefits to extending the scope of civil sanctions for certain wildlife offences, we do not think that they are the appropriate means through which to deal effectively with all forms of wildlife crime. **We are concerned that this proposal will reduce the enforcement powers of the police and result in a default position of using civil sanctions *instead* of prosecution. We fail to see how such an outcome will benefit the protection and conservation of wildlife;** instead we fear that the inappropriate use of these sanctions will have the opposite of the desired effect and make offenders far less fearful of the repercussions of committing criminal acts. We would be interested to hear examples of how civil sanctions could work in practice for species-related offences and how they would benefit species of high conservation concern.

Our view is that whilst civil sanctions such as stop notices may be effective in dealing with operations that may be damaging to protected habitats, and in dealing with species offences which are the unfortunate by-product of negligent businesses operating without sufficient due diligence, they cannot be effective at dealing with species offences such as illegal killing or taking, use of prohibited methods and attempting to commit such offences. We would strongly oppose their use in relation to such offences.

Our position is driven by an issue of particular concern to the RSPB: the illegal killing of birds of prey. This type of crime has serious consequences for the conservation status of species such as the hen harrier and golden eagle. The RSPB believes that bird of prey persecution is serious and organised crime linked predominantly to land managed for game shooting, and particularly on moors used for driven grouse shooting. The Government has recognised this by making raptor persecution one of its UK wildlife crime priorities[32]. The RSPB's view is that offences involving the killing or taking of wild birds of prey, including the use of traps and poisons, are so serious that the default position should be that they are investigated by the police with criminal prosecution. Many initial raptor persecution

[32] http://www.defra.gov.uk/paw/files/priorities-oct2010.pdf

offences lead to a wider police investigation which uncovers further offences and/or leads to other offenders. We would be concerned that dealing with reported incidents in isolation by civil sanction could prevent a proper investigation into wider offending. Furthermore we believe there is a real danger of more serious offences being significantly downgraded. For example, the use of a cage trap baited with a live pigeon to take a rare species like a goshawk is a serious conservation offence. Without a proper assessment and criminal investigation we are concerned that such matters could simply be treated as a 'breach of general licence' issue and subject to a civil minor financial penalty.

Despite the high conservation impact level of bird of prey persecution crime, only a small fraction of incidents come to light. Due to the difficulty in obtaining the level of evidence required by the courts, only a handful of these known incidents result in prosecutions each year. Yet these few prosecutions are an essential part of the process of highlighting the impact of this serious conservation issue, putting pressure on the perpetrators to desist from this activity and supporting the need for legislative change, such as vicarious liability. We would be concerned about any move which would reduce even further the ability of the police to bring such cases to court and the negative impact this might have on the conservation status of these vulnerable species.

At the heart of our position are our concerns over the balance between civil and criminal sanctions and the transparency involved in the decision-making process. It is essential that any extension of civil sanctions must not undermine the application of criminal sanctions if they are the most appropriate and effective way of dealing with wildlife crime. In other words, civil sanctions must be an addition to the armoury of tools available to enforcers and not a way of decriminalising serious illegal activity such as raptor persecution. There is no doubt, in our view, that the perpetrators of such acts and those who employ them would be content for these matters to be dealt with quietly by way of a civil fixed penalty fine rather then have their transgressions aired in open court. We believe that fines typically imposed on those involved in most raptor persecution cases are fairly meaningless to their employers and of little or no deterrent. It is the significance of criminal prosecutions and attendant public scrutiny which is of far greater concern. We require further information on how decisions over the severity of the offence and the consequent form of sanction to be applied would be made transparent and subject to public scrutiny.

We are concerned about Natural England's ability to apply civil sanctions outside the fairly limited areas they currently apply them, given the scale of funding cuts applied. The suggestion is made that the expanded role of NE in the investigation of WCA Part 1 offences could be carried out by Wildlife Inspectors. However, Wildlife Inspectors are not trained to the same level as police officers in investigative techniques and this would be a concern if they were to be tasked with taking on what are often very complex cases which often necessitate the use of forensic techniques to obtain a level of evidence required to prove the offence. Nor do they have, for example, the powers of the arrest that the police have in order to question suspects to obtain evidence.

Finally, whilst we appreciate that there may be circumstances where civil sanctions are appropriate, Article 5 of the Environmental Crime Directive (2008/99/EC) requires Member States to "*take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are*

punishable by effective, proportionate and dissuasive criminal penalties." Article 3 includes "*the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species"*; and the "*trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species*". **Thus, Member States must use effective, proportionate and dissuasive criminal penalties and cannot allow the application of civil sanctions to undermine the overall system of environmental protection.**

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

Notwithstanding our comments above, we support this proposal. Clarity on the use of civil sanctions will be essential.

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

No, we do not think that the current sanctions for wildlife crime are sufficient; in fact, we consider them to be wholly inadequate. We note that the EAC in its recent report recommended that Government reviews whether the available penalties provide sufficient deterrent effect.[33] The RSPB believes the Law Commission's project presents a timely opportunity to review the sanctions currently available, and expects that any resulting legislation will help, not hinder, enforcement and achieve a much stronger deterrent effect.

Of particular concern is the maximum fine which can be awarded for offences to be tried in the Magistrates' Court under the WCA. This is just £5000, which, particularly for a crime committed by a body corporate, is wholly inadequate in its value as a deterrent, particularly if sentencing guidelines encourage a penalty lower than the maximum available. This is out of line with penalties provided for under other recent environmental legislation. For example, penalties provided under the Environmental Permitting (England and Wales) Regulations 2010, for offences such as failing to comply with an environmental permit condition, can reach fines of up to £50,000 and/or up to 12 months in prison in the Magistrates Court, and unlimited fines and/or up to 5 years in prison in the Crown Court. Inconsistencies in the application of sentencing guidelines could additionally be addressed through mandating minimum sentences in the relevant statute – we encourage the Law Commission to assess the pros and cons of such an approach.

The option of custodial sentences has been used by the court for a range of wildlife offences relating to birds. An analysis of all cases where custodial sentences were issued for offences relating to birds (other than welfare), shows such sentences were awarded in 55 cases between 2001 and 2010. The offences involved the WCA, Control of Trade in Endangered

[33] http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf

Species (Enforcement) Regulations 1997, Customs and Management Act 1979 and the Food and Environment Protection Act 1985. The RSPB believes the courts have been careful and selective in the use of custodial sentences, reserving them for more serious cases and/or for individuals with previous convictions. **The RSPB believes it is essential that courts have a full range of sentencing options available when dealing with wildlife cases.** The appropriate use of custodial sentences has been widely supported by the statutory agencies and the public.

We note the comments of the Association of Chief Police Officers (ACPO) on the appropriateness of penalties for certain wildlife crimes, and that serious offences, including the persecution of birds of prey, should be tried at Crown Court and therefore subject to more stringent penalties. We support these comments. Crown Court trials would carry the additional benefit of such offences being recorded for official reporting purposes by the Home Office[34].

We encourage the Law Commission to explore the application of the Proceeds of Crime Act 2002 (POCA) with regards wildlife crime, particularly where significant financial gain is likely to result. In 2010, a POCA order was issued to a man previously jailed for illegally trading in tortoises[35] (contrary to Control in Trade in Endangered Species (Enforcement) Regulations 1997); we believe such orders should be considered more widely.

We note that EU Directive 2008/99/EC (on the protection of the environment through criminal law) makes certain requirements of offences covered by the Directive. The offences covered by the Directive are (for the purpose of this paper) offences to protect Annex I and regularly occurring migratory species under the Birds Directive, and offences to protect Annex IV animals and plants under the Habitats Directive (i.e. European Protected Species). Directive 2008/99/EC requires these offences to be "punishable by effective, proportionate and dissuasive criminal penalties" (Article 5). It also requires that legal persons liable under such offences should be "punishable by effective proportionate and dissuasive penalties" (Article 7). The expression "effective proportionate and dissuasive" derives from European Court case law. Whilst these terms are not defined in the Directive a few comments on them may assist:

"Effectiveness" requires that the penalty furthers the relevant goals of the legislation. Given that the goal of European environmental law is to reach a high level of environmental protection, penalties should further this goal. The effectiveness of a penalty will to a large extent depend upon its ability to create deterrence.

"Dissuasive" requires that criminal law should be of such a type and magnitude that the expected costs are higher than expected benefits to the perpetrator. In addition the lower the probability of detection, the higher the penalty must be.

[34] See paragraphs 3.11-3.13 and 6.7-6.12 in http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/writev/1740/wild12.htm

[35] See Legal Eagle 64, page 8

"Proportionality" requires consideration of the particular interests which are protected by the specific crimes. If a crime would merely protect administrative interests, it is less serious than when ecological values would be protected. The manner in which the interests are infringed is also important: causing concrete harm to an interest is of course more important than merely endangering an interest.

It can be strongly argued that these requirements are not met by domestic legislation, particularly in relation to persecution of birds of prey on Birds Directive Annex I or regularly occurring migratory species. Persecution of these birds continues, demonstrating absence of effectiveness and dissuasiveness of the penalties. The maximum £5000 fine provides little scope for proportionality, particularly when taking into account the rarity in England and Wales of the birds concerned and hence the low likelihood of detection.

Finally, the UK is almost unique in Europe and North America in having no form of, or potential for, the regulation of the practice of game shooting by individuals or service providers. Given a) the potential of this activity to threaten the UK's natural heritage, through adverse population-level impacts on species of conservation priority, and b) the serious and organised nature of criminality targeted at birds of prey, consideration of stronger and, in the context of wildlife statute, novel sanctions is merited. An option to withdraw the 'right' of an individual to shoot game, or businesses to supply shooting services, for a fixed period following conviction for a wildlife or environmental offence, should be considered.

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

As stated above, we do not believe that the current sanctions are adequate, so we do not support this proposal.

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

This is not our area of expertise.

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

Yes, we think that these provisions should be kept.

The RSPB has extensive experience with prosecution cases involving multiple instances being dealt with within a single offence, typically in relation to offences of egg collecting and to a lesser degree, taxidermy. The grouping of, for example, multiple birds or eggs within a charge is routine and the RSPB are not aware of any problems arising out of the sentencing

provisions within Section 20(5) WCA. The courts are limited ultimately by circumstances as to what financial penalty can be imposed.

We appreciate the point made at 9.113 and, by way of example, the killing of a single adult white-tailed eagle is clearly more serious in conservation terms than an individual in possession of 50 eggs taken from a black-headed gull colony. However, it is incumbent on the prosecution to make the court aware of the relative seriousness of offences, irrespective of how many instances they may relate to. In many cases being able to include large number of instances can help illustrate the gravity of offences – for example a collection of several thousand birds' eggs gathered by an offender over a period of twenty years.

The RSPB has been involved closely in hundreds of wildlife prosecutions over the last four decades and has extensive experience of working with prosecutors at court. It is our experience that the potential dangers expressed in the consultation are not born out in practise. We cannot recall any case where the ability of a court to impose a fine per individual instance has resulted in a court imposing a disproportionately high fine for an offence of low conservation importance.

There are also other issues to consider.

On occasion, the defence has argued that the grouping of items, which are capable of being individual offences in their own right, is duplicitous. This has been countered by express reference to the sentencing powers within Section 21(5) WCA which allows a court to impose a penalty in respect of each item.

Being able to group birds or eggs into offences where the evidential issues are the same, or very similar, is extremely helpful rather than having to resort to a large number of individual offences. On some occasions several thousand birds' eggs have been included in a single charge. All items within a charge are also subject to mandatory forfeiture upon conviction.

Without this provision prosecutors may feel forced to proceed with large numbers of individual offences rather than sensibly grouping like instances together. With a large number of instances this will not be administratively practicable and could result in the prosecution being restricted in what evidence can be placed before a court, and the court losing the ability to forfeit items obtained through criminal acts.

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

Yes, in the interests of consistency this seems appropriate.

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

We agree that liability in England and Wales should be extended to principals. Our reasoning is set out below. However, one issue that is not clear is whether the Law Commission is proposing to introduce this offence in relation to wild bird offences only (as per s24 WANE 2011) or whether the proposal is to introduce this offence more widely across all wildlife statute. We support its introduction in relation to wild bird offences as per s24 WANE 2011. We see potential benefits in it being introduced more widely - whilst corporate liability is already a possibility under existing provisions, a "vicarious liability" offence would presumably make prosecution of the "principal" easier as the "mens rea" part of the offence would not have to be proven in relation to the corporate body.

Scotland sets a precedent for England and Wales to follow, both through the Nature Conservation (Scotland) Act 2004 (which creates, for example, an offence of harassment of certain wild bird species) and more recently through the Wildlife and Natural Environment Act 2011, which introduced the offence of vicarious liability. This is very welcome, but **persecution of birds of prey is a problem across the UK and to be effective at protecting species like the hen harrier, which is currently facing extinction in England as a breeding species[36], we believe that vicarious liability should be introduced in England and Wales.** Only one pair of hen harriers nested successfully in England in 2012, despite there being sufficient habitat to support over 300 pairs, and the chances of any population recovery at current levels of persecution associated with grouse moor management are slight[37] [38].

Analysis of court convictions show that the vast majority (c.70%) of bird of prey persecution incidents are committed by gamekeepers[39]. Many gamekeepers' jobs come with a house tied to the position and choosing to defy orders from managers or landowners to kill birds of prey risks not only losing employment but also a home. Numerous gamekeepers have assured the RSPB that they are under tremendous pressure from their employers and managers to carry out acts of predator control with the explicit understanding that this includes illegal killing of birds of prey.

Section 5 of the Wildlife and Countryside Act 1981 currently provides for an element of employers liability for certain offences, namely the use of prohibited methods of killing of taking wild birds such as illegal traps and poisons. However, the prosecution have to prove that the employer 'knowingly caused or permitted' the illegal act and since employees are unlikely to 'bite the hand that feeds them' by implicating their bosses it is perhaps not surprising that an employer has never been convicted using these provisions.

The existing legal system allows for a maximum penalty against anyone convicted of bird of prey persecution, of a £5000 fine and/or six months in prison. The lack of progress in tackling bird of prey persecution clearly shows this has not been an effective deterrent[40]. **The RSPB believes a key reason for this lack of effectiveness has been that it does not target those ultimately responsible – the managers and landowners encouraging or forcing their employees to break the law. Vicarious liability would address this.**

[36] http://www.rspb.org.uk/media/releases/299300-four-steps-away-from-english-extinction
[37] http://naturalengland.etraderstores.com/NaturalEnglandShop/NE140
[38] http://jncc.defra.gov.uk/pdf/jncc441.pdf
[39] *Birdcrime 2009* p36 http://www.rspb.org.uk/Images/birdcrime_tcm9-260567.pdf
[40] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/writev/1740/wild12.htm

It may also prove helpful as a means of ensuring compliance with, for example, the Environmental Protection (Restriction on Use of Lead Shot) (England) Regulations 1999.

We note ACPO support for this proposal at paragraph 3.7 of http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenvaud/writev/1740/wild12.htm and subsequently the recommendation of the EAC to consider the introduction of the offence of vicarious liability in England and Wales.[41]

We note also that Article 6 of the Environmental Crime Directive (2008/99/EC) requires that Member States ensure that limited companies or partnerships or other organisations (ie "legal persons") can be prosecuted for offences committed by an employee for the benefit of that organisation.

The RSPB, as an employer and major landowner itself, does not share the view that the introduction of a vicarious liability offence would impose "significant burdens on business" (Paragraph 9.116) over and above what the Commission itself admits is in line with the current regimes in place to ensure the health and safety of employees. Nor do we understand the comment about it "considerably increasing anxiety". The introduction of any criminal sanction is designed to stop illegal activity and consequently the only group among whom anxiety might be increased are, presumably, those engaged in criminal activity.

CHAPTER 10: APPEALS AND CHALLENGES AGAINST REGULATORY DECISIONS

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

We accept that the First-tier Tribunal (Environment) *may* be the appropriate forum for appeals but we note that it is yet to hear any cases, so its likely suitability is untested. We acknowledge that in its favour are the composition of the Tribunal (comprising one judge and two lay members with some environmental background or knowledge), its relative inexpensiveness and the speed of the process. These characteristics would all help ensure compliance with Article 9(4) of the Aarhus Convention which requires that relevant review procedures should be 'fair, equitable, timely and not prohibitively expensive.'

Question 10-2: Do consultees think that it is unnecessary to create a new appeals process for wildlife licences (option 1)?

We would not object to the creation of a new appeals process for wildlife licences, on the condition that it is not restricted to the applicant; **third parties must also have the right to challenge licensing decisions** (see response to Question 10-3).

[41] Recommendation 5, http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf

<u>Question 10-3</u>: If consultees think that there should be a dedicated appeals process for wildlife licences, should it be restricted to the initial applicant for the wildlife licence (option 2), or be open additionally to the public with a "sufficient interest" (option 3)?

If a dedicated appeals process is introduced, it must be open additionally to the public with a "sufficient interest" (Option 3). As acknowledged by the Law Commission at Paragraph 10.83, this is necessary to give the fullest effect to Article 9(3) of the Aarhus Convention. Judicial review is expensive and time-consuming, and in many cases is likely to lead to costs on both sides which may be entirely disproportionate to the issues at stake. An appeal route would allow a cheaper and quicker way of dealing with disagreement and would, we understand, be consistent with most other statutory licensing regimes in the licensing field.

<u>Question 10-4</u>: Do consultees think that the appeal process should be available for all types of wildlife licence (general, class and individual)?

If a dedicated appeals process is introduced, it should be available for all types of wildlife licence.

<u>Question 10-5</u>: Do consultees think that it would be more appropriate for appeals concerning wildlife licences to go to the Planning Inspectorate or the First-tier Tribunal (Environment)?

If a dedicated appeals process is introduced, we believe appeals concerning wildlife licences should go to the First-tier Tribunal, for the reasons outlined in response to Provisional Proposal 10-1.

Additional comments

Project scope

Consideration of Multilateral Environmental Agreements (MEAs)
We note that Chapter 2 of the consultation document outlines the obligations placed on England and Wales by international agreements. However, no mention is made within the consultation of the Convention on Migratory Species (CMS) or the African-Eurasian Waterbird Agreement (AEWA, from which the lead shot regulations described below were derived) and we question to what extent these MEAs were taken into account during the development of project proposals. The commitments made under these MEAs should be acknowledged and represented in this review and its outputs.

Inclusion of existing statute
It is our expectation that the Law Commission will, as the project progresses, clarify and list the existing statute intended for inclusion within the project. This remains unclear at present. As stated previously, we believe that the project needs to incorporate (and improve upon) **s40-42 of the Natural Environment and Rural Communities Act (2006)**. We query below the intended status of two further legal regimes we consider relevant to the project:

The lead shot regulations: the apparent exclusion of the regulations controlling the use of lead shot[42] is – if not rectified – a missed opportunity to improve enforcement in this area. Designed to implement a commitment under AEWA to phase out the use of lead shot, these regulations make it illegal to use lead shot for the purpose of shooting with a shot gun on or below the high water mark, on certain wetland SSSIs and for shooting any ducks, geese, swans, coot and moorhen. This is in recognition of the significant mortality and suffering caused to waterfowl by the ingestion of spent lead shot.[43] Studies have shown compliance with these regulations (in England) to be poor[44], so these regulations are failing to remove the threat of lead shot in wetland environments. Furthermore, there is increasing evidence that lead shot is having negative impacts in terrestrial ecosystems, particularly on birds of prey[45]. This presents a strong case for a total ban on lead ammunition use. A 2012 report to the EC's Ornis Committee noted that more complete bans on use (eg. across all habitats) are associated with greater compliance, and significantly reduced lead poisoning in wildlife. There are no technical blockages to this, as steel shot is now widely available for use over

[42] The Environmental Protection (Restriction on Use of Lead Shot) (England) Regulations 1999 (as amended) and Environmental Protection (Restriction on Use of Lead Shot) (Wales) Regulations 2002
[43] E.g. Mateo, R., 2009. Lead poisoning in wild birds in Europe and the regulations adopted by different countries. In: Watson, R.T., Fuller, M., Pokras & M., Hunt, W.G. (Eds.), Ingestion of lead from spent ammunition: implications for wildlife and humans. The Peregrine Fund, Boise, Idaho, USA. http://www.peregrinefund.org/subsites/conference-lead/PDF/0107%20Mateo.pdf; Newth, J.L., Cromie, R.L., Brown, M.J., Delahay R.J., Meharg, A.A., Deacon, C., Norton, G.J., O'Brien , M.F. and Pain, D.J. (2012). Poisoning from lead gunshot: still a threat to wild waterbirds in Britain. European Journal of Wildlife Research. http://dx.doi.org/10.1007/s10344-012-0666-7.
[44] Cromie, R.L., Brown, M.J., Hughes, B., Hoccom, D.G. & Williams, G., 2002. Prevalence of shot-in pellets in Mallard purchased from game dealers in England in winter 2001/2002. *In*: RSPB. (Eds.), *Compliance with the Lead Shot Regulations (England) during winter 2001/02*. RSPB, Sandy, UK; Cromie, R.L., Loram, A., Hurst, L., O'Brien, M., Newth, J., Brown M.J. & Harradine, J.P., 2010. Compliance with the Environmental Protection (Restrictions on Use of Lead Shot)(England) Regulations 1999. Report to Defra, p. 99, Bristol. http://randd.defra.gov.uk/Document.aspx?Document=WC0730_9719_FRP.pdf
[45] Fisher, IJ, Pain, DJ & Thomas, VG (2006) A review of lead poisoning from ammunition sources in terrestrial birds, *Biological Conservation* **131,** 421-432

UK wetlands. We therefore recommend the Law Commission supports a statutory ban on the use of lead gunshot in the UK, with supportive controls on possession and sale (see below).

Pests Act 1954: At Paragraph 3.105 of the consultation paper it is suggested that the Pests Act 1954 is relevant to this review. We agree although it is not clear from this document whether its provisions are to be incorporated. Since the Pests Act controls use of, sale of, and possession of spring traps, unless of a type authorised by the Spring Traps Approval Order 1995 (and Variations from 2007, 2009 and 2010), its inclusion in this review is important. Its relevance from the RSPB's perspective is that approved spring traps are sometimes used in an unapproved manner, set on posts, to illegally trap protected birds of prey and owls.

Creation of new offences
In addition to the creation of an offence extending liability to a principal, we recommend that the review also creates an offence:

- **Of intentionally/recklessly obstructing access to a bird's nest while in use, being built or with dependent young**
  Several examples of this loophole have been brought to our attention, such as where a mineral extraction company prevented access to a sand martin colony. Once the birds had deserted the active nests, the colony was destroyed as it was no longer in use. Without this specific offence, we believe that the Birds Directive is not properly transposed into domestic law. Note that this distinction is made by the provisions of s9(4) WCA in respect of Schedule 5 animals, where two separate offences exist for (i) damaging; and (ii) obstructing access to a place of shelter or protection.

- **Of intentionally/recklessly harassing a Schedule 1 (or equivalent) species during its display**
  To fully transpose the Birds Directive, we believe that birds must be protected from disturbance at the outset of the 'period of reproduction' since the display is critical to the breeding cycle, especially for lekking species. In the case of the lekking black grouse, its inclusion on Schedule 1 (or equivalent) would be subject to its inclusion as a 'wild bird'.

- **Of harassment of those species of wild birds listed on a new Schedule (or subsection of Schedule 1)**
  Changes to address this were introduced in Scotland under the Nature Conservation (Scotland) Act 2004. It would provide year round protection and would prevent the regular, unwarranted disturbance of rare breeding birds outside the breeding season, such as roosts of red kite, hen harrier and raven, and before the breeding season commences (we have received numerous reports of inappropriate – but targeted – burning of heather to destroy prospective hen harrier nest sites).

- **Of selling ducks, geese, swans, coot or moorhen killed using lead shot**
  It remains legal to sell birds killed illegally under the Environmental Protection (Restriction on Use of Lead Shot) (England) Regulations 1999 and subsequent regulations in Wales. This undermines the purpose and effective enforcement of the

existing Regulations.

- **Of purchasing a wild bird**
  Many people purchase a taxidermy specimen without thought to its origin or to the regulations controlling trade. In line with recent amendments to COTES, we believe it should be an offence to purchase a wild bird contrary to the relevant provisions of the general licence controlling the sale of wild birds. This would make people more aware of the origin of the specimens and ensure that the seller provides the appropriate documentary evidence to show the bird originates from a lawful source. A similar clause may be merited for Schedule 5 animals and Section 8 plants.

- **Of tampering with approved rings or possessing birds wearing tampered rings**
  Long term datasets (dating from the onset of the WCA) indicate a persistent problem with the illegal trapping of wild finches which are then laundered in the avicultural market on the pretence of being legitimately captive bred. The RSPCA in particular has taken scores of successful prosecution for these offences. Under the WCA, a system of using close rings was introduced to try to prevent the taking and sale of wild birds. The principle is that a correctly sized close ring can be fitted to a bird just a few days after hatching and helps support the claim the bird was captive bred. The close rings for the main finch species in the avicultural market are issued by two bodies approved by the government. These rings are manufactured to specific sizes for different species. The ring sizes are intended to prevent them being fitted to a wild taken bird (taken after the short post hatching period). However, these controls are easily circumvented and there are hundreds of cases where close rings have been tampered with in order to increase the internal diameter to allow them to be fitted to a wild taken birds. Current legislative controls are failing to give the protection necessary to wild birds as required under the Birds Directive. The proposed offence would improve the ability of the enforcement agencies to investigate offences and tackle those involved in these offences.

Criminal Behaviour Orders

In February 2012, an Anti-Social Behaviour Order (ASBO) was granted to a convicted egg collector, which is the first time such an order has been used in relation to a wildlife crime. This development strengthens the penalties available to future wildlife crimes, as a breach of the conditions of the ASBO could result in an unlimited fine and a five-year jail term. We understand that at least one company has been granted an ASBO in relation to environmental offences[46], and indeed the Interpretations Act 1978 states that "persons" includes both natural and legal persons (i.e. companies). The Wildlife Management Project should explore how these civil orders could be used more widely.

Reporting on wildlife crime

In Paragraph 9.12, the Law Commission declares an intention to outline 'the mechanisms to ensure transparency and consistency in implementing enforcement' but appears to have left

[46] http://www.yorkshireeveningpost.co.uk/news/latest-news/top-stories/offending-firm-falls-foul-of-asbo-laws-1-2137405

this section out. We advocate the adoption of the provision introduced recently in Scotland, which requires Ministers to produce an annual report on wildlife crime[47].

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30 November 2012

[47] See http://www.legislation.gov.uk/asp/2011/6/section/20/enacted